

CABINET - SUBJECTS FOR CONSIDERATION, 03 JULY 2008 9:30 AM

Not Relevant



6 Cabinet Notes for Discussion

601 INQUIRY INTO THE LEGISLATIVE ARRANGEMENTS TO OUTLAW SERIOUS AND ORGANISED CRIME GROUPS (Paul Holloway) - **NOTED**

Not Relevant





CABINET NOTE

CN MPOL 08/006

TO: THE PREMIER FOR CABINET TO NOTE

RE: INQUIRY INTO THE LEGISLATIVE ARRANGEMENTS TO OUTLAW SERIOUS AND ORGANISED CRIME GROUPS**1. PROPOSAL**

1.1 Cabinet note the South Australian Government's response to the Parliamentary Joint Committee on the Australian Crime Commission's Inquiry into the Legislative Arrangements to outlaw serious and organised crime groups.

2. BACKGROUND

2.1 The Parliamentary Joint Committee will examine the effectiveness of legislative efforts to disrupt and dismantle serious and organised crime groups and associations with these groups. The report will be tabled in Parliament within the next twelve months.

2.2 On 5 July 2007 the South Australian Government announced it would undertake a significant legislative reform program focused on serious and organised crime, and specifically targeting outlaw motorcycle gang crime, violence and disorder.

2.3 At this time the Attorney-General's Department and South Australian Police commenced working together to examine and develop a suite of legislation designed to dismantle, disrupt and discourage the presence of criminal organisations in South Australia.

2.4 As a result, South Australia has undertaken major legislative reform in relation to the dismantling of serious and organised crime groups and associations. On 8 May 2008 the Parliament of South Australia passed the first of a number of Government reforms in the form of the *Serious and Organised Crime (Control) Act 2008*.

3. DISCUSSION

3.1 During September 2007 South Australia provided a comprehensive across-government submission to the Parliamentary Joint Committee Inquiry into Future Impacts of Serious and Organised Crime on Australian Society.

- 3.2 The attached submission provides information in relation to the raft of legislative reforms that have taken place in relation to serious and organised crime since the last submission whilst re-enforcing some of the comments previously provided.
- 3.3 This submission outlines the specific areas within the Act that seek to dismantle, disrupt and discourage criminal organisations. It further provides comment on selected legislation, both current and proposed that complements the South Australian Government's holistic approach to tackling the problem of serious and organised crime. Issues addressed by South Australia include:
- International legislative arrangements developed to outlaw serious and organised crime groups and associations to those groups, and the effectiveness of these arrangements.
 - The need in Australia to have legislation to outlaw specific groups known to undertake criminal activities, and membership of and association with these groups.
 - Australian legislative arrangements developed to target consorting for criminal activity and to outlaw serious and organised crime groups, and the effectiveness of these arrangements.
 - The impact and consequences of legislative attempts to outlaw serious and organised crime groups, and membership of an association with these groups on:
 - a. Society
 - b. Criminal groups and their networks
 - c. Law enforcement agencies; and
 - d. The judicial/legal system
 - An assessment of how legislation which outlaws criminal groups and membership of and association with these groups might affect the functions and performance of the ACC.

4. CONSULTATION

- 4.1 Cabinet Office, Department of Premier and Cabinet, in consultation with the Attorney-General's Department and SAPOL, have jointly led the development of this submission. Cabinet Office chaired a reference group that had representatives from the following agencies:
- SAPOL
 - Attorney-General's Department
 - Department of Families and Communities
 - Liquor and Gaming Commission
 - Treasury and Finance
 - Department for Transport, Energy and Infrastructure
- 4.2 The final submission to the Australian Crime Commission Parliamentary Joint Committee is the result of thorough consultation and represents an agreed across-government position.

5. RECOMMENDATIONS

It is recommended that Cabinet note:

- 5.1 The attached South Australian Government response to the Australian Crime Commission Parliamentary Joint Committee Inquiry into the Legislative arrangements to outlaw serious and outlaw crime groups.



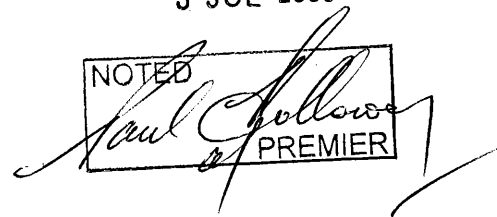
Paul Holloway

Leader of the Government in the Legislative Council
Minister for Police
Minister for Mineral Resources Development
Minister for Urban Development and Planning

Date: 217 /2008

In Cabinet

- 3 JUL 2008



NOTED
Paul Holloway
PREMIER

Australian Crime Commission Parliamentary Joint Committee

**Inquiry into the legislative
arrangements to outlaw serious
and organised crime groups**

**Submission of the Government of
South Australia**

June 2008

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i. TERMS OF REFERENCE

- (1) International legislative arrangements developed to outlaw serious and organised crime group and association to those groups, and the effectiveness of these arrangements
- (2) The need in Australia to have legislation to outlaw specific groups known to undertake criminal activities, and membership of an association with those groups
- (3) 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
- (4) The impact and consequences of legislative attempts to outlaw serious and organised crime groups, and membership of an association with these groups on:
 - a. Society
 - b. Criminal groups and their networks
 - c. Law enforcement agencies; and
 - d. The judicial / legal system
- (5) An assessment of how legislation which outlaws criminal groups and membership of and association with these groups might affect the functions and performance of the ACC

1. Introduction

Outlaw motorcycle gangs (OMCG) present the most serious threat to South Australia out of any organised crime groups due to their impact across all levels of crime. It is acknowledged that the issues and legislative arrangements outlined in this submission, whilst making reference to OMCG, apply more broadly to the issue of serious and organised crime.

The term 'serious and organised crime' as referred to in the Terms of Reference is not viewed by the South Australia Government as exclusively collective in its meaning. Some groups involved in serious crime that cause considerable concern for the community may not be involved in organised crime. Whilst all organised crime is considered serious crime, not all serious crime is organised crime.

In February 2007 as part of the Government's law and order policy the Government sought to identify opportunities to enhance its existing legislative initiatives targeting serious and organised criminal activity of OMCG and gang related crime more generally.

In April 2007 South Australia Police undertook a comprehensive environmental scan of law enforcement issues and legislative reform addressing the threat of OMCG within Australia and overseas. The outcome of this scan was considered within the context of the current OMCG threat to South Australia specifically and organised crime groups generally.

On 5 July 2007 the South Australia Government announced it would undertake a significant legislative reform program focused on serious and organised crime, and specifically targeting OMCG crime, violence and disorder. At this time senior officers from within the Attorney-General's Department and South Australia Police commenced working together to examine and develop a suite of legislation designed to dismantle, disrupt and discourage the presence of criminal organisations in South Australia

On 8 May 2008 the Parliament of South Australia passed the first of a number of Government reforms in the form of the *Serious & Organised Crime (Control) Act 2008*. This submission outlines the specific areas within the Act that seek to dismantle, disrupt and discourage criminal organisations. It further provides comment on selected legislation, both current and proposed, that complements the South Australia Government's holistic approach to tackling the problem of serious and organised crime.

2. TERMS OF REFERENCE 1

International legislative arrangements developed to outlaw serious and organised crime groups and associations to those groups, and the effectiveness of these arrangements

2.1 Legislation outlawing serious & organised crime groups

SAPOL research in 2001 and again in 2007 indicated that very few countries around the world have been successful in dismantling serious and organised crime groups, particularly OMCG, by proscribing membership to the group. The experiences of Belgium and Germany, in particular, were noted.

Belgium attempted to proscribe OMCG under their laws against '*private militias*' which forbids the joining or unification of criminals for the purpose of violent acts. The court of Ghent declared the OMCG a *private militia* however this ruling was later over-turned on appeal.

In 1983 Germany introduced a law prohibiting an OMCG. The grounds for the law included that its members were using the club premises to plan criminal offences. The prohibition was possible as their constitution permitted the banning of a group whose purpose violates criminal law or is in conflict with the constitutional order. The OMCG challenged the validity of the prohibition in 1984 however the law was upheld. In response to upholding the prohibition, the OMCG declared that no member was to wear their gang insignia in Germany, demonstrating OMCG propensity to work around the law.

To date no other Australian State or Territory has attempted to proscribe gang membership outright, but rather have chosen to legislate for the individual actions of gang members. SAPOL advises that in a serious and organised crime context this does little more than address the 'symptom' rather than the 'problem'.

SAPOL advise that evidence suggests members of criminal groups and networks (in particular OMCG) associate for the purpose of criminal activity and that the strength of OMCG members lies in their close cohesion and ability to congregate together to plan and carry out their illegal activities.

This membership forms the basis of their offending and often includes fear and intimidation tactics under the banner of the gang itself. It is the act of meeting fellow members that facilitates the means to promote these criminal activities and recruit prospect members. The root cause of the problem, arguably, lies in the ability of OMCG members to associate which, leads to criminal activity.

The South Australia Government has considered the legislation option of proscribing membership in serious and organised crime groups and has rejected this as its preferred approach, accepting the need to target associations between members of criminal groups and those who associate with these members.

2.2 Legislation targeting participation in an organised criminal group

SAPOL advise that organised crime today operates within less identifiable and more flexible, loosely associated and entrepreneurial networks. These networks may involve small groups of members at the core with other non members in the periphery or one member controlling and directing the activities of a number of non members.

For this reason legislation is required that targets organised criminal groups and anyone operating within the group from time to time, whether they are a member or not.

SAPOL has examined comparative overseas legislation dealing with organised crime and participation in a criminal organisation with respect to serious and organised crime. Specifically these include:

- Racketeering Influenced and Corrupt Organisation (RICO) Act – USA
- Participate in criminal organisation – New Zealand (NZ)
- Criminal organisation legislation – Canada

It is noted from the outset that these legislative arrangements do not proscribe or 'outlaw' membership in a criminal organisation, but target the criminal activities of those involved in the group and impose penalties commensurate with the role the individual plays in the criminal group. An overview of the legislation and considerations of its effectiveness as determined by SAPOL is outlined:

2.3 USA – Racketeer Influenced and Corruption Organisations legislation

The *Racketeer Influenced and Corruption Organisations (RICO) Act* was introduced in the United States of America (US) in 1970 to counter the growth and sophistication of organised crime. It provides extended penalties for criminal acts performed as part of an ongoing criminal organisation. RICO does not ban membership within groups but focuses on the enterprise and pattern of criminal activity. Four offences are created in RICO:

- (a) It makes it illegal to acquire an interest in an "enterprise" with income received as a result of a "pattern of racketeering activity" or the "collection of an unlawful debt"
- (b) It prohibits acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity or collection of an unlawful debt
- (c) It makes it illegal to be involved in the activities of an enterprise that is conducting a pattern of racketeering activities or the collection of unlawful debt
- (d) It makes it illegal to conspire to commit any of the above activities

RICO applies where a person or group commits any two of 35 'predicate crimes' (federal or state) within a 10 year period (excluding periods of incarceration) and in the opinion of the US Attorney, the accused has committed the crimes with similar purpose or results. In such circumstances a charge of racketeering can be laid. Evidence of "enterprise" is also required. The legislation imposes a penalty of 20 years to life imprisonment and may impose fines up to \$250,000. Where a RICO prosecution includes an offence with a more severe penalty, the RICO allows the greater penalty to apply.

If convicted the person must forfeit all "ill-gotten gains" and interest in any business gained through a pattern of racketeering. RICO laws are also applicable in the civil jurisdiction which enables victims who have suffered financial loss to sue for damages up to three times the original loss. It has achieved varying success in the US.

A "pattern of racketeering activity" must include at least two of 35 nominated crimes. Whilst legislation only requires two of these crimes be committed, US prosecutors prefer that a RICO charge include at least 5 *offences*.

An "enterprise" includes any legal entity, such as individual, partnership, corporation or union. It can include a group of individuals associated in fact, such as an organised crime family or OMCG or other group united for the purpose of engaging in a certain course of conduct. Importantly the activities must have a minimal effect on interstate or overseas commerce to be charged as RICO statute.

RICO statutes do not make any individual acts unlawful that could not be prosecuted under some other statute, so the burden of proof for RICO requires proof of the 'predicate crime' as well. Three additional factors must be proven: that the individuals involved are associated with one another (forming the enterprise); that the predicate acts are related and timely; and that the enterprise (criminal acts) has at least a minimal effect on interstate commerce (this may include withdrawing money from an interstate bank account).

SAPOL research identified that the complexity of RICO legislation often 'dampens' its use. In RICO cases the prosecutor must 'educate' the jury about the statute, which is difficult to understand and convince them that not only have the elements of the RICO charge been met, but elements of the underlying predicate crime have been proven. SAPOL noted that prosecutors must be skilled litigators willing to take on this burden.

Furthermore, Federal RICO laws are not widely used because it requires approval from the Department of Justice before the local Attorney-General's Office can proceed. Such approval is only granted in circumstances where it serves a special purpose.

2.3.1 Positive aspects of the legislation:

- RICO has been used with success against major criminal syndicates that appear to be a minority representation of the community
- RICO focuses on two or more persons engaged in criminal activity
- RICO has widened what has been seen to be inconvenient restrictions on conspiracy indictments

2.3.2 Negative aspects of the legislation:

- The major features of RICO, being telephone interception and confiscation of proceeds of crime, already exist in Australian law and within South Australia
- Significant difference exists between Australian and USA criminal jurisprudence making RICO difficult to adapt in Australia (eg: double jeopardy).
- Anecdotal evidence suggests USA based OMCG have been able to restructure their clubs and business operations to avoid the impact of RICO laws
- Like traditional criminal law approaches to serious and organised crime, the legislation has limited prevention capability

2.4 Canada – Criminal organisation legislation

In 2001 Canada introduced amendments C-24 to the *Criminal Code (Organised Crime and Law Enforcement) 2001* to deal with gang related violence and crime by identifying and defining a criminal organisation, and outlining particular offences for participating in that criminal organisation. The aim of the legislation was to deal primarily with OMCG. The offences captured by this legislation include:

- (1) *Participate in activities of a criminal organisation [467.11 (1)]*
- (2) *Commission of a criminal offence for a criminal organisation [467.12 (1)]*
- (3) *Instructing the commission of offence for a criminal organisation [467.13 1)]*

Membership in the organisation is not an offence but rather, the commission of crimes within a criminal organisation. The legislation does not differentiate between levels of sophistication and therefore has broad application. Furthermore, a sentence imposed on a person under 467.11 or 467.12 requires it to be served consecutively with any other substantive crime.

'*Criminal organisation*' under this legislation is aligned with overseas jurisdictions, stipulating a requirement of three or more people with their main purpose or activity being the commission of one or more serious offences for material benefit of either the organisation or a person within the group. It does not include a group that forms randomly for the immediate commission of a single offence. A serious offence is an indictable offence under the Code or any other Act of Parliament which has a maximum sentence of five years. The exclusion of randomly formed groups to commit immediate offences ensures the legislation is not applied to lower level criminals, for whom it is not intended.

Offences under the Canadian Criminal Code fit comfortably within both the traditional OMCG crime structure and a more fluid and flexible networks in which they currently operate.

Three levels of the criminal organisation are targeted which in the context of OMCG could apply to full members; prospect and associate members, and professionals who support OMCG criminality.

Firstly, it can be applied to anyone who participates in or contributes to activities that help a criminal organisation achieve its criminal objectives. The offence can include for example, people who recruit others to join a criminal organisation or who facilitate illegal transactions of a criminal organisation. A maximum penalty for this offence is 5 years imprisonment.

Secondly, it applies to a person who is involved in committing indictable offences for the benefit of a criminal organisation. This incurs a maximum penalty of 14 years imprisonment.

Finally, the legislation targets leaders within a criminal organisation. This captures those who instruct another person to become involved in a criminal offence, and carries with it a maximum penalty of life imprisonment.

The legislation further supports difficulties associated with complex serious and organised crime by making provision for evidentiary aides to the prosecution in certain circumstances. These vary with respect to the categories of criminal liability and include for example; that the prosecution need not prove that a criminal organisation actually facilitated or committed an indictable offence; or that the accused knew the identity of any of the persons who constituted the organisation.

In determining whether an accused participates in or contributes to any activity of a criminal organisation, the Court may consider among other factors, a legislated criteria including whether the accused used a name, word, symbol or other representation that identifies, or is associated with the criminal organisation. This is useful in the context of OMCG.

Significant offences have been developed under the Canadian Criminal Code to protect people in the criminal justice system from intimidation. This extends to family members of those people who include witnesses, jurors, police, prosecutors, prison guards, judges, media personnel and members of Parliament. South Australia has adopted this approach in expanding the application of Section 248 and 250 of the Criminal Law Consolidation Act, 1953 relevant to threats or reprisals in judicial proceedings and against public officers.¹

2.4.1 Positive aspects of the legislation:

- The legislation was designed with OMCG organised crime in mind
- It can be used for specific criminal organisations or smaller flexible criminal networks
- It has proven to be somewhat effective against OMCG groups²
- Canadian courts have accepted the legislation and it has been successfully applied to serious and organised crime³
- The legislation could allow Law Enforcement Agencies in Australia to draw on the extensive operational and prosecutorial experience of Canada in combating criminal organisations

2.4.2 Negative aspects of the legislation:

- Definition of 'criminal organisation' has been criticised for being too vague
- 'Criminal organisation' must be proved on every occasion and is not a continued status for application of other legislative initiatives
- Like most traditional criminal law approaches to serious and organised crime, the legislation is reactive to criminal activity

2.5 New Zealand – Participate in Criminal Group

The *Crimes Act 1961* New Zealand (NZ) provides for the offence of '*participation in a criminal group*'. The offence was originally introduced in 1998 in response to concern over gang crime. The section was amended via the *Crimes Amendment Act 2002 (NZ)* to replace the term 'gang' with the term 'group', in line with New Zealand becoming a signatory to the United Nations

¹ Related Amendments within the Serious & Organised Crime (Control) Bill 2008: Section 248 and Section 250 of the Criminal Law Consolidation Act, 1953,.

²On 4 April 2007, Project DEVELOP, an 18 month investigation into the Hells Angels by RCMP Biker Enforcement Unit in Ontario Canada arrested 31 OMCG members and associates laying 169 charges including many for offences under the Criminal Code.

³ R v Lindsay, 2005 CanLII 24240 (ON S.C.), 30/6/2005

Convention against Transnational Organised Crime and its Protocols on the Smuggling of Migrants and Trafficking of Persons.⁴

The offence is not restricted to any specific group and has very broad application. It can be applied where a group consisting of 3 or more people participate in an organised criminal group, knowing that the group is an organised criminal group and knowing that their participation contributes to the occurrence of criminal activity; or are reckless as to whether their participation so contributes. A maximum penalty of five years imprisonment applies.

The definition of 'organised criminal group' under this Section requires proof of:

(2) For the purposes of this Act, a group is an organised criminal group if it is a group of 3 or more people who have as their objective or one of their objectives—

- (a) obtaining material benefits from the commission of offences that are punishable by imprisonment for a term of 4 years or more; or*
- (b) obtaining material benefits from conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of offences that are punishable by imprisonment for a term of 4 years or more; or*
- (c) the commission of serious violent offences (within the meaning of section 312A(1)) that are punishable by imprisonment for a term of 10 years or more; or*
- (d) conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of serious violent offences (within the meaning of section 312A(1)) that are punishable by imprisonment for a term of 10 years or more.*

(3) A group of people is capable of being an organised criminal group for the purposes of this Act whether or not—

- (a) some of them are subordinates or employees of others; or*
- (b) only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or*
- (c) its membership changes from time to time.*

The only other aspect to proving the offence is that the person either knew or was reckless as to whether their participation may contribute to the occurrence of criminal activity.

The Section has potential for broad application in an organised crime context and would be equally suitable for targeting OMCG criminal structures and entrepreneurial syndicates often operated by OMCG members.

This legislation was modelled on Section 186.22(a) of the *Californian Street Terrorism Enforcement and Prevention (STEP) Act*, which contains provision for enhanced sentences for gang-related offences. A number of States in the

⁴ New Zealand signed this Convention in December 2000. The Trans-national Organised Crime Bill was enacted and came into effect from 18 June 2002.

USA have adopted legislation identical to or based on the Californian provisions.

As of April 2007 this legislation had not been tested in New Zealand courts. At that time, only two known cases had used this law. Results of the 2002 case involving drug dealing could not be found. The second case in 2003 involved a serious assault. The defendant pleaded guilty. McKenzie J in his sentencing remarks observed that the definition of 'participation' seemed problematic, noting that the verb is more apt to describe involvement in the conduct of others than involvement within entities.⁵

2.5.1 Positive aspects of the legislation:

- It has broad and flexible application in the organised crime environment
- It meets obligations within UN Convention against Trans-national Organised Crime⁶
- It targets both individuals and groups
- It operates within a judicial system akin to those within Australia

2.5.2 Negative aspects of the legislation:

- The definition of 'participation' is considered to be problematic
- The penalty is at the low end of sentencing compared to Canadian legislation
- The legislation does not provide prosecution aides like Canadian legislation
- Like most traditional criminal law approaches to serious and organised crime, the legislation is reactive to criminal activity

As part of the South Australia Government's holistic approach to serious and organised crime, the Government's current legislative reform program is considering a number of these international legislative arrangements and their application to South Australia to enhance traditional criminal laws dealing with serious and organised crime. Introduction of legislation of this kind would complement the initiatives of the *Serious and Organised Crime (Control) Act 2008* that targets associations between members and associates of criminal organisations.

In addition to introducing legislation capturing the participation in a criminal organisation, the South Australia Government is considering the introduction of specific offences aligned to aiding and abetting offences that target those who support activities that facilitate criminal enterprises.

⁵ Comments of sentencing McKenzie J of the High Court at Palmerston North on a plea of guilty to the offence of 'Participation in a organised criminal group' as cited by Glaze brook J in R v Mitford And Anor CA CA216/04 9 September 2004

⁶ Ten One New Zealand Police Magazine, vol 239 26 July 2002 pp18-21

2.6 The scope of these offences could consider activities including:

- **Directing the activities of an organised crime group**
This offence targets those persons who from time to time have influencing roles capable of directing and controlling the activities within an organised crime group.
- **Providing support to an organised crime group**
This offence attempts to discourage any offering of support to a serious and organised crime group that facilitates the breaking of any law of South Australia or the Commonwealth.
- **Obtaining a benefit / advantage through use of the name of an organised crime group, or through membership etc**
Serious and organised crime groups exploit their criminal reputation to create the fear in the mind of the person or victim in order to coerce their cooperation or control their behaviour. This behaviour contributes to increasing the fear of crime in the community that criminal acts of intimidation, violence, and acts against public order are likely to occur.
- **Financing a member of a declared organisation**
This offence relates to a person providing funds that will be used to facilitate a crime involving a member of a declared organisation. This may include 'investors' providing funds to support the criminal activities of a single member who may be controlling a criminal syndicate or group.
- **Getting funds to, from or for an organised crime group**
Serious and organised crime groups use 'professional' persons such as accountants, lawyers, stock brokers, to move and hide proceeds of crime. This offence targets the receiving and collection of funds for an organised crime group as well as making funds available to these groups. This offence has the potential to target those persons who may not be members of the criminal group however support or finance the criminality.

3. **TERMS OF REFERENCE 2**

The need in Australia to have legislation to outlaw specific groups known to undertake criminal activities, and membership of and association with those groups.

3.1 **Threats posed by serious and organised crime groups**

OMCG are involved in numerous and continuous criminal activities including the organised theft and re-identification of motor vehicles; drug manufacture, importation and distribution; murder; fraud; vice; blackmail; assaults and other forms of violence; public disorder; firearms offences; and money laundering. They continue to intimidate and threaten the public safety and profit from crime.

OMCG criminal activity operates largely by the performance of unlawful acts by sub-cultural groups who deliberately eschew the rule of law. OMCG crime impacts on all levels of society and in South Australia it is varied in scope, expertise, sophistication and influence. It has a substantial social and economic impact on the State.

SAPOL further advise that OMCG are increasingly infiltrating legitimate industries and using professionals to provide insulation from law enforcement and enhance their income opportunities.

The outcomes of SAPOL investigations of OMCG in South Australia since 2002 indicate that highly disproportionate criminal activity can be linked to OMCG, who comprise a small proportion of South Australia's population.

Current threats by OMCG are not unique to South Australia and include:

- Illicit drug manufacturing, trafficking and distribution
- Infiltration into legitimate industry and partnerships with professional personnel
- Increased sophistication and resourcefulness, making it more difficult for police to carry out successful investigations
- Expansion amongst the greater criminal community, particularly organised crime syndicates
- Inter and Intra gang violence, including blackmail, trafficking and use of firearms and other weapons
- OMCG expansion, including size, scope and influence

To insulate their criminal activity from law enforcement and the reach of the criminal justice system, serious and organised crime groups are increasingly relying on networks of non-members or associates to commit offences or undertake high risk aspects of criminal activity.

OMCG members actively recruit the services of members of less-known and lower level street gangs and use them to undertake high-risk aspects of their criminal enterprises, including violence, carrying weapons and the manufacture and distribution of illegal drugs. OMCG also rely upon professionals, particularly accountants and lawyers, to create complicated structures to hide the proceeds of their crimes.

3.2 Violence, intimidation and reputation

Public violence committed by OMCG members individually and as a group creates considerable public concern, and often causes injury to innocent members of the community. Their general disregard for public safety manifests itself in many ways including acts of violence towards the community and between themselves.

Furthermore OMCG members promote an existence outside of society's norms. Most are overt about their affiliation, advertising their identity by wearing gang colours, tattoos or T-shirts with the gang's insignia or name. OMCG use their reputation for crime and violence as a power base upon which they intimidate, coerce and control serious and organised criminal activity and enterprises.

The threat to public safety by OMCG as a result of their volatile and unpredictable nature has been clearly evidenced in South Australia. This unpredictability is directly linked to their culture of violence, inter-gang rivalry and conflict.

Public violence involving OMCG members and their associates, including but not limited to public shootings, highlights the ongoing serious risk to public safety posed by these gangs and their associates to South Australia. The risk to public safety is amplified when considering the commission of similar incidents across other States and Territories by members of the same organisations and the ease by which they can travel between States and Territories.

Beyond public acts of violence, there exists the covert and insidious use of intimidation, threats and violence by OMCG members and their associates both internally and externally.

Internal violence, threats and intimidation is used as a means of control to support a sub-cultural 'code of silence' and activities connected with the commercialisation of crime. Externally it has been used to dissuade and discourage witnesses and victims from reporting serious crimes and participating in the criminal justice system.

Such violence ranges from physical acts of violence and shootings to more subtle acts akin to stalking. The effect of this reduces the risk of criminal convictions associated with the criminal activity undertaken and renders traditional criminal law approaches less effective.

SAPOL advise that the intimidation, threats or violence is not always carried out by the OMCG member who is the subject to criminal charges but often by other gang members or associates of the member or gang on their behalf or for their benefit.

Legislative reform must therefore recognise 'reputational violence' and the 'criminal reputation' of a criminal group as having the same benefit as 'goodwill' does in a legitimate business. That is; it is an 'asset' to the group that can be used to enable and control criminal enterprises more effectively. Legislation targeting serious and organised crime groups should therefore take account of this 'asset' and seek to diminish its effect whilst enhancing community safety.

3.3 Firearms and Weapons

Firearms and weapons are key instruments of violence in OMCG culture and more generally amongst those involved in organised crime. SAPOL advise that police investigations into OMCG highlight that they continue to possess and stockpile larger quantities of firearms and weapons across fewer locations, many within residential homes where children either reside or visit.

Premises connected with OMCG members have seen the seizure of fully automatic assault rifles, thousands of rounds of ammunition, ballistic vests, and a range of prohibited and dangerous weapons (including double edged knives, stun guns disguised as mobile telephones, and knuckle dusters).

In South Australia, the majority of violent criminal behaviour involving firearms does not involve legitimate firearms owners, or legitimately owned, secured and registered firearms.

Whilst there is some conjecture as to the quantity of illegal firearms circulating in the community, there is no doubt that there is a market for unrecorded and essentially untraceable firearms to be used for a criminal purpose. It is the nature of this enterprise that present difficulties in impacting upon this trade and the subsequent crime arising from it.

SAPOL advises that there are three main, but not exclusive, levels of firearms related offences within South Australia. Firstly, offences committed by otherwise legitimate firearms owners in relation to administrative or regulatory matters, not involving violence, which include such matters as 'insecure firearms', 'storage of firearms and ammunition together' and such like.

Secondly, intentional criminal behaviour involving firearms, committed by those with a history of violence, association with others involved in crime, or with a tendency or potential towards violent or criminal behaviour, including intentional shootings, carriage of firearms, and firearms trafficking.

Thirdly, there are 'incidental' offences, involving the use of easily accessed and available firearms, which may involve persons belonging to both the legitimate firearms community or criminals, including domestic violence related shootings or threats, suicides, or offences arising from mental health conditions.

3.4 Expansion of serious and organised crime groups

In 2008 serious and organised crime groups, particularly OMCG, remain prominent within the criminal and general community of South Australia and have continued to develop and expand. In support of this statement, South Australia has seen the expansion of 6 OMCG with 9 Chapters in 2001 to 8 OMCG with 13 chapters in 2008. This expansion is not unique to South Australia.

The Government of South Australia notes the findings of the 2007 Parliamentary Joint Committee (PJC) on the Australian Crime Commission (hereinafter in this submission referred to as PJC-ACC) that confirm an Australia-wide growth in the membership and illegitimate activities of OMCG. Witnesses to the inquiry⁷ gave evidence of increased OMCG membership and participation in criminal activity in their respective states, and about the significant threat to community safety these gangs pose.

The Inquiry also heard evidence describing the 'quasi-military modes of organisation and discipline' of OMCG; which make them particularly difficult to deal with from a law enforcement perspective.

An emerging feature of OMCG offending is the use of non-members, including the formation of strategic alliances with other criminal organisations such as street gangs.

In addition to general expansion of these groups SAPOL advises that OMCG members associate with and have sought out and recruited the services of street gang members, using them to undertake high risk aspects of their criminal enterprise, including violence, carrying firearms, and engaging in drug trafficking and distribution. There is also evidence of key individuals within street gangs being recruited into OMCG.

⁷ Detective Chief Superintendent Ross Barnett, QPS, & Assistant Commissioner Tony Harrison, Crime Service, SAPOL.

3.5 Associations within serious and organised crime groups

The Government of South Australia acknowledges that not all members of an organisation may be involved in serious and organised crime.

Notwithstanding this, SAPOL advise that the strength of OMCG and other serious and organised crime groups lies in the close cohesion between members, and their associates and ability for these members and associates to congregate together to plan and carry out their illegal activities.

As previously stated, this membership forms the basis of their offending and often includes the use of intimidation and violence under the banner of the group itself. The South Australia Government accepts that it is the act of meeting fellow members that facilitates the means to promote these criminal activities and recruit prospective members.

SAPOL have advised that the dynamic that exists within organised crime groups today usually involves regular collaboration between criminally active members to plan and commit criminal offences. This is particularly the case in relation to conspiracies to commit acts of violence.

SAPOL advise that OMCG members and their associates have demonstrated a willingness to be involved in the commission of 'collective violence' if it is in the interests of the criminal group or its members, regardless of their individual opinion. Violence appears to be viewed as a legitimate means of dispute resolution and extreme forms of violence are often used.

It is recognised and accepted that OMCG enlist others, who may not seek permanent membership within the gang, to undertake high-risk aspects of criminal activity on their behalf whilst OMCG members profit from the crime.

Beyond criminal activity, SAPOL advise OMCG recruitment practices are highly selective and tightly controlled by its membership. Often this sees a full member take responsibility for and mentor a potential recruit through the various stages of membership selection where they prove themselves loyal to the gang. This often involves undertaking criminal activity for or on behalf of the gang.

3.6 Observations for consideration of legislative reform

SAPOL's research in April 2007 made key observations of past legislative reform and issues relevant to OMCG and like groups involved in serious and organised crime both in Australia and overseas which contribute to the basis for South Australia's new legislative approach:

1. Organised crime is a complex problem that requires a sophisticated law enforcement approach.
2. Traditional legislative reform approaches have generally been reactive in their response and have relied heavily on the 'criminal law' and the 'criminal justice system' as the primary mechanisms to effectively deal with serious and organised crime.
3. The criminal law has a limited capacity for 'prevention' and as such makes legislative reform in this area reactive in nature. For example; the threshold of 'reasonable cause to suspect' is required before law enforcement agencies can use legislative powers to combat a specific crime threat. In many instances, by the time law enforcement have established the requisite suspicion, associations between those involved in serious and organised crime have advanced into relationship and networks, with positive steps taken towards the commission of the crime. Law enforcement therefore is disadvantaged in 'preventing' the threat and impact of serious and organised crime on the community.
4. Whilst not diminishing the need for continued legislative reform focused on addressing current and emerging crime, previous reforms have treated the commission of crime as the 'problem'. The ability of criminals involved in serious and organised crime to associate together in order to plan, organise and undertake criminal activity and establish criminal networks, syndicates and groups is more likely the problem, which results in the commission of crime – the symptom.
5. Practiced intimidation and violence by groups and networks involved in serious and organised crime towards victims and witnesses is an effective means of control, and in South Australia has insulated individuals involved in serious and organised crime from the reach of the criminal law.
6. Legislation that has proven successful in South Australia to prevent or reduce the impact of serious and organised crime have integrated civil (administrative) law prevention or exclusion initiatives with criminal law sanctions for breaches of prevention orders.
7. Law enforcement agencies hold factual information, either as evidence or intelligence of the commission of serious and organised crimes that either as a result of legislative requirements or the non-participation of a witness is never put before a criminal court.

4. TERMS OF REFERENCE 3

Australian legislative arrangements developed to target consorting for criminal activity and to outlaw serious and organised crime groups, and membership of an association with those groups, and the effectiveness of these arrangements.

South Australia is taking a lead role within Australia in introducing legislation that seeks to enhance community safety and well being by dismantling, disrupting and discouraging the presence of criminal organisations. It seeks to do this by restricting associations and activities of criminal organisations, their members and associates. It does not proscribe membership in a criminal group.

The *Serious and Organised Crime (Control) Act 2008* was passed by the Parliament of South Australia on 8 May 2008.

Together with enhanced drug laws, unexplained wealth and declared drug trafficker legislation, and specific organised crime offences it will provide South Australia with a holistic, integrated and flexible approach to prevent or disrupt the “*broad and evolving range of organised crime activities*”⁸.

The *Serious and Organised Crime (Control) Act 2008* integrates civil and criminal law principles, targeting high risk associations before the commission of crime. Prevention initiatives such as ‘declared organisations’, ‘control orders’ and ‘public safety orders’ operate on the civil burden of proof, with offences committed in breach of respective order under the Act dealt with under the criminal law burden of proof.

4.1 ***Serious and Organised Crime (Control) Act 2008***

4.1.1 **Summary of Act**

The *Serious and Organised Crime (Control) Act 2008* provides for:

- **Declarations.** The Act authorises the Attorney-General to issue a declaration about an organisation where satisfied that the members of the organisation associate for the purpose of organising, planning, supporting, facilitating or engaging in serious criminal activity, and the organisation represents a risk to public safety and order in South Australia.
- **Control Orders.** The Act authorises the Magistrates Court to make orders against members of declared organisations and others who engage in serious criminal activity, prohibiting them from associating with other members of declared organisations or other people suspected of being engaged in serious criminal activity, from attending specified premises,

⁸ Parliamentary Joint Committee on the Australian Crime Commission, 2007 Report on the ‘Inquiry into the future impact of serious and organised crime on Australian society, Chapter 6, pp 66

possessing dangerous articles or prohibited weapons and other specified articles.

- **Public Safety Orders.** The Act authorises senior police officers to issue time-limited orders against individuals or members of a group prohibiting the individual or members of the group attending a public event or place or being within a specified area on public safety grounds.

The offence of consorting, found in section 13 of the *Summary Offences Act 1953*, is repealed and re-enacted in a modern form, to better target criminal associations between OMCG members and others.

The Act amends the *Criminal Law Consolidation Act* to amend the existing offences of threatening a public officer and threatening a participant in the justice system to better target offending by OMCG members.

The Act also amends the *Summary Offences Act* so that anti-fortification orders may be obtained against premises that are owned, occupied or habitually used by members of a declared organisation.

Finally the Act amends the *Bail Act* to add as categories of prescribed applicants, applicants on whom a presumption against bail falls:

- a person charged with a breach of a control order;
- a person charged with a breach of a public safety order;
- a person charged with the offence of blackmail;
- a person charged with the amended offence of threatening a public officer or threatening participants in the criminal justice system.

This Act, along with the *Statutes Amendment (Public Order Offences) Act 2008* and the *Summary Offences (Possession of Prescribed Equipment) Amendment Act 2008* represent the first phase of the Government's legislative response to OMCG offending. Legislation comprising the second and subsequent phases is being developed and will be introduced later this year.

4.2 Declared Organisations

Part 2 of the *Serious and Organised Crime (Control) Act 2008* establishes a procedure by which the Attorney-General is authorised to issue a declaration about an organisation on the application of the Commissioner of Police.

Upon receiving an application, the Attorney General is required to publish a notice in the *Gazette* and in a newspaper circulating throughout the State.⁹ Members of the organisation and other people with a relevant interest will be invited to make submissions on the application. This provides an element of natural justice.

⁹ Section 9

The Attorney-General is authorised to make a declaration about an organisation if satisfied, on reasonable grounds, that:

- (a) the members of the organisation associate for the purpose of organising, planning, supporting, facilitating or engaging in serious criminal activity; and
- (b) the organisation represents a risk to public safety and order in South Australia.¹⁰

When determining whether to make a declaration, the Attorney General will be able to have regard to:

- evidence suggesting that a link exists between the organisation and serious criminal activity;
- the criminal records of members or past members of the organisation;
- evidence that members or past members have been involved (directly or indirectly) in serious criminal activity;
- evidence about offending by members of overseas chapters or branches of the organisation;
- any submission received by the Attorney-General; and
- any other matter the Attorney-General considers relevant.¹¹

Evidence for the purpose of a declaration application will include information certified as “criminal intelligence” by the Commissioner for Police. 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, to 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.

The declaration process is aimed primarily at OMCGs, although the Attorney General may make a declaration about any organisation meeting the criteria. To accommodate this, organisation is defined broadly to include any incorporated body or unincorporated group, however structured.¹² A declaration will be able to be made whether or not all of the members associated for a criminal purpose and whether or not the members associated for other, legitimate purposes (although the members who do associate for criminal purposes must constitute a significant

¹⁰ Section 10(1)

¹¹ Section 10(3)

¹² Section 3

group within the organisation, either in terms of numbers or capacity to influence the organisation).¹³

A declaration will, of itself, impose no direct sanction on an organisation or its members. It will, however, be used for associated purposes. For example, membership of a declared organisation will be a ground on which a control order will be able to be issued¹⁴ and the new consorting offence will prohibit a person associating or communicating with a member of a declared organisation.¹⁵

4.3 Control Orders

Part 3 of the Act provides for control orders. A control order is an order, akin to a restraining order, that will, depending upon the terms of the order, prohibit a person from:

- associating or communicating with specified persons or persons of a specified class;
- entering or being in the vicinity of specified premises or premises of a specified class;
- possessing specified articles or articles of a specified kind;
- possessing a dangerous article or prohibited weapon (within the meaning of the *Summary Offences (Dangerous Articles and Prohibited Weapons) Regulations 2000*).

Applications for control orders will be made by the Commissioner of Police to the Magistrates Court.¹⁶ The Court will be authorised to make an order against these people:

- members of declared organisations;¹⁷
- former members of declared organisation or persons who engage in serious criminal activity (as defined) and who regularly associate with members of declared organisations;¹⁸ or
- persons engaged in serious criminal activity who regularly associate with persons who engage in serious criminal activity.¹⁹

¹³ Section 10(4)

¹⁴ Section 14(1)

¹⁵ Section 35(1)

¹⁶ Section 14(1), 14(2)

¹⁷ Section 14(1)

¹⁸ Section 14(2)(a)

¹⁹ Section 14(2)(b)

Control orders will be used to break up associations that further serious criminal activity. They will be sought to prohibit members of declared organisation from associating and communicating with each other and attending premises associated with the organisation, such as clubhouses. They will also be sought to break up associations between members of declared organisations and others who commit offences with, at the behest of, or for the benefit of, declared organisations and their members. They will, however, have broader application and the Act allows for orders to be made against people who; although not members or associates of declared organisations, engage in serious offending.

The process for obtaining a control order is as follows:

- the Commissioner will apply to the Magistrates Court for a control order. The initial application will be heard *ex parte*;²⁰
- if, on the application of the Commissioner, the Court makes a control order, a copy of the order specifying the grounds on which it is made must be served on the defendant.²¹ The police will be given special powers to serve orders on unco-operative defendants²²;
- the defendant will have 14 days to lodge a notice of objection disputing the control order. A copy of the notice of objection must be served on the Commissioner;
- on hearing the notice of objection, the Court will be authorised to vary or revoke the order;²³
- both the defendant and the Commissioner will have a right of appeal to the Supreme Court on a decision by the Magistrates Court on a notice of objection (by right on a question of law or by leave on a question of fact);²⁴
- a control order will not become effective until after any notice of objection has been heard and the order confirmed by the Court or, if no notice of objection is lodged, 14 days after the initial order is made;²⁵
- an appeal to the Supreme Court by the defendant will not stay the operation of a control order.²⁶
- a privative clause will protect any decision from judicial review.²⁷

²⁰ Section 14

²¹ Section 15

²² Section 16

²³ Section 17

²⁴ Section 19

²⁵ Section 16(4)

²⁶ Sections 14, 16, 17

²⁷ Section 41

Again, the Commissioner will be able to rely upon information properly certified as ‘criminal intelligence’ for the purpose of an application for a control order. Criminal intelligence will be disclosed to, and be taken into consideration by the Court but will not be disclosed to the defendant, his legal representatives or any other person during the hearing of a notice of objection.

The offence of contravening or failing to comply with a control order will carry a maximum penalty of five years imprisonment.²⁸ To take account of the wide range of offending, a discretion will be conferred on the prosecution to proceed summarily, having regard to the seriousness of the offending, if this is appropriate.²⁹

4.4 Public Safety Orders

Part 4 of the Act authorises a Senior Police Officer to issue a public safety order in respect of a person or persons in a specified class of persons if satisfied that:

- the presence of the person or members of the specified class at specified premises, a specified event or within a specified area, poses a serious risk to public safety or security, being a risk of death or serious physical harm to a person or serious damage to property; and
- the making of the order is appropriate in the circumstances having regard to the extent to which the order will mitigate the risk to the public and other measures reasonably available to mitigate the risk.³⁰

To limit the application of the powers, when determining the risk the officer will be required to have regard to the nature of the group and any history of behaviour that previously gave rise to a serious risk to public safety or property.³¹ A public safety order may not be issued against members of legitimate protest or advocacy groups to prevent their attendance at non-violent protests, rallies or demonstrations.³²

A public-safety order will prohibit the person or persons of the specified class from entering or being on specified premises, attending a specified event or entering or being in a specified area.

“Serious risk to public safety or security” is defined to mean the risk of:

- the death of, or serious physical harm to, a person; or
- serious damage to property.³³

²⁸ Section 22(1)

²⁹ Section 22(2)

³⁰ Section 23(1)

³¹ Section 23(2)

³² Section 23(5)

³³ Section 23(8)

This is a high threshold test that is intended to restrict the use of public safety orders to appropriate circumstances.

A public safety order will be able to be varied or revoked by a Senior Police Officer³⁴ but will be time limited to either 72 hours or the duration of the event (whichever is the longest).³⁵ An order will be able to be extended, however:

- any extension beyond 72 hours will be by *ex parte* order of a court;³⁶ and
- a person subject to a public-safety order will have the right to object to any extension of the order beyond seven days.³⁷

In urgent circumstances, a police officer will be able to seek an extension by telephone.³⁸

A public-safety order and extension will have to be served on the people to whom it applies³⁹ and will have to be accompanied by a notice setting out the date on which it was made, to whom it applies, its duration, the place, event or areas to which it applies and the penalty for breaching the order.⁴⁰ Police are given the power to serve a notice orally in urgent circumstances⁴¹ and special powers to serve orders on unco-operative people.⁴²

The offence of contravention or failure to comply with a public-safety order carries a maximum penalty of five years imprisonment.⁴³ To take account of the wide range of offences, a discretion will be conferred on the prosecution to proceed summarily where the prosecution considers, having regard to the seriousness of the breach, that this is appropriate.⁴⁴

4.5 New offence of Criminal Association

OMCG function because of the cohesion of the group and acceptance into the group by nomination and a series of loyalty tests. Therefore, the 'life blood' of the group relies on the recruitment, loyalty and retention of new members. Legislation that acts to break the cycle of recruitment by targeting associations with members of criminal organisations provides an opportunity to disrupt and retard the expansion of these groups.

³⁴ Section 24

³⁵ Section 25(1)

³⁶ Sections 27(2) to 27(4)

³⁷ Section 26

³⁸ Section 25(5)

³⁹ Sections 30(1) and (6)

⁴⁰ Section 30(2)

⁴¹ Section 31

⁴² Sections 30(4) to (5)

⁴³ Section 32(1)

⁴⁴ Section 30(3)

As has been identified in this submission OMCG members have actively recruited the services of members of less known street gangs and used them to do the high-risk aspects of their criminal enterprises, including violence, carrying weapons and the possession and distribution of illegal drugs.

Currently, the only offence provision in South Australia to break up these criminal associations is the offence of consorting in section 13 of the *Summary Offences Act 1953*. Section 13 provides:

13—Consorting

A person who habitually consorts with reputed thieves, prostitutes or persons having no lawful visible means of support is guilty of an offence.

Maximum penalty: \$2 500 or imprisonment for 6 months.

SAPOL has advised there are problems with the offence of consorting, including the petty nature of the classification of persons (reputed thieves, prostitutes and persons with no visible means of support), the absence of any defence and that consorting does not include modern forms of communication.

SAPOL recommended that the offence of consorting be replaced with a more modern offence that targets the association and communication between OMCG members and other serious criminals.

The Act repeals section 13 and replaces it with an offence in a more modern form.

The new offence will prohibit a person from associating or communicating (by any means) with:

- members of declared organisations;
- persons who are the subject of control orders.⁴⁵

The new offence will also prohibit persons with convictions for prescribed offences from associating or communicating with other persons with convictions for prescribed offences.⁴⁶

The concept of 'habitually' consorts is replaced with a requirement that the defendant associate or communicate with the person not less than six times in 12 months.

An association or communication is to be disregarded if:

⁴⁵ Section 35(1)

⁴⁶ Section 35(3)

- it occurs between close family members, in the course of a lawful occupation, business or profession, in the course of training, education or rehabilitation, in lawful custody or as a result of a court order, or in any prescribed circumstance, unless the prosecution proves the particular association or communication was unreasonable;⁴⁷ and
- if the defendant proves he had a reasonable excuse for the particular association or communication.⁴⁸ This defence will not, however, apply to a member of a declared organisation, a person on a control order or a person with prescribed convictions.⁴⁹

The Section clearly identifies that it is not necessary for the prosecution to prove that the defendant associated with another person for any particular purpose or that the association would have led to the commission of any offence. It is the act of association, which includes communication by any means whatsoever that constitutes the offence.⁵⁰ This provision distinguishes these offences from existing preparatory offences such as inciting, soliciting or conspiracy.

The Act authorises a police officer to require the personal details of a person where he has reasonable cause to suspect that the person is associating with a member of a declared organisation, a person who is subject to a control order or a person who has a relevant criminal conviction.

The current penalty for consorting is a \$2,500 fine or imprisonment for six months. To reflect that the new offence will involve associating or communication with more serious categories of persons, the maximum penalty for the new offence is five years' imprisonment. To take account of the wide range of offending, a discretion will be conferred on the prosecution to proceed summarily, having regard to the seriousness of the offending, if this is appropriate. Notwithstanding this, all convictions are indictable convictions for the purpose of any Act or law.⁵¹

4.6 Review and Expiry of Act

Part 5 of the Act provides that, before 1 July each year, the Attorney-General must appoint a retired judicial officer to conduct a review on whether the powers under the Act have been used appropriately having regard to the objects of the legislation.⁵² Both the Attorney General and the Commissioner of Police must provide the person conducting the review with such information, as he requires⁵³, although confidentiality obligations apply.⁵⁴ The person must provide a report by

⁴⁷ Section 35(6)

⁴⁸ Section 35(7)

⁴⁹ Section 35(8)

⁵⁰ Section 35 (9)

⁵¹ Section 42(2)

⁵² Section 37(1)

⁵³ Section 35(2)

⁵⁴ Section 37(3)

30 September each year⁵⁵, whereupon the Attorney General must table a copy of the report in both Houses of Parliament.⁵⁶

The Act also requires the Attorney General to conduct a review of the operation and effectiveness of the legislation as soon as practicable after the fourth anniversary of the commencement of the legislation.⁵⁷ The Attorney General must prepare a report based on the review and table a copy of the report in both Houses of Parliament.⁵⁸

The Act also contains a sunset clause. The Act will expire five years after the day on which the clause comes into operation.⁵⁹

4.7 Amendments to related Acts

Traditional criminal law offences are an important dimension in combating serious and organised crime. The effectiveness of the traditional criminal law approach requires the continued support and participation of victims and witnesses in the criminal justice system. Any criminal activity that undermines this support threatens the effectiveness and general support for the system.

The Government also recognises that with the introduction of the *Serious and Organised Crime (Control) Act 2008* public officials and persons involved in judicial proceedings need enhanced legislative protection from threats and reprisals from those who are targeted by the new laws and who may seek to pervert the course of justice. In addressing these issues amendments to the *Criminal Law Consolidation Act 1935* and the *Bail Act 1985* have been introduced.

4.8 Sections 248 and 250 of the Criminal Law Consolidation Act 1935

Section 248 of the *Criminal Law Consolidation Act* provides:

4.8.1 248 Threats or reprisals relating to duties or functions in judicial proceedings

- (1) A person who causes or procures, or threatens or attempts to cause or procure, any injury or detriment with the intention of inducing a person who is or may be:

⁵⁵ Section 37(3)

⁵⁶ Section 35(5)

⁵⁷ Section 38(1)

⁵⁸ Section 38(3)

⁵⁹ Section 39

- (a) a judicial officer or other officer at judicial proceedings (whether proceedings that are in progress or proceedings that are to be or may be instituted at a later time); or
 - (b) involved in such proceedings as a witness, juror or legal practitioner, to act or not to act in a way that might influence the outcome of the proceedings is guilty of an offence.
- (2) A person who causes or procures, or threatens or attempts to cause or procure, any injury or detriment on account of anything said or done by a judicial officer, other officer, witness, juror or legal practitioner in good faith in the discharge or performance or purported discharge or performance of his or her duties or functions in or in relation to judicial proceedings is guilty of an offence.

Section 250 of the *Criminal Law Consolidation Act* provides:

4.8.2 250 Threats or reprisals against public officers

A person who causes or procures, or threatens or attempts to cause or procure, any physical injury to a person or property:

- (a) with the intention of influencing the manner in which a public officer discharges or performs his or her official duties or functions; or
- (b) on account of anything said or done by a public officer in good faith in the discharge or performance or purported discharge or performance of his or her official duties or functions,

is guilty of an offence.

The maximum penalty for an offence pursuant to both Sections 248 and 250 is: imprisonment for 7 years.

SAPOL advises that sections 248 and 250 are, at present, too narrow to catch the type of threatening behaviour engaged in by OMCG members and their associates. This behaviour is often more subtle than the making of overt threats and includes:

- following a person;
- Loitering outside a person's home or place of work;
- keeping person under surveillance;
- communicating with a person (by letter, email, telephone etc.).

The more subtle intimidation will, in many cases, amount to unlawful stalking within the meaning of section 19AA of the *Criminal Law Consolidation Act*. However, the penalty for unlawful stalking is only three years' imprisonment (for the basic offence) and five years' imprisonment (for an aggravated offence).

The Act amends sections 248⁶⁰ and 250⁶¹ so that a person who engages in conduct that amounts to stalking within the meaning of 19AA(1)(a) with the intention prescribed in section 248 or 250 will commit an offence under those sections and be liable for the maximum penalty, seven years' imprisonment. Section 248 is also amended to make clear that threats etc., directed at a person who provides assistance to a criminal investigation will also amount to an offence whether or not a complaint or information is laid against the defendant.⁶²

4.9 Section 10A of the Bail Act 1985.

Section 10 creates a statutory presumption in favour of bail where a person is charge with, but not convicted of, an offence. This means that a person should be released on bail unless, having regard to the matters in subsection 10(1), the bail authority believes that bail should be refused.

Section 10A creates exceptions to the general rule in section 10. Section 10A(1) provides, despite section 10, bail is not to be granted to a prescribed applicant unless the applicant establishes the existence of special circumstances justifying the applicant's release on bail.

Section 10A(2) defines a prescribed applicant to mean an applicant taken into custody about certain serious motor vehicle offences where committed, or allegedly committed, by the applicant in the course of attempting to escape pursuit by a police officer or attempting to entice a police officer to engage in a pursuit.

SAPOL advises that intimidation of victims and other witnesses by OMCG members and their associates is a key reason for lack of prosecution success against OMCG members.

Intimidation of victims and witnesses by OMCG members and associates harms the Crown's ability to secure convictions.

SAPOL advises that uncertainty about the release of OMCG members and associates on bail contributes to the fear held by victims and witnesses. At present, OMCG members and associates charged with blackmail or offences involving the intimidation of witnesses are subject to a presumption in favour of bail.

The Act amends section 10A to add to the list of prescribed applicants a person taken into custody for:

⁶⁰ Schedule 1, Part 3, clause 3

⁶¹ Schedule 1, Part 3, clause 4

⁶² Schedule 1, Part 3, clause 3

- the offence of breach of a control order;
- the offences of breach of a public safety order;
- the offence of blackmail (section 171 of the Criminal Law Consolidation Act);
- offences pursuant to Sections 248 and 250 of the *Criminal Law Consolidation Act* (as amended).⁶³

4.10 Liquor and Gambling Legislation

Significant work has been undertaken in South Australia through legislative reform, regulation enforcement and police operations to remove OMCG members from security industries and licensed premises.

Keeping OMCG members and associates out of licensed premises has reduced the number of serious assaults in and around hotels and nightclubs.

The following aspects of liquor and gambling legislation in South Australia are instrumental in tackling OMCG:

- Fit and proper test
- Scrutiny of associates
- Criminal intelligence and confidentiality provisions
- Barring orders

4.10.1 Fit and proper test

In determining an application for a liquor licence or gaming machine licence, the Liquor and Gambling Commissioner must be satisfied that the applicant is a fit and proper person to hold the licence.

Section 55 of the *Liquor Licensing Act 1997* sets out the factors to be taken into account in deciding whether a person is fit and proper to hold a liquor licence. These factors include the reputation, honesty and integrity (including the creditworthiness) of the person.

⁶³ Schedule 1, Part 2

Section 19(2) of the *Gaming Machines Act 1992* also requires the reputation, honesty and integrity (including the creditworthiness) of the applicant to be taken into account in deciding whether a person is fit and proper to hold a gaming machines licence.

The *Casino Act 1997*⁶⁴ and the *Authorised Betting Operations Act 2000*⁶⁵ also impose a fit and proper test on applicants.

The legislation also imposes a fit and proper test on applicants who wish to hold approved positions within licensed premises, such as responsible person⁶⁶ or gaming machine employee⁶⁷ or gaming machine manager⁶⁸.

Reputation is a key to determining the applicant's fitness and propriety to hold a licence or be approved under these Acts. This is a very broad criterion and allows the licensing authority to inform itself about matters beyond an applicant's criminal record. This is important in the case of OMCG members who may not have significant criminal histories but are known to participate in activities that are not appropriate for a licensee or approved person.

4.10.2 Associates

The *Liquor Licensing Act 1997* and *Gaming Machines Act 1992* require the licensing authority to take account of the reputation, honesty and integrity of people with whom the applicant associates, in deciding whether a person is fit and proper to hold a licence. These provisions allow the licensing authority to go beyond the applicant's criminal record.

The *Casino Act 1997* and *Authorised Betting Operations Act 2000* require the licensing authority to take account of the character, reputation and financial background of the applicant's *close associates*.

Section 4 of the *Casino Act 1997* and section 5 of the *Authorised Betting Operations Act 2000* define two persons as close associates if:

- (a) one is a spouse, domestic partner, parent, brother, sister or child of the other; or
- (b) they are members of the same household; or
- (c) they are in partnership; or

⁶⁴ section 21(4)

⁶⁵ section 22(5)

⁶⁶ section 71 of the *Liquor Licensing Act 1997*

⁶⁷ section 37 of the *Gaming Machines Act 1992*

⁶⁸ section 37 of the *Gaming Machines Act 1992*

- (d) they are joint venturers; or
- (e) one is a body corporate and the other is a director or executive officer of the body corporate; or
- (f) one is a body corporate (other than a public company whose shares are quoted on a prescribed financial market) and the other is a shareholder in the body corporate; or
- (g) one is a body corporate whose shares are quoted on a prescribed financial market and the other is a substantial shareholder in the body corporate; or
- (h) one has a right to participate (otherwise than as a shareholder in a body corporate) in income or profits derived from a business conducted by the other; or
- (i) one is in a position to exercise control or significant influence over the conduct of the other; or
- (j) a chain of relationships can be traced between them under any one or more of the above paragraphs.

4.10.3 Criminal intelligence

The licensing authority relies on information provided by SAPOL to properly assess fitness and propriety of applicants. In most cases the information is in the form of a criminal history report. In some cases the applicant does not have any, or any significant, criminal history. SAPOL may have other information, in the form of intelligence, relevant to determining the application but public disclosure of the information may compromise a SAPOL operation.

Section 28A of the *Liquor Licensing Act 1997* allows the Commissioner of Police to classify information as criminal intelligence. This information may be provided by the Commissioner of Police to the Commissioner and not disclosed to any other person (except the Minister, a court or a person to whom the Commissioner of Police authorises its disclosure).

If the licensing authority makes a determination on the basis of the criminal intelligence, the authority is not required to provide any grounds or reasons for the decision other than that to grant the application would be contrary to the public interest.

If the Commissioner of Police lodges an objection to an application or takes other action against a licensee because of information that is classified by the Commissioner of Police as criminal intelligence the applicant or licensee is not entitled to be provided with that information.

In any proceedings under this Act, the Commissioner, the Court or the Supreme Court must take steps to maintain the confidentiality of the 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.

Similar provisions in relation to criminal intelligence and confidentiality are included in the *Gaming Machines Act 1992*, the *Casino Act 1997* and the *Authorised Betting Operations Act 2000*.

4.10.4 Barring Orders - Proposed amendments

Combined use of civil (administrative) law prevention orders in the form of barring orders with criminal sanctions for breaching these orders currently exists within South Australia legislation. Barring orders have proven successful in enhancing community safety and denying serious and organised crime groups access to vulnerable marketplaces for the distribution of illicit drugs and perpetration of violence.

Cabinet has approved the *Liquor Licensing (Power to Bar) Amendment Bill*; which provides the Commissioner of Police the power to bar persons from entering or remaining on licensed premises on certain grounds. This Bill will be progressed as part of the legislative reform program targeting serious and organised crime in South Australia.

4.10.5 Impact of targeting OMCG and associates in licensed premises

SAPOL have successfully targeted the presence of OMCG members and their associates in and around licensed premises in the Adelaide Central Business District. A partnership approach between police and licensees of hotels to prevent OMCG members and their associates from entering or being in licensed premises resulted in more than 60 barring orders issued. The outcome of the police operations contributed to a significant reduction in serious assaults in the Adelaide Central Business District.

The barring order initiative was the subject of review by the Licensing Court of South Australia in May 2007 in the matter of HQ.

The licensee of premises known as HQ served an order on three known members of an OMCG, barring them from entering or remaining on the licensed premises.

The barring order was issued pursuant to s125(1)(b) "*on any other reasonable ground*". The licensee's reasoning was that by allowing known members of an outlaw motorcycle gang on to the premises he would be committing an offence under s 21 of the *Summary Offences Act* - "a person who is the occupier of

premises frequented by reputed thieves... persons of notoriously bad character... is guilty of an offence”.

Upon review in the Licensing Court of South Australia, the judge upheld the barring on the basis that it would be a ‘reasonable ground’ within the meaning of s 125(1)(b) of the Act to bar a person so as to avoid breaking the law, in this case s21 of the *Summary Offences Act*.

4.11 Unexplained Wealth

A holistic approach to countering serious and organised crime requires effective legislation to confiscate proceeds of crime and unexplained wealth.

OMCG not only work hard at making money through commercialisation of crime, but work equally hard ensuring that profits of their illegal activities are well protected and further invested in both illegitimate and legitimate ventures.

Illicit drug manufacture and distribution and blackmail, arguably provide OMCG with the most lucrative sources of income. In South Australia, blackmail has in recent times emerged as a significant under-reported crime of violence that provides OMCG immediate and low risk finance and assets as a result of their practiced intimidation, threats and violence. Reluctance of victims to report OMCG crime as identified earlier in this submission translates into missed opportunities to confiscate illegal proceeds.

The South Australia *Criminal Assets Confiscation Act 2005* allows for the proceeds or instruments of crime to be forfeited to the Crown. However, forfeiture⁶⁹ may only occur:

- where the person has been convicted of a serious offence; or
- where the person is suspected on reasonable grounds of having committed a serious offence,

and the relevant property is either a proceed or instrument of that crime.

However, the effectiveness of these provisions is limited by the need to prove the defendant (or some other relevant person) has committed a serious offence.

South Australia Government therefore, as part of its current legislative reform program targeting serious and organised crime, will amend the *Criminal Assets Confiscation Act (SA)* to provide for unexplained-wealth orders. The provisions will be based on the provisions in Division 1 of Part 6 of the Northern Territory’s *Criminal Property Forfeiture Act*.

⁶⁹ Forfeiture here includes the making of a pecuniary penalty order.

The proposed amendments will authorise the Director of Public Prosecutions (“D.P.P.”) to apply to a court for a declaration that a person (including an incorporated body) has ‘unexplained wealth’. A person has ‘unexplained wealth’ if the value of their total wealth, calculated in accordance with the legislation, exceeds their lawfully obtained wealth.

The proposed amendments will have these key features:

- no criminal threshold. There will be no threshold test to be satisfied before an application for an unexplained wealth declaration can be made against a person or body corporate. An application may be brought against any person or body corporate (a small business, for example) irrespective of whether the person or body corporate has been convicted of an offence, has been charged with an offence or, indeed, is suspected for any reason of committing an offence. That is, there is no obligation on the Crown to prove or even allege the person or body corporate is engaged in any sort of criminal activity. Although this represents a departure from the current criminal assets confiscation where the Court must be satisfied, either by conviction or on the civil burden, that the respondent has committed a relevant criminal offence, the effectiveness of unexplained-wealth declarations rests on the Crown being relieved of the need to prove the defendant is, or has been, involved in criminal activity or that a particular asset is linked to a particular crime. This is consistent with the legislation in force in the Northern Territory and Western Australia;
- the Attorney-General’s consent will be required before an application for an unexplained-wealth order may be made against a person or organisation.
- the respondent (the person or body corporate who is the subject of the application) bears the onus of establishing that his or its wealth has been lawfully obtained. All the Crown is required to prove is that the respondent owns or effectively controls wealth;
- the Court hearing an application must declare that the respondent has unexplained wealth if the Court determines that it is more likely than not that the respondent’s total wealth is greater than his or its lawfully acquired wealth;
- where the Court makes an unexplained-wealth declaration, the respondent is required to pay the amount found to be unexplained to the Crown.

As the Crown does not have to establish criminality, or link a particular asset to a particular crime, unexplained-wealth proceedings allow the assets of those who may not have directly participated in crime, but who have benefited

financially from crime, to be seized on the basis that their wealth exceeds that which they could reasonably have obtained through lawful means.

This legislation will provide a mechanism by which the Government can attack those who direct and who profit from the activities of criminal organisations but who are, themselves, insulated from any direct criminal liability.

4.12 Declared Drug Trafficker

The South Australia Government as part of its legislative reform program for serious and organised crime has proposed to amend the *Criminal Assets Confiscation Act 2005* to provide for the confiscation of all of the property of a declared drug trafficker. These provisions will be based on the model in the Western Australian *Criminal Property Forfeiture Act 2000*.

Two situations will be catered for. The first is the repeat offender. The second is the major offender (whether repeat or not).

The repeat offender is caught if he/she is convicted on a third (or more) offence against nominated offences, or a prescribed equivalent Commonwealth offence or any combination, within a period of 10 years.

The major offender is caught if the person commits any one offence at any time about a prohibited drug or prohibited plant that exceeds a prescribed amount.

The Government proposes to introduce legislation dealing with declared drug traffickers.

4.13 Firearms Prohibition Orders

The South Australia *Firearms (Prohibition Orders) Amendment Bill 2007* provides for increasing the powers of police in relation to violent crime involving firearms, and provides police with strong powers for taking pre-emptive and compliance authority over persons who, through their own actions and history, have demonstrated that they present as a risk to society and a threat to public safety. Such strong powers are complemented by development of a judicial review process, and are targeted against those who have shown a propensity for the use of violence for their own ends, rather than against the legitimate legal firearms community. The proposed legislation will introduce the strongest powers available nation wide to South Australia Police to combat violent firearms related crime.

In general terms, firearms regulation has focused on the firearm, rather than the individual involved with the firearm, and has been structured in such a

way as to place controls on the licensed firearms owner. Offences involving violence and the criminalised use of firearms tended to be rolled into generalised offence categories, such as assaults, wounding or murder.

Matters involving specific firearms related offences, not involving violence, tend to be heard summarily, and as a consequence the penalties applicable tend to be low, and in many cases involving career criminals, offences under the Firearms Act are withdrawn or not proceeded with in deference to other charges. This derives from the criminalisation of what are essentially regulatory issues, where legitimate firearms owners are prosecuted for non-violent non-compliance with the law in relation to the lawful keeping of their firearms, and has the disadvantage of light penalties for persons using firearms in an intentionally criminal manner.

This has been compounded with difficulties of prosecuting a person for possession offences with regards to non-registered unrecorded firearms, wherein a defence of ignorance of the existence of a firearm, such as in a car in which a criminal is travelling in, can severely limit, if not negate, a successful prosecution.

It is in consideration of this that the focus of this Bill is on the behaviour of persons, rather than on the firearm itself. This is combined with the view that firearms ownership and possession is a privilege, not a right, and that the ultimate determination of this being vested in the State. A clear separation between criminalisation and regulation is developed in the Bill, which will allow for a concentration of police efforts at reducing the level of firearms related crime, and pre-emptive action on the potential for that to occur, while maintaining an appropriate level of co-operative regulation within the legitimate firearms using community.

The Bill strengthens the powers of police to combat firearms related violence, by introducing Firearms Prohibition Orders giving police the ability to ban persons with a known propensity for violence, or persons who associate with such persons, from accessing firearms.

Although primarily aimed at targeting motor cycle gangs and their associates, Firearms Prohibition Orders can also be applied to any person who has a known history of serious crime or violence, or who has been identified by a medical professional as being a risk to themselves or others because of a health condition.

Complementing the prohibition orders is a range of ancillary legislation which will provide the police with further tools to both investigate firearms related crime, and to ensure that only appropriately responsible persons are able to gain a firearms licence and possess registered firearms.

This is the first step in the process of refocussing the attention from the regulation of the legitimate firearms community, towards combating the

criminal elements that use firearms in the furtherance of their criminal endeavours.

The Bill provides for a range of offences including, making it an offence for a person subject to a Firearms Prohibition Order to attend any shooting range, or firearms dealership, to possess a firearm, and for any person to supply a person subject to an order with a firearm.

4.14 Revised Appeal Process

Complementing these powers of compliance, the Bill amends the appeal process of the South Australia Firearms Act. Previously, the appeals under the Act could only be referred to the Firearms Consultative Committee, which could only either affirm decisions of the Registrar, or refer matters back to that authority for further consideration. The Bill provides for the changing of the name of the Committee to the Firearms Review Committee, which retains its powers of referral. However, the Bill also provides for matters of appeal to be placed before the District Court, it being considered appropriate that the proposed police powers of compliance should be complemented by a judicial appeal mechanism.

4.15 Complementary Proposals

The Bill provides for the creation of aggravated offences under the Firearms Act. This will consist of carrying a loaded firearm or a firearm and a loaded magazine for the firearm or the person has a firearm concealed about the person. Exemptions will be obtainable for persons who have a necessity to carry loaded firearms, such as in rural areas and industries. The object here is to fight those who are a threat to public safety, not legitimate firearms users.

The Bill also provides a range of reporting requirements on certain bodies and persons. Firearms clubs are required to report to the Registrar on members who the club considers to be a person who should not have access to firearms, and will receive indemnity from civil or criminal liability for doing so. Likewise, medical professionals and other prescribed persons will be required to report to the Registrar on persons they have seen in their professional capacity and have determined may pose a risk to themselves or others if they possessed firearms.

The Bill also provides for tighter controls on the manufacture and modification of, and dealing in, firearms. Broader provisions on the associations and employees of firearms dealers will mean the Registrar has a greater say in who may take part in this legitimate business, as well as stronger laws in relation to manufacture and modification will provide police the tools to make a significant impact into the clandestine firearms trade.

Enhanced investigative powers: Police will have the power to require a person whom they suspect on reasonable grounds is committing an offence in relation to firearms to state their full name, and whether they are the owner of the firearm, part or ammunition to which the question relates, or if not, to state who is the owner. They will also be required to answer questions in relation to the purpose of possession of the firearm, and who else may have had possession of it.

To assist in progressing successful prosecutions, certain terms and definitions will be clarified or expanded by the Bill.

The definition of 'possession' of a firearm is to be clarified, placing the onus of proof on any person reasonably suspected of being in possession of a firearm to establish a lawful excuse for that possession, however, a defence is provided if the person establishes that they could not have reasonably known that the firearm was in their possession.

Further, the Bill provides for the clarification and expansion of the term 'fit and proper person' to have possession of a firearm, licence or ammunition, by taking the onus from being convicted of an offence under the Firearms Act, or an offence involving actual or threatened violence, to having been found guilty of such. This will allow for the application of previous offences where a person has been convicted without penalty, in the assessment processes of the Registrar for matters where a determination as to a person's fitness for access or possession of firearms is required. This will be complemented by a broadening of criteria to allow regard for the reputation, honesty and integrity of a person, and the people with whom that person associates with, to be taken into account.

Finally, to bring the State in line with practice nationally, the term 'criminal intelligence' is to be replaced with the term 'confidential', under the Registrar's existing power in relation to the classification of evidence. The Registrar may now identify information as confidential, if its disclosure might prejudice investigation, or may enable the existence or identity of a confidential source of information to be ascertained, or if such would endanger a person's life or physical safety. This is considered an imperative to protect the rights and safety of those persons who, through their own civic virtue, assist police in the fight against violent crime.

5. TERMS OF REFERENCE 4

The impact and consequences of legislative attempts to outlaw serious and organised crime groups, and membership of an association with these groups in:

- a. society***
- b. criminal groups and their networks***
- c. law enforcement agencies; and***
- d. the judicial system***

5.1 Society

5.1.1 Enhanced public safety

The South Australia Government through its holistic legislative reform approach to serious and organised crime is delivering modern and progressive legislation to enhance community safety and security.

Assuming the measures in the *Serious and Organised Crime (Control) Act 2008* have their intended impact and consequences on criminal associations, the legislation will have a positive impact on society in that the capacity of organised crime groups to engage in serious crimes will be significantly compromised, thereby reducing the impact of serious and organised crime on the community.

The ability to intervene and disrupt associations within these groups and organisations before the commission of the crime presents South Australia with the best opportunity to reduce the physical, social and economic impact of serious and organised crime on the community.

Legislative initiatives to more effectively deal with public acts of violence, enhance powers of drug and firearms detection and prohibition, coupled with enhanced legislation to confiscate profits of crime and unexplained wealth will significantly impact on factors that currently serve to insulate members of serious and organised crime groups from the full reach of the law.

Enhancements to criminal law, bail legislation (presumption against bail) and public order offences targeting violence, threats and intimidation by members of serious and organised crime groups will serve to reassure the public and support police in their investigations. Furthermore these initiatives will contribute towards encouraging and supporting the continued participation of victims and witnesses in the criminal justice system.

5.2 Balancing civil liberties and public safety

The South Australia Government recognises that in developing legislative responses to the complex problem of serious and organised crime responsible legislation requires an appropriate balance between civil liberties and ensuring public safety and well being.

Considerable public debate has occurred in South Australia regarding the *Serious and Organised Crime (Control) Act 2008*. Some concerns were raised regarding the broad construct of the legislation and the potential for the legislation to unduly encroach upon freedoms of law-abiding citizens.

This legislation in South Australia grants unprecedented powers to the police and the Attorney General to combat serious and organised crime. The South Australian Government believes that this is a measured response appropriate to the threat posed by serious and organised crime groups and their criminal activities.

Ensuring that these powers are used appropriately and responsibly is a concern of the Government. As such, in addition to review and appeal mechanisms within specific legislation, the Act contains the following over-arching measures:

- the objects of the legislation are clearly set out. These are to disrupt and restrict the activities of organisations involved in serious crime and the members and associates of such organisations, and to protect members of the public from violence associated with these criminal organisations. However, the Act makes clear that, without derogating from these primary objects, it is not the intention of the Parliament that the powers in the legislation be used in a manner that would diminish the freedom of people in this State to participate in advocacy, protest, dissent or industrial action;
- the Act requires the Attorney-General to appoint a retired judicial officer to conduct an annual review on whether the powers under the legislation have been used appropriately having regard to the objects of the Act. The Attorney-General must table a copy of the review report in both Houses of Parliament;
- the Act requires the Attorney-General to review the operation and effectiveness of the legislation after four years, to prepare a report based on this review and to table a copy of the report in both Houses of Parliament; and
- the Act provides that the legislation will expire 5 years after the date on which it comes into operation.

The South Australia Government is satisfied that these measures provide appropriate oversight for the use of the legislation.

5.3 Criminal Groups and their Networks

5.3.1 Displacement

The South Australia Government's current legislative reform program provides a holistic approach to serious and organised crime by targeting the associations of and between members of criminal organisations, enhancing criminal laws relating to organised crime activity including public violence, drugs and firearms as well as targeting unexplained wealth and assets of these members.

The effect of this reform program has seen displacement interstate of some members of criminal groups that could be targeted by South Australia's new laws. Displacement of this kind may continue to occur in order to evade the reach of the legislation.

A second form of displacement that may occur is for serious and organised crime groups to become less identifying, driving them 'underground'. Some may argue that this will reduce the ability of law enforcement agencies to effectively deal with these groups.

The South Australia Government recognises intended displacement as a legitimate outcome. Diminishing the effect of the criminal reputation of serious and organised crime groups is an intended outcome of the South Australian legislation. This can have a positive effect in reducing community fear and can contribute to an improved sense of community safety and security.

5.3.2 Disruption to serious and organised crime activity

As has been identified in this submission, the strength of serious and organised crime groups and in particular OMCG, lie in their cohesion and ability to associate together in order to plan, organise, engage in, support or facilitate serious criminal activity. The advantage of targeting the associations of members and associates of these groups over outright proscription of membership is that legislative arrangements provide greater flexibility in achieving sustained disruption to the criminal activities of these groups.

The South Australia Government's holistic legislative approach however extends beyond merely targeting core members of criminal groups to associations across all levels that support the group and its commercialisation of crime. These include members, close associates or peripheral supporters. The legislation under the *Serious and Organised Crime (Control) Act 2008* has the capacity to cut off the "tentacles" of these groups thereby reducing their span of influence and control. The effect of this may see core members, who were otherwise insulated from the crime; undertake high-risk aspects of criminal activity, leaving them more vulnerable to apprehension. This approach serves dual purposes in disrupting both the criminal activity and the potential recruitment and expansion of the crime groups.

5.3.3 Legal challenges

In general, serious and organised crime groups, such as OMCG are well financed and resourced to employ the best legal advisors and representatives to challenge legislation that impact on their 'way of life'.

Legislation that specifically seeks to criminalise their membership, classify their organisation as 'criminal' or target associations with and between its members can expect to be the subject of vigorous legal challenge.

Recent legal challenges including the matter of the Gypsy Jokers and the Commissioner of Police (WA) in the High Court 2008; the legal challenge to the issue of barring orders against Hells Angels members in South Australia in 2007 highlight this as a real possibility. It is important that any legislation sought to target associations or membership of serious and organised crime should consider constitutional validity in its design.

5.3.4 Potential for increased confrontation towards public officers

Legislation that prohibits or restricts associations between members of a criminal organisation strikes at the heart of the organisation itself. Therefore where the organisation subject to the legislation has a sub-culture of violence, such as OMCG, there is a potential that public officers involved in the enforcement of legislation may be subject to threats, increased confrontation or violence by these members and supporters of these groups.

In recognition of this potential, South Australia Government has enhanced both the scope and penalties for offences under the criminal law where threats or reprisals are directed towards public officers or persons involved in judicial proceedings.

5.3.5 Adaptability of organised crime groups

SAPOL advises that serious and organised crime groups are adaptive to change and have demonstrated resilience to traditional criminal law approaches that have sought to disrupt their criminal activities. Anecdotal evidence on the effectiveness of the USA RICO legislation on OMCG suggests these groups restructured their clubs and business operations to avoid the impact of those laws.

A possible consequence of South Australia's new approach may see serious and organised crime groups change both in terms of their organisational structure and the way they undertake their criminal enterprises. The South Australian legislation has been designed with maximum flexibility to capture any organisation, however structured, and having consideration of a broad range of serious criminal activity.

In support of this approach, the MC-PEMP national SOG (Law enforcement) Working Group of 28 June 2007 acknowledged that the style of legislation being introduced in South Australia has application not only to OMCG but to other forms of organised crime. The Working Group observed that it is important therefore that any legislation enacted is not so specific to a serious and organised crime group that they can simply adapt their activities to avoid its effect.

5.4 Law Enforcement Agencies

5.4.1 Harmonisation of legislation

The MC-PEMP national SOG (Law enforcement) Working Group established 28 June 2007 reviewed the legislation proposed under the *Serious and Organised Crime (Control) Act 2008*. In addition to recognising the potential for displacement of serious and organised crime groups across jurisdictional boundaries, the Working Group recognised that the full effect of South Australia's new legislation will be minimised if individual members of serious and organised crime groups can avoid the requirements of control orders or other statutory requirements simply by crossing borders.

The Working Group therefore recommended that each jurisdiction review the South Australian model of legislation and consider enacting (within their jurisdictional/constitutional responsibilities) harmonised legislative models, with mutual recognition provisions where appropriate. Subject to any assessment made by the relevant jurisdiction, this may include some but not necessarily all elements of the South Australian model.

5.4.2 Introducing a new paradigm for policing serious and organised crime

The strength of the South Australian Government's legislative response to serious and organised crime lies in its multi-dimensional approach. Traditionally, addressing serious and organised crime has been a two dimensional approach consisting of: 1) 'investigation of crime'; and 2) 'criminal assets confiscation'.

The *Serious and Organised Crime (Control) Act 2008* introduces a third dimension of 'prevention'. This new dimension relies on an expanded use of the civil law jurisdiction for prevention orders combined with criminal sanctions for breaches of those orders.

Members and associates of OMCG are recognised by the Licensing Court of South Australia as being notorious for their bad character and criminal offences involving violence and drugs. Their infiltration into legitimate businesses must be resisted at every opportunity. Experience in South Australia with the Security Industry and the removal of members and associates of serious and organised

crime groups supports the success of using civil law initiatives to increase community resilience to serious and organised crime.

In South Australia this innovative approach will extend to:

- Disrupting associations of serious and organised crime groups
- Issue of 'Barring Orders' preventing members of serious and organised crime being on licensed premises, thereby denying them access to potential marketplaces for illicit drug distribution
- Issue of prohibition orders for firearms
- Removing members and associates of serious and organised crime groups from the security industry and holding of liquor and gaming licences.

Enhancements to the Investigation and Asset Confiscation dimensions are also proposed including:

- Introduction of unexplained wealth and declared drug trafficker legislation
- Enhanced drug laws for possession of precursor chemicals, drug equipment, and drug detection
- Enhancements to cross border legislation

5.4.3 Expanded investigation focus

New legislation targeting declared organisations, control orders and public safety orders requires an emphasis on evidence collection on historic and current serious criminal activity and risk to public safety. The expanded use of administrative procedures in tackling serious and organised crime will require broader investigation focus and evidence collection by law enforcement, beyond the traditional investigation of crime.

A focus on targeting associations at all levels within the criminal group will create opportunities for major disruption to criminal enterprises; increase the risk to those who continue to engage in serious criminal activity and present opportunities to enhance the traditional criminal investigation approach.

5.4.4 Enhanced knowledge, skills and aptitude

Law enforcement training of investigators, intelligence practitioners and prosecutors has traditionally focused on the criminal justice system and its corresponding rules of evidence. A multi-faceted investigation approach combining civil administrative procedures with the criminal law has generally been limited and dealt with by a select group of employees. Enhanced knowledge, skills and aptitude across broader investigation, intelligence and prosecutorial disciplines will be required to ensure effective application for this 21st Century investigation approach.

5.4.5 Relationship between Investigations and Intelligence

The new suite of legislation in South Australia further reinforces the requirement for greater cooperation and cohesion between intelligence and investigation functions both within South Australia and across jurisdictions, with particular emphasis on the timely identification, collection and exchange of information.

5.4.6 Information management

Legislation aligned to the *Serious and Organised Crime (Control) Act 2008* makes provisions for the use of information assets contained within law enforcement agencies in a new evidentiary capacity. This may require law enforcement agencies to identify, retrieve, evaluate and analyse large amounts of disparate information. Furthermore, effective administration and enforcement will rely on the timely reporting and monitoring of associations.

Information management systems, business processes and intelligence capabilities may need to be enhanced, depending upon the respective agency, including information and communication technology (ICT) infrastructure, to support the effective administration and enforcement of this style of legislation.

5.4.7 Dedicated policing response

To effectively administer and enforce the new laws that target associations, police need to be supported with appropriate resources. A dedicated enforcement response needs to be supported by specialist skills including investigators, criminal intelligence analysts, forensic accountants and legal officers.

The South Australia Government has recognised this requirement, providing additional resources to SAPOL to establish a dedicated Crime Gangs Task Force focused on enforcement, the establishment of a Criminal Associations Unit and funding for a sophisticated ICT system for the effective administration of the new *Serious and Organised Crime (Control) Act 2008* and provision of additional specialist forensic accounting skills to support future unexplained wealth and criminal asset confiscations.

5.4.8 The Judicial / Legal System

The measures in the *Serious and Organised Crime (Control) Act 2008* are expected to impact upon the judicial/legal system.

These measures include the hearing and determining applications for civil prevention orders such as control orders and public safety orders and the exercise of various review and appeal provisions. As has been identified in this submission, it is reasonably expected that initial applications for control orders

and the use of information certified as 'criminal intelligence' may be the subject of legal challenge.

The enforcement of these civil orders depends upon new criminal offences: contravention or failure to comply with a control order; and contravention or failure to comply with a public safety order.

The legislation also creates the new offence of criminal association and extends the existing offences of threatening a public officer and threats or reprisals relating to duties or functions in judicial proceedings.

All these offences are indictable or major indictable. This raises the prospect of more jury trials and preliminary hearings. This has the potential to further impact on the efficiency of the criminal-justice system.

In addressing this impact the *Serious and Organised Crime (Control) Act 2008* confers on the prosecution discretion to proceed summarily on charges of breach of control and public-safety orders and the new offence of criminal association. Notwithstanding this, all convictions are recognised as indictable convictions for the purposes of this Act or any other law.

6. **TERMS OF REFERENCE 5**

An assessment of how legislation which outlaws criminal groups and membership of and association with these groups might affect the functions and performance of the ACC

6.1 **Impact of South Australian legislation on the ACC**

The South Australian Government observes the expectations⁷⁰ relevant to the performance and functions of the Australian Crime Commission (ACC) include but are not limited to:

1. Work cooperatively and collaboratively with Commonwealth, State and Territory departments and agencies to counter serious and organised criminal activity in Australia through the conduct of intelligence operations and investigations.
2. Generate information on serious and organised criminal threats in Australia utilising effective investigative and intelligence strategies, including national intelligence systems.
3. Maintain robust support systems that enable the sharing of criminal information and intelligence among law enforcement agencies.
4. Continue to develop strategic and effective relationships with government agencies and the private sector to enable the ACC to gather, analyse and disseminate high-quality criminal intelligence to appropriate bodies.

The suite of legislative arrangements being introduced under the South Australian Government's multi-faceted legislation reform program has the potential to significantly enhance the performance and operations of the ACC, working collaboratively with SAPOL.

The *Serious and Organised Crime (Control) Act 2008* will provide SAPOL with the legislative capacity to more effectively target and disrupt serious and organised crime groups and their networks. This will involve the collection of observations of a criminal nature in real time, providing dynamic information on current and emerging criminal groups operating within South Australia. The timely collection and dissemination of this information will support an enhanced ability to develop the picture of criminality and emerging trends on serious and organised crime in South Australia and other jurisdictions.

⁷⁰ Australian Crime Commission, Statement of Expectation, By Senator the Hon David Johnston Minister for Justice and Customs, http://www.crimecommission.gov.au/content/about/ACC-Ministers_Expectations.pdf, accessed on 19 May 2008

The introduction of sophisticated ICT resources and associated business processes within SAPOL in support of these new laws will contribute to the quality of this information available to the ACC. Timely exchange of information between SAPOL and the ACC will contribute to improved strategic assessments on serious and organised crime networks.

6.2 ACC support to South Australia's new legislative approach

The South Australian Government acknowledges that since August 2007 the ACC has established arrangements to facilitate, in collaboration with the jurisdictions, the use of target development capabilities including ACC coercive powers.

The provision within the *Serious and Organised Crime (Control) Act 2008* supporting prevention initiatives introduce a new legislative landscape within South Australia. Initiatives, including 'declarations', control orders and public safety orders are administrative processes. These processes provide for the presentation of broader information as 'evidence' than would otherwise be admissible in criminal proceedings. This includes:

- any information suggesting that a link exists between the organisation and serious criminal activity;
- the criminal records of members or past members of the organisation;
- any information suggesting that members or past members have been involved (directly or indirectly) in serious criminal activity;
- any information suggesting offending by members of overseas chapters or branches of the organisation;⁷¹
- information certified as 'criminal intelligence', in accordance with the *Serious and Organised Crime (Control) Act 2008*, whether in South Australia or elsewhere.⁷²

The Act also provides for information originating in jurisdictions outside South Australia (including overseas), relevant to criminal organisations that represent a risk to South Australia to be used in proceedings against those organisations. Information of this type in the form of criminal intelligence is collected within all law enforcement jurisdictions and accessible by the ACC.

The use of coercive investigative powers will play an important role in identifying and collecting evidence as outlined above. The ACC through the timely dissemination of such information for use in evidence in administrative law

⁷¹ Clause 10(3), *Serious and Organised Crime (Control) Bill 2007*

⁷² Clause 3 – Definition of 'Criminal Intelligence'

proceedings under the *Serious and Organised Crime (Control) Act 2008* can play an important role.

SAPOL advise that all jurisdictions in the Australasian law enforcement community have expressed interest in South Australia's new approach to serious and organised crime and are monitoring progress.

6.3 Legislative arrangements of the ACC supporting South Australia new approach

The introduction of civil administrative processes within the *Serious and Organised Crime (Control) Act 2008* supporting prevention initiatives introduces a new legislative landscape within South Australia.

These initiatives, including 'declarations', control orders and public safety orders are not investigations of crime but investigations of an organisations past and present involvement in, or links to, serious criminal activity and the level of risk the organisation and its members present to South Australia.

In ensuring the ACC can working collaboratively with SAPOL in pursuit of this new legislative approach, an assessment of relevant State and Commonwealth legislation supporting the operation of the ACC relevant to the collection, dissemination and use of intelligence and information as evidence may be required.