Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au

Office of the President

15 July 2015

Our ref Criminal Law Committee – 104

Your ref 565751/10, 2916622

The Honourable Alan M Wilson
Chairperson
Taskforce on organised crime legislation
GPO Box 149
Brisbane QLD 4001

By post and email:
taskforceonorganisedcrime@justice.qld.gov.au,

Dear Chairperson

Inquiry Area Two (Term of Reference 12) - Taskforce on Organised Crime Legislation

We write in relation to Inquiry area two and paragraph 12 of the Terms of Reference. Inquiry area two contains a request for information on the legislation that targets organised crime in other jurisdictions.

Commonwealth

We **enclose** a copy of the Law Council of Australia's briefing note entitled, 'Anti-bikie' Laws – Recent Developments' dated 28 April 2014 for your information. This contains a broad overview of anti-organisation legislation at the Commonwealth, State and Territory level.

Recent updates on legislation that targets organised crime in the Northern Territory and South Australia can be found below.

Northern Territory

The *Serious Crime Control Act (NT)* is currently in force in the Northern Territory and can be accessed here - http://www5.austlii.edu.au/au/legis/nt/consol_act/scca253/. The *Serious Crime Control Act (NT)* provides that the Commissioner of Police may apply to the Northern Territory Supreme Court to make a declaration that the organisation is a declared organisation. The Court may make such a declaration where it is satisfied that the members of the organisation associate for the purposes of serious criminal activity and the organisation represents a risk to public safety and order. Upon this declaration, the Commissioner may then seek a 'control order' from the Supreme Court against particular individual members of that organisation which restricts these particular individuals from associating with other members of the declared organisation or other persons who have engaged in serious criminal activity. The *Serious Crime Control Act (NT)* also allows for a Senior Police Office to make a Public Safety Order against a person or class of persons to prohibit that person from being present at a premise, and for the Local Court to order a fortification removal order in relation to premises.

To date the *Serious Crime Control Act (NT)* has not been used and there are no declared organisations in the Northern Territory.

South Australia

There are several relevant pieces of legislation in South Australia (which can be accessed here - http://www.legislation.sa.gov.au/listAZActs.aspx?key=S):

- *Serious and Organised Crime (Control) Act 2008 (SA)*
- *Serious and Organised Crime (Control) (Declared Organisations) Amendment Act 2013 (SA)*
- *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012 (SA)*
- *Serious and Organised Crime (Unexplained Wealth) Act 2009 (SA)*

The *Statutes Amendment (Serious and Organised Crime) Bill (SA) 2015* was passed in the House of Assembly on 17 June 2015, and received in the Legislative Council on the same date. The Bill may be accessed here - http://www.legislation.sa.gov.au/LZ/B/CURRENT/STATUTES%20AMENDMENT%20(SERIOUS%20AND%20ORGANISED%20CRIME)%20BILL%202015/D_AS%20RECEIVED%20IN%20LC/STATUTES%20ORGANISED%20CRIME%20BILL%202015.UN.PDF. You may find it of assistance to look at the most recent debate on the second reading of the Bill in the Legislative Council: https://hansardpublic.parliament.sa.gov.au/Pages/DateDisplay.aspx#/DateDisplay/HANSARD-10-16118/HANSARD-10-16113. Earlier debate during the Committee Stage in the House of Assembly can be found here: https://hansardpublic.parliament.sa.gov.au/Pages/DateDisplay.aspx#/DateDisplay/HANSARD-11-20057/HANSARD-11-20054.

We **enclose**:

- a copy of the Explanatory Report accompanying the *Statutes Amendment (Serious and Organised Crime) Bill 2015* (SA) dated 3 June 2015; and
- a copy of the Law Society of South Australia's submission to the *Statutes Amendment (Serious and Organised Crime) Bill 2015* (SA) dated 29 June 2015.

Thank you again for consulting with us on these matters. We look forward to continuing to be involved in the important work of the Taskforce.

Yours faithfully

Michael Fitzgerald
President

Law Council
OF AUSTRALIA

Briefing Note

Date: 28 April 2014

'Anti-bikie' Laws – Recent Developments

Major Points

1. The most recent assessment of outlaw motor cycle gangs identified that there are more than 40 outlaw motor cycle gangs operating in Australia, with about 6000 patched members.[1]

2. The Commonwealth and the majority of states and territories have passed laws in recent years designed to combat serious and organised crime by proscribing certain groups and organisations and criminalising association with these groups. These laws are often called 'anti-bikie' laws but actually have wider application.

3. Like its Constituent Bodies, the Law Council abhors all acts of violence and supports effective measures to protect the community from criminal activity, including criminal activity conducted by organisations or other groups.

4. However, the Law Council questions the necessity for the introduction of extraordinary and far reaching 'anti-bikie' laws in light of the extensive range of law enforcement and investigative powers already available to police in all jurisdictions and pre-existing criminal offences designed to combat the commission of crime by groups, such as extended liability offences of conspiracy. The Law Council considers that these pre-existing laws, that more closely reflect traditional criminal law principles, provide a more appropriate starting point to address the types of criminal activity engaged in by outlaw motorcycle groups.

5. The Law Council is also concerned that the so-called 'anti-bikie' laws have broader application than outlaw motorcycle gangs and have the potential to impact on other members of the community and their rights, particularly the freedom of association. A further overarching concern relates to the potential for such offences to allow for much wider and more extensive use of a range of intrusive police powers. Related to these concerns is the fact that by focusing on association, these laws seek to target certain categories of people – for example those who for socio-economic or familiar reasons may be more like to associate with others who may have a criminal background – and apply harsh penalties and intrusive investigative powers to this group, in a way that does not apply to the broader community. This approach, in contrast to traditional criminal offences based on conduct, undermines the principle of equality before the law that is central to the Australian legal system.

6. The Law Council is particularly concerned that the anti-association laws in place at the Commonwealth level contain features that conflict with the Law Council's Rule of Law Principles and undermine traditional criminal law principles by:

   (a) removing the presumption in favour of bail;

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[1] See the Australian Crime Commission, *Outlaw Motorcycle Gangs*, at https://www.crimecommission.gov.au/publications/intelligence-products/crime-profile-fact-sheets/outlaw-motorcycle-gangs.

(b) shifting the focus of criminal liability from a person's conduct to his or her associations;

(c) relying on broad criteria for the declaration of organisations as criminal organisations and the use of criminal intelligence (which may not be made available to the respondent), in addition to evidence, for the purpose of making such declarations;

(d) increasing police powers to issue non-association notices to members of certain organisations, enforce control orders against such members and to stop and search such members without warrants; and

(e) reversing the onus of proof in certain offences and in proceedings relating to unexplained wealth.

7. The Law Council has expressed these concerns in submissions relating to:

(a) A 2008 Commonwealth parliamentary committee inquiry into serious and organised crime;

(b) Two Bills passed by the Commonwealth Parliament in 2009 relating to the introduction of criminal organisation association offences and unexplained wealth provisions;

(c) A 2012 Commonwealth parliamentary committee inquiry into unexplained wealth legislation and arrangements;

(d) A Bill introduced in 2012 in relation to restricting respondents' access to restrained assets for legal costs for unexplained wealth proceedings;

(e) A Bill introduced in 2014 which largely replicates proposed amendments in the 2012 Bill in relation to unexplained wealth proceedings.

8. The Law Council's National Criminal Law Committee and National Human Rights Committee have an interest in monitoring developments in this area and in providing relevant materials (including this briefing note) to Constituent Bodies for use in advocacy at the State and Territory level.

National Overview

9. Laws outlawing criminal organisations and criminalising association with and provision of support for such organisations currently exist at the Commonwealth level, in Queensland, Victoria, South Australia (SA), New South Wales (NSW), Western Australia and the Northern Territory. A number of jurisdictions have also introduced additional legislative measures to combat organised crime, including unexplained wealth regimes and anti-fortification laws.

10. The Commonwealth Minister for Justice, Michael Keenan has indicated his support for state and territory efforts to address serious and organised crime, and the Australian Government is pursuing a number of initiatives designed to combat outlaw motorcycle gangs moving between jurisdictions and evading law enforcement operatives. Some of these build upon pre-existing mechanisms, such as the Anti-Gang Intelligence Coordination Centre, and the National Border Targeting Centre.[2] Recent initiatives include 'Operation Hades', set up within Customs and Border Protection to target international criminals coming into Australia, with assistance from the Australian Federal Police (AFP) and the Australian Crime Commission.[3] Special 'strike squads' have also been established

[2] Media Release, Minister for Immigration and Border Protection, the Hon Scott Morrison, 'Stronger border measures to combat outlaw motorcycle gangs' (Wednesday, 30 October 2013)
[3] See for example media report at http://www.theguardian.com/world/2013/oct/30/victorian-strike-force-established-in-national-crackdown-on-bikie-gangs

in a number of jurisdictions, involving state police, the AFP and officers from the ATO, as part of a national anti-gangs taskforce.[4] Further, the Australian Crime Commission now houses the Australian Gangs Intelligence Coordination Centre, which develops and coordinates an intelligence-led response to outlaw motor cycle gangs and other known gangs operating across state and territory borders.[5]

11. Queensland currently has the most extensive 'anti-bikie' legislative regime, following the passage of a package of legislation during October and November 2013,[6] which builds upon pre-existing anti-association offence provisions, and control order regimes. The 2013 legislation, introduced in response to a recent outbreak of violence among members of motorcycle clubs, contains provisions that:

    (a) include a presumption against bail for members of motorcycle clubs;

    (b) make it an offence for groups of three or more such members to ride together;

    (c) allow police to stop and search persons wearing motorcycle club colours;

    (d) introduce new forms of aggravated criminal liability, such as where the defendant meets the definition of a 'vicious lawless associate', and impose a mandatory sentencing regime for certain offences;

    (e) establish special prisons for such offenders; and

    (f) invest the Crime and Misconduct Commission with coercive powers to conduct hearings into matters relating to organised criminal activity.

12. Premiers in Victoria and NSW have indicated that their Governments may also consider adopting similar laws.[7]

13. Many of the Law Council's constituent bodies, particularly those in Victoria, SA, NSW and Queensland, have been engaged in advocacy in respect of these developments, raising concerns that the legislative changes depart from established principles of criminal law, undermine civil liberties and fail to adhere to human rights standards.

14. For example, the Queensland Law Society (the QLS) has recently raised concerns that the legislation introduced in 2013 designed to target outlaw motor cycle gangs actually applies to a much broader section of the community, and are so broadly drafted that they can apply to any association or business, or anyone out in public with three people or more.[8] If offences are committed in these circumstances, the burden of proof would be placed on the defendant to show that the association does not exist to commit crimes. The QLS is further concerned that the new mandatory sentencing regime imposed by these laws removes judicial discretion in sentencing.

15. The debate about the appropriate legislative response to bikie violence in Queensland has become further heated as a result comments made by the Queensland Premier on 24 October 2013 where the Premier was reportedly critical

[4] See for example media report at http://www.abc.net.au/news/2013-10-30/new-anti-gang-taskforce-formed-in-victoria/5056752

[5] The Australian Gangs Intelligence Coordination Centre comprises staff from the following agencies: the Australian Crime Commission, Australian Federal Police, Australian Taxation Office, Australian Customs and Border Protection Service, the Department of Immigration and Border Protection, and the Department of Human Services (Centrelink).

[6] This includes the *Vicious Lawless Association Disestablishment Bill 2013* and the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013.* This legislation is summarised in further detail below.

[7] See for example http://www.theguardian.com/world/2013/oct/30/victorian-strike-force-established-in-national-crackdown-on-bikie-gangs

[8] See http://www.qls.com.au/About_QLS/News_media/Media_releases/Legislative_rush_impacts_the_rights_of_all_Queenslanders

of recent court decisions granting bail to alleged bikie members.[9] A Supreme Court judge in Queensland subsequently referred to the Premier's comments when adjourning an application by the Department of Public Prosecutions to revoke bail in respect of a person charged with offences arising out of bikie related violence.[10] This was reported in the media as a growing dispute between the Government and the judiciary, which in turn prompted the Bar Association of Queensland to express concern that the dispute risked reducing the public's confidence in the judicial system.[11] Further information about the relevant Queensland legislation is provided below.

16. The concerns raised by Constituent Bodies in relation to the anti-bikie laws at the State and Territory level are similar to those concerns raised by the Law Council in relation to developments at the Commonwealth level.

Background

17. This section of the briefing note provides further information about the relevant legislative developments occurring in each jurisdiction.

Commonwealth

18. The need for a national approach to tackling serious and organised crime has been an issue explored in some detail in recent years, including by various taskforces established by the Australian Crime Commission (the ACC) and as part of a number of inquiries by the then Parliamentary Joint Committee on the ACC and the current Parliamentary Joint Committee on Law Enforcement.

19. On 16-17 April 2009 the then Standing Committee of Attorneys General (SCAG) met and discussed the need to take a comprehensive national approach to combat organised and gang related crime and to prevent gangs from simply moving their operations interstate. At the meeting, the Commonwealth agreed to:[12]

    (a) develop an Organised Crime Strategic Framework, with mechanisms to engage the States and Territories, for agreement by the Commonwealth Government by mid 2009.

    (b) consider the introduction of a package of legislative reforms to combat organised crime including measures to:

        (i) strengthen criminal asset confiscation, including unexplained wealth provisions;

        (ii) prevent a person associating with another person who is involved in an organised criminal activity;

        (iii) enhance police powers to investigate organised crime, including model cross-border investigative powers for controlled operations, assumed identities and witness identity protection;

        (iv) facilitate greater access to telecommunication interception for criminal organisation offences; and

[9] ABC Online, 'Qld Premier Campbell Newman, Attorney-General Jarrod Bleijie raise concerns about bail decisions for alleged bikies' (24 October 2013) available at http://www.abc.net.au/news/2013-10-24/newman-bleijie-raise-concerns-about-alleged-bikiesbail-decisions/5042408

[10] http://www.abc.net.au/news/2013-10-30/judge-adjourns-alleged-bikies-bail-application-over-newman-comme/5058222

[11] http://www.abc.net.au/news/2013-10-31/bar-association-of-queensland-says-newman-judiciary-stoush-regr/5061070

[12] Standing Committee of Attorneys-General, *Communiqué* (16-17 April 2009) available at http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2009_SecondQuarter_17April2009-Communique-StandingCommitteeofAttorneys-General.

(v) address the joint commission of criminal offences.

(c) consider the issue of director disqualification under the *Corporations Act 2001* (Cth) in relation to organised criminal activity.

20. The States and Territories also agreed to consider the introduction of a range of measures to combat organised crime, such as coercive questing powers, proceeds of crime mechanisms and consorting offences, where they had not already done so.

21. On 24 June 2009 the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* was introduced into the Commonwealth Parliament. This Bill introduced a range of reforms designed to give effect to the Commonwealth's commitment to enhance its legislation to combat organised crime, as agreed at the April 2009 SCAG Meeting.

22. In September 2009, the *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* was introduced into Parliament. The Bill included four new offence provisions relating to criminal organisations and associating with a person in a manner which may facilitate organised crime.

23. Both Bills were subsequently passed and assented to.

24. Some of the new association based offence provisions, and in particular the defences, are modelled on section 102.8 of the Criminal Code which makes it an offence to associate with a member of a terrorist organisation in circumstances where that association will provide support to the organisation and is intended to help the organisation expand or continue to exist.

25. In its submission opposing the enactment of these new offence provisions, the Law Council explained that in shifting the focus of criminal liability from a person's conduct to their associations, offences of this type unduly burden freedom of association and are likely to have a disproportionately harsh effect on certain sections of the population who, simply because of their familial or community connections, may be exposed to the risk of criminal sanction. The Law Council submitted that if a person does not themselves plan, assist or participate in the commission of any particular offence, they should not have to live in the shadow of offence provisions such as these.

26. In addition to its general objection to offence provisions of this type, the Law Council also raised concerns regarding the reliance on broadly defined terms in the offence provisions, and the limited nature of the defences available.

27. A further overarching concern the Law Council raised in relation to the association based offences related to the potential for such offences to allow for much wider and more extensive use of a range of intrusive police powers. The Council explained that while in practice, because of its complexity and ambiguity, the provisions may in fact generate very few successful prosecutions, the danger with broad offence provisions such as this is that they are available to serve as a hook for the exercise of a wide range of law enforcement and intelligence gathering powers.

28. In the 2013 Election campaign, the Coalition released a policy to tackle crime which contained commitments to:

(a) establish anti-gang Commonwealth, state and territory taskforces to tackle organised crime and outlaw bikie gangs at the local level using national tools, resources and intelligence;

(b) introduce new unexplained wealth legislation to disrupt criminal organisations and seize assets;

(c) expand the powers of the Australian Crime Commission and other law enforcement agencies to investigate unexplained wealth;

(d) implement all recommendations of the 2012 Commonwealth parliamentary committee inquiry into unexplained wealth arrangements;

(e) introduce mandatory minimum five year sentences for importation of illegal firearms;

(f) encourage nationally consistent penalties for firearms offences; and

(g) establish a new Standing Council on Law, Crime and Community Safety (the Standing Council) that merges the existing Attorneys-General and Police Ministers Councils and allows state and territory police commissioners as well as the heads of Commonwealth agencies such as the Australian Crime Commission and ASIO to attend this council.

29. Since being elected to Government, the Commonwealth Minister for Justice, Michael Keenan, has announced his intention to support efforts in 'tackling criminal gangs' through 'anti-gang squads, toughening unexplained wealth legislation, increased screening of cargo to prevent guns from entering Australia and through working cooperatively with state and territory governments. Some of these initiatives, such as the establishment of 'anti-gang' squads, and the establishment of 'Operation Hades' set up within Customs and Border Protection to target international criminals coming into Australia have already been implemented.

30. On 23 December 2013, the Attorney-General announced the Standing Council's establishment, and noted that its priorities would include a national approach to organised crime gangs.

31. However, it has also been reported that the Attorney-General, Senator George Brandis QC, has advised the Queensland Premier that the Commonwealth Government will not seek a referral of powers from the states and territories in relation to unexplained wealth laws as recommended by the 2012 Commonwealth parliamentary committee inquiry. This would mean that existing Commonwealth, state and territory laws would continue to operate in their own jurisdictions.

32. On 5 March 2014 the Minister for Justice introduced the *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014* into the House of Representatives.[13] The Bill seeks to amend the *Proceeds of Crime Act 2002* (Cth) the POC Act) to, for example, prevent restrained assets being used to meet legal expenses, expand search and seizure powers, remove a court's discretion to make unexplained wealth orders in certain circumstances and expand the circumstances for disclosure of information. The Law Council has raised several key concerns about the Bill in a submission to the Senate Standing Committee on Legal and Constitutional Affairs,[14] including in relation to the:

(a) Bill's proposed expansion of the disclosure of information obtained using coercive powers under the POC Act, without appropriate safeguards to protect the information;

(b) lower proposed standards for information in affidavits to support the making of preliminary unexplained wealth orders;

(c) inequality of arms that would arise between the Commonwealth and the respondent from preventing assets being used to meet legal expenses;

[13] The Bill and the Explanatory Memorandum are available at: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5178.
[14] Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014*, 2 April 2014, to be made available on the Law Council's website shortly.

(d) lack of demonstrated necessity in expanding already intrusive search and seizure powers;

(e) need to retain judicial discretion in making unexplained wealth orders, which may significantly impact upon a person's livelihood;

(f) proposals to allow consideration of applications ex parte in certain circumstances to infringe a person's right to a fair hearing; and

(g) difficulties which arise more broadly for individuals in responding to unexplained wealth proceedings, and the negative implications that may arise for an individual's right to a fair trial in criminal proceedings.

33. The Law Council's submission on the Bill builds on its previous advocacy which has highlighted its strong concerns about the reversal of the onus of proof within unexplained wealth regimes, arguing that this runs contrary to established common law principles and to the presumption of innocence. In particular, the Law Council has consistently raised its concerns that:

(a) the Commonwealth unexplained wealth regime allows the confiscation of assets without the need for a criminal conviction, and there is no requirement to demonstrate an evidence-based link between the property in question, and the commission of a criminal offence; and

(b) the reverse onus means that the respondent may lose legitimately obtained assets if he or she cannot show that they have been lawfully obtained. There is a risk, for example, that liberal use of these powers may result in those who have failed to keep receipts or records losing their lawfully acquired assets; and

(c) there is a lack of safeguards in unexplained wealth provisions to ensure that these extraordinary powers are only used when necessary and in pursuit of a legitimate end.[15]

Queensland

34. Prior to 2013, Queensland already had extensive laws in place designed to combat serious and organised crime, such as those introduced by the *Criminal Organisations Act 2009* and the *Criminal Organisation Amendment Act 2011*. The Queensland legislation is broadly similar to that in place in NSW (described below), with amendments introduced in 2011 to broaden the criminal intelligence provisions and to ensure that the Act avoided the provisions that gave rise to two successful High Court challenges in relation to the NSW and South Australian legislation.

35. The Queensland Law Society and Queensland Bar Association were actively involved in advocacy in respect to these laws, expressing concerns that the laws are contrary to rule of law principles and deny fundamental rights to citizens who come within the purview of the legislation. They have also submitted that these laws are not exclusively directed at bikie gangs, but potentially apply to any minority group in the community which others are prepared to vilify and target by supplying information suggesting unlawful or anti-social behaviour.

[15] See for example, Law Council of Australia: *Submission to the Senate Committee on Legal and Constitutional Affairs on the Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, August 2009, copy available upon request; *Submission to the Parliamentary Joint Committee on Law Enforcement on the Inquiry into Commonwealth unexplained wealth legislation and arrangements – Discussion Paper*, 31 January 2009, available on the Law Council's website at: http://www.lawcouncil.asn.au/lawcouncil/index.php/library/submissions; *Submission to the Senate Legal and Constitutional Affairs Committee on the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012*, 31 January 2013, also available on the Law Council's website

36. During October 2013 a package of legislation was rushed through Queensland Parliament designed to provide a 'tough' response to bikie-related violence, and to make other amendments to the criminal law in Queensland.

37. This package includes the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013,*[16] the *Tattoo Parlours Act 2013*[17] and the *Vicious Lawless Association Disestablishment Act 2013* (the VLAD Act).[18] The VLAD Act was passed through Parliament in just over 12 hours.

38. The *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013*:

    (a) introduces three new offences to the Queensland *Criminal* Code, making it an offence for participants in criminal organisations to knowingly gather together in a group of three or more; or to enter or attempt to enter a prescribed place, or attend or attempt to attend a prescribed event; or to recruit another person to that organisation (all carrying a maximum penalty of three years imprisonment and a mandatory minimum penalty of six months imprisonment served wholly in a corrective services facility);

    (b) amends a range of other offences (including affray, misconduct in relation to public office, and assault offences) to create circumstances of aggravation where the offender is a participant in a criminal organisation and to impose new mandatory minimum penalties of imprisonment for these aggravated offences that must be served wholly in a corrective services facility;

    (c) introduces new powers to impound and forfeit vehicles used in the commission of certain offences;

    (d) increases the maximum penalty (and introduces a mandatory minimum penalty) for offences committed by participants in a criminal organisation relating to affray, misconduct in relation to public office, grievous bodily harm, serious assault and obtaining or dealing with identification information;

    (e) imposes mandatory disqualification of a driver's licence for certain offences where the offender is a participant in a criminal organisation, regardless of whether the offence was committed in connection with or arose out of driving a motor vehicle;

    (f) imposes new mandatory conditions of bail, and presumptions against bail in respect of any defendant who is a participant in a criminal organisation;

    (g) significantly expands the powers of the Crime and Misconduct Commission (CMC) to conduct coercive hearings relating to criminal organisations and participants in criminal organisations, and expands powers and increases penalties for refusing to take an oath, answer a question or produce a stated document or thing at any CMC hearing;

    (h) expands the stop and search powers of the police in relation to a person reasonably suspected of being a participant in a criminal organisation; and

    (i) increases the mandatory minimum penalty for the offence of failing to stop motor vehicle.

39. The VLAD Act aims to create a legislative scheme whereby:

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[16] *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013*, Explanatory Notes
[17] *Tattoo Parlours Act 2013*, Explanatory Notes. This Act requires tattoo parlours owners to hold licences from 2014. Current and prospective proprietors will need to be fit and proper persons and will undergo police checks before their licence application is approved.
[18] *Vicious Lawless Association Disestablishment Act 2013* Explanatory Notes

members of criminal associations that commit serious criminal activity for the purposes of, or in the course of participating in the affairs of, the relevant association, are subject to significant terms of imprisonment.

This penalty regime is to be imposed by the court without reduction or mitigation unless the offender cooperates with law enforcement. Only in circumstances where an offender provides such cooperation, to the satisfaction of the Commissioner of the Queensland Police Service, may a penalty be reduced. The purpose of this regime is to cultivate informants within associations and to deny individual members the assistance and support usually provided by their grouping.[19]

40. The VLAD Act imposes new forms of aggravated criminal offending for persons who fall within the definition of terms such as: 'vicious lawless association', 'vicious lawless associate', 'office bearer', and 'participant'. For example, subsection 5(1) sets out the three elements that must be proved for a person to be a 'vicious lawless associate'. These are that the person: (a) commits a declared offence; (b) at the time the offence is committed, or during the course of the commission of the offence, is a participant in the affairs of, the relevant association; and (c) for the purposes of the association, or in the course of participating in the affairs of the association, did or omitted to do the act which constitutes the declared offence. The legal onus (balance of probabilities) is upon the defendant to prove that the relevant association is an association whose members do not have as their purpose, or one of their purposes, engaging in, or conspiring to engage in, declared offences;

41. The VLAD Act also imposes a new mandatory sentencing regime for persons who fall within the above categories and commit certain declared offences.[20] For example subsection 7 (1)(a) states that the court must impose a 'base sentence' for certain offences described in the Act, without regard to any further punishment that the Act may impose. Paragraphs 7(1)(b) and (c) then provide for further cumulative sentences to be imposed upon a 'vicious lawless associate'. This is referred to as the further sentence. Paragraph 7 (1)(b) states that in addition to the base sentence, the court must impose a further sentence of 15 years imprisonment. This term of imprisonment is cumulative to any term of imprisonment imposed as part of the 'base sentence'. Paragraph 7 (1)(c) states that if the 'vicious lawless associate' was, at the time of the commission of the offence, or during the course of the commission of the offence, an 'office bearer of the association', then a further sentence of 10 years must be imposed. This term of imprisonment is cumulative to any term imposed as part of the base sentence and is cumulative to the term of 15 years imposed under paragraph 7 (1)(b).

42. Sections 8 and 9 also regulate sentencing in relation to persons found to be 'vicious lawless associates', for example, by imposing limits on decisions relating to parole and only permitting reductions in sentence in circumstances where the defendant has cooperated with the relevant authorities.

43. Further changes to Queensland's anti-bikie laws occurred in November 2013 with the passing of the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (the CLCOD Act). As described in the Explanatory Notes to the CLCOD Act, the policy objectives of this Act are:

...to combat the threat of criminal motorcycle gangs (CMCGs) to public safety and certain licensed industries and authorised activities, through enhanced information-sharing, licensing, interrogatory and correctional powers. These objectives align with the Queensland Government's commitment to address serious community concern about recent incidents of violent, intimidating and

[19] *Vicious Lawless Association Disestablishment Act* Explanatory Notes
[20] *Vicious Lawless Association Disestablishment Act* Schedule 1 details declared offences – including, for example s9 Drugs Misuse Act, possessing dangerous drugs.

criminal behaviour or members of CMCGs, as well as the infiltration of criminal organisations iwthin legitimate businesses and industries in the community.[21]

44. The CLCOD Act was an omnibus piece of legislation which amended 23 Acts of Parliament (QLD). For instance, the CLOD Act:

    (a) amended subsection 16(3A) of the *Bail Act 1980* (QLD) (the Bail Act) to provide that a refusal of bail provision will apply 'if the defendant is charged with an offence and it is alleged the defendant is, *or has at any time been*, a participant in a criminal organisation'. That is, once a person is established as a participant in a criminal organisation the presumption against bail will apply against the person;

    (b) amended subsection 16(3C) of the Bail Act to provide that it does not matter: whether the offence with which the defendant is charged is an indictable offence, a simple offence or a regulatory offence; *or whether the defendant is alleged to have been a participant in a criminal organisation when the offence was committed; or that there is no link between the defendant's alleged participation in the criminal organisation and the offence with which the defendant is charged* (amendments emphasised);

    (c) enhanced the ability of the Crime and Misconduct Commission (CMC) to effectively deal with criminal organisations by: complementing and clarifying the powers of the CMC to hold intelligence hearings about criminal organisations; expanding the definition of former participant in a criminal organisation to a person who was a participant in the preceding two years; providing for confidentiality of CMC operations and investigations; and including safeguards to ensure no unfairness is caused to a respondent who is a defendant in later criminal proceedings as a result of the use in a confiscation proceeding against the respondent under the Criminal Proceeds Confiscation Act 2002 of any compelled self-incriminating evidence given by the respondent in a CMC hearing or investigation;

    (d) amended a range of licensing pieces of legislation to prevent identified participants in criminal organisations (as defined in the Queensland Criminal Code) and, where necessary, criminal organisations, from obtaining or retaining a licence, permit or other authority, as administered by various government agencies;

    (e) allows the Police Commissioner to 'disclose to an entity, the criminal history of a current or former participant in a criminal organisation where the Commissioner is satisfied it is in the public interest' by means of amendments to the *Police Service Administration Act 1990* (QLD);

    (f) amended various Acts to enhance the ability of the courts to use video and audio links in criminal proceedings and removed the requirement for consent of the prosecution and defence for the use of video and audio links; and

    (g) enabled a mechanism to allow for the management of both remand and sentenced prisoners who have been identified as participants in a criminal organisation by amending the *Corrective Services Act 2006* (QLD). New Division 6A of the CSA Act mandates the chief executive to make a criminal organisation segregation order if the commissioner advises that a prisoner is an identified participant in a criminal organisation. New section 267A also allows directions to be given to a person who is an identified participant in a criminal organisation and is subject to a parole order or community-based order. These directions relate to wearing a monitoring device, allowing

[21] Explanatory Notes to the Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013, p 1.

installation of devices or equipment and remaining at a stated place for a stated period.

45. On 19 March 2014 the Queensland Government introduced the *Crime and Misconduct and Other Legislation Amendment Bill 2014* into the Queensland Parliament. The Bill was subsequently referred to the Legal Affairs and Community Safety Committee for consideration. The Bill seeks, among other things, to enable the renamed Crime and Corruption Commission to deal primarily with serious and organised crime and allow minor allegations of corruption to instead be dealt with by government departments.

46. In addition, the Queensland Premier Campbell Newman has been reported as describing lawyers representing bikies as 'hired guns' and part of the 'criminal gang machine'.[22] In response, a Supreme Court Justice Peter Applegarth has defended the role of criminal lawyers acting for their clients.[23]

47. The Queensland Law Society and the Queensland Bar have issued a number of submissions and media releases raising concerns with these and other aspects of the Newman Government's recent reforms to criminal law in Queensland. See for instance http://www.qls.com.au/About_QLS/News_media/Media_releases and http://www.qldbar.asn.au/index.php/news/media-releases

Victoria

48. Victoria has been slower than other states to adopt anti-association laws, with concerns initially being raised by the Victorian Police that the types of laws introduced in NSW and SA could not be introduced in Victoria without raising compatibility concerns with the Victorian *Charter of Human Rights and Responsibilities 2006*.[24]

49. Despite these concerns, in November 2012 the Napthine Government passed the *Criminal Organisations Control Act 2012* (Vic). This legislation, based broadly on the NSW model, provides for the making of declarations and control orders for the purpose of preventing and disrupting the activities of organisations involved in serious criminal activity, and of their members, former members, prospective members and associates. It also provides for the recognition and application of declarations and control orders made under corresponding laws.

50. When the legislation was introduced, the Law Institute of Victoria issued a media release wherein it cast doubt on the legislation saying it was not convinced it would be legally enforceable.[25] The then LIV President Michael Holcroft said bikie legislation introduced in other States had so far proved ineffective and there was a challenge to the then Queensland legislation before the High Court. New South Wales and South Australian anti-bikie legislation had already been successfully challenged in the High Court. Mr Holcroft also questioned whether the Government proposal to allow interstate orders to be registered and enforced in Victoria would be upheld by the courts. The LIV also expressed concern at "laws that make criminals out of a whole class of people" and pointed to a range of existing criminal law provisions designed to combat violence and crime.

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[22] See for example: 'Queensland Bar Association demands Campbell Newman to withdraw his hired guns remarks against lawyers', *ABC News*, 7 February 2014, at http://www.abc.net.au/news/2014-02-07/bar-association-demands-newman-to-withdraw-hired-guns-remarks/5245270.

[23] See for example, Renee Viellaris, 'Campbell Newman blasted by Supreme Court Justice Peter Applegarth for calling bikie lawyers 'hired guns', *Courier Mail*, 11 February 2014, at http://www.couriermail.com.au/news/queensland/campbell-newman-blasted-by-supreme-court-justice-peter-applegarth-for-calling-bikie-lawyers-hired-guns/story-fnihsrf2-1226822875483.

[24] See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=acc_ctte/laoscg/submissions/sublist.htm

[25] http://www.liv.asn.au/Practice-Resources/News-Centre/Media-Releases/2012-Media-Releases/Peak-legal-body-throws-doubt-on-effectiveness-of-B.aspx?rep=1&qlist=0&sdiag=0

51. In 2013 the *Fortification Removal Act 2013* (Vic) was enacted. It provides for the Magistrates' Court, on application by the Chief Commissioner of Police, to require the removal or modification of fortifications on premises that are connected to certain criminal offences. While a fortification removal order is in effect, a member of Victoria Police is authorised to enter and inspect fortified premises without requiring a warrant. The fortification laws also ban any fortified walls or barricades, allowing police to obtain court orders to destroy any fences or walls at bikie club rooms. When these laws were introduced, concerns were raised that they undermine the rights of private property owners and were incompatible with the right to privacy protected under the *Victorian Charter of Human Rights*.[26]

52. In October 2013, Premier Napthine and Victoria Police Assistant Commissioner Steve Fontana announced a new Victorian Strike Force to tackle bikie related violence in Melbourne. The Victorian Premier also left open the possibility of taking on some of Queensland's controversial new anti-bikie laws, which include mandatory sentences and a special prison for bikie gang members, to add to its own tough anti-fortification laws.[27]

Western Australia

53. The *Criminal Organisations Control Bill 2011* (WA) (the WA Act) was passed in 2012. It is modelled on the NSW approach, and provides for the making of declarations and control orders and imposes criminal sanctions on persons who recruit members for declared criminal organisations or finance or support them in other ways.

54. Like the NSW Act, there is a two stage process of obtaining control orders, involving an application for an interim control order followed by the making of a final control order. 'Criminal intelligence' information can also be protected in interim and final hearings. The range of restrictions available under control orders is broad comprising 'standard' conditions (such as restrictions on working in certain places) and 'non-standard' conditions (such as restricting the communication devices a person can possess and use).

55. The WA Act also contains additional concerning features such as:

- Providing that juveniles aged 16 and 17 years can be subject to control orders with the same conditions as adults;
- Providing police significant new powers in relation to persons the subject of a control order, such as requiring the controlled person to attend at a police station to have identification particulars taken;
- The introduction of a number of new penalties for persons who are convicted of certain offences committed in connection with a declared criminal organisation, including mandatory imprisonment in defined circumstances.

56. Although the Law Society of WA has advised the Law Council Secretariat that it has not made any formal submissions in relation to this legislation, the society's representative on the Law Council's Criminal Law Committee expressed serious concerns, particularly the aspect of mandatory sentences of 2 years for even simple offences.

New South Wales

57. The NSW anti-association laws (as reformed in 2012) have become a model for a number of other jurisdictions.

[26] http://www.theaustralian.com.au/national-affairs/opinion/roadblock-on-path-to-hard-won-rights/story-e6frgd0x-1226741249234#sthash.xFLibMyK.dpuf
[27] See more at: http://www.theaustralian.com.au/national-affairs/state-politics/victoria-forms-strike-team-against-bikie-gangs/story-e6frgczx-1226749435331#sthash.y5RLBtNw.dpuf

58. The laws were first introduced in response to a violent incident at Sydney airport in March 2009 with the government rushing the NSW *Crimes (Criminal Organisations) Control Act 2009* (the 2009 NSW Act) through Parliament with limited debate.

59. Under Part 2 of the 2009 NSW Act, a judge of the Supreme Court was empowered to declare an organisation to be a criminal organisation if he or she was satisfied that the members of the organisation associated for the purposes of organising, planning, facilitating, supporting or engaging in serious criminal activity and that the organisation represented a risk to public safety and order in NSW. Section 13(2) of the 2009 NSW Act provided that the Judge had no obligation to provide reasons for making or refusing to make a declaration. Further, if a declaration was made in respect of an organisation, the Supreme Court was empowered, on the application of the Commissioner of Police, to make control orders against individual members of that organisation.

60. The NSW Law Society and the NSW Bar Association both expressed 'shock' and 'serious concern' at the nature of the laws and the speed at which the 2009 NSW Act passed through Parliament. Both bodies also publicly expressed the view that the law was unlikely to be effective and unlikely to withstand legal challenge. The NSW Legislative Review Committee also drew attention to significant human rights issues raised by the Act, but was only in a position to do so once the Act had already passed through Parliament.

61. In July 2010, the Acting Commissioner of Police for NSW applied to a judge of the Supreme Court for a declaration under Part 2 of the 2009 NSW Act in respect of the Hells Angels Motorcycle Club in New South Wales. Mr Wainohu, a member of the Club, applied to the High Court for a declaration that the 2009 NSW Act was invalid on the basis that it conferred functions on the Supreme Court and its judges which undermined its institutional integrity in a way inconsistent with Chapter III of the Constitution. He also argued that the Act infringed the implied constitutional freedom of political communication and political association. The parties agreed a special case which was referred to the Full Court of the High Court in October 2010.

62. In 2011, the High Court held the 2009 NSW Act, to be invalid on the basis that it conferred functions upon judges of the Supreme Court which undermine the institutional integrity of that Court in a manner that is inconsistent with the national integrated judicial system for which Chapter III of the *Constitution* provides.[28] It said that the jurisdiction of the Supreme Court to make control orders was enlivened by the decision of an eligible Judge to make a declaration and, in those circumstances, the absence of an obligation to give reasons for the declaration was repugnant to, or incompatible with, the institutional integrity of the Supreme Court. Because the validity of other parts of the 2009 NSW Act relied on the validity of Part 2, the whole Act was declared invalid.

63. In February 2012 the NSW Government introduced the *Crimes (Criminal Organisations Control) Bill 2012* (the 2012 NSW Bill), which sought to overcome the findings of the High Court whilst still maintaining a system for declaring organisations and issuing control orders. The Bill was enacted in March 2012.

64. When the 2012 NSW bill was introduced into Parliament in February 2012, the NSW Law Society and the NSW Bar Association each wrote to the NSW Attorney General raising strong concerns. Both bodies expressed concern at the lack of opportunity to provide comment on the Bill prior to its introduction, or during its passage through Parliament. The NSW bodies also raised concerns that the proposed provisions abrogated the fundamental rights of freedom of association, freedom of speech, equal treatment before Courts and tribunals, the presumption of innocence and the entitlement to fair hearings.

[28] *Wainohu v New South Wales* [2011] HCA 24

65. Around the same time the NSW Government introduced the *Crimes Amendment (Consorting and Organised Crime) Bill 2012* (the Consorting Bill) which introduced a number of new offences including a new consorting offence which extends to any person who habitually consorts with individuals previously convicted of an indictable offence, by electronic or other forms of communication.

66. When the Consorting Bill was introduced in February 2012, the NSW Law Society and the NSW Bar Association each wrote to the NSW Attorney-General opposing the introduction of the new offence provisions and raising particular concerns with the consorting offence. For example, the NSW bodies explained that the consorting offence is unduly broad in scope and confers too much discretionary power on the police, who are required to "officially warn" the putative offender as a precondition to the offence. The Bill was enacted into law in March 2012, and came into effect in April 2012.

67. On 4 November 2013 the NSW Ombudsman reviewed the operation of the consorting provisions and prepared an issues paper for the Commissioner of Police and the Attorney-General. The issues paper noted, for example, that since the laws came into effect, police had incorrectly given official warnings to at least 100 people within the first year of the laws being introduced. The NSW Bar provided a submission responding to the Ombudsman's issues paper and reiterated its concerns over the consorting provisions.

South Australia

68. In September 2008 the SA Government passed the *Serious and Organised Crime (Control) Act 2008* (the 2008 SA Act). The 2008 SA Act empowered the Attorney-General, on application of the Commissioner of Police, to declare an organisation to be a 'criminal organisation'.[29] Once a declaration had been made, serious criminal liability flowed for people who were members of, or associated with members of, the organisation.

69. When the 2008 SA Act was introduced, the LSSA and the SA Bar expressed serious concerns, including that the Act undermined the presumption of innocence by restricting a person's liberty on the basis of who they knew rather than what they may have done, and removed a person's right to challenge unfounded or unreasonable decisions of the executive arm of government.[30]

70. On 14 May 2009, the SA Attorney-General made a declaration pursuant to s 10(1) of the 2008 SA Act in relation to the Finks Motorcycle Club. A number of control orders were subsequently made by Magistrates but were challenged in a Supreme Court application which raised the validity of the legislation. On 25 September 2009, the Supreme Court found section 14(1) of the 2008 SA Act to be invalid. This section enabled the making of a control order where the Magistrates Court was satisfied that the person was a member of a declared organisation.[31]

71. In *South Australia v Totani* [2010] HCA 39 the High Court confirmed the finding of the Supreme Court that section 14(1) was invalid on the basis that it did not afford the Magistrate's Court any meaningful fact-finding, adjudicative or decision making role. The section effectively only reserved one matter for determination by the Magistrate's Court - that is, whether the person, the subject of the Commissioner's application, was a member of a declared organisation. If that question was answered in the affirmative, the legislation directed the court to issue a control order severely restricting that person's freedom of association. The majority of the High Court found that this provision confined the role of the Judiciary to rubber stamping

[29] *Serious and Organised Crime (Control) Act 2008* (SA) ('the SA Act') Part 2.
[30] Joint Statement of Law Society of South Australia and South Australian Bar Association, *Serious and Organised Crime (Control) Bill 2007*(3 March 2008).
[31] Totani v South Australia [2009] SASC 301

a process entirely directed and controlled by the Executive, and in this way improperly interfered with the independence and impartiality of the court.

72. Amendments were made to South Australian criminal laws in 2012 designed to address the findings of the High Court in *Totani* [32] The 2012 amendments also significantly extended the serious and organised crime regime in SA. They included changes to the process of declaring an organisation to be a declared organisation for the purposes of the Act, the process for making control orders, the presumption in favour of bail, and the right to trial by jury. They also introduced new offences relating to participating in a criminal organisation, new aggravated versions of various existing offences, new offences relating to declared organisations, and new consorting and loitering offences. The amendments also provided broader powers to police in relation to consorting and loitering.

73. In September 2011, the Law Society of South Australia (LSSA) and the South Australian Bar Association (SA Bar) made a detailed submission in respect of amendments proposed in 2011, which were similar to those eventually introduced in 2012.

Northern Territory

74. In October 2009, the NT passed the *Serious Crime Control Act 2009* which provides for the making of declarations about criminal organisations and control orders. The Law Society NT opposed the legislation on the following grounds:

    (a) Extended liability provisions, existing investigative powers and forfeiture provisions were sufficient to deal with organised crime;

    (b) The provisions criminalised associations rather than conduct in a similar way to terrorism laws and represented an incremental expansion of the terrorism proscription regime;

    (c) The provisions infringed human rights by:

        (i) Lowering the burden of proof required for deprivation of liberty;

        (ii) Removing the right to freedom of association;

        (iii) Infringing the right to natural justice;

        (iv) Removing the right to judicial review and limiting the right of appeal to the Supreme Court.

75. Although the *Serious Crime Control Act 2009* was passed in 2009 it was not commenced due to the High Court's consideration of the cases of *Totani* and *Wainohu.* Following the outcome of these cases, in 2011 the *Serious Crime Control Amendment Act 2011* was passed making amendments to the 2009 Act to ensure that it avoided the provisions that had been subject to criticism by the High Court.

[32] *South Australia v Totani* [2010] HCA 39

THE LAW SOCIETY
OF SOUTH AUSTRALIA

THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

Postal Address: GPO Box 2066, Adelaide SA 5001 • DX 333, Adelaide
T: 08 8229 0200 • F: 08 8231 1929
E: email@lawsocietysa.asn.au • www.lawsocietysa.asn.au
Level 10, Terrace Towers, 178 North Terrace, Adelaide SA 5000

29 June 2015 RP:sr

The Honourable John Rau MP
Deputy Premier and Attorney-General
DX 336
ADELAIDE SA

by email: agd@agd.sa.gov.au

Dear Mr Attorney

Statutes Amendment (Serious and Organised Crime) Bill 2015

I refer to the *Statutes Amendment (Serious and Organised Crime) Bill* 2015 ("the Bill").

The Law Society has provided submissions concerning various Serious and Organised Crime Bills. The Society does not oppose legislative measures to combat serious organised crime but any such measures must be limited to *serious* and *organised* ongoing criminal activities and include safeguards to avoid abuse, wrongful or unnecessary detention/curtailment of liberties and unsafe convictions. Importantly, the Bill should not capture those who are not planning to commit a crime or who are not in the process of committing a crime.

The Society makes the following comments on the Bill.

Declared Criminal Organisations

The Bill sets out a number of offences in respect of "participants" of "criminal organisations" in the amendments to the *Criminal Law Consolidation Act* 1935 (proposed sections 83GB-83GD) . The Bill has the effect of declaring 27 organisations to be "criminal organisations", under the *Criminal Law Consolidation (Criminal Organisations) Regulations* 2015 (and *the Liquor Licensing (Declared Criminal Organisations) Regulations* 2015), set out in Part 5 of the Bill. Similar declarations will be able to be made in future, on the recommendation of the Minister, by regulation. The Society is opposed to this system, as it means that the Government, or Parliament, assumes the decision-making role of the Court, but does not act in the way that a Court does, with the same checks and balances and accountability.

Unlike a Court, Parliament does not hear evidence, and, critically, is not open to review by a higher authority. A Court will assess the evidence and give it the appropriate weight after determinations of admissibility and reliability. By contrast, the Parliament will not be obliged to give reasons for making a declaration that an organisation is a criminal organisation, and the decision to declare is not reviewable.

This is of particular concern given that the consequences of being declared a criminal organisation are grave. If a person is guilty of an offence as a "participant" in a criminal organisation, a mandatory sentence of immediate imprisonment must be imposed. This is inappropriate and particularly disproportionate in circumstances where the person captured is not involved or intending to be involved in any criminal activity. These offences are not like committing or intending to commit a crime in the way that is familiar (such as those for violence, dishonesty or damage). "Participant" has a broad definition, and a participant will be guilty of an offence and imprisoned if they:

- associate with two or more other participants in a public place;
- go into a place that Parliament says they are not permitted to enter ("prescribed places"); or
- recruit members to the organisation.

In addition, a person will be guilty of an offence if they enter or remain in licensed premises wearing certain items of clothing or jewellery, bearing the name or logo/insignia of a declared criminal organisation (under proposed amendments to the *Liquor Licensing Act* 1997).

The title "criminal organisation" gives the impression that individual members are involved in criminal activity and, therefore, are or should be prohibited from having the freedom to move throughout the community and wear certain jewellery or clothing, for example. However, the reality is that a person who is a "participant" in a so-called criminal organisation may not have involvement in any criminal activity nor have any intention to be so involved.

The Society recognises that it is Parliament's intention to disband "criminal" organisations, but submits that the very least it should do is to set up a judicial process for it to be established that the organisation is "criminal" and that people genuinely associated with it are a real risk of committing serious crimes. The Bill does not do that, in the Society's view. Parliament decides whether the organisation is criminal, in a way that is neither defined nor transparent, apart from the list of matters that the Minister *may* take into consideration when making a recommendation for a declaration, in proposed s83GA(3) of the *Criminal Law Consolidation Act*. Parliament then mandates the Courts to sentence people to imprisonment if a person "participates" in that organisation.

Presently, under Part 2 of the *Serious and Organised Crime (Control) Act* 2008, a Court can make a declaration in respect of an organisation, after being satisfied that the members of the organisation associate for a criminal purpose and are a risk to public safety, upon the hearing of evidence. All declarations by a Court are reviewable by a higher court.

To date, there have been no such declarations by the Courts. The authorities have suggested that this means the current law is not working and that amendments are needed to facilitate the making of declarations and to outlaw certain organisations. The counter-

view is that if the police, with their extensive investigative powers, cannot produce sufficient evidence to convince a Court, then it may be that such evidence does not exist. Subject to one important consideration: we understand that a number of people involved in so-called criminal organisations are currently before the courts or serving sentences in respect of criminal offences. This reflects the excellent work being undertaken by the specialist SAPOL sections focussing on organised crime.

Offences

Participants of "criminal organisations" – Amendments to *Criminal Law Consolidation Act*

As referred to, above, under proposed Division 2 of the *Criminal Law Consolidation Act*, any person who is a participant in a criminal organisation and:

- enters, or attempts to enter a prescribed place (s83GB); or
- associates with two or more other participants in a public place (s83GC)

will be liable to imprisonment for up to 3 years. Any offence under Division 2 requires the Court to impose a sentence of imprisonment which cannot be suspended unless evidence given on oath establishes "exceptional circumstances".

"Participant" is very widely defined in s83GA(1) and includes a person who *seeks* to be a member of or to be associated with the (criminal) organisation (s83GA1). The Society is of the view that the definition of participant is far too wide in scope, and very likely will catch individuals in respect of whom there is no evidence of ongoing criminal conduct. This is disproportionate to the aims of the Bill. The definition is so wide that one cannot exclude the possibility that engaging in conversation with members of a declared criminal organisation could be said to be seeking to be associated with that organisation. Having a social interaction with someone wearing bikie colours may qualify a person as a "participant". As such, and by way of example, a person having a meal in a public place with 2 or more people wearing bikie colours would potentially be guilty of an offence and qualify for a sentence of imprisonment of a minimum of 9 months, by reason of s83GB.

Wearing Prohibited Items in Licensed Premises – Amendments to *Liquor Licensing Act*

The Bill proposes amendments to the *Liquor Licensing Act* 1997. A person will be guilty of an offence if they enter or remain in licensed premises wearing certain items of clothing or jewellery, bearing the name or logo/insignia of a declared criminal organisation. The penalties are a $25,000.00 fine for a first offence, $50,000.00 or 6 months imprisonment for a second offence and $100,000.00 or 18 months imprisonment for a third offence. Again, these are very serious penalties for conduct which is not, of itself, harmful to others.

Making of Future Regulations

As referred to, above, organisations may be declared "criminal organisations" by regulation at a later date. Similarly, regulations may be made to add places to the list of "prescribed places" currently set out in Part 5, Schedule 1 of the Bill.

The Bill states that the *Subordinate Legislation Act* 1978 does not apply to regulations made pursuant to Part 5 of the Bill. The Society is concerned that the exclusion of the *Subordinate Legislation Act* might mean that future declarations made by regulation will not be "disallowable" which at least provides for some scrutiny by the Parliament. The Society understands that it was not the Government's intention to exempt such regulations from being disallowable, but would be grateful for clarification of this point and how any "loophole" might be corrected.

Summary

The Society is opposed to fundamental aspects of the Bill.

The Society opposes the declaration of organisations as "criminal organisations" by regulations made by the Governor on the recommendation of the Minister. The system of declaration is flawed and unfair, because it is not transparent, it is not subject to the same rules and processes for admissibility of and testing evidence as a Court would be and it is not reviewable. Any such declarations should be for a Court to make. This is particularly the case given that the consequences of being declared a criminal organisation are grave, and will lead to a serious limitation on individual "participants'" freedom of movement and even in respect of what people choose to wear.

The definition of a "participant" in a criminal organisation is too wide in scope, and will capture innocent people. This is particularly concerning given that the penalties for offences relating to being a participant involve mandatory periods of immediate imprisonment. This is entirely disproportionate to the aims of the Bill.

I trust these comments are of assistance.

Yours sincerely

Rocco Perrotta
PRESIDENT
Ph: (08)8229 0222
Email: president@lawsocietysa.asn.au

3.6.2015 (5)

Statutes Amendment (Serious and Organised Crime) Bill 2015

REPORT

This Bill will enact new offences, mirroring those enacted in Queensland, both those in their *Criminal Code* and those in their *Liquor Act*, declared valid by the High Court. In addition, the Bill modifies South Australia's consorting provisions as enacted in New South Wales and declared valid by the High Court, modified in accordance with the advice of the Solicitor-General.

Moreover, this Bill contains the same provisions as Queensland enacted in specifying declared criminal organisations and prescribed places (although, of course, places will differ). Extensive and detailed advice has been taken from police, both on names and places, and their proposals have been assessed by reference to the proposed statutory criteria for the making of regulations.

Consorting - South Australia

Section 13 of the *Summary Offences Act 1953* ('the SO Act') contains the offence of consorting. It provides that a person must not, without reasonable excuse, habitually consort with a prescribed person or persons. A person may consort with another person for the purposes of section 13 by any means, including by letter, telephone or fax or by email or other electronic means. A maximum penalty of two years imprisonment applies.

Part 14A of the SO Act establishes a regime for consorting prohibition notices. Section 66A provides for a senior police officer to issue a consorting prohibition notice prohibiting a person (the recipient) from consorting with a specified person or persons if the officer is satisfied that:

- the recipient is subject to a control order under the *Serious and Organised Crime (Control) Act 2008* 'the SOCC Act'), or the specified person or each specified person:
    - has, within the preceding period of three years, been found guilty of one or more prescribed offences; or
    - is reasonably suspected of having committed one or more prescribed offences within the preceding period of three years;

- the recipient has been habitually consorting with the specified person or specified persons; and
- the issuing of the notice is appropriate in the circumstances.

Section 66C provides that a consorting prohibition notice must be served on the recipient personally and is not binding on the recipient until it has been so served (other than where the Magistrates Court orders substituted service).

Section 66D and the following sections contain the necessary machinery and procedural provisions. Section 66K provides that a person who contravenes or fails to comply with a consorting prohibition order is guilty of an offence. The maximum penalty is imprisonment for two years. However:

- a person does not commit an offence in respect of an act or omission unless the person knew that the act or omission constituted a contravention of, or failure to comply with, the notice, or was reckless as to that fact;
- a consorting prohibition notice:
    - does not prohibit associations between close family members; and
    - does not prohibit associations occurring between persons:
        - for genuine political purposes; or
        - while the persons are in lawful custody; or
        - while the persons are acting in compliance with a court order; or
        - while the persons are attending a rehabilitation, counselling or therapy session of a prescribed kind; and
    - may specify other circumstances in which the notice does not apply.

The offence of consorting and the consorting prohibition notices were introduced through the *Statutes Amendment (Serious and Organised Crime) Bill 2012*. They are important components of the Government's serious and organised crime strategy.

Consorting - New South Wales

New South Wales also recognised the importance of the use of consorting offences in the legislative armoury against organised crime and legislated at about the same time as South Australia.

Section 93X of the *Crimes Act 1900* (NSW) contains that jurisdiction's consorting offence. Section 93X provides that any person who habitually consorts with convicted offenders, after having been given an official warning by police in relation to each of those offenders, is guilty of an offence, punishable by imprisonment, fine, or both. A person does not 'habitually consort' with convicted offenders unless the person consorts with at least two convicted offenders (whether on the same or separate occasions) and the person consorts with each convicted offender on at least two occasions.

Section 93W of the *Crimes Act 1900* (NSW) defines 'consort' to mean consort in person or by any other means, including by electronic or other form of communication, and 'convicted offender' to mean a person who has been convicted of an indictable offence (disregarding an offence under section 93X). Section 93Y provides that specified forms of consorting are to be disregarded for the purpose of section 93X if the defendant satisfies the court that the consorting was reasonable in the circumstances. The specified forms of consorting are consorting:

- with family members;
- that occurs in the course of lawful employment or the lawful operation of a business;
- that occurs in the course of training or education;
- that occurs in the course of the provision of a health service;
- that occurs in the course of the provision of legal advice; and
- that occurs in lawful custody or in the course of complying with a court order.

On 8 October 2014 the High Court of Australia, by majority, dismissed a challenge to the constitutional validity of section 93X (*Tajjour v State of New South Wales; Hawthorne v State of New South Wales; Forster v State of New South Wales* [2014] HCA 35).

The plaintiffs alleged that section 93X was invalid because it impermissibly burdened the freedom of communication concerning government and political matters implied in the Commonwealth Constitution. Two of the plaintiffs further alleged that section 93X was invalid because it infringed a freedom of association which they said should be found to be implied in the Constitution and because the provision was inconsistent with Australia's obligations under the International Covenant on Civil and Political Rights ('the ICCPR').

By majority, the High Court upheld the validity of section 93X. The Court accepted that the provision effectively burdened the implied freedom of communication about government and

political matters. However, the majority of the Court held that section 93X was not invalid because it was reasonably appropriate and adapted, or proportionate, to serve the legitimate end of the prevention of crime in a manner compatible with the maintenance of the constitutionally prescribed system of representative government.

The High Court unanimously concluded that the provisions of the ICCPR, where not incorporated in Commonwealth legislation, imposed no constraint upon the power of a State Parliament to enact contrary legislation. Each member of the High Court who considered it necessary to answer the question about a free-standing freedom of association concluded that no such freedom is to be implied in the Constitution.

The critical point to note here is that the New South Wales consorting provisions have been subjected to a thorough and searching examination by the High Court and found to be constitutional. The South Australian provisions have yet to be the subject of litigation.

Consorting in the Bill

The New South Wales model can be improved in a non-constitutionally threatening way by making it interact seamlessly with corresponding laws (like the New South Wales laws themselves). The official warnings and the number of occasions of consorting should be recognised whether or not they take place in South Australia or in another corresponding jurisdiction (such as New South Wales).

Second, advice from the Solicitor-General is to the effect that it is worth keeping the provisions dealing with consorting prohibition notices in an amended form. The Solicitor-General suggests the removal of any requirement that there be a control order under the SOCC Act.

In addition, it is now proposed to enact the Queensland consorting-like offences in the *Criminal Code* declared valid by the High Court. That means enacting these offences:

1. the offence of a being a participant in a criminal organisation being knowingly present in a public place with two or more other persons who are participants in a criminal organisation (section 60A of the *Criminal Code*);
2. the offence of being a participant in a criminal organisation entering a prescribed place or attending a prescribed event (section 60B of the *Criminal Code*); and
3. the offence of being a participant in a criminal organisation recruiting anyone to become a participant in a criminal organisation (section 60C of the *Criminal Code*).

For the first two purposes, a criminal organisation is defined to mean:

(a) an organisation of three or more persons:

(i) who have as their purpose, or one of their purposes, engaging in, organising, planning, facilitating, supporting, or otherwise conspiring to engage in, serious criminal activity as defined under the SOCC Act; and

(ii) who, by their association, represent an unacceptable risk to the safety, welfare or order of the community; or

(b) a declared organisation under the SOCC Act; or

(c) an entity declared under a regulation to be a criminal organisation.

For the third purpose, the definition of criminal organisation will be limited to paragraph (c). This is because the current Part 3B of the *Criminal Law Consolidation Act 1935* already adequately and expressly deals with recruiting in the context of definitions (a) and (b).

The Minister will be asked to consider the criminal history of the organisation and its members before recommending that a regulation be made declaring an organisation to be a criminal organisation.

The *SOCC Act*- South Australian Legislative History

The Government began its legislative attack on serious and organised crime in general and outlaw motor-cycle gangs in particular with the enactment of the *SOCC Act*. On 11 November 2010 the High Court, by a majority of 6-1, decided that, at least in so far as the Magistrates Court was required to make a control order on a finding that the respondent was a member of an organisation declared to be a criminal organisation under the SOCC Act, that court was acting at the direction of the executive, was deprived of its essential character as a court within the meaning of Chapter III of the Commonwealth *Constitution* and that section was, therefore, invalid (*South Australia v Totani* (2010) 242 CLR 1 ('*Totani*')). The net effect of that decision was that a key part of the legislative scheme in the SOCC Act was inoperable. That, in turn, meant that the legislative scheme for attacking criminal organisations and their members was rendered ineffective and the essential objectives of the SOCC Act thwarted.

In 2011-2012 the Government prepared extensive amendments to the SOCC Act in light of *Totani* and the subsequent decision of the High Court to invalidate the New South Wales equivalent legislation in *Wainohu v New South Wales* (2011) 243 CLR 181. These amendments represented, on the best advice then available to Government, an attempt to place

the legislation and the accomplishment of its aims on a sound constitutional footing. The amendments were passed and came into effect as the *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012*.

After the 2012 amendments the High Court heard and delivered judgment on a constitutional challenge to the equivalent *Criminal Organisation Act 2009* (Qld). The *Criminal Organisation Act 2009* (Qld) differed from both versions of the SOCC Act. The High Court dismissed the challenge and upheld the validity of the Queensland scheme in *Assistant Commissioner Condon v Pompano Pty Ltd & Anor* [2013] HCA 7. The *Serious and Organised Crime (Control) (Declared Organisations) Amendment Act 2013* amended the South Australian legislative scheme in accordance with the High Court decision of validity by vesting the jurisdiction to make declarations of unlawful organisations in the Supreme Court rather than, as before, "eligible judges".

The package of amendments introduced in 2013 was not, however, confined to amendments to the SOCC Act. The *Statutes Amendment (Serious and Organised Crime) Bill 2013* enacted a series of assorted measures aimed at disrupting and distressing serious and organised crime, its members and aspirant members. In brief, the Bill contained these initiatives:

- a new offence framed so as to criminalise participation in a criminal organisation knowing or being reckless as to both:
    - whether it is a criminal organisation; and
    - whether the participation contributes to the occurrence of any criminal activity.

Participation includes recruitment, supporting the organisation, committing an offence for or at the direction of the organisation and occupying a leadership or management position in the organisation;

- an increase in maximum penalties, including aggravated versions of various existing offences, the aggravation being that the offence was committed for the benefit of, at the direction of, in association with a criminal organisation or the offender identifies him or herself as the member of a criminal organisation;
- a presumption against bail for any person charged with a serious and organised crime offence and severe conditions if bail is granted;

- a special procedure of direct indictment into the Supreme Court. Where that direct indictment is made, the trial of the accused must begin within strict time lines to minimise the opportunity to intimidate or otherwise harass the victim or the witnesses;
- a frightened witness is given the opportunity to give evidence as a vulnerable witness in the same way as any other person who faces intimidation in giving evidence against another;
- provisions creating new offences and procedures directed against consorting, loitering and enabling place restriction and non-association orders; and
- the special admission of evidence of what a frightened witness said out of court if through fear that person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement.

The SOCC Act - Recent Developments in Queensland

By 2013, Queensland had a new government and it was determined to go beyond the previous nationally agreed model of counter-organised crime legislation. It enacted a large package of measures as the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) with associated amendments, most notably in this context, amendments to the *Liquor Act 1992* (Qld). The first part of the package contained the *Vicious Lawless Association Disestablishment Act 2013* (Qld) ('the VLAD Act') and new provisions of the *Criminal Code* annexed to the *Criminal Code Act 1988* (Qld) ('the *Criminal Code*') and the *Bail Act 1980* (Qld).

This package of legislation was in addition to the *Criminal Organisation Act 2009* (Qld) discussed above. Significantly, it directed its attack at consorting-type behaviour and other behaviour associated with consorting.

The VLAD Act provided for significant additional penalties by way of imprisonment to be imposed upon persons convicted of declared offences who are participants in associations which had not been shown not to have a criminal purpose. New provisions in the *Criminal Code* provided for enhanced penalties to be imposed on persons, convicted of certain offences against the *Criminal Code*, in the aggravating circumstance where such persons are participants in organisations which are found to be, or had been declared by the Supreme Court or designated by regulation as, criminal organisations. The amendments to the *Bail Act 1980* (Qld) imposed constraints upon the grant of bail to persons who were participants in such organisations if they are charged with any offences. Further amendments to the *Criminal Code*

created new offences which effectively imposed restrictions upon the freedom of movement and association of participants in criminal organisations. Amendments to the *Liquor Act 1992* (Qld) proscribed the wearing or carrying in licensed premises of items bearing insignia and other markings of criminal organisations.

It is apparent that some of the features of this package of legislation borrowed from and adapted features of the *Statutes Amendment (Serious and Organised Crime) Bill 2013*.

Significantly, the definition of criminal organisation for the purposes of these offences includes an entity declared by regulation under the *Criminal Code* to be a criminal organisation. Section 708A of the *Criminal Code* sets out criteria which the Minister may have regard to in deciding whether to recommend a listing of a criminal organisation by regulation. The definition of criminal organisation also includes an organisation declared to be a criminal organisation under the *Criminal Organisation Act 2009* and an organisation that had the purpose of committing serious criminal offences and posing an unacceptable risk to community safety.

But the Queensland Parliament took things a step further. Section 70 of the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) said:

70 Making of Criminal Code (Criminal Organisations) Regulation 2013

(1) *Schedule 1 has effect to make the Criminal Code (Criminal Organisations) Regulation 2013 that is set out in schedule 1 as a regulation under the Criminal Code.*

(2) *To remove any doubt, it is declared that the Criminal Code (Criminal Organisations) Regulation 2013, on the commencement of schedule 1, stops being a provision of this Act and becomes a regulation made under the Criminal Code.*

Schedule 1 of the Act listed the organisations by name that were to be declared to be criminal organisations under the provisions ('criminal organisations') and also listed, by address, the places in which consorting or associating was to be made unlawful ('prescribed places'). These listing were by the provision quoted then deemed to have been made as regulations.

VLAD - The High Court Decision

The entire package was the subject of a constitutional challenge by a member of the Hells Angels Motor Cycle Club. The challenge reached the High Court.

The High Court divided the legislation challenged into three categories:

- those provisions of the VLAD Act that imposed aggravated sentences on a participant in a criminal organisation found to have committed certain offences;
- those new provisions of the *Criminal Code* that created new offences, an element of which included being a participant in a criminal organisation or which involved wearing or carrying symbols of criminal organisations; and
- amendments to the *Bail Act 1980* (Qld) reversing the presumption of bail for an accused alleged to be a participant in a criminal organisation.

The High Court was unanimous in deciding that the plaintiff did not have standing to challenge those provisions dealt with in categories one and three. It necessarily follows that the Court did not rule on the constitutional validity of those provisions. The 6:1 majority upheld the constitutional validity of those provisions in category two. It necessarily follows that the Court ruled the following measures to be constitutionally valid:

- the offence of a being a participant in a criminal organisation being knowingly present in a public place with two or more other persons who are participants in a criminal organisation (section 60A of the *Criminal Code*);
- the offence of being a participant in a criminal organisation entering a prescribed place or attending a prescribed event (section 60B of the *Criminal Code*);
- the offence of being a participant in a criminal organisation recruiting anyone to become a participant in a criminal organisation (section 60C of the *Criminal Code*);
- the offence of knowingly allowing a person who is wearing or carrying a prohibited item to enter or remain in liquor licensed premises (section 173EB of the *Liquor Act 1992* (Qld));
- the offence of entering and remaining in licensed premises wearing or carrying a prohibited item (section 173EC of the *Liquor Act 1992* (Qld)); and
- the offence of failing to leave licensed premises when required to leave because of wearing or carrying a prohibited item (section 173ED of the *Liquor Act 1992* (Qld)).

The High Court considered the device of defining a criminal organisation by regulation. The decision clearly says that this way of defining a criminal organisation is constitutionally valid "for the purposes of these offences".

Core Proposals

The Bill contains those same provisions, notably the new offences, both those in the *Criminal Code* and those in the *Liquor Act*, as enacted in Queensland and declared valid by the High Court. In addition, the Bill modifies South Australia's consorting provisions as enacted in New South Wales and declared valid by the High Court, modified in accordance with the advice of the Solicitor-General.

Moreover, this Bill contains the same provisions as Queensland enacted in specifying declared criminal organisations and prescribed places (although, of course, the places will differ).

The Bill names, in Schedules 1 and 2, the following as declared criminal organisations:

(a) the motorcycle club known as the Bandidos;

(b) the motorcycle club known as the Black Uhlans;

(c) the motorcycle club known as the Coffin Cheaters;

(d) the motorcycle club known as the Commancheros;

(e) the motorcycle club known as the Descendants;

(f) the motorcycle club known as the Finks;

(g) the motorcycle club known as the Fourth Reich;

(h) the motorcycle club known as the Gladiators;

(i) the motorcycle club known as the Gypsy Jokers;

(j) the motorcycle club known as the Hells Angels;

(k) the motorcycle club known as the Highway 61;

(l) the motorcycle club known as the Iron Horsemen;

(m) the motorcycle club known as the Life and Death;

(n) the motorcycle club known as the Lone Wolf;

(o) the motorcycle club known as the Mobshitters;

(p) the motorcycle club known as the Mongols;

(q) the motorcycle club known as the Muslim Brotherhood Movement;

(r) the motorcycle club known as the Nomads;

(s) the motor cycle club known as the Notorious;

(t) the motorcycle club known as the Odins Warriors;

(u) the motorcycle club known as the Outcasts;

(v) the motorcycle club known as the Outlaws;

(w) the motorcycle club known as the Phoenix;

(x) the motorcycle club known as the Rebels;

(y) the motorcycle club known as the Red Devils;

(z) the motorcycle club known as the Renegades;

(za) the motorcycle club known as the Scorpions.

Members should note that this list includes organisations that have a presence in South Australia and organisation that are based in other jurisdictions and do not.

It might be asked why this is being done. The answer is first, that the legislation will give Parliament the chance to debate and approve the listing of criminal organisations and the places and second, while the making of a regulation is open to judicial review, the decision of Parliament is not.

I have taken extensive and detailed advice from police both on names and places listed in Schedules 1 and 2 and have considered their inclusion by reference to the proposed statutory criteria for the making of regulations. I am satisfied, based on this advice, that each meets the proposed statutory criteria for the making of regulations.

Sentencing Considerations

A number of the Queensland offences provide for mandatory minimum penalties. This Government has consistently opposed mandatory minimum sentences and it should continue to do so.

Instead of a mandatory minimum penalty, the Bill provides:

- imprisonment should ordinarily be imposed unless exceptional circumstances are found to exist;
- the period or any part of it may only be suspended if exceptional circumstances are found to exist;

- if exceptional circumstances are found in either or both instances, they must be detailed in written reasons; and
- a finding of exceptional circumstances must be backed by evidence on oath.

In addition, provision is made for a 'standard non-parole period'. The standard non-parole period must be taken into account by the court in determining the appropriate sentence and, if the court fixes a different non-parole period, the court must record its reasons for so doing and must identify each factor that it took into account. The standard non-parole period specified is nine months and represents the non-parole period for an offence, being a first offence, in the middle of the range of objective seriousness for these offences.

Conclusion

This Bill represents another step forward in the fight against organised crime.

I commend the Bill to Members.

EXPLANATION OF CLAUSES

Part 1—Preliminary

1—Short title

2—Commencement

3—Amendment provisions

These clauses are formal.

Part 2—Amendment of *Criminal Law Consolidation Act 1935*

4—Amendment of section 5—Interpretation

This clause modifies the definition of ***criminal organisation*** consequentially on the insertion of Part 3B Division 2. The definition refers to the definition contained in Part 3B Division 1 and as such remains unchanged by the measure.

5—Insertion of heading to Part 3B Division 1

This clause inserts a heading to Part 3B Division 1 which serves to wrap the present contents of Part 3B into a new Division 1.

6—Amendment of section 83D—Interpretation

This clause replaces references to the "Part" with references to the "Division", which is consequential on clause 5.

7—Amendment of section 83G—Evidentiary

This clause replaces references to the "Part" with references to the "Division", which is consequential on clause 5.

8—Insertion of Part 3B Division 2

This clause inserts Part 3 Division 2 comprised of 4 sections, 3 of which are offences in relation to criminal organisations.

Proposed section 83GA includes an interpretation subclause for the purposes of the Division and provides for a declaration, by regulation on the recommendation of the Minister, that specified entities are criminal organisations for the purposes of the Division. This proposed section also provides that a change in the name or membership of a criminal organisation, or a reforming of a criminal organisation into another organisation, will not affect the status of the organisation as a criminal organisation.

Proposed section 83GB provides that any person who is a participant in a criminal organisation and is knowingly present in a public place with 2 or more other persons who are participants in a criminal organisation commits an offence. The maximum penalty is imprisonment for 3 years.

Proposed section 83GC provides 2 offences. Firstly, any person who is a participant in a criminal organisation and enters, or attempts to enter, a prescribed place commits an offence. Secondly, any person who is a participant in a criminal organisation and attends, or attempts to attend, a prescribed event commits an offence. The maximum penalty in each case is imprisonment for 3 years.

Proposed section 83GD provides that any person who is a participant in a criminal organisation and recruits, or attempts to recruit, anyone to become a participant in a criminal organisation commits an offence. The maximum penalty is imprisonment for 3 years.

Proposed section 83GE provides for matters related to sentencing which must be followed unless the sentencing court finds exceptional reasons exist for departing from the requirements of the section. The requirements are that—

(a) a sentence of imprisonment must be imposed on the person;

(b) the sentence of imprisonment cannot be suspended;

(c) sections 17 and 18 of the *Criminal Law (Sentencing) Act 1988* do not apply;

(d) section 18A(1) of the *Criminal Law (Sentencing) Act 1988* does not apply (but nothing in this subsection affects the operation of that section in respect of other offences for which the person is being sentenced).

Proposed section 83GE also requires a court, if the court is required to impose a non-parole period in sentencing a person for an offence against the Division, to have regard to the ***standard non-parole period***, being 9 months (and representative of the non-parole period for an offence, being a first offence, in the middle of the range of objective seriousness for offences in the Division). The court must provide written reasons if it departs from the standard non-parole period.

Proposed section 83GF provides that if a court, on application by the DPP, declares an organisation to be a criminal organisation within the meaning of paragraph (a) of the definition of ***criminal organisation***, then that organisation will, for the purposes of

any subsequent criminal proceedings, be taken to be a criminal organisation (within the meaning of that paragraph) in the absence of proof to the contrary.

Part 3—Amendment of *Liquor Licensing Act 1997*

9—Insertion of Part 7B

This clause inserts new Part 7B dealing with offences relating to criminal organisations.

Proposed section 117B includes definitions for the purposes of the Part. Importantly, ***prohibited item*** means an item of clothing or jewellery or an accessory that displays the name of a declared criminal organisation, the club patch, insignia or logo of a declared criminal organisation or any image, symbol, abbreviation, acronym or other form of writing that indicates membership of, or an association with, a declared criminal organisation. This clause also provides that a change in the name or membership of a declared criminal organisation, or a reforming of a declared criminal organisation into another organisation, will not affect the status of the organisation as a declared criminal organisation.

Proposed section 117C provides an offence for the licensee, the responsible person or an employee or agent of the licensee or responsible person working at the premise if they knowingly allow a person who is wearing or carrying a prohibited item to enter or remain in licensed premise. The maximum penalty is $10 000.

Proposed section 117D provides that a person must not enter or remain in licensed premises if the person is wearing or carrying a prohibited item. The maximum penalty is $25 000 for a first offence, $50 000 or imprisonment for 6 months for a second offence and $100 000 or imprisonment for 18 months for a third or subsequent offence.

Proposed section 117E provides that if an authorised person requires a person who is wearing or carrying a prohibited item to leave licensed premises, the person must immediately leave the premises. This section also provides that if a person fails to leave when required to, an authorised person may use necessary and reasonable force to remove the person. The maximum penalty in each case is $25 000 for a first offence, $50 000 or imprisonment for 6 months for a second offence and $100 000 or imprisonment for 18 months for a third or subsequent offence.

Further, proposed section 117E provides an offence of resisting an authorised person who is removing a person. The maximum penalty is $50 000 or imprisonment for 6 months for a first offence and $100 000 or imprisonment for 18 months for a second or subsequent offence.

Part 4—Amendment of *Summary Offences Act 1953*

10—Substitution of section 13

This clause substitutes a new section dealing with the offence of consorting. The proposed new offence applies to a person who habitually consorts with convicted offenders (whether in or out of South Australia) and then consorts with those persons after being issued with an official warning in relation to each of the convicted offenders. The maximum penalty is imprisonment for 2 years. The provisions lists types of consorting that is to be disregarded if it is shown to be reasonable in the

circumstances, such as consorting with family members or in the course of lawful employment.

11—Amendment of section 66A—Senior police officer may issue consorting prohibition notice

This clause amends the section 66A so that the provisions relating to consorting prohibition notices do not apply in relation to a person the subject of a control order under the *Serious and Organised Crime (Control) Act 2008*.

Part 5—Regulations

12—Preliminary

This clause provides that the *Subordinate Legislation Act 1978* does not apply in relation to a regulation made pursuant to this Part.

13—Making of *Criminal Law Consolidation (Criminal Organisations) Regulations 2015*

This clause provides that Schedule 1 has effect to make the *Criminal Law Consolidation (Criminal Organisations) Regulations 2015* (which are set out in the Schedule) being regulations that will be taken to have been made under the *Criminal Law Consolidation Act 1935*.

14—Making of *Liquor Licensing (Declared Criminal Organisations) Regulations 2015*

This clause provides that Schedule 2 has effect to make the *Liquor Licensing (Declared Criminal Organisations) Regulations 2015* (which are set out in the Schedule) being regulations that will be taken to have been made under the *Liquor Licensing Act 1997*.

Schedule 1—*Criminal Law Consolidation (Criminal Organisations) Regulations 2015*

1—Short title

This clause provides the short title of the regulations, the *Criminal Law Consolidation (Criminal Organisations) Regulations 2015*.

2—Organisations declared to be criminal organisations—section 83GA

This clause provides the list of entities declared to be criminal organisations for the purposes of paragraph (c) of the definition of ***criminal organisation*** in proposed section 83GA(1) of the Act.

3—Places declared to be prescribed places—section 83GA

This clause provides the list of places declared to be prescribed places for the purposes of the definition of ***prescribed places*** in proposed section 83GA(1) of the Act.

Schedule 2—*Liquor Licensing (Declared Criminal Organisations) Regulations 2015*

1—Short title

This clause provides the short title of the regulations, the *Liquor Licensing (Declared Criminal Organisations) Regulations 2015*.

2—Organisations declared to be declared criminal organisations

This clause provides the list of entities declared to be declared criminal organisations for the purposes of the definition of ***criminal organisation*** in proposed section 117B(1) of the Act.