



The New South Wales Bar Association

09/126

21 February 2012

The Hon Greg Smith SC MP
Attorney General
Level 31 Governor Macquarie Tower
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SYDNEY NSW 2001

Dear Attorney

Crimes (Criminal Organisations Control) Bill 2012 and Crimes Amendment (Consorting and Organised Crime) Bill 2012

The New South Wales Bar Association strongly opposes the Crimes (Criminal Organisations Control) Bill 2012 and the Crimes Amendment (Consorting and Organised Crime) Bill 2012, which are currently before the Legislative Council.

Crimes (Criminal Organisations Control) Bill 2012

The provisions of the Criminal Organisations Bill are substantially the same as those of the Crimes (Criminal Organisations Control) Act 2009.

The Association's opposition to the 2009 Act is recorded in the Legislative Council Hansard for 2 April 2009. I note the following extract:

The Association makes the obvious but important point that it is completely inappropriate that legislation infringing on recognised basic civil liberties should be passed so quickly, with no consultation or opportunity for debate. As a general comment, the Bar Association states:

Police resources would be better used fighting actual crime rather than people's associations. The legislation will not achieve anything other than to drive these organisations underground and make it more difficult to detect their existence and any associated criminal activities

It is concerning that control orders can be made based on confidential police 'intelligence' rather than any publicly proven criminality. How could a person adequately challenge the making of such an order without access to the information on which it is based?

Ms Lee Rhiannon MLC then went on to outline the Association's concerns with respect to the operation of specific provisions of the 2009 Act.

I note that the Criminal Organisations Bill has endeavoured to remedy defects in the 2009 Act identified by the High Court in *Wainohu v New South Wales* [2011] HCA 24.

Notwithstanding this, the Association notes that most of its concerns in relation to the operation of the 2009 Act have not been addressed by the Criminal Organisations Bill. Accordingly, the Association wishes to reiterate its concerns with respect to the proposed legislation. The purported function of the Criminal Organisations Bill is already substantially served by the existing provisions of the *Crimes Act* 1900 relating to participation in criminal groups.

Provisions of the proposed legislation

Under the proposed legislation the Police Commissioner can make an application seeking a declaration that a particular organisation is a 'declared organisation'. The rules of evidence do not apply to a hearing of such an application.

The Commissioner is then free to seek 'control orders' in respect of individual members of the 'declared organisation'. The person subject of a 'control order' is not required to attend the hearing in relation to the granting of the order. The 'control order' may be made if the Court is satisfied that the person is either a member of a 'declared organisation' or purports to be a former member who has ongoing involvement with the organisation and its activities. The 'control order' remains in force until revoked by the Court.

The offence of associating with another individual subject of a 'control order' is strict, it is not necessary to establish that the association was for any particular purpose or that the association would have led to the commission of any offence. Persons subject to 'control orders' may be restricted from pursuing certain occupations.

Concerns with the proposed legislation

The legislation has been widely touted as a solution to crime associated with 'bikie gangs'. However, any particular organisation can become a 'declared organisation' for the purposes of the Criminal Organisations Bill.

Similarly, the group of individuals who may be subject to a 'control order' is overly broad. Someone may be considered a member of an organisation merely by being a prospective member (which is not defined) or a person who is treated by others (members) as belonging to the organisation in some way. The scope of the proposed legislation has the potential to capture a large group of individuals regardless of whether their association with the organisation or any members is lawful.

The Association considers the proposed legislation to be an unnecessary and unwarranted infringement on rights of association, communication and the right to procedural fairness. In operation, there is a real likelihood that criminal organisations will merely adapt to the provisions of the legislation, and communications and associations will become more sophisticated, in turn making them more difficult to detect.

Crimes Amendment (Consorting and Organised Crime) Bill 2012

The Association has similar concerns in relation to the breadth of the provisions contained in the Crimes Amendment (Consorting and Organised Crime) Bill.

Provisions of the proposed legislation

The Consorting Bill introduces an offence of receiving material benefits from a criminal group, knowing or being reckless as to whether the group is a criminal group and that the benefit resulted from that group's criminal activities. The Agreement in Principle Speech notes that it is intended that the offence will capture those who 'may be at arm's length, they may be a passive recipient or they may have a legitimate business, but if they knowingly receive a material benefit, they, too, will be committing a criminal offence'.

The Bill amends the existing offence of participating in a criminal group by replacing the requirement for knowledge with an objective standard, 'ought reasonably to have known'.

The proposed introduction of a new consorting offence is also of great concern. The offence will capture any person who habitually consorts with individuals previously convicted of an indictable offence, by electronic or other forms of communication. The definition of 'habitual' involves consorting with at least 2 convicted offenders, whether on the same or separate occasions, on at least 2 occasions.

Concerns with the proposed legislation

The Association has a number of concerns in relation to the proposed legislation. Ultimately, what is most concerning is its 'net-widening' effect.

Both of the provisions outlined above have the effect of criminalising members of the community who are not otherwise engaging in criminal activity. The individuals captured are not criminal offenders or those who are not members of the criminal organisations in question, merely those peripherally involved in what may be legitimate and legal aspects of the group or individual's operations.

The legislation has the effect of criminalising individuals in the interests of deterring people from associating with the 'criminal milieu'. The maximum penalty for the proposed offence is 3 years imprisonment. With respect, the ends do not justify the means.

The Association has a fundamental objection to the proposal to create a serious offence of participation in criminal gangs based on a test of negligence. A fundamental principle of criminal law is that of mens rea. As the proposed legislation currently stands there is no requirement for the prosecution to establish that the accused was ever aware of the existence of the criminal group, nor that the impugned activity in any way assisted any criminal activity.

The new consorting offence is perhaps the more concerning. The scope of the provision is unduly broad in a number of respects, particularly with respect to the definition of 'habitual' and the methods of communication that will be considered when determining whether the offence has been established (electronic or other forms of communication).

Practically, the operation of the proposed legislation is problematic. Requiring police to give an individual one warning before the offence of consorting can be established effectively gives police the power to select the individuals that will be subject to the operation of the legislation.

There is a very real possibility that this power may result in discrimination and corruption. Free communication and association of individuals would be circumscribed at the discretion of the police long after the person in question, with whom the consorting is done, has met the punishment for their prior indictable offence.

The rights that are impinged upon by these two pieces of legislation are to be found in the International Covenant on Civil and Political Rights, to which Australia is a party. That instrument provides that derogation by a state from its major obligations under the Covenant is permissible only in defined circumstances. For example, Article 22 provides the right to freedom of association and in paragraph 2 says:

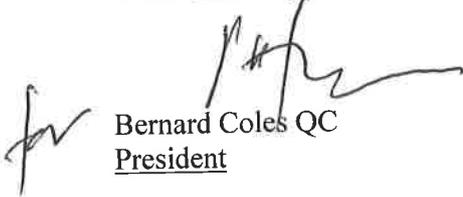
No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others...

The Association submits that none of these grounds for derogation in this manner have been established in New South Wales.

The Association urges the government to consider deferring debate on the Consorting Bill and the Criminal Organisations Bill until there has been an opportunity for adequate community consultation.

If there is anything that you or your officers would like to discuss, please do not hesitate to contact me on 9232 4055.

Yours sincerely



Bernard Coles QC
President