



Our ref: JD:CriminalLaw:HumanRights:586904

20 February 2012

The Hon Greg Smith SC MP
Attorney General and Minister for Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Attorney General

Crimes (Criminal Organisations Control) Bill 2012

The Law Society's Criminal Law Committee and the Human Rights Committee (Committees) are writing to voice their strong concerns about the provisions contained in the *Crimes (Criminal Organisations Control) Bill 2012* ("Bill").

The Committees submit that there is no objective evidence to support the need for the proposed offences, particularly as the Bill will have a broad-ranging effect on individuals' fundamental rights. The Committees' view is that the proposed legislation would criminalise a person's associations and interactions rather than their conduct, and that the Bill constitutes a denial of 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.

The Committees submit that the Bill is unnecessary as the NSW Police Force already has wide powers to fight organised crime. A wide variety of modern powers of investigation are already available to the NSW Police Force, including those allowing the tapping of telephones and computers, satellite tracking, facial identification technology, DNA testing and other investigative techniques not available even 25 years ago. Given this, the Committees submit that this Bill does not add any value. Rather, the Committees submit that a concentrated effort to enforce the existing law is a more effective response to the problem of gangs.

The Committees also note their disappointment that they were not given the opportunity to comment prior to the introduction of the Bill and note the very short time period between the introduction of the Bill and its passage through the Legislative Assembly.

Set out below are the Committees' specific comments in relation to the Bill.

1. The Committees submit that to reflect the intention set out in the Attorney General's Agreement in Principle speech and in clause 5(7) in relation to the appointment of "eligible judges", clause 5(3) should be amended.

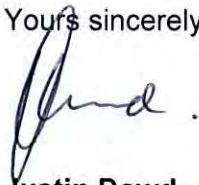
2. The power to “declare” an organisation is not restricted to motor cycle clubs and can be used against any organisation, including one in which a minority but “significant” number of members “associate for the purpose of serious criminal activity”. The consequences of being a “Declared Organisation” are so severe that it would be disproportionate to allow an organisation to be “declared” where only a small minority, but nevertheless “significant” number of members, were involved in criminal activity.
3. While the present Bill seeks to change clause 13 to avoid the issue upon which the High Court declared the previous Act to be invalid (the Judge is now required to give reasons for a declaration under clause 13(2)), clause 13 provides that the rules of evidence do not apply to the hearing of an application for a declaration. Given the serious consequences of the declaration, it is not clear to the Committees why the normal rules of evidence would not apply in these circumstances. It is possible for a declaration to be made based on hearsay or secret evidence only.
4. There is no appeal available from such a declaration.
5. Evidence adduced by the Police Commissioner constituting “criminal intelligence” can be heard in private and may not have been disclosed to the organisation in question or its members prior to the declaration being made. This provision conflicts with accepted notions of procedural fairness and open justice.
6. “Protected submissions” being evidence of persons alleging they fear reprisals can be heard in private and not disclosed. This provision is objectionable on the same basis as the objection in paragraph 4 above.
7. Once a declaration is made, a member can be subjected to a Control Order by a separate proceeding in the Supreme Court. If that Control Order is made against a member of an association, that person cannot communicate with another controlled member on pain of commission of a criminal offence. Even the sending of a text message is caught by the provision concerned. This is objectionable as an infringement of the fundamental right of freedom of association, which under international law, Australia has an obligation to introduce and maintain in its domestic legislation (Article 22, ICCPR).
8. Control Orders, by prohibiting communication between controlled members of the association, including perhaps a majority of members who do not associate for the purposes of serious criminal activity, restrict freedom of speech in a manner that is in contravention of Australia’s human rights obligations (Article 19, ICCPR).
9. The criminal offences for breach of a Control Order may also involve further breaches of international law because:
 - a) they fail to treat persons equally before the Supreme Court. Only Controlled Persons are prevented from, for example, communicating with other persons or holding certain occupations. This is a breach of Article 14(1) of the ICCPR; and
 - b) they fail to respect the presumption of innocence by requiring, in sub-clause 26(3) and 26(5), that the accused has the onus of proving certain defences to such charges. This is a breach of Article 14(2) of ICCPR.

10. A Control Order itself is in the nature of a criminal sanction, yet may be made in the absence of a person sought to be controlled and the standard of proof in the proceeding is the "balance of probabilities". Even the appearance of a lack of procedural fairness involved in this procedure may undermine public confidence in the court system.

The Human Rights Committee notes in the absence of comprehensive human rights legislation in Australia, it is even more important to subject Bills to the closest possible scrutiny to ensure that they conform to the (generally accepted) fundamental rights of the ICCPR. These rights largely arise out of the English legal tradition which still underpins our democratic rights. It is submitted that a careful approach to the preparation, drafting, introduction and consideration of legislation which outwardly conflicts with fundamental rights should itself be a fundamental task of the NSW Parliament.

The Committees submit that this Bill should not be supported.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Justin Dowd', with a small dot at the end.

Justin Dowd
President