



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: HRC/Crim/PWvk:1386648

4 August 2017

Mr Andrew Cappie-Wood  
Secretary  
Department of Justice  
Locked Bag 5111  
PARRAMATTA NSW 2124

By email: [policy@justice.nsw.gov.au](mailto:policy@justice.nsw.gov.au)

Dear Mr Cappie-Wood,

**Statutory review of the *Crimes (Criminal Organisations Control) Act 2012***

Thank you for seeking the Law Society's comments on the statutory review of the *Crimes (Criminal Organisations Control) Act 2012* ("the Act"). The Human Rights and the Criminal Law Committees have contributed to this letter.

The Law Society has previously raised concerns about this Act in our letters to the Attorney General dated 20 February 2012 and 29 May 2017 (a copy of each of these letters is enclosed).

The Law Society continues to have serious concerns about the Act as it criminalises a person's associations and interactions rather than their conduct and violates several fundamental rights.

We note also that no organisations have been declared "criminal organisations" under the Act, despite concerted efforts by NSW Police to do so. In its recent review of police use of powers under the Act, the Acting NSW Ombudsman was advised by NSW Police that "work on these applications ceased in 2015, and that it does not intend to resource such work in the future."<sup>1</sup> Further, operational police advised that "the procedural requirements of the Act are onerous, resource-intensive, and involve difficulties that ultimately prevented police making an application to the Court."<sup>2</sup>

Given this, we reiterate our view that the Act is unnecessary as the NSW Police Force already has wide and more effective and resource efficient powers to fight organised crime. We support the recommendation of the Acting NSW Ombudsman that it would be in the public interest for the Act to be repealed.<sup>3</sup>

Thank you for considering this submission. Should you have any questions or require further

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<sup>1</sup> NSW Ombudsman, 'Review of police use of powers under the *Crimes (Criminal Organisations Control) Act 2012*' (Report, November 2016) 3

<sup>2</sup> *Ibid.*

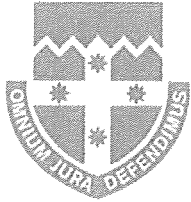
<sup>3</sup> *Ibid.*

information, please contact Rachel Geare, Senior Policy Lawyer on (02) 9926 0310 or email [rachel.geare@lawsociety.com.au](mailto:rachel.geare@lawsociety.com.au).

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Pauline Wright', written in a cursive style.

Pauline Wright  
**President**  
Encl.



THE LAW SOCIETY  
OF NEW SOUTH WALES

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.

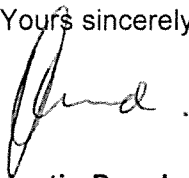
2. The power to "declare" an organisation is not restricted to motor cycle clubs and can be used against any organisation, including one in which a minority but "significant" number of members "associate for the purpose of serious criminal activity". The consequences of being a "Declared Organisation" 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.

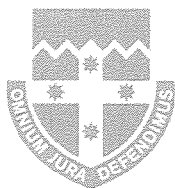
The Human Rights Committee notes in the absence of comprehensive human rights legislation in Australia, it is even more important to subject Bills to the closest possible scrutiny to ensure that they conform to the (generally accepted) fundamental rights of the ICCPR. These rights largely arise out of 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



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: Crim:PWrg1338320

29 May 2017

The Hon. Mark Speakman SC MP  
Attorney General  
GPO Box 5341  
Sydney NSW 2001

Dear Attorney General,

**Tattoo Parlours Amendment Act 2017**

I write to you on behalf of the Law Society of NSW in relation to the *Tattoo Parlours Amendment Act 2017* (the Act).

As you will be aware, the Act received assent on 9 May 2017, and commences on proclamation. We note with concern that the Law Society was not consulted on the legislation prior to it being introduced.

The Law Society has serious concerns with the Act. While the legislation is limited to those involved in tattoo parlours, it gives police extraordinary powers which bypass the safeguards applying to the Crime Commission and ordinary police investigations. The Law Society has concerns about the precedent value of the provisions, particularly given that these significant powers, originally conceived for use in counter-terrorism laws, have been incorporated into ordinary areas of criminal law enforcement and business regulation.

The Act extends the existing regulatory scheme for the licensing of tattoo parlours from a fit and proper person test for the operator, to the same test for both the operator and his or her close associates (ss 19(1)(a1), 19(2)(a1)). The Act then extends the powers available to investigate whether these people are fit and proper persons.

Firstly, the principal Act allows an investigator to enter premises without a warrant (s 30A). The Act expands this power, not simply to investigate a contravention of the Act, but to "make such examinations and inquiries as the authorised officer considers necessary" (s 30C(1)(c)).

This arbitrary power appears to breach Article 17 of the International Covenant on Civil and Political Rights ("ICCPR") which protects against arbitrary interference with privacy or correspondence.

Secondly, the Act abrogates the privilege against self-incrimination. Under the existing legislation the Commissioner of Police may require the operator to provide further information and inquiries can be made during the execution of a warrant. It is an offence to fail to comply, obstruct or hinder. The new Act extends the obligation to answer to close

associates. The Act provides a limited safeguard in that if a person objects then the answer cannot be used against them (s 33A(3)). However, the provision specifically states that records are not protected (s 33A(4)). The Act further states in relation to derivative use, that further information obtained as a result of information given over objection is not inadmissible against the person (s 33A(5)).

This abrogation appears to breach Article 14(3)(g) of the ICCPR which protects against being required to "confess guilt". Chief Justice Bathurst warned against such provisions in an opening of law term speech on 4 February 2016.<sup>1</sup>

The Law Society is opposed to the extraordinary powers contained in the Act, and we are of the view that the Act should not be proclaimed.

We also note, and support, the recent recommendation of the Acting NSW Ombudsman, that the *Crimes (Criminal Organisations Control) Act 2012* be repealed.<sup>2</sup> This legislation criminalises a person's associations and interactions rather than their conduct. The Law Society has always been of the view that this legislation is unnecessary as the NSW Police Force already has wide powers to fight organised crime, and that a concentrated effort to enforce the existing law is a more effective response to the problem of gangs.

The contact person for this matter is Ms Rachel Geare, Senior Policy Lawyer, who can be contacted on 9926 0310 or at [rachel.geare@lawsociety.com.au](mailto:rachel.geare@lawsociety.com.au).

Yours sincerely,



Michael Tidball  
Chief Executive Officer

Cc The Hon Troy Grant MP, Minister for Police

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<sup>1</sup> The Hon. T F Bathurst AC, Chief Justice of NSW, Opening of law term address: "The Nature of the Profession; The State of the Law", paras 48-50, [http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Bathurst%20CJ/Bathurst\\_20160204\\_speech.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Bathurst%20CJ/Bathurst_20160204_speech.pdf)

<sup>2</sup> NSW Ombudsman, Review of police use of powers under the *Crimes (Criminal Organisations Control) Act 2012*, November 2016, p3.