Submission No. 32

Queensland Law Society

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Office of the President

7 October 2016

Your ref: Serious and Organised Crime Legislation Amendment Bill

Our ref: Criminal Law Committee/ND

Inquiry Secretary
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: lacsc@parliament.qld.gov.au

Dear Inquiry Secretary

Serious and Organised Crime Legislation Amendment Bill 2016

Thank you for the opportunity to provide comments on the Serious and Organised Crime Legislation Bill 2016 (the Bill). The Queensland Law Society appreciates being consulted on this important legislative reform.

This response has been compiled with the assistance of the Criminal Law Committee who has substantial expertise in this area.

The Society appreciates that there is some urgency around this issue, and consequently the response period has not allowed for a comprehensive review of the Bill. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not yet identified.

Our policy committees and working groups are the engine rooms for the Society's policy and advocacy to government. The Society, in carrying out its central ethos of advocating for good law and good lawyers proffers views which are truly representative of the legal profession on key issues affecting practitioners in Queensland and the industries in which they practise. This furthers the Society's profile as an honest, independent broker delivering balanced, evidence-based comment on matters which impact not only our members, but also the broader Queensland community.

The Society sees the introduction of new legislation targeting serious organised crime as a step forward for the state. While the Society has raised some concern with some aspects of the Bill, it is preference of QLS for the Bill to pass in an amended form, rather than for the 2013 amendments to be maintained.

This Bill incorporates key findings from the Byrne Commission and the Taskforce report led by retired Justice Wilson, which the Society was pleased to have representatives a part of.

The Society is of the view that any laws directed at serious and organised crime must be robust, enforceable and crafted to enable our police and prosecutors the powers they need to keep our streets safe, whilst also taking into account the need for strong judicial oversight at all stages. It is also important that any legislative change be constitutionally valid.

Our responses to specific amendments are addressed below:

Bail Act 1980

The Society supports the proposed amendments to the *Bail Act 1980* that will reinstate the ordinary presumption in favour of bail that was reversed in the 2013 amendments. It is the Society's policy that judicial officers, both in the Magistrates Court and in the Supreme Court, be able to exercise a broad judicial discretion with respect to all of the matters relevant to bail, subject to the aim of protection of the public. This can often be achieved by the crafting, where necessary, of suitable bail conditions.

The Society agrees with the view of the Taskforce that any risks associated with a grant of bail to a person charged with an offence committed in connection with organised crime will be adequately addressed under these amendments.

Corrective Services Act 2006

The Society supports the amendments to the *Corrective Services Act 2006* that will repeal the 2013 amendments. The Society is of the view that offenders identified as participants in a criminal organisation will be effectively managed and supervised through the Queensland Corrective Services prisoner management regime.

Crime and Corruption Act 2001

The Society supports the amendments to the *Crime and Corruption Act 2001* and, in particular, the amendments that will increase oversight over the Crime and Corruption Commission's immediate response function and replacement of the fixed mandatory minimum sentencing regime for contempt with an escalating maximum penalty regime.

Peace & Good Behaviour Act 1982

Public Safety Orders

The Society has several concerns about the proposed Public Safety Order provisions of the *Peace and Good Behaviour Act 1982* (PGA):

- The Society is concerned that section 17 directly gives a commissioned officer the power to issue a public safety order. The Society is of the view that any such power should be in the hands of the Courts and not prosecuting or investigative authorities.

- The Society is concerned about the breadth of conditions that can be imposed under sections 18 and 28, for example 'entering or remaining in a stated area', the only limit on such being that it cannot cover a person's usual place of residence.

- The Society is concerned that there is seemingly no right of review or appeal against an order imposed for 72 hours or less.

- The Society is concerned that section 30 of the PGA amendments only give the police power to seek an amendment or variation of a public safety order and does not give this same power to a respondent of an order. This may lead to unforeseen injustice by not allowing a review of this process by a court.

Restricted Premises Orders

The Society has serious concerns that the proposed Restricted Premises Order provisions impede individual rights to privacy, property and freedom, the violation of which is not justified by the objects of the Bill.

- The definition of "disorderly activity" under section 33 is extremely broad. It not only includes criminal offences or unlawful activity on premises, but also could include drunkenness, "disorderly conduct", "indecent conduct", "entertainment of a demoralising character" (all of which is not defined) and also includes the presence of recognised offenders or even associates of recognised offenders (defined in the proposed section 77 of the Code as "any person with a recorded conviction for an offence with a maximum penalty of five (5) years).

  Given this extremely broad definition, the Society is of the view that Restricted Premises Applications could made in most foreseeable circumstances and therefore have the potential to be misused by overzealous policing.

  The Society is also highly concerned that section 54 makes it an offence attracting a possible term of imprisonment for "disorderly" activity to take place in a premises declared a restricted premises, where such activity would otherwise be completely lawful.

  Further, there is a serious risk that the use of the term "disorderly" could bring many socially disadvantaged people within the ambit of the Act. This may include those with mental illness, cognitive or intellectual impairment who may behave in a disorderly manner due to the symptoms of their illness or impairment. Aboriginal and Torres Strait Islander people, who are already overrepresented in the criminal justice system, may face further criminalisation as a result of the use of this broad term.

- The definition of "prohibited item" under section 33 is also extremely broad and includes a substantial number of items which might otherwise be completely lawful to possess, for example, a bottle of beer and the beer itself. The Society is further of the view that the definition under this section of "things used in support of the sale or consumption of liquor or drugs" and "entertainment of a demoralising character" (whatever this may be, it may for example include watching a performance of Waiting For Godot) unfairly target entertainment, adult entertainment, the liquor and gaming industries.

- The Society is concerned that Restricted Premises Applications can be made by any police officer at or above the rank of sergeant under the section 34. It is also concerning that the threshold for making an order is the 'reasonable suspicion' of such an officer about relevant conduct having taken place and being likely to take place again. The additional protection of a court being satisfied that the making of an order is 'appropriate in all the circumstances' without further clarification is of little assistance.

- The Society is concerned that section 37 states that, upon making an order, a Court must prohibit certain activities and persons present. The Society is concerned that this requirement unnecessarily limits the Court's discretion. In particular, upon making an order, section 37 states that a Court must prohibit "recognised offenders" and their associates, and persons subject to control orders being present at the premises. The fact that in these circumstances, a Court would not have discretion but to make an order prohibiting association between persons is of grave concern to the Society.

- The Society is concerned that sections 39 and 48 of the PGA amendments only give the police power to seek an amendment or variation of a restricted premises order (or its extension) and do not give this same power to a respondent of an order.

- The Society has serious concerns with the proposed section 49 of the PGA. Unlimited searches of a premises without a warrant for a period of up to two years severely interferes with an individual's right to privacy and quiet enjoyment of their home, the violation of which we are of the view is not outweighed by the objects of the Act.

  This provision does not limit the number of searches on premises or seizures of property by police. This could allow baseless harassment of individuals who have not committed a criminal offence.

  This provision allows police to seize "prohibited items", which would otherwise be lawful to possess but are defined in section 33 as prohibited. The Society is concerned that "prohibited items" do not need to be connected to the commission of an offence in any way in order for the items to be lawfully seized by police.

- The Society is further concerned that section 51(b) of the proposed amendments to the PGA limits the discretion of the Courts in returning items to parties, and that courts may only order return of such seized property if the seizure is "not lawful" under the Act itself.

- The Society is concerned that on an application to extend an order (section 45), the Court must order the extension if satisfied of the same matters as provided for in the original application. This runs the risk of resulting in an effective reversal of onus – unless something can be demonstrated to have changed since the making of the order the court would be obliged to extend it.

- The Society is concerned about the structure of the relevant offence provision (section 54) – amongst other things, this sections appears to make it an offence for 'an owner or occupier of premises.. to know.. that a disorderly activity has taken place'. This appears to state that if an owner learns after the fact that someone was, for example, drunk in their

premises then they commit an offence. Aside from difficulties in proving or defending such a charge, the scope of this offence is extremely broad by virtue of this construction. Any knowledge must be contemporaneous to the act it seeks to criminalise.

Fortification Removal Orders

The Society has the following specific concerns about the proposed Fortification Removal Order provisions of the PGA:

- Section 56 gives a definition of "fortification of premises" which is overly broad.
- The Society is concerned that section 63 of the PGA amendments only give the police power to seek an amendment or variation of a fortification removal order and do not give this same power to a respondent of an order.
- The Society is concerned that section 65 (Powers for removing and modifying fortifications) allows powers under Fortification Removal Orders to be exercised at any time and as often as required to achieve the removal or modification. This provision could allow repeated and unfettered access to residences without restriction which would unjustly interfere with an individual's private enjoyment of their home.

Consorting

The Society is greatly concerned about the breadth of the proposed consorting offence. Under the proposed new Part 6A of the Criminal Code, there is no required nexus between the association and the commission of, or intended commission of, a serious criminal offence. As a result, the potential for the proposed consorting offence to criminalise associations that are unrelated to criminal activity is significant.

We note that the proposed consorting offence is based on the equivalent offence in New South Wales under section 93X of the *Crimes Act 1900* (NSW). In the review of the NSW Consorting Laws, the NSW Ombudsman recommended several measures to narrow the scope of the consorting laws, including that the Attorney-General (for NSW) introduce, for the consideration of Parliament, an objects or purpose clause to the consorting law to clarify that the intent of the consorting law is for the prevention of serious crime.[1] The Society is of the view that use of the proposed consorting offence should be similarly narrowed to the prevention of serious crime.

The report affirmed that the meaning of 'consorting' had been previously considered by the High Court, which established there is no need for an occasion of 'consorting' to have any unlawful purpose or be linked to ongoing or recent criminal activity.[2] The result,

[1] https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0005/34709/The-consorting-law-report-on-the-operation-of-Part-3A,-Division-7-of-the-Crimes-Act-1900-April-2016.pdf, p. 5.
[2] *Johanson v Dixon* (1979) 143 CLR 376.

acknowledged in a more recent decision, is that the 'primary practical constraint upon its application is the discretion afforded to police officers.[3]

Accordingly there is potential for disproportionate impact on vulnerable and disadvantaged people:

- the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system will also increase the potential for this group to be subject to the proposed consorting offence; and
- given police will rely on the observation of people in public areas to identify consorting, the potential for consorting to disproportionately impact on groups who occupy public space, including people experiencing homelessness, is also significant.

The Society is also concerned that there is no clear, low-cost review mechanism for official warnings. This is particularly problematic given the number of incorrect warnings that were issued in NSW following the introduction of the new consorting office.[4] A review of an official warning could be facilitated in an identical way to a traffic infringement notice which allows the recipient to complete a section on the infringement notice electing to challenge the infringement notice in court. This simple procedure would provide the mechanism whereby a person could challenge or seek a review of a consorting prohibition notice issued by police.

The Society is concerned that the proposed consorting offence infringes Article 22 of the International Covenant on Civil and Political Rights, which confirms the right to freedom of association. In an explanation of this international human right, the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association states that a right of association is a prerequisite for a democracy and a just society. In explaining the universal nature of this human right the Rapporteur says:

> "*The freedoms of peaceful assembly and association are not cultural or specific to a particular place and time. They are born from our common human heritage. It is human nature – and human necessity – that people come together to collectively pursue their interests*".

Although the freedom of association is not explicitly protected under domestic legislation, the infringement of this right nonetheless remains a concern.

The Society is concerned that the list of 'Particular act of consorting to be disregarded' is inadequate and does not capture a complete range of circumstances within which consorting could be reasonable. The Society is of the view that this list should be expanded to include other circumstances, including consorting that occurs in the course of participating in legitimate political, social or industrial advocacy and protest and consorting that occurs in the course of accessing a welfare or support service.

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[3] *Tajjour v New South Wales; Hawthorn v New South Wales; Forster v New South Wales* [2014] HCA 35 at 1, per French CJ.

[4] https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0005/34709/The-consorting-law-report-on-the-operation-of-Part-3A,-Division-7-of-the-Crimes-Act-1900-April-2016.pdf, p. 91.

If you have any queries regarding the contents of this letter, please do not hesitate to contact the Society's Advocacy department [redacted] or telephone [redacted] 3842 5862.

Yours faithfully

[redacted]

Bill Potts
President