

20 November 2013

Our ref 339/59

The Hon Ian Berry MP  
Chair  
Legal Affairs and Community Safety Committee  
Parliament House  
George Street  
BRISBANE QLD 4000

By Post and Email to: [lacsc@parliament.qld.gov.au](mailto:lacsc@parliament.qld.gov.au)

Dear Chair

**Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013**

The Society writes in relation to the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013* (the Bill), introduced on 19 November 2013 which the Legal Affairs and Community Safety Committee is currently reviewing.

The Society provides the following feedback.

*Consultation process*

The Society notes that it has had the opportunity to provide comments on the parts of the Bill relating to the use of video-links in judicial proceedings and commends the Government for that opportunity.

On the remainder of the Bill, we are disappointed with the lack of consultation prior to the Bill being introduced into Parliament. It is desirable that there should be a reasonable opportunity, beyond isolated details published in media reports, for stakeholders to be informed about the Government's policy agenda, and have the opportunity to comment on the details of proposed legislation, prior to it becoming law. This ensures that issues relating to fundamental legislative principles or unintended drafting consequences are identified and addressed at an early stage.

Given the exceedingly compressed timeframe for consideration of the Bill, the Society has not had the opportunity to make a considered review of the Bill, or to seek the input of its specialist committees of expert practitioners. Accordingly the following brief comments are provided as initial points and are in no way intended to be a comprehensive or exhaustive consideration of issues in the Bill.

## 1. Amendments to the *Bail Act 1980*

The Society notes that s 16(3A) 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.*”

We are concerned with the broad nature of this provision, as there is no timing provision linking when a person was a participant in an organisation and when an offence was committed. This means that once it is established that you are a participant, it will always be the case and the presumption against bail will always apply. It appears unfair that a person can be punished for behaviour which may have taken place a significant time ago, where no recent evidence supports the notion that a person is still a participant and despite any rehabilitation of the person which may have occurred since then. We consider that these provisions should be time bound to the commission of an offence.

We suggest that the provision should be changed to reflect that the presumption against bail should apply “*if the defendant is charged with an offence and it is alleged **the defendant was at the time of the commission of the offence** a participant in a criminal organisation.*”

We also note that s16(3C) is amended to provide that it does not matter:

- (a) whether the offence with which the defendant is charged is an indictable offence, a simple offence or a regulatory offence; or*
- (b) whether the defendant is alleged to have been a participant in a criminal organisation when the offence was committed; or***
- (c) that there is no link between the defendant’s alleged participation in the criminal organisation and the offence with which the defendant is charged.***

We are concerned that there is no link between a person’s alleged participation and the commission of the offence. We consider that criminal organisation behaviour should be defined by activity that would likely result in benefit by the group or by the persons who constitute the group. We consider that linking the commission of the offence with participation in the organisation’s activities is crucial to establishing a criminal conspiracy.

The Society is also concerned that the presumption against bail applies on being charged with all indictable, simple or regulatory offences under s16(3C). There is potential for the unintended consequence that persons charged with offences which normally would not justify a sentence of imprisonment will be remanded into custody. We suggest that s16(3A) should operate where a person has been charged with a declared offence prescribed under Schedule 1 of the *Vicious Lawless Association Disestablishment Act 2013*. This will ensure that those that have been charged with offences that the government has deemed to be serious offences will be caught under the bail provision. This will also standardise the definitions across the recent legislative instruments so that there is consistency and a clear focus on targeting the participants and leaders of criminal organisations.

## **2. Licensing Acts – amendments to prevent access to certain licences, permits and activities**

The Society notes that the scheme of the proposed amendments introduces consideration of whether an applicant or holder of certain occupational licences is a criminal organisation or is an identified participant in a criminal organisation. The Society notes that the critical definition of ‘participant’ is taken from s 60A(3) of the *Criminal Code* and is to be considered in light of information supplied by the police commissioner.

The Society understands s 60A(3) to operate to identify current participants in a criminal organisation.

The Society has a significant concern that there may be misunderstanding of the operation of the relevant definition in s 60A(3) of the *Criminal Code* and that licensing authorities may consider past participation in a criminal organisation as a relevant consideration. Given the operation of the relevant definition we consider it would be most effective if the Attorney-General undertook to ensure that affected licensing authorities only considered issues of current participation in a criminal organisation and no other irrelevant considerations.

There is a strong argument against consideration of past participation being a relevant consideration in licensing decisions as this will directly obviate the incentive for current participants in criminal organisations to leave those organisations and rehabilitate themselves into mainstream society.

The Society is also concerned that there is the significant possibility of injustices occurring where the information supplied by the police commissioner is either inaccurate or out of date.

## **3. Amendments to the Police Service Administration Act 1990**

The Society notes the inclusion of Subdivision 1A- Disclosure of criminal histories relating to criminal organisations. New s10.2AAB states:

### ***10.2AAB Disclosure of criminal history of current or former participants of criminal organisations***

*(1) The commissioner may disclose, to any entity, the criminal history of a current or former participant in a criminal organisation if the commissioner is satisfied the disclosure is in the public interest.*

*(2) The commissioner may disclose the criminal history despite another Act that may otherwise prevent or restrict the disclosure.*

*Examples of other Acts that may otherwise prevent or restrict the disclosure—*

- *Criminal Law (Rehabilitation of Offenders) Act 1986*
- *Youth Justice Act 1992, part 9*

The Society is uncertain what “entities” this section it is contemplated releases will be made to. There is no definition of “entity” within the *Police Service Administration Act 1990*, and the definition of “entity” in the *Acts Interpretation Act 1954* is “**entity** includes a person and an unincorporated body.” The Society suggests that the Attorney-General clarify the types of intended entities that may receive criminal histories, and that this be made clear in the legislation.

If it is intended that the police commissioner can release the criminal histories of individuals to entities such as news media, the Society would have some significant concern regarding the impact this may have on a person’s right to a fair trial or that potentially it may lead the news media outlet to commit a contempt of court with respect to their reporting of ongoing criminal proceedings. It may be that publication of criminal convictions prior to the end of a trial may prejudice a jury against a defendant and thereby reduce the chances of a fair trial and amount to contempt of court punishable by fines or imprisonment. We are also concerned this would have a significant impact where the criminal history of a child under the *Youth Justice Act 1992* is released.

The Society is also concerned that disclosure of criminal histories can be made without the consent of the individual. There are no provisions to ensure that the individual is informed of the decision, has had the opportunity to provide submissions to the police commissioner regarding the release of his or her criminal history, and there is no opportunity to review the decision to release the criminal history. We consider these issues should be addressed in the legislation.

#### **4. Amendments to use of video link facilities and audio link facilities in criminal proceedings**

The Society is concerned with the removal of the requirement for consent, noting that there still remains many practical issues that need to be worked out regarding the use of video and audio link processes, such as the ability for a legal practitioner to obtain signed instructions, and the impact video link processes will have on duty lawyers. If the legislation is amended without the appropriate infrastructure in place to deal with video link proceedings, disruption and delays may result.

We are pleased to note the legislation provides for provision of facilities to ensure private communication between lawyers and their clients, confidentiality of the communication between lawyers and their clients, and also ensuring that there is no legislative obligation regarding use of the link where facilities are not available.

The Society is of the view that a prisoner must be physically present in court for trials and sentencing. There is significant value in ensuring a person is able to interact with his or her lawyer in these two circumstances. Additionally, the community would expect that the defendant should be present, particularly for their sentencing, as that is the point in time where the accused person is receiving the court’s decision on behalf of the community and through

the Judge, the community's denunciation of the conduct. At the very least, if the government is minded to proceed with this proposal despite our significant concern, we consider that the defendant should have the ability to elect to be at court in person for sentencing in District Court and Supreme Court matters.

We also suggest that consideration should be given to the potential impact on the right of the defendant to a fair trial, including the ability of the defendant to understand the proceedings, participate and consult and instruct their lawyer privately. We note that these additional requirements are contained in section 6 of the New Zealand *Courts (Remote Participation) Act 2010*:

***Additional criteria for allowing use of audio-visual links in criminal proceedings***

*A judicial officer or Registrar must also consider, when he or she is required to determine under this Act whether or not to allow the use of AVL for the appearance of any participant in a criminal proceeding, the potential impact of the use of the technology on the effective maintenance of the right of the defendant to a fair trial, and on his or her rights associated with the hearing, and, in particular,—*

*(a) the ability of the defendant—*

*(i) to comprehend the proceedings; and*

*(ii) to participate effectively in the conduct of his or her defence; and*

*(iii) to consult and instruct counsel privately; and*

*(iv) to access relevant evidence; and*

*(v) to examine the witnesses for the prosecution; and*

*(b) the level of contact the defendant has with other participants; and*

*(c) any adverse impression that may arise through the defendant or any other participant appearing by means of AVL, and whether that adverse impression may be mitigated.*

If you require further information, please contact our Principal Policy Solicitor, Mr Matt Dunn, on 3842 5889 or email [m.dunn@qls.com.au](mailto:m.dunn@qls.com.au) or our Policy Solicitor Ms Raylene D'Cruz on 3842 5884 or email [r.dacruz@qls.com.au](mailto:r.dacruz@qls.com.au).

Yours faithfully

Annette Bradfield  
**President**