CRIMINAL ORGANISATIONS CONTROL BILL 2011

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Michael Mischin (Parliamentary Secretary)**, read a first time.

Second Reading

HON MICHAEL MISCHIN (North Metropolitan — Parliamentary Secretary) [5.13 pm]: I move —

That the bill be read a second time.

There is no question that the influence of criminal organisations in this jurisdiction is a significant law enforcement issue. Police figures provided to *The Sunday Times* last year show that in the two years prior, some 135 patched members of outlaw motorcycle gangs (OMGs) had been charged with over 600 offences, many of a serious nature such as extortion, drug dealing and abduction. Those same police sources revealed that almost half of WA's outlaw bikie gang community and members had faced serious criminal charges in the previous two years.

Other figures contained in the police information are in some respects even more concerning. WA Police revealed that between 2008 and 2010 it had seized almost 18 kilograms of amphetamines, worth some $13 million, from gang members. In the two years prior to 2009 police had seized 111 illegal firearms, of which 84 were from outlaw motorcycle gang members and associates. Without labouring the point, these figures may represent the tip of the iceberg especially as it is the case that OMGs are just one of a number of groups or organisations involved in criminal activity and, more importantly, these groups are now fighting each other for market share. Recent incidents on the east coast of Australia and here in Perth illustrate that these groups have no qualms whatsoever in putting the public at risk in resolving their inter-gang disputes.

Across Australia communities have had enough of these activities, and governments across the nation, both state and commonwealth, have acted using appropriately tough but highly targeted legislation. Whilst the introduction of this legislation in two other states, South Australia and New South Wales, has been the subject of successful challenges in the High Court, Western Australia has the advantage of the High Court decisions providing us here in Western Australia with guidance about the most constitutionally valid approach. More importantly, the New South Wales decision found that there is nothing constitutionally or legally objectionable about the principal underlying objectives of these laws.

At this point it is opportune to assure the Parliament and the people of Western Australia that this legislation is aimed at organisations that harbour and encourage criminal activities. It is not aimed at people who enjoy riding motorcycles as a group, organisations that show off their skills with firearms at competitive meetings, or organisations and clubs that like to distinguish themselves by wearing badges and other regalia.

Although the long title of the bill clearly outlines its legislative intent, I want to make it very clear to the house what the government's policy intent is with this legislation. Quite simply, it is to directly disrupt the activities of organisations that harbour and encourage crime by providing increased monitoring of, placing restrictions upon and providing for the incapacitation of members. In addition, the legislation is aimed at deterring persons from becoming involved in organised crime and, more generally, deterring such organisations from being involved in any criminal activity in this jurisdiction.

Critical to understanding the policy intent of this legislation is not just the legal definition of a criminal organisation, which is contained in clause 13 of the bill, but what research informs us is the nature of criminal organisations. Research in Canada has identified three types of criminal organisation —

economic criminal organisations—those organisations set up for the sole purpose of achieving material gain for members via criminal activity;

social criminal organisations—those organisations that only support the economic activities of their members indirectly, but whose membership creates a sense of solidarity, trust and secrecy, promotes a deviant—that is, non-law abiding—ideology, and provides a forum to share criminal and non-criminal information and thereby provide criminal opportunities to members;

and quasi-governmental criminal organisations—organisations that formally govern and control criminal activities within their sphere of influence by making and enforcing rules and codes of conduct for criminal activity in a specific area, seeking to control all such activity.

These categories are not mutually exclusive but they provide us with a succinct description of the sorts of governance arrangements that criminal organisations have. They also help to explain that, whilst outlaw motorcycle gangs have the highest profile in the community, they are not the only organisations to which these

descriptions fit. We need to be clear: the targets of this legislation are all these types of criminal organisation, or any combination of them, irrespective of what the particular organisation's public name might be.

Finally, before moving to describe the key features of the bill before the house, I would like to outline how the bill, once enacted, will function. Firstly, taking all of the above into account, there is no question whatsoever that members of these organisations—I may refer to OMGs for brevity's sake—will frequently commit criminal offences, which means that using offences as triggers for particular consequences under this bill is an appropriate approach. Secondly, it is recognised that in many cases it might not be possible to disable or disband a criminal organisation by jailing its leader, because leadership of the organisation may not necessarily be involved in oversight of all criminal activity committed by that group. Rather, what is needed—the government believes the bill I introduce today achieves this—is constant pressure over a period of time through surveillance, arrests, confiscations and imprisonment, to break down associations, break open the culture of secrecy, reduce the profitability of associated activities, and incapacitate individual members where appropriate. Thirdly, the key operative features within the bill need to be flexible and varied. Given the financial and legal resources available to organised crime gangs, the government is fully aware that every step of this legislation is likely to be litigated, and possibly some parts subject to constitutional challenge. Given the onerous and time-consuming nature of such challenges, it is the government's intent with this bill that its key features be sufficiently targeted, stringent and varied to make the legislation a worthwhile tool for our state's police and prosecution authorities.

I now turn to the key features of the Criminal Organisations Control Bill 2011. Much of what follows in the bill hinges on the operation of part 2—that is, the process for declaring an organisation a criminal organisation. Many of the features of the application process under part 2 are similar to those in operation in New South Wales. However, to reflect the situation in Western Australia, clause 7(1) enables both the Commissioner of the Corruption and Crime Commission and the Commissioner of Police to be applicants. Other key features governing the application process for a declaration shared with the New South Wales legislation include —

> the use of a "designated authority" to determine applications for a declaration. Division 4 of part 2 describes the process of designating a judge or retired judge as a "designated authority". It is worth noting in this regard that in the High Court's decision regarding parts of the New South Wales legislation, being the decision in Wainohu v The State of New South Wales [2011] HCA 24 (23 June 2011), the High Court said nothing adverse in respect of the powers to make a declaration order being vested in a single designated authority;
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> the ability for the applicant to submit "criminal intelligence information"—part 5—in a declaration hearing. This effectively prohibits parties, other than the applicant and the designated authority, from access to the information and places an obligation on the designated authority to take all reasonable steps to maintain the confidentiality of information classed as criminal intelligence information;
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> an ability for the applicant and the organisation—the respondent—subject to a declaration to provide a "protected submission" under clause 11. A protected submission can be made by a person who feels that they may be threatened or intimidated by making a submission; and
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> in relation to the High Court's decision in Wainohu, clause 14 is critical. It ensures that the designated authority must provide reasons for its decision.

Division 3 of part 2 provides parties to a declaration hearing with the ability to seek renewal or revocation of the declaration order. Again, this part requires the designated authority to provide reasons for the decision under clause 22. Declarations in Western Australia can only remain in force for five years under clause 16, although they can be subject to an application for renewal under clause 18. As indicated earlier, the full effect of this legislation involves a two-stage process, starting with the declaration of an organisation as a criminal organisation and subsequent publication of this status. Once this has occurred, a number of consequences may follow. An immediate effect is that it is an offence for anyone to recruit for a declared organisation under clause 106; and, secondly, it allows for the Commissioner of Police to apply to the Supreme Court for a control order against an individual who is a member of a declared criminal organisation or a person who regularly engages in criminal behaviour. This is provided for in part 3.

Key features of this process are —

> first, this will generally be a two-stage process involving an application for an interim control order under division 2, clause 5, followed by the making of a final control order under division 3, although provision is made for an application for a final control order to be made directly under clause 52. In a sense, this process is not dissimilar to the way restraining orders can be applied for at present. Clause 37(a) allows for applications for interim orders to be ex parte. Despite this, clause 52 allows for a one-stage process in certain circumstances;

clause 38(2) allows the court to hear and determine two or more applications for an interim control order at the same time;

criminal intelligence information can also be protected in interim and final control order hearings under clause 34;

again, to reflect the targeted nature of this legislation, before an application for a control order can be made, the organisation of which the respondent is a member has to have been declared a criminal organisation, or the respondent must be a former member of a declared organisation or have ongoing involvement with such an organisation, or the person, not being a member of such organisation, must regularly associate with members of a declared organisation or the person engages in, or has engaged in, serious criminal activity, or associate with persons who engage in, or have engaged in, serious criminal activity. This is a critical point as, for example, significant new police powers are provided in clause 43 that enable police to detain a person to ensure proper identification in the process of applying for a control order;

similar to the checks and balances regarding declaration orders, subdivisions 3 and 4 of division 2 of part 3 allow for applications for the revocation of an interim control order, and subdivision 5 of part 5 provides for appeals, variations and revocations of a control order; and

finally, all the conditions that can be applied for under a final control order can be applied to an interim control order—these will be discussed in more detail shortly.

In line with the government's intent to disrupt and restrict the criminal activities of members of declared organisations and in line with similar legislation in other states, the conditions that can apply to either an interim control order or a control order are categorised as "standard conditions", set out in division 5, subdivision 1, and "non-standard conditions", set out in division 5, subdivision 2. The standard conditions of a control order are that the person is not able to associate with another person subject to an interim control order or a control order, although there are some limited exceptions to this; the person is not to receive funds from, or provide funds to, a declared organisation; the person cannot be involved in any aspect of the organisation of any event open to the public; and the person cannot recruit others to become members of a declared criminal organisation. Non-standard conditions that can be imposed at the discretion of the Supreme Court include prohibition on carrying on any prescribed activity, which includes but is not limited under clause 80 to working in the gambling, betting, motor vehicle and security industries, as well as a broad category of occupations that require an authorisation that are to be prescribed by regulation; prohibition of the possession of firearms and other forms of weapon; prohibition of the person under control from certain places under clause 79(1)(c); and prohibition of the person under control from accessing one or more forms of communication or technology specified in the order.

Subdivision 5 of division 3 is an important part of the balanced approach taken by the government in dealing with criminal organisations. Not only does it contain provisions for variations and revocations similar to those in place for declarations, but also this subdivision includes an appeal provision available to both parties against either the granting of an order or the refusal to grant an order. The appeal is to be to the Court of Appeal and the provisions under clauses 64, 65 and 66 generally follow normal appeal processes.

Division 4 of part 3, control orders, implements government policy in that juveniles aged 16 and 17 years, if they become involved in criminal organisations and meet the grounds for making a control order, too will be subject to the same conditions as adults. Clause 75 provides a safeguard in relation to juveniles in that the order has to be served personally if the juvenile was not present when the order was made.

Before turning to the offence and penalty provisions in part 4 of the bill, it is worth examining in some detail the provisions of subdivision 4 of division 5 of part 3 relating to the effect of interim and final control orders. These provisions give police significant new powers in relation to persons the subject of a control order, such as requiring the controlled person to attend at a police station to have identification particulars taken, taking a DNA profile of a controlled person and power to require the controlled person to disclose identification details.

Whilst parts 2 and 3 are concerned with the application process and the making of declarations and control orders, part 4 sets out various offences and penalties associated with control orders. Subdivision 1 deals with the most obvious offence—that of breaching a non-association condition of a control order. The penalty and the escalating penalty for subsequent offences of the same nature reflect the government's intent to restrict and disrupt these criminal organisations and to provide a significant deterrence to both individuals under control, and more broadly to other members of criminal organisations. Clause 99(3) particularly reflects the government's response to a common characteristic of many members of these organisations—that is, thumbing their nose at the law. Subdivision 2 covers financing offences and here the penalty is even higher. Subdivision 3 deals with other offences under this bill that can be committed by a person under a control order. The penalty for failing to

provide identity information or providing false identity information is 12 months' imprisonment under clause 104.

Division 2 of part 4 goes to the heart of the government's intention to ensure that it becomes increasingly difficult for criminal organisations to recruit new members. Membership and revenue are critical for these organisations, as are premises from which they operate—a matter that is to be addressed shortly. Clauses 106, 107 and 108 introduce new offences of recruiting members for declared criminal organisations; owning, occupying, leasing or managing premises that are habitually used by members of a declared criminal organisation; and allowing a controlled person to use or have access to a firearm. The penalties for these offences range from a fine of $4 000 to imprisonment for two years.

Whilst dealing with offence provisions contained within this bill, I might take the opportunity, although a little out of sequence, of dealing with matters contained in part 10, "Amendments to other Acts". This part makes amendments to a number of acts but I will concentrate on the Criminal Code Act 1913 and the Sentencing Act 1995. This part represents somewhat of a departure from the format of corresponding interstate legislation consistent with the dual aims of this legislation—namely, to disrupt and restrict the activities of organisations involved in serious criminal activity and to deter persons from remaining in or becoming new members of organisations that harbour and encourage criminal activity. Part 10 introduces a number of new offences to apply to criminal organisations, whether or not declared; and a number of new penalties for members of declared criminal organisations who are convicted of certain offences, including mandatory imprisonment in defined circumstances.

Before the critics of mandatory imprisonment start jumping up and down, let us be clear about the circumstances in which they are to apply. New sections 9C and 9D to be introduced into the Sentencing Act 1995 cover the application of these new sentences. For these provisions to apply, the offender has to be a member of a declared criminal organisation; secondly, it has to be proved that the offence was committed at the direction of or in association with or for the benefit of a declared criminal organisation or a member of a declared criminal organisation; and, thirdly, the offender has to be convicted of either an offence under this bill, an indictable offence—whether or not it is an either-way offence—or a relevant offence, which is a summary offence listed in a new schedule, schedule 1A, to be included in the Sentencing Act 1995. The government's intention is clearly spelt out in proposed new section 9C(2) of the Sentencing Act 1995.

Simply put, any offender who meets the two criteria described in proposed section 9C(1) of the Sentencing Act 1995 will mandatorily receive one of the following imprisonment terms —

> if the offence is indictable, whether it is an either-way offence, the mandatory penalty is 75 per cent of the statutory maximum period of imprisonment specified for the particular offence;
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> if the statutory maximum period of imprisonment is life imprisonment for the particular offence, the mandatory penalty is a minimum of 15 years' imprisonment;
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> if the offence is a "relevant offence" as listed in new schedule 1A of the Sentencing Act 1995, the mandatory penalty is a minimum period of two years' imprisonment; and
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> except in the case of life imprisonment upon conviction for murder, where the offender could be eligible for parole after a minimum period of 20 years, all other mandatory terms of imprisonment will be served without parole.

The government makes no apology for these measures. Information provided to the government recently by Western Australia Police indicates that between January and July 2011 some 223 members, associates or nominees of outlaw motorcycle gangs have been charged with 416 offences, most of which involve drugs in one way or another.

Clause 107 also represents a significant provision as far as the government is concerned. This provision targets a person who is either the owner, lessee, occupier or concerned in the management of premises that are used habitually—that is, with some degree of regularity and frequency—by members of a declared criminal organisation. Here I need to make it clear that this provision applies to any member of a declared organisation whether or not they are the subject of a control order. It will be noted that clause 107(3) and (4) makes the presumption, to be rebutted by the accused, that the owner, occupier, lessee or manager of the premises knowingly allows the premises to be used in such a manner if the person himself or herself is a member of the declared criminal organisation. It should also be noted in passing that the offence as reflected by its penalty is a "confiscation offence" under the Criminal Property Confiscation Act 2000.

Parts 5 and 6 of the bill concern information presented to the decision maker, and the recording and storage of information about organisations that have been declared and individuals who have been placed under control orders. Part 5 concerns protected criminal intelligence information on suspected criminal activity and on any

police operation, which, if disclosed, could prejudice it. Whilst courts should be as open as possible, the proactive stance of parts of this legislation means that this sort of information is critical for the designated authority when considering grounds for making a declaration order against an organisation.

Part 6 simply requires the Commissioner of Police to keep a record of declared organisations and individuals under control orders. This record will also involve declaration and control orders made in another state or territory, and is to be made publicly available.

This leads us to another key section of the bill, divisions 2 and 3 of part 7, which deal with reciprocal recognition of declarations and control orders. There is little doubt that organised crime is transnational these days, and it is well known that the organisational structures of outlaw motorcycle gangs allow for chapters to be formed in states and parts of states and territories. This phenomenon is well recognised by the commonwealth and state and territory governments, which have worked together through the Standing Council on Law and Justice—formerly the Standing Committee of Attorneys-General. Whilst not advocating uniform legislation, this group of Attorneys is committed to ensuring that all states and territories have largely consistent legislation. This legislative response is a key component of a broader plan by the commonwealth and the states to respond to organised crime with all the means at their disposal. Part 7, division 2, implements these commitments with regard to declarations. Mutual recognition is not automatic in the legislation and requires an application to be made to the relevant Western Australian authority. However, most of the processes are largely administrative. Subdivisions 1 to 8 cover these administrative arrangements.

Division 3 mirrors many of the administrative processes in division 2 and deals with the mutual recognition of control orders. Of note regarding this division is that in dealing with control orders, flexibility is provided by clause 136, which allows Western Australia to adapt an order made in another state, when necessary, for its effective use in this state. This determination has to take place in a court rather than by a registrar. The other key issue in the reciprocal recognition of control orders is that should a variation to the conditions of a control order occur in the other state, or in fact the order is revoked in the other state, an administrative process under subdivision 8 is envisaged for effecting these changes as quickly as possible in this state.

Other provisions of note are that the Commissioner of Police in this state can apply to a registrar in WA to cancel the interstate order and, similarly, a respondent to an interstate order can apply to the court, not the registrar, for cancellation of the registration of the order in this state.

Parts 8 and 9 of the bill are administrative in nature. As members have become aware during the course of this outline, it is clear that this is unprecedented legislation, which I am sure some will say restricts the basic rights of a group of people. As I have said previously, the government does not apologise for this in the interests of the wider constituency of law-abiding citizens. Nevertheless, as the bill contains significant powers for the Commissioner of Police, the government is particularly mindful of having appropriate checks and balances on the additional powers to deal with the scourge of organised crime. Part 8, division 1, requires the Ombudsman to monitor and report to the Parliament on the exercise of the powers conferred on the commissioner and police officers. For the period before which the act is to be reviewed the Ombudsman will report each year. Following this, division 2 requires the act to be reviewed after five years.

Part 9 comprises a number of miscellaneous provisions. I will draw members' attention to just one—clause 164, "Costs in proceedings under this Act". No doubt many aspects of this bill will be subject to extensive litigation. The government is mindful of this and intends to limit costs payable only to proceedings in which either the state or the respondent has engaged in unreasonable or unethical conduct in instituting or continuing proceedings calculated to prolong the case unnecessarily or cause unnecessary expense to the other party.

The final part of the bill is part 10. I have already described changes to the Sentencing Act 1995 that will require mandatory jail terms to be imposed in certain circumstances. Clause 173 makes a number of amendments to the Criminal Code to introduce a new chapter titled "Facilitating activities of criminal organisations". This chapter sets up two new offences in the code—proposed section 221E, "Participating in activities of criminal organisation" and proposed section 221F, "Instructing commission of offence for benefit of criminal organisation". It introduces a penalty of two years' imprisonment for the former and 20 years' imprisonment for the latter.

Some minor changes are also being made to the Criminal Investigation Act 2006 to provide police officers with additional search powers if they reasonably suspect someone is a person who is the subject of a control order and is prohibited from possessing certain things. Clause 175 amends the Criminal Investigation (Identifying People) Act 2002 to allow identifying information obtained under that act to be disclosed for the purposes of the Criminal Organisations Control Bill.

Not surprisingly, the final policy initiative of the government implemented in this bill concerns amendments to the criminal property confiscation legislation. Clause 176 amends the Criminal Property Confiscation Act 2000. The first change, which is to section 141, defines any offence committed or suspected of being committed by a person under a control order as a "confiscation offence". This includes the offence provisions in this bill. The second change, which is to section 148, extends the definition of "crime derived" property to cases in which a person who is a member of a declared criminal organisation is convicted of a confiscation offence. The effect of the amendment is that it is presumed that the property the person owns or effectively controls at the time of the commission of the offence is crime derived unless the person establishes to the contrary. Finally, a rewritten section 159(2)(a), in conjunction with changes made to the Misuse of Drugs Act 1981 contained in clause 179 of this bill, introduces a category of drug offences which, if committed by a person who is a member of a declared organisation, enables the person to be declared a drug trafficker.

In closing and summarising the policy intent of this bill, I will quote a few lines from an article the Attorney General wrote for *The West Australian* newspaper on 27 June 2011 —

> Simply put, the Government's sole and primary objective with these laws will be to use every legislative means available to ensure the police and courts are legally equipped to disrupt organised crime networks, fill our jails with people who engage in organised crime and confiscate their property to the point where it will not be profitable for these organisations to openly exist in WA.

The government very much hopes this bill will do just that, but in a way that balances individual civil liberties and the public interest. This is what this bill strives to achieve by paying particular attention to the decisions of Australia's High Court. I will end with another quote from the same article —

> This Government is absolutely committed to these laws because we consider that the public interest demands that people who associate for the purposes of engaging in violence, intimidation and organised criminal activity are disrupted, imprisoned, stripped of their property and forced out of this jurisdiction.
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> We intend to pursue these goals with every legislative and administrative means at our disposal.

The bill I present today represents the legislative response of the government. Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill; it does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party. Nor does this bill by reason of its subject matter introduce a uniform scheme or uniform laws throughout the commonwealth. I commend the bill to the house, and I table a copy of the explanatory memorandum.

[See paper 4347.]

Debate adjourned, pursuant to standing orders.