Parliamentary Committees

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

Report No. 46

Legal Affairs and Community Safety Committee

November 2013

Legal Affairs and Community Safety Committee

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Abbreviations

ASIO	Australian Security Intelligence Organisation
Attorney-General	The Honourable Jarrod Bleijie MP, Attorney-General and Minister for Justice
Bail Act	*Bail Act 1980*
BAQ	Bar Association of Queensland
Bill	Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013
CMC	Crime and Misconduct Commission
Committee	Legal Affairs and Community Safety Committee
Department	Department of Justice and Attorney-General
QLS	Queensland Law Society
QPU	Queensland Police Union of Employees
SLC	Former Scrutiny of Legislation Committee

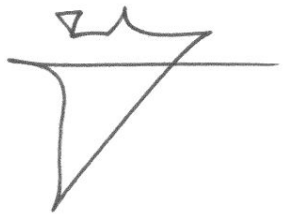
Chair's foreword

This Report presents a summary of the Legal Affairs and Community Safety Committee's (Committee) examination of the Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013 (Bill).

The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the Committee, I thank those individuals and organisations who lodged written submissions on this Bill. I also thank the Committee's Secretariat, and the Department of Justice and Attorney-General.

I commend this Report to the House.



Ian Berry MP

Chair

Recommendations

Recommendation 1 **2**

The Committee recommends the Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013 be passed.

Point of Clarification 1 **6**

The Committee requests the Attorney-General and Minister for Justice to clarify the intent of the Bill – in relation to its application to current and former participants in a criminal organisation.

Point of Clarification 2 **7**

The Committee requests the Attorney-General and Minister for Justice to clarify in his second reading speech – the level of probity checks required in obtaining a licence from the Prostitution Licencing Authority; and confirm there is no requirement to include the prostitution industry in the group of industries being targeted under the Bill.

Point of Clarification 3 **8**

The Committee requests the Attorney-General and Minister for Justice to address the concerns raised by the Bar Association of Queensland in his second reading speech.

Point of Clarification 4 **17**

The Committee requests the Attorney-General and Minister for Justice clarify, for the benefit of the House, the extent of the burden of the public interest test to be applied by the Queensland Commissioner of Police when considering the disclosure of a current or former participant of a criminal organisation's criminal history as provided for in Part 13 of the Bill.

Point of Clarification 5 **18**

The Committee requests the Attorney-General and Minister for Justice clarify, for the benefit of the House, the intended scope of operation of the amendments to the *Police Service Administration Act 1990* – addressing the concerns raised by the Queensland Law Society and confirm whether any inter-jurisdictional problems are foreseen.

Recommendation 2 **23**

The Committee recommends that for the benefit of the House, the Attorney-General and Minister for Justice address in his second reading speech each of the fundamental legislative principle matters in part 3 identified by the Committee, where the matter has not been addressed in the Explanatory Notes tabled with the Bill.

1. Introduction

1.1 Role of the Committee

The Legal Affairs and Community Safety Committee (Committee) is a portfolio committee of the Legislative Assembly which commenced on 18 May 2013 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The Committee's primary areas of responsibility include:

- Department of Justice and Attorney-General;
- Queensland Police Service; and
- Department of Community Safety.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation;
- the application of fundamental legislative principles (FLPs); and
- for subordinate legislation – its lawfulness.

The Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013 (Bill) was introduced into the House and referred to the Committee in the evening sitting session on 19 November 2013. By resolution of the Legislative Assembly, the Committee was required to report to on the Bill to the Legislative Assembly by 10.00am on 21 November 2013.

1.2 Inquiry process

The Committee met on the morning of 20 November 2013 to conduct its initial consideration of the Bill. The Committee invited stakeholders and subscribers to lodge written submissions on the Bill and set a closing time limit of 5:00pm on 20 November 2013.

The Committee received 13 submissions (see Appendix A). The submissions are available for viewing on the Committee's website.

The Committee continued to meet throughout the day and held a public birefing where it received evidence from representatives of the Department of Justice and Attorney-General (Department) and a number of other departments whose portfolio area of responsibility contains legislation which is being amended by the Bill. A copy of the transcript can be accessed on the Committee's website.

Due to the compressed timeframes, it was determined that it would not be feasible to hold a further public briefing with stakeholders, nor would there be an ability to obtain a response to submissions from the Department.

1.3 Policy objectives of the Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013

The objectives of the Bill are outlined in detail in the Explanatory Notes which were tabled in the Legislative Assembly with the Bill.

[1] *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

The primary objective of the Bill, is to combat the threat of criminal motorcycle gangs to public safety and certain licensed industries and authorised activities, through enhanced information-sharing, licensing, interrogatory and correctional powers.

These objectives align with the Queensland Government's commitment to address serious community concern about recent incidents of violent, intimidating and criminal behaviour of members of criminal motorcycle gangs, as well as the infiltration of criminal organisations within legitimate businesses and industries in the community.

1.4 Should the Bill be passed?

Standing order 132(1) requires the Committee to determine whether or not to recommend the Bill be passed.

While the timeframe provided to the Committee in which to consider the Bill has been short, the Committee considers it has been able to suitably discharge it duties and has examined the Bill in accordance with the requirements of section 93 of the *Parliament of Queensland Act 2001.*

The Committee has not conducted an in-depth clause by clause analysis of the Bill; to claim to have done so in the time provided would be disingenuous. The Committee has however relied on the professionalism of the drafters of Office of the Queensland Parliamentary Counsel, in preparing the Bill, to accurately reflect the policy objectives that are being pursued by the Government.

What this report does set out, is a summary of Committee's examination of the Bill – in which it has considered the policy to be given effect by the Bill and the application of fundamental legislative principles to the Bill.

After examination of the Bill, including the policy objectives which it aims to achieve and consideration of the information provided by the Department at the public hearing and from submitters, the Committee makes the following recommendation.

Recommendation 1

The Committee recommends the Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013 be passed.

2. Examination of the Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013

This section of the report discusses the Committee's examination of the major policy objectives being pursued by the Bill.

2.1 Combating the threat of criminal motorcycle gangs

Restrictions on licencing

As highlighted by the Attorney-General in his introductory speech, the Bill contains the second phase of the Newman Government's commitment to tackle organised crime in Queensland. The Bill extends the package of reforms introduced and passed in October 2013 (Phase 1 reforms) which has already been seen to have an immediate impact on the activities of criminal organisations across the State.

The Bill does this by extending the regime where identified participants in criminal organisations are prevented from obtaining or retaining a licence, permit or certificate under a number of industry licencing organisations.

Amendments to regulatory regimes

To achieve this objective, the following Acts (collectively referred to in this report as the 'relevant regulatory Acts') are amended by the Bill:

- *Electrical Safety Act 2002*;
- *Liquor Act 1992*;
- *Queensland Building Services Authority Act 1991;*
- *Racing Act 2002;*
- *Second-hand Dealers and Pawnbrokers Act 2003;*
- *Security Providers Act 1993;*
- *Tow Truck Act 1973;*
- *Weapons Act 1990;*
- *Work Health and Safety Act 2011.*

The Explanatory Notes state:

> *This is the most effective way of excluding participants in criminal organisations and those criminal organisations from participating in particular industries and providing the community with assurance that people authorised to operate in those industries have been subject to rigorous identification and probity requirements. A critical role will be played by the Queensland Police Service in assessing the suitability of licence applicants and licensees to hold a licence.*
>
> *The Acts listed above have been identified as regulating high risk industries or activities; for example, there is a known link between suspected participants of criminal organisations and criminal organisations applying for and being granted licences (including nightclub licences) or permits (including adult entertainment permits) under the* Liquor Act 1992*. Under these*

> *amendments the Commissioner of Police will be tasked with identifying participants in a criminal organisation, as defined in the Criminal Code 1899 (an identified participant).*[2]

As the relevant regulatory Acts have been developed at different stages over the years and the processes for issuing licences or certificates etc contained in the individual Acts differ substantially from Act to Act, it was not possible for the Bill to contain identical amendments to each piece of legislation.

The Committee notes however that insofar as it has been possible, the amendments to each of the relevant regulatory Acts have been drafted to be as consistent as possible, while dovetailing into each of the individual licencing regimes.

The amendments will insert into each of the relevant regulatory Acts a process which will ensure identified participants in criminal gangs are excluded from participating in these industries by enabling the Commissioner of Police to disclose a list of participants in criminal gangs to the relevant administering departments or agencies.

If an applicant or holder of the licence, permit or certificate (a relevant authorisation) is identified as being on the list, the relevant administering department or agency must immediately take action to cancel or revoke the relevant authorisation.

As stated by Mr David Ford of the Department:

> *If they are flagged on a list that the commissioner has provided to the licensing authority then they cannot be licensed. There is actually no discretion on the licensing authorities, as I understand it, in any circumstances.*[3]

The Bill contains appropriate provisions to maintain the confidentiality of criminal intelligence where the Commissioner of Police provides information to the chief executive of the relevant department for each of the relevant regulatory Acts. A similar provision is included in the Bill for proceedings initiated under the *Tattoo Parlours Act 2013*, which was not included in the Phase 1 reforms.

The Explanatory Notes state:

> *It has been identified that the existing provisions, for example, might not cover circumstances where a Court identifies that criminal intelligence has been inadvertently used in proceedings. Although section 57* [of the Tattoo Parlours Act 2013] *applies to QCAT in relation to maintaining criminal intelligence and the Supreme Court in some circumstances, not all provisions in section 57 apply broadly to review proceedings under certain circumstances.*[4]

The *Judicial Review Act 1991* will not apply to the refusal to grant, or the decision to revoke, a relevant authorisation in relation to criminal organisations or identified participants, except to the extent the decision is affected by jurisdictional error. However, where an application is refused or a relevant authorisation is cancelled, the individual will be informed of the decision to the extent that it does not disclose criminal intelligence. A decision to refuse or cancel a relevant authorisation will be subject to merits review by the Court or the Queensland Civil and Administrative Tribunal (QCAT).

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2 *Explanatory Notes*, Criminal Law (Criminal Organisation Disruption) and Other Legislation Amendment Bill 2013, page 2.

3 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, page 6.

4 *Explanatory Notes*, Criminal Law (Criminal Organisation Disruption) and Other Legislation Amendment Bill 2013, page 7.

Issues raised in submissions

In addressing this aspect of the Bill, the Queensland Law Society (QLS) noted the scheme of 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.[5]

The QLS noted that the critical definition of 'participant' was taken from section 60A(3) of the *Criminal Code* and is to be considered in light of information supplied to the relevant regulatory bodies by the Commissioner of Police.

The QLS set out its position as – it understood section 60A(3) operated to identify *current* participants in a criminal organisation and it had a significant concern that there may be misunderstanding of the operation of that definition.

The QLS explained:

> *…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.*[6]

This aspect of the Bill was discussed with the Department at the public hearing as the Committee shared the same concerns as raised by the QLS. In explaining the intent of these amendments, the Department advised the Committee:

The thrust of the legislation is not to penalise people who have, if I can put it this way, turned over a new leaf and want to get on and have a constructive life in the above-ground community, if I can put it that way. It is to simply prevent people who are currently associated with criminal motorcycle gangs from being licensed.[7]

The Committee while satisfied with this response, considers that it is of the utmost importance that the intent of the legislation is clear. To that end, the Committee considers it would be helpful in the ongoing application of the amendments if the Attorney-General could specifically address this issue in his second reading speech.

5 Queensland Law Society, Submission No. 9.

6 Queensland Law Society, Submission No. 9.

7 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, page 7.

Point of Clarification 1

The Committee requests the Attorney-General and Minister for Justice to clarify the intent of the Bill – in relation to its application to current and former participants in a criminal organisation.

The Bar Association of Queensland (BAQ) also addressed the issue on restrictions on licensing in its submission to the Committee:

> *The areas of occupation addressed are: electrical licences; licences under the Liquor Act; adult entertainment permits; contractor's licences and supervisor's licences under the Queensland Building Services Authority Act 1991; certificates under the Racing Act 2002; permits under the Second hand Dealers and Pawnbrokers Act 2003; licences under the Security Providers Act 1993; and licences and certificates under the Tow Truck Act 1973. In broad terms, we understand some of the areas of prohibition to relate to the hydroponic cultivation of drugs, the sale of stolen goods, money laundering through betting and prostitution and extortion. The reasons for including the building industry within the regime are less clear than other areas.*[8]

The Committee similarly sought clarification from the Department on how industries targeted for licence holder checks were arrived at. The Departmental representatives advised the Committee:

> *There is already an existing list under the* Criminal Organisations Act 2009*. There is a definition in schedule 2 of prescribed activities which are applicable to that act as currently stands. Many of these industries are already highlighted as having relevance to criminal organisations, so many were taken from that. In addition, the industries were also identified through, for example, intelligence from police and so on of where they are seeing links between criminal organisations' activities and licensed industries.*
>
> *… These are, by and large, fairly highly regulated industries already which generally have probity requirements or fit-and-proper-person requirements in the licensing processes as they stand.*
>
> *… For example, in the security industry it has been documented over a number of years about links between the security industry in not just Queensland but also other jurisdictions and motorcycle gangs.*[9]

The Committee generally accepted the Department's response however queried why the gaming and prostitution industries were not included in the suite of reforms. The Committee notes an activity that requires a licence under the *Prostitution Act 1999* is a prescribed activity within the meaning of the *Criminal Organisations Act 2009* – the list referred to by the Department at the public hearing.[10]

The Department advised the Committee:

> *Prostitution was considered. The advice from the Police Service was that they felt their legislation was already quite wide in probity checking and they felt they could already look at this type of information within the current requirements. They did not think it needed to specifically also include these amendments to deal with that matter, so that is why it was*

8 Bar Association of Queensland, Submission No. 12.

9 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, page 4.

10 *Criminal Organisations Act 2009,* Schedule 2 - Dictionary.

not included as part of this round of changes. In relation to adult entertainment permits, I will have to defer to my colleague.

…It is under a separate act. Prostitution is administered separately under the Prostitution Act by the Prostitution Licensing Authority.

… consultation with police, who administer that statute, has indicated that their existing provisions were adequate to address the prohibition of criminal organisations and identified participants.[11]

In relation to the gaming industry the Department explained:

..the probity for some of the other gaming legislation, like casinos, similar to prostitution, is very high. So it was not considered necessary to put these provisions in as the existing legislation already allowed the purpose to be achieved.

In relation to other more general gaming licences, for instance gaming machine licences, they already relate to licensed premises now. So you cannot get a gaming machine licence unless you have a liquor licence. So the provisions in relation to a liquor licence, which are subject to these provisions, would therefore automatically extend to the gaming machine licence. But I should just clarify that the legislation is separate. The use of the material provided by police in relation to the applications under the liquor licence is only for those applications under the liquor licence, and those other pieces of legislation affected. So it would not be necessarily permissible to use it in relation to the Gaming Machine Act because the Gaming Machine Act is not subject to these provisions.[12]

The Committee is satisfied with the explanation of the Department insofar as it relates to the gaming industry. With respect to the prostitution licencing regime, the Committee has not had sufficient time to satisfy itself that the probity requirements administered by the Prostitution Licencing Authority currently achieve the same effect as the proposed amendments to the issuing of licenses in the other industries referred to in the Bill.

The Committee seeks the Attorney-General's assurance that the current probity checks applying in the prostitution industry are equivalent, if not stronger, than the restrictions being proposed in other industries under this Bill.

Point of Clarification 2

The Committee requests the Attorney-General and Minister for Justice to clarify in his second reading speech – the level of probity checks required in obtaining a licence from the Prostitution Licencing Authority; and confirm there is no requirement to include the prostitution industry in the group of industries being targeted under the Bill.

The BAQ also raised two significant issues in its submission for the attention of the Committee.

The first issue relates to the potential for economic loss to innocent third parties to occur as a flow on effect to the removal of a licence or approval from a participant in a criminal organisation.

11 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, pages 4-5.

12 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, page 7.

The BAQ submitted:

> *In respect of licensed premises, the Bill has the effect of withdrawing approvals of relevant agreements (eg. lease, franchise agreement, management agreement): see clause 110. This will have an effect on third parties. For example, it appears likely that a lessor of hotel premises which has entered into a lease with a lessee who is a participant in a criminal organisation will have the lease effectively ended. Whether there exists for the lessor a right of legal recourse against the former lessee is unclear. It is unlikely. This and otherwise the unexpected loss of a lessee, licensee or franchisee may cause economic loss to innocent third parties.*[13]

The Committee is concerned that a third party acting in good faith could be put in this position due to the automatic suspension or withdrawal of an approval under the Bill. The Committee seeks clarification from the Attorney-General as to what considerations were given to this aspect of the Bill during its development and what recourse would be available, if any, to an innocent third party who was in the unfortunate position outlined in the submission from the BAQ.

Point of Clarification 3

The Committee requests the Attorney-General and Minister for Justice to address the concerns raised by the Bar Association of Queensland in his second reading speech.

Secondly, the Committee brings the BAQ's analysis of the process undertaken by the Commissioner of Police to the attention of the House to assist members in their consideration of the Bill.

> *Whether a person is a participant in a criminal organisation or whether an organisation is a "criminal organisation" depends, relevantly, on the opinion expressed by the commissioner. There is no mechanism provided for a challenge to that opinion. Although one would expect the opinion to be expressed on the basis of evidence available to the commissioner, there is no process within the Bill by which that evidence, or that opinion, may be challenged.*
>
> *The opinion formed by the commissioner, conveyed to the regulating authority, has far reaching consequences for the person about whom it is expressed.*
>
> *The decision of the regulating authority relating to the licence or permit is "final and conclusive", not subject to judicial review or other challenge except on the ground of jurisdictional error.*
>
> *An error by the commissioner, or by the regulating authority, would be very difficult to challenge. These decisions may relate to a person's livelihood - for example, the holder of a builder's licence may by the decision be deprived of his livelihood.*
>
> *There is potential for injustice, particularly for persons wrongly thought to be participants in a criminal organisation. The word "participant" is of potentially broad compass (see Criminal Code, s 60A), thus increasing the prospect of arbitrary and unintended consequences.*

The Committee has identified a number of further FLP issues relating to these amendments which are set out in Part 3 of the Report.

[13] Bar Association of Queensland, Submission No. 12.

Weapons licensing restrictions

The Explanatory Notes provide that the regulatory framework contained in the *Weapons Act 1990* is different from the other licensing, permit and authorising Acts referred to above. The Explanatory Notes state:

> *Currently, sections 10B and 10C of the Weapons Act 1990 provide that authorised persons must consider various factors when determining whether an applicant is a 'fit and proper' person to hold a weapons licence.*
>
> *Certain factors automatically determine that an individual is not a 'fit and proper' person to hold or continue to hold a licence. These currently include:*
>
> - *the person has been convicted of, or discharged from, custody on sentence after the person has been convicted of any offences relating to the misuse of drugs, using or threatened use of violence, the use, carriage, discharge or possession of a weapon; or*
> - *the person has a domestic violence order, other than a temporary protection order, made against the person.*[14]

The Bill proposes that the *Weapons Act 1990* be amended to include persons who are identified participants in criminal organisations, and bodies that are identified criminal organisations, as defined by the *Criminal Code*, as an additional group of persons to be considered not 'fit and proper' to possess a weapons licence.

The Explanatory Notes anticipate:

> *Excluding members and participants of criminal organisations as persons suitable to possess a weapons licence will reduce the risk of criminal motor cycle gang infiltration into the licensed weapons industry and the possession of weapons generally.*[15]

The Queensland Police Union submitted:

> *The QPU also supports the proposed Weapons Act amendments to prevent CMGs from being eligible to apply for weapons licences, however, the QPU's experiences is such individuals, despite possessing weapons, are frequently not licence holders. The amendments however will close a potential legal source for CMGs to obtain firearms.*[16]

The Committee accepts the QPU's statement of fact that the target participants in criminal organisations, most likely do not possess the appropriate licences – however agrees that this policy objective is a sensible addition to the suite of reforms in tackling the threat of criminals and criminal organisation.

2.2 Amendments to the *Bail Act 1980*

Refusal of Bail

A number of amendments were made to the Bail Act 1980 (Bail Act) in the Phase 1 reforms, including the insertion of a new section 16(3A) which provided that if a defendant is a participant in a criminal

[14] *Explanatory Notes*, Criminal Law (Criminal Organisation Disruption) and Other Legislation Amendment Bill 2013, page 3.

[15] *Explanatory Notes*, Criminal Law (Criminal Organisation Disruption) and Other Legislation Amendment Bill 2013, page 3.

[16] Queensland Police Union, Submission No. 6.

organisation, the court or a police officer must refuse to grant bail unless the defendant can 'show cause' why their detention in custody is not justified.

As set out in page 4 of the Explanatory Notes, further amendments to the Bail Act are contained in the Bill in response to the interpretation, by the judiciary, of the new provisions since they were enacted. The Explanatory Notes provide:

> *In the matter of an application for bail by Michael Kenneth Spence (Supreme Court of Queensland No. 10279 of 2013), Her Honour Justice Wilson held that the time at which an applicant must be a participant in a criminal organisation, if the show cause provision in section 16(3A) is to apply, is at the time of the bail application.*[17]

The Government's intention of how the Bail Act should apply to defendants who are participants in criminal organisations is best summed up by the following paragraphs in the Explanatory Notes to the Bill:

> *If an individual chooses to be part of a criminal organisation then it is reasonable for the legislature to deem that individual an on-going risk to the community in lieu of evidence to the contrary. Further, the fact that an individual has ceased to be a member of the criminal organisation may be a relevant factor for the court to consider, when determining whether the defendant has shown cause as to why they should not be detained. An individual who purports to resign their membership from a criminal organisation or disassociate from the organisation, is best placed to prove that fact.*
>
> *The Bill amends section 16(3A) to ensure that a defendant charged with any offence, must show cause as to why their detention in custody is not justified, where it is alleged the defendant is, or at any time has been, a participant in a criminal organisation.*
>
> *The amendment deems such individuals to be an on-going risk with regards to bail considerations. Requiring the Crown to allege the circumstance of participation rather than prove the circumstance as a fact is consistent with the evidentiary requirements of section 16(3).*[18]

The BAQ submitted that in relation to the widening of the application of section 16(3A), it could be considered to be contrary to one of the primary aims of the recent legislative measures, that is, to cause members of criminal organisations to disassociate.[19]

The QLS submitted to the Committee the rewording of section 16(3) of the Bail Act was too broad:

> *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.*[20]

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17 *Explanatory Notes*, Criminal Law (Criminal Organisation Disruption) and Other Legislation Amendment Bill 2013, page 4.

18 *Explanatory Notes*, Criminal Law (Criminal Organisation Disruption) and Other Legislation Amendment Bill 2013, page 4.

19 Bar Association of Queensland, Submission No. 12.

20 Queensland Law Society, Submission No. 9.

The QLS went on to suggest an alternative as follows:

> *…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."*[21]

This suggestion is not consistent with the Government's strong stance on refusal of bail to participants in criminal organisations.

The QLS also raised the following concern:

> *…the presumption against bail applies on being charged with all indictable, simple or regulatory offences under section 16(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 section 16(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.*[22]

The Committee notes this aspect of the operation of section 16(3C) remains unchanged from the provision as it currently exists.

At the public hearing, the Committee sought clarification from the Department on the meaning of the word 'alleged' as used in section 16(3A). Clarification was specifically sought as to whether there was a requirement for reasonable grounds for that belief or whether, in layman's terms, a mere *allegation* was all that is required that a defendant is, or has at any time been, a participant of a criminal organisation.

The Department advised:

> *The redrafting to require the Crown to allege is consistent with how section 16 of the Bail Act currently operates with regard to show-cause situations. Section 16(3) of the Bail Act, which has been in place for a very long time, sets out the circumstances when a person is in a show-cause situation for bail; for example, if the person is charged with an indictable offence in the course of committing which the defendant is alleged to have used or threatened to use a firearm or, for example, where the person is charged with an indictable offence and it is alleged that they committed that whilst they were at large, whether or not on bail. So the redrafting of (3A) has been redrafted to be consistent with the current approach in the Bail Act when a person is in a show-cause situation. The fact is that the Crown may allege this, but the Crown still has to satisfy the court that it is not just a baseless allegation. So it would operate as section 16(3) currently operates, where certain evidence would be put to the court accompanying that allegation.*[23]

The Committee is satisfied with the response provided by the Department.

The Department also advised that section 16(3A) commenced operation on 17 October 2013. It is a provision which regulates the grant of bail and as a procedural law appropriately operates retrospectively. However given subsection (3A) has the effect of removing the presumption for bail

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21 Queensland Law Society, Submission No. 9.

22 Queensland Law Society, Submission No. 9.

23 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, page 8.

the operation of the subsection will be clarified in the Bill as applying to offences committed before 17 October 2013.

Chief Magistrate's practice direction

The Bill also contains amendments to the Bail Act to assist the Chief Magistrate to ensure that all contested bail applications for defendants in a show-cause situation owing to their alleged connection with a criminal organisation can be heard in the Brisbane Magistrates Court.

The benefits of the proposed amendments to the *Bail Act 1980* were also highlighted to the Committee at the public hearing where it was stated '*these amendments will assist greatly in the speedy resolution of cases and the management of the court's workload, particularly Magistrates Court proceedings in relation to criminal organisations*'.[24]

The Department advised the Committee that consultation occurred with the Chief Magistrate in relation to this provision and it was a provision that the Chief Magistrate requested.

The Committee has identified a number of further FLP issues relating to these amendments which are set out in Part 3 of the Report.

2.3 Enhancing the Crime and Misconduct Commission

The Bill amends the *Crime and Misconduct Act 2001* (CM Act) to enhance the ability of the Crime and Misconduct Commission (CMC) to effectively deal with criminal organisations.

As stated in the Explanatory Notes,[25] as part of the Phase 1 reforms the CM Act was amended to enhance the ability of the CMC to effectively deal with criminal organisations. In particular, additional powers were given to the CMC to allow hearings to be conducted to gather intelligence and to investigate or hold hearings to respond to an immediate threat to public safety.

Further, as a result of the Phase 1 amendments, a participant in a criminal organisation can no longer rely upon a threat to his or her personal safety or property to refuse to answer a question or produce a document at a hearing that involves a criminal organisation. The punishment for contempt was also strengthened to provide for mandatory minimum terms of imprisonment for a second or third contempt.

The amendments in the Bill complement and clarify the expanded powers of the CMC to hold intelligence hearings about criminal organisations; expand the definition of former participant in a criminal organisation to include a person who was a participant in a criminal organisation in the preceding two years; provide for confidentiality of CMC operations and investigations; and include safeguards to ensure no unfairness is caused to a respondent who is a defendant in later criminal proceedings as a result of the use in a confiscation proceeding against the respondent under the *Criminal Proceeds Confiscation Act 2002* of any compelled self-incriminating evidence given by the respondent in a CMC hearing or investigation.

At the public hearing, the Committee sought information from the Department as to how the timeframe of two years was arrive at in relation to the definition of 'participant'. The Department advised the Committee:

> *The two-year period basically, as you recall in the October amendments, gave the CMC the power to actually conduct hearings for the purpose of intelligence operations into criminal*

[24] *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, page 3.

[25] *Explanatory Notes*, Criminal Law (Criminal Organisation Disruption) and Other Legislation Amendment Bill 2013, pages 4-5.

> *organisations, and at that particular point it was just limited to intelligence hearings in relation to criminal organisations or participants and it was obviously at a particular point in time. Once the amendments were passed there was further consideration and representations made by the CMC, and government made a decision to take that time period back to two years. So that is a policy decision that government has made.*[26]

The Department further clarified the operation of the amendments to the CM Act as follows:

> *Basically, in October we gave the CMC those new powers with respect to conducting intelligence operations with respect to criminal organisations. Some of the amendments that we are doing here are actually giving the CMC—those powers are very much limited to conducting the actual hearings, but these extra provisions, for example, enable them to issue notices to produce in relation to those sorts of matters. So they are existing powers which were not part of that first tranche of amendments, so they are adding on to that. The amendments are also going back the two years to the definition of 'participant', as we talked about previously, and I guess also to put in some safeguards in relation to ensuring that a defendant in a criminal proceeding down the track is not prejudiced as a result of the use of compelled evidence that is obtained from a CMC hearing, but now can be used in confiscation proceedings under the amendments that were made to section 197 in the October. That is basically what they are chosen to do.*[27]

The Committee notes the QPU's support for the amendments where it stated in its submission to the Committee:

> *The QPU believes it is appropriate to extend the powers of the Crime and Misconduct Commission to conduct closed investigative hearings and operations in relation to the activities of CMGs. I note that similar amendments in relation to paedophiles resulted in a significant increase in the detection of that type of offending.*[28]

The Committee has identified a number of fundamental legislative principle issues relating to the amendments to the CM Act which are addressed in Part 3 of this Report. The Committee has also set out the increases in penalties to a number of provisions of that Act for the attention of the House.

2.4 Management of both remand and sentenced prisoners who have been identified as a participant in a criminal organisation

The Bill amends the *Corrective Services Act 2006* to enable Queensland Corrective Services to implement a restricted management regime for participants in criminal organisations in Queensland prisons.

The Bill will enable Queensland Corrective Services to:

- segregate a remand or sentenced prisoner and apply a restrictive management regime including limiting that prisoner's entitlements if informed by the Commissioner of the Queensland Police Service that the prisoner is a participant in a criminal organisation (clause 14, new section 65A);
- enable that segregation and a restricted management regime remain in place until such time that the prisoner is no longer a participant in a criminal organisation (clause 14, new section 65A);

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26 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, page 11.

27 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, page 15.

28 Queensland Police Union, Submission No. 6.

- ensure all prisoners who are subject to the restricted management regime will receive high or maximum classification (clause 11, amended section 12);
- ensure regular medical checks of prisoners who are subject to the restricted management regime (clause 14, new section 65C);
- enable the exchange of information and intelligence between QPS and QCS (clause 17, new section 344AA); and
- apply electronic monitoring, movement restrictions and drug testing requirements to offenders under supervision in the community who are members of a criminal organisation (clause 16, new section 267A).

It is generally understood that these amendments are intended to give effect to the Government's commitment to subject identified participants in criminal motorcycle gangs to strict sanctions such as restricted visiting hours, increased drug testing and limited opportunities for recreation.[29]

In relation to the proposed changes to the *Corrective Services Act 2006,* the Bar Association outlined the following concerns in their submission to the Committee[30]:

> *Part 3 (clause 10 onwards) compels the chief executive to make a criminal organisation segregation order (a "COSO") for a prisoner if the commissioner advises the chief executive that the prisoner is an identified participant in a criminal organisation. The Bar Association notes that there is vested in the chief executive a broad discretion, which may or may not involve (for example) a particular level of confinement of the prisoner. The COSO may include directions about the extent to which the prisoner is to be segregated from other prisoners and the extent to which the prisoner is to receive privileges. For many years Corrective Services have managed the conditions of prisoners. The case for conditions in prisons to be made more difficult for prisoners is one which should be made out.*
>
> *Clause 16 inserts s 267A into the Corrective Services Act 2006. It applies to an offender who is an identified participant in a criminal organisation and subject to a parole order or community based order. It permits directions to be made by the chief executive through a corrective services officer to the offender to remain at a stated place for a stated period; to wear a monitoring device; to permit the installation of a device or equipment at the place where the offender resides. There is no review except for jurisdictional error: cl 18, inserting s 350B. Like provisions have existed for some time concerning sexual offenders. The provisions constitute a tightening of the supervision of participants in criminal organisations who are on parole or community based orders.*

In their submission[31], the Prisoners' Legal Service expressed the view that "in relation to the Corrective Services Act changes, we believe that rehabilitation must be central to defining prison conditions."

At the public briefing, the Committee raised various issues for clarification regarding these amendments. In particular, the anticipated cost of the amendments was raised. In this regard, the

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29 *Outlaw motorcycle gang members to be sent to bikie-only prison at Woodford Correctional Centre as part of Newman Government's push against bikies*, http://www.couriermail.com.au/news/queensland/outlaw-motorcycle-gang-members-to-be-sent-to-bikieonly-prison-at-woodford-correctional-centre-as-part-of-newman-government8217s-push-against-bikies/story-fnihsrf2-1226739885791, accessed 20 November 2013.

30 Queensland Bar Association, Submission No. 12.

31 Prisoners' Legal Service, Submission No. 4.

Department confirmed that consistent with the statement in the Explanatory Notes, where possible, costs would be absorbed within existing budgets.[32]

In addition, the requirement under Clause 14, new section 65C that prisoners who are subject to the restricted management regime be subjected to "regular medical checks" was queried. In response, the Department advised the Committee:

> *We have full-time health staff in every prison and we have visiting medical officers who regularly check on the wellbeing of prisoners. The bill does not prescribe the manner in which the doctor will conduct an assessment. That is a matter for the doctor, but that provision replicates other existing provisions in the Corrective Services Act where doctors conduct health checks of the wellbeing of prisoners who are subject to segregation, so it mirrors existing provisions.* [33]

The Committee has identified a number of fundamental legislative principle issues relating to these amendments which are addressed in Part 3 of this Report.

2.5 Amendments to the *Transport Planning and Coordination Act 1994*

The Explanatory Notes state the Department of Transport and Main Roads (DTMR) currently holds information under a number of transport Acts, including '*…for example, details about vehicle registrations, the holders of driver licences and authorisations granted by the department to allow people to undertake certain activities (e.g. drive public passenger transport vehicles or conduct vehicle safety inspections)'.*[34]

The Bill proposes amendments to the Transport Planning and Coordination Act 1994 '…to further enhance community safety by providing that the chief executive of the Department of Transport and Main Roads can give to the head of an approved agency any or all information held in a database maintained by the department'.[35]

The Explanatory Notes add that this information can be given '*for enforcement purposes*' and specify that an 'approved agency' must be '*an entity established under a law of the Commonwealth or a State and must be prescribed in a regulation*'.[36] The Bill amends the *Transport Planning and Coordination Regulation 2005* to prescribe the Australian Security Intelligence Organisation (ASIO) as an 'approved agency'.[37]

The Attorney-General commented further on the amendments, specifically addressing further ramifications for ASIO:

> *The bill will allow the Department of Transport and Main Roads to release information it holds to ASIO including details about vehicle registrations and about the holders of driver's licences, including photographs of those licence holders. ASIO's access to and use of the information will be subject to a memorandum of understanding with the Department of Transport and Main Roads and the rigorous controls that govern ASIO at the federal level.*

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32 Letter from the Department of Justice and Attorney-General, 20 November 2013, page 2.

33 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, page 13.

34 *Explanatory Notes*, Criminal Law (Criminal Organisation Disruption) and Other Legislation Amendment Bill 2013, page 6.

35 *Record of Proceedings (Hansard)*, 19 November 2013, page 3988.

36 *Explanatory Notes*, Criminal Law (Criminal Organisation Disruption) and Other Legislation Amendment Bill 2013, page 6.

37 *Explanatory Notes*, Criminal Law (Criminal Organisation Disruption) and Other Legislation Amendment Bill 2013, pages 6-7.

> *Providing access to this information will assist ASIO not only in its preparations for the G20 summit but also in its ongoing role of monitoring and protecting national security.*[38]

The Explanatory Notes state that *'ASIO has identified that its current limited ability to access this information is an intelligence gap, the significance of which has been highlighted in its preparations for the G20 Summit in Brisbane next year'*.[39]

The Committee acknowledges the community safety goals of the proposed amendments, however notes there are potentially significant fundamental legislative principle issues relating to these amendments. The Committee has addressed the FLP issues in more detail in Part 3 of this Report.

2.6 Disclosure of criminal history by the Police Commissioner

In his introductory speech, the Attorney-General briefly spoke of the Bill's proposed amendments relating to the *Police Service Administration Act 1990* (the PSA Act):

> *The Police Commissioner will be given discretion to disclose to an entity the criminal history of a current or former participant in a criminal organisation where the commissioner is satisfied it is in the public interest.*[40]

The Bill's Explanatory Notes do not expand on this policy objective or the reason for these proposed amendments. The Committee understands the Police Commissioner is being given a discretion to release criminal history information to address concerns about some of the misinformation appearing in the public domain about the criminal history of members of criminal gangs.

At the public briefing, the Committee noted the Bill's amendments to the PSA Act include the insertion of provisions pertaining to the disclosure of criminal histories relating to criminal organisations. Specifically, the Committee observed the Bill's inclusion of a power for the Commissioner of Police to disclose a criminal history to an entity, as outlined above.[41]

In response to the Committee's query as to how the Commissioner of Police is to determine when such a disclosure is in the public interest, the Department advised: '*That really will be a matter for the commissioner to actually take advice at the time when he is making his decision having regard to the general law around the determination of public interest in a particular case, but that will be a matter that he will have to consider on the particular case that is presented before him*'.[42]

In response to further Committee questioning, the Department confirmed the Bill offered no guidance or criteria as to how such a determination is to be made.[43]

The Committee notes the powers granted to the Commissioner under the Bill are non-delegable;[44] this gives the Committee some assurance that they will not any way be used in a frivolous manner, however the lack of criteria to guide the Commissioner is a concern to the Committee.

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38 *Record of Proceedings (Hansard)*, 19 November 2013, page 3988.

39 *Explanatory Notes*, Criminal Law (Criminal Organisation Disruption) and Other Legislation Amendment Bill 2013, page 7.

40 *Record of Proceedings (Hansard)*, 19 November 2013, page 3988.

41 See proposed section 10.2AAB(1), as set out in clause 123 of the Bill

42 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, page 5.

43 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, page 5.

44 See proposed section 10.2AAD, as set out in clause 123 of the Bill.

Point of Clarification 4

The Committee requests the Attorney-General and Minister for Justice clarify, for the benefit of the House, the extent of the burden of the public interest test to be applied by the Queensland Commissioner of Police when considering the disclosure of a current or former participant of a criminal organisation's criminal history as provided for in Part 13 of the Bill.

The Committee notes the Commissioner's power to disclose a relevant criminal history is to '*any entity'* and further notes that no definition of 'entity' is contained in amendments to the PSA Act.

The Committee raised this issue with the Department at the public hearing and was advised the intention for 'entity' was to be interpreted broadly and noted that the word, as defined in the *Acts Interpretation Act 1954* includes a person and an unincorporated body. The Committee sought to clarify whether entity would include an entity that was outside the Queensland jurisdiction.

The Department undertook to follow this aspect up with the Queensland Police Service and provided further information to the Committee following the hearing, by way of letter from the Director-General, Mr John Sosso. Mr Sosso advised the Committee:

> *The Government is of the view that the Commissioner would be able to disclose under new section 10.2AAB to an interstate or overseas person or body if satisfied the disclosure in the public interest.*
>
> *New section 10.2AAC allows the Commissioner to give a written authorisation to the entity to publish the information or otherwise disclose it. Depending on the Commissioner's written authorisation publication or disclosure by the first entity could include interstate or overseas.*[45]

At the public briefing, the Committee observed further proposed amendments to the PSA Act, namely the inclusion of provisions relating to the authorisation to publish or further disclose a criminal history.[46] In relation to these amendments, the Committee sought guidance on how an entity would be able to apply to the Commissioner for authority to publish or further disclose a criminal history, for example, by way of completion of a written form.[47]

In its written response following public briefing, Mr Sosso provided further detail on new section 10.2AAC:

> *[it] allows the Commissioner to give a written authorisation to the first entity to publish the information or otherwise disclose it if satisfied in the public interest. This authorisation is not dependent on an application by the first entity to the Commissioner. Depending on the circumstances of the particular case the Commissioner may choose to give such authorisation at the time he discloses to the first entity. Otherwise, the manner (i.e. in writing or orally) the first entity would seek the authorisation to publish or otherwise disclose will depend on the particular circumstances of the case.*[48]

In its written submission to the Committee, the QLS shared the Committee's interest is the meaning of the term 'entity', expressing uncertainty as to what entities are expected to receive disclosures of

45 Letter from the Department of Justice and Attorney-General, 20 November 2013.

46 See proposed section 10.2AAC, as set out in clause 123 of the Bill.

47 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, page 6.

48 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, page 6.

criminal histories, suggesting that the Attorney-General clarify the types of intended entities, and that this be made clear in the legislation.[49]

If it is intended that the police commissioner can release the criminal histories of individuals to entities, such as news media, the QLS stated it:

> *…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.*[50]

Additionally, the QLS expressed concern 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*.[51]

The QLS submitted these issues should be addressed in the legislation.[52]

Point of Clarification 5

The Committee requests the Attorney-General and Minister for Justice clarify, for the benefit of the House, the intended scope of operation of the amendments to the *Police Service Administration Act 1990* – addressing the concerns raised by the Queensland Law Society and confirm whether any inter-jurisdictional problems are foreseen.

2.7 Use of video and audio links in criminal proceedings

In his introductory speech, the Attorney-General identified the following proposed amendments to existing legislation, as set out in the Bill:

- amendments to the *Justices Act 1886*, the *Bail Act 1980*, the *Penalties and Sentences Act 1992* and the *Criminal Code* to enhance the ability of the courts to use audio visual technology; and
- consequential technical amendments to the *District Court of Queensland Act 1967* and the *Supreme Court of Queensland Act 1991*.

The Bill's Explanatory Notes provide further detail on those amendments seeking to '…enable an increase in the courts' use of video and audio links for the appearance of defendants, with the aim of enhancing the orderly and expeditious conduct of proceedings':

> *The Bill amends the Justices Act 1886 to allow for 'audio link facilities' in addition to 'video link facilities' to be used to conduct criminal proceedings in the Magistrates Court.*

49 Queensland Law Society, Submission No. 9.
50 Queensland Law Society, Submission No. 9.
51 Queensland Law Society, Submission No. 9.
52 Queensland Law Society, Submission No. 9.

> *The Bill amends the Justices Act 1886, the Penalties and Sentences Act 1992 and the Criminal Code to remove the requirement that parties consent to the use of video or audio links in certain criminal proceedings. The discretion will lie with the court to order the use of such links where it is considered to be in the interests of justice to do so. Consequential amendments are made to the Supreme Court of Queensland Act 1991 and the District Court of Queensland Act 1967.*[53]

At the public hearing, Mr David Ford, stated that the bill 'enables video and audio links in the Magistrates Courts to be used across the various districts of the court for all proceedings, thereby enabling greater use of links in remote and regional areas'.[54] The Explanatory Notes add that these '…amendments mean that cases can be dealt with more readily than would otherwise be the case'.[55]

Mr Ford advised the Committee that the amendments:

> *…consolidate the primary provisions on remote technology use into one part of the Justices Act for magistrates and allow for links to be used across the different districts of the Magistrates Court for all types of proceedings, without expressly allowing that a magistrate in Brisbane cannot determine a case in Cairns by video link unless it is a bail proceeding only.*[56]

In its written submission to the Committee, the QLS expressed concern 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'*.[57] The QLS warned that, if the legislation is amended without the appropriate infrastructure in place to deal with *video* link proceedings, disruption and delays may result.[58]

On the other hand, the QLS supported the Bill's 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*'.[59]

The QLS's written submission identified the circumstances where it considers, firstly, there is significant value in ensuring a person is able to interact with his or her lawyer and, secondly, a prisoner must be physically present in court – namely, for *trials* and for *sentencing*.[60] It also claimed the community would expect the defendant to 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*'.[61] The QLS expressed significant concerns with the Government's audio-visual technology proposal and argued

53 *Explanatory Notes*, Criminal Law (Criminal Organisation Disruption) and Other Legislation Amendment Bill 2013, page 6.
54 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, page 3.
55 *Explanatory Notes*, Criminal Law (Criminal Organisation Disruption) and Other Legislation Amendment Bill 2013, page 6.
56 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, page 3.
57 Queensland Law Society, Submission No. 9.
58 Queensland Law Society, Submission No. 9.
59 Queensland Law Society, Submission No. 9.
60 Queensland Law Society, Submission No. 9.
61 Queensland Law Society, Submission No. 9.

that, at the very least, '*the defendant should have the ability to elect to be at court in person for sentencing in District Court and Supreme Court matters*'.[62]

The QLS cited New Zealand legislation[63] which sets out criteria for allowing the use of audio-visual technology in criminal proceedings, such as requirements that consideration 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.[64]

The Committee notes a number of fundamental legislative principle issues relating to these amendments, which are set out in Part 3 of this Report.

These potentially significant issues pertain to the Bill's inclusion of powers for a court to order proceedings to be held by audio or video link, and the removal of the consent requirement.

2.8 Appointment of part time commissioners to the CMC

The Bill contains a new provision to be inserted into the CM Act. Proposed section 237A is intended to facilitate the ongoing operations of the CMC by allowing acting part-time commissioners to be appointed by the Governor in Council.

Substantive part-time commissioners are currently appointed by the Governor in Council set out in section 230 of the CM Act, however this follows a process whereby under section 227(2) of the CM Act, the Minister must advertise nationally for applications from suitably qualified persons to be considered for selection as part-time commissioners (other than the civil liberties commissioner who is one of the three part-time commissioners).

In relation to the civil liberties commissioner, the Minister must ask the Bar Association of Queensland and the Queensland Law Society to each nominate two person having appropriate qualifications for appointment as the civil liberties commissioner.

Section 228 of the CM Act states that before nominating a person for appointment as a (part-time) commissioner, the Minister must consult with the Parliamentary Crime and Misconduct Committee (PCMC) and the chairperson of the CMC. The Minister may only make the nomination to the Governor in Council if the nomination has the bipartisan support of the PCMC.

The proposed provision mirrors the existing of the CM Act which relates to the appointment of an acting chairperson of the CMC, which removes the application of section 227 (advertising) and section 228 (consultation) from the appointment process.

The Department advised the Committee at the public hearing 'that the decision has been made that the part-time commissioner provision should align with the provisions for the chairperson of the CMC. These do permit an acting chair of the CMC to be appointed in the absence of advertising and consultation.'[65]

The PCMC submitted the following to the Committee for consideration:

> *Currently, the CMC has an Acting Chairperson and only two, of a possible four, part-time Commissioners. Mrs Judith Bell's term as a part-time commissioner expired in May 2013 and Mr Philip Nase's term expired in early November 2013. The CM Act requires a quorum of three commissioners, including the Chairperson, to conduct an ordinary commission*

62 Queensland Law Society, Submission No. 9.

63 See section 6 of the New Zealand *Courts (Remote Participation) Act 2010*

64 Queensland Law Society, Submission No. 9.

65 *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, page 10.

> *meeting and four commissioners including the Chairperson to consider a CMC report. The CMC is unable to consider a CMC report at this time as it lacks the required number of commissioners to constitute a quorum. In this regard the Committee brings your attention to recommendation 36 of the former Parliamentary Crime and Misconduct Committee in its Report 86, Three Yearly Review of the Crime and Misconduct Commission.*
>
> *The Committee understands that in some cases, the urgency of a situation requires immediate action to appoint an Acting Chairperson. The Committee welcomes the flexibility of the legislation in this regard. However, the Committee considers it is appropriate that the Attorney-General consult with the Committee on the proposed appointment of Acting Chairpersons and acting part-time commissioners.*[66]

Recommendation 36 of the former PCMC's three yearly review states:

> *The [PCMC] recommends that the Attorney-General and Minister for Justice review the recruitment and selection process for Commissioners to ensure that sufficient time is allocated to allow a process to run its course, including factoring in an appropriate timeframe for seeking bipartisan support of the Committee.*[67]

The PCMC went so far as to recommend to the Committee that the proposed section be amended to require consultation with the PCMC prior to the appointment of a person as acting chairperson of the CMC or as a part-time commissioner of the CMC.

In relation to the requirement to consult on the appointment of the civil liberties commissioner only, the QLS submitted:

> *We are concerned that the proposed s237 A seeks to omit this consultation process. It is important that we continue to be consulted on acting part-time civil liberties commissioner appointments. The need to ensure appropriate consultation is not diminished by virtue of the appointment being only in an acting capacity. This is particularly relevant as there is no time limit for which a person can serve as an acting part-time commissioner. Similarly, there is no requirement to consult with the Parliamentary Crime and Misconduct Committee (or even the Chair of the Committee), and no requirement for bipartisan support, which is required by s228 of the Crime and Misconduct Act 2000.*
>
> *We recommend that either appointments under s237A are limited to one month in duration with no reappointment or the full process in both s227 and 228 be made applicable to these appointments.*[68]

The Committee accepts in some cases, the urgency of a situation requires immediate action to appoint an acting commissioner of the CMC, either the chairperson or part-time commissioner. The Committee also accepts that there is a need for consistency in the appointment processes undertaken.

In reviewing the proposed amendment, the Committee accepts that section 227 (advertising) need not apply to acting appointments as the need for urgency in the appointment process would most likely outweigh the need to go through the full advertising process.

The Committee does not consider there is a need for the nomination to the Governor in Council of an acting commissioner to receive the bipartisan support of the PCMC, as is the case for substantive appointments. However the Committee considers it would not be unreasonable to require the

66 Parliamentary Crime and Misconduct Committee, Submission No. 10.

67 Parliamentary Crime and Misconduct Committee, Report 86, *Three Yearly Review of the Crime and Misconduct Commission*, May 2012, page 170.

68 Queensland Law Society, Submission No. 9.

Minister to consult with the Parliament's dedicated oversight Committee, which is charged with monitoring and reviewing the performance of the CMC, on the appointment of acting commissioners.

Similarly, the Committee sees some merit in retaining an aspect of consultation with the BAQ and the QLS in the case of the appointment of an acting civil liberties part-time commissioner. In relation to the duration of acting appointments, the Committee considers the provisions of the *Acts Interpretation Act 1954,* which limits acting appointments to one year appropriately applies to the acting commissioners of the CMC.

The Committee therefore brings to the attention of the Attorney-General, the recommendations of the PCMC and the QLS in relation to retaining a level of consultancy in the appointment process of acting commissioners of the CMC. The Committee notes amendments to existing section 237 and proposed section 237A can be easily made to achieve both consistency in the appointment processes appropriate levels of consultation.

3. Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The Explanatory Notes[69] provide, in relation to the Bill's consistency with fundamental legislative principles, as follows:

> *As discussed in further detail below, the Bill may be considered to contravene fundamental legislative principles (FLP) in a number of respects. However, the measures are considered justified as an appropriate and effective way of dealing with serious issues associated with the infiltration of criminal organisations, particularly CMCGs, within legitimate businesses and industries in the community, as well as address unacceptable violent, intimidating and antisocial behaviour the community has been subjected to in recent times by members of CMCGs.*

The Committee refers the House to the matters raised in the Explanatory Notes. In the limited time available, the Committee has also attempted to examine the application of the fundamental legislative principles to the Bill.

The Committee brings the following matters to the attention of the House and recommends the Attorney address each of the matters raised in his second reading speech, where the matter has not been identified in the FLP section of the Explanatory Notes.

Recommendation 2

The Committee recommends that for the benefit of the House, the Attorney-General and Minister for Justice address in his second reading speech each of the fundamental legislative principle matters in part 3 identified by the Committee, where the matter has not been addressed in the Explanatory Notes tabled with the Bill.

3.1 Combating the threat of criminal motorcycle gangs

The Bill amends a number of Acts to prevent identified participants in criminal organisations (as defined at section 60A(3) of the *Criminal Code*) and criminal organisations (as defined at section 1 of the *Criminal Code*) from obtaining or retaining a licence, permit or other authority to work in industries and activities that have been deemed to be 'high risk'.

The identified 'high risk' industries and activities include: electrical safety, night clubs, adult entertainment premises, building contractors, racing, second-hand dealers and pawnbrokers, security guards, tow truck operators and weapons licences.

[69] *Explanatory Notes*, Criminal Law (Criminal Organisation Disruption) and Other Legislation Amendment Bill 2013, page 7.

In this section, the term 'decision-maker' refers to the individual or body who makes decisions about licences, certificates, authorities etc., and includes the chief executive, regulators and commissioners.

The amendments to the above Acts raise the following potential FLP issues:

Section 4(2)(a) *Legislative Standards Act 1992* - Does the bill have sufficient regard to the rights and liberties of individuals?

The amendments to the above Acts prevent a person who is identified by the Police Commissioner as being a 'participant in a criminal organisation' or a 'criminal organisation' from working in licensed occupations considered to be high risk.

These provisions have the potential to impact on the right of individuals to paid employment. The Explanatory Notes (p.8) contend that these provisions are justified *due to the serious issues associated with the infiltration of criminal organisations*. The Explanatory Notes (p.2) also state that the amendments provide the community with assurance that people authorised to operate in these industries have been subject to rigorous identification and probity requirements.

The issue of whether the amendments strike an appropriate balance between protecting the public and an individual's right to gainful employment is brought to the attention of the House.

Section 4(3)(a) *Legislative Standards Act 1992* - Are rights, obligations and liberties of individuals dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?

The former Scrutiny of Legislation Committee (SLC) considered that to provide practical rights of appeal or review, and consistent with having sufficient regard to the rights and liberties of individuals, a decision maker should be required to give reasons for a decision, together with information on review or appeal rights.

The amendments in the Bill limit the information to be provided to an applicant whose application for an authority (i.e. a licence or certificate) is refused, or to a person who has had their authority suspended or cancelled because they have been identified either as a 'participant in a criminal organisation' or as a 'criminal organisation'. [70]

For example, the amendment to section 64 of the *Electrical Safety Act 2002*, section 27B of the *Acts Interpretation Act 1954 (*which specifies that a decision must set out the findings on material questions of fact and refer to the evidence or other material on which the findings were based) does not apply to the information notice to the extent to which the decision is the result of advice given by the Police Commissioner to the regulator under section 65B of the *Electrical Safety Act 2002*.

The Explanatory Notes (p.3) advise that an appellant will be informed of the decision, but only to the extent that it does not disclose criminal intelligence. It may be that an affected person is never fully informed of the reasons why their application was refused or why they had their authority suspended or cancelled, nor why they have been identified as a 'participant in a criminal organisation' or as a 'criminal organisation'.

[70] For example, clauses 61, 66, 133, 142, 146, 147, 162, 163, 176, 178, 179, 194, 196, 197, 201, 226

Section 4(3)(b) *Legislative Standards Act 1992* - Is the bill consistent with principles of natural justice and procedural fairness?

The amendments provide for QCAT reviews of decisions about licences and certificates to take place without the affected person being provided with the criminal intelligence information that was used to make the decision (i.e. the information used to identify a person as a 'participant in a criminal organisation') and with closed hearings (in the absence of the parties to the review).[71]

These provisions are arguably contrary to natural justice and procedural fairness, which provide that information made available to a disciplinary body that is adverse to a person must be disclosed to that person and the person permitted to respond to the matters raised in the information.

The Explanatory Notes (p.8) acknowledge that arguably these provisions breach the natural justice principles of procedural fairness under section 4(3)(b) of the LSA. However, the Explanatory Notes state that these *safeguards are procedurally necessary to ensure that an applicant for review does not inadvertently obtain confidential criminal intelligence*. The Explanatory Notes contend that natural justice is still afforded to an affected person as they are able to proceed with a full merits review.

The question of whether preventing the disclosure of confidential criminal intelligence justifies this potential breach of natural justice is brought to the attention of the House.

The amendments also provide for criminal intelligence evidence to be introduced by way of an affidavit of a police officer of at least the rank of superintendant.[72] The SLC expressed the view that provisions authorising evidence to be admitted by a certificate or other way that avoids normal common law requirements of direct evidence from a witness and cross-examination should be limited to technical and non-contentious issues.

It is arguable that the types of evidence provided at these QCAT hearings is more than merely evidence of a technical or non-contentious nature.

Section 4(3)(a) *Legislative Standards Act 1992* - Are rights, obligations and liberties of individuals dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?

The amendments provide that the chief executive must cancel an authority holder's authority if the Police Commissioner advises the decision maker that the authority holder is either an 'identified participant in a criminal organisation' or is a 'criminal organisation'.[73] The Bill makes no provision for a 'show cause' process before the decision to cancel the authority is taken.

The SLC considered that a suspended person is arguably denied natural justice when there is no opportunity to make representations before an immediate suspension is put in place. The principles of natural justice dictate that a person has a right to be made aware of an allegation made against them. It is also a principle of natural justice that something should not be done to a person that will deprive the person of some right, interest, or legitimate expectation of benefit, without the person being given an adequate opportunity to present their case to the decision-maker[74].

The Explanatory Notes (page 8) state that aside from being *justified due to the seriousness of the issues associated with the infiltration of criminal organisations,* the amendments provide for a full merits review process by QCAT. The Explanatory Notes (p.8) also state that the immediate

71 For example, clause 68, 91, 135, 153, 180, 227

72 For example, clause 227

73 For example, clauses 109, 110, 133, 146, 165, 178

74 *Alert Digest No.9 of 2000*, page 6.

cancellation is limited to specific circumstances and is considered necessary to prevent the operation of participants in criminal organisations.

The power to cancel an authority could have a significant impact on the holder's ability to earn a living. While an authority holder may request QCAT review the cancellation decision, the fact that (for decisions under the *Tow Truck Act*) QCAT cannot stay the operation of the chief executive's decision means that an authority holder, who may be subsequently found not to be an identified participant in a criminal organisation or a criminal organisation, will still have had their authority to operate or work cancelled until QCAT conducts the review.

Administrative power - Section 4(3)(a) *Legislative Standards Act 1992* - Are rights, obligations and liberties of individuals dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?

The amendments remove current mechanisms for seeking an internal review of the decision maker's decision about a licence or certificate.[75] The amendments also provide that part 4 of the *Judicial Review Act 1991* does not apply to a decision maker's decision to cancel or refuse a licence or certificate on the basis that a person has been identified as a participant in a criminal organisation or as a criminal organisation.[76]

As a matter of fundamental legislative principle, exercises of administrative power are to be subject to appropriate review. The amendments take effect as a privative clause as it purports to '*oust the inherent and statutory jurisdiction of the Supreme Court to review the legality of decisions and actions*'.[77] The SLC considered that:

> *… privative clauses should rarely be contemplated and even more rarely enacted. They represent a parliamentary attempt to deny the courts a central function of their judicial role, preventing courts pronouncing on the lawfulness of administrative action.*[78]

The SLC further stated:

> *… in given circumstances, it is possible that removal of rights to access to courts and tribunals may be justified by significant legislative objectives. However, the committee notes that Australian courts have resisted parliamentary attempts to limit their powers and have given a restrictive interpretation to privative clauses. Principles to be taken into account by a court will include:*
>
> - *parliamentary supremacy which 'requires obedience to the clearly expressed wish of the legislature', and*
> - *preservation of rights to access the courts.*

As stated above, the SLC considered that the removal of these rights may be justified by the overriding significance of the objectives of the legislation.[79] The issue of whether the removal of review rights is justified by the objective of protecting the public is brought to the attention of the House.

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75 For example, clauses 63, 67, 202

76 For example, clauses 68, 91, 135, 153, 167, 167, 203, 180, 227

77 Former Scrutiny of Legislation Committee, *Alert Digest* 5 of 2009, page 20.

78 Former Scrutiny of Legislation Committee, *Alert Digest* 5 of 2009, page 20.

79 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, page 19.

Section 4(3)(c) *Legislative Standards Act 1992* - Does the bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?

The amendments under the Bill provide that the Police Commissioner is responsible for identifying whether an individual is a 'participant in a criminal organisation' or is a 'criminal organisation', as defined in the *Criminal Code*.[80]

The definition of a 'participant in a criminal organisation' or a 'criminal organisation' in the *Criminal Code* is broad. The only apparent guidance given to the Police Commissioner when reaching a decision about whether a person is a participant in a criminal organisation are the categories set out at section 60A(3) of the Criminal Code. This issue is brought to the attention of the House.

Section 4(3)(g) *Legislative Standards Act 1992* - Does the bill adversely affect rights and liberties, or impose obligations, retrospectively?

The amendments include transitional provisions to provide that if immediately before the commencement of the Bill the decision maker has not reached a decision on an application, the decision maker must decide the application under the provisions of the Bill.[81]

These transitional provisions may adversely affect the rights and liberties of applicants for an authority, retrospectively. It is arguable that an applicant, in this scenario, will have relied on the legislation as it applied before the commencement of the Bill, and had a legitimate expectation that their application would be considered under the legislation before it was amended by the Bill. The Bill introduces new requirements and restrictions on the granting of a licence or certificate which it is arguable an earlier applicant could not have anticipated.

The SLC considered that strong argument is required to justify either an adverse effect on rights and liberties, or the imposition of obligations, retrospectively. The explanatory notes do not raise this matter as a potential FLP issue.

Institution of Parliament

Section 4(4)(a) *Legislative Standards Act 1992* - Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?

Clauses 231 to 233 amend the *Work Health and Safety Act 2011* to provide that provisions aimed at preventing identified participants in criminal organisations from undertaking activities under that Act are to be made by way of regulation. It is arguable that such provisions should have been made in the Bill, as is the case with other amendments, for example to the *Electrical Safety Act 2002, Liquor Act 1992, Queensland Building Services Authority Act 1991* and *Racing Act 2002.*

Section 4(3)(b) Legislative Standards Act 1992 - Is the bill consistent with principles of natural justice and procedural fairness?

Clause 186 replaces section 57 of the *Tattoo Parlours Act 2013*. Proposed new section 57(3)(b) provides that QCAT or the Supreme Court may receive evidence and hear argument about criminal intelligence information in the absence of parties to the proceeding and their representatives; and may take evidence by affidavit.

Receiving evidence and hearing argument in the absence of parties to a proceeding is inconsistent with principles of natural justice because a party is not given the opportunity to hear the case being made against them or to respond to the matters raised. Further, taking evidence by affidavit does

[80] For example, clauses 71, 137, 157, 169, 182, 230

[81] For example, clauses 70, 115, 136, 156, 168, 181, 229

not allow the evidence to be tested by cross examination. These matters are not identified in the Explanatory Notes, nor are there any justifications provided.

3.2 Amendments to the *Bail Act 1980*

Section 4(3)(g) *Legislative Standards Act 1992* - Does the bill adversely affect rights and liberties, or impose obligations, retrospectively?

Section 7 of the *Bail Act 1980* (Bail Act) creates a statutory presumption in favour of police or watch-house bail. Section 9 of that Act gives a similar statutory presumption in favour of court ordered bail where it is able to be granted for a particular offence. The statutory presumption in favour of bail arises from the common law principle that a person is innocent until proven guilty and that their free movement should not be impeded by arrest and detention without good cause. The Bail Act does make some notable exceptions to that general presumption, in sections 13, 16(1), 16(3) and 16(3A).

Section 16(3A) of the Bail Act currently provides that if a defendant is a participant in a criminal organisation the court or police must refuse to grant bail unless the defendant shows cause why his or her detention in custody is not justified.

Clause 7 of the Bill amends section 16(3A) to provide for the above refusal of bail *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.*

A number of potential breaches of rights and liberties have been identified in respect of those clause 7 amendments.

Firstly the presumption against bail applies under proposed section 16(3A) where a defendant is alleged (not proven) to be, or to at any time have been, a participant in a criminal organisation. Under the amendments this applies whether or not the person was a participant in a criminal organisation at the time of the alleged offence, and even where there is no link between the defendant's alleged participation in the criminal organisation and the offence with which the defendant is charged.

The amended section 16(3A) will have some retrospective application in that it there is a presumption against bail for a defendant who is alleged to have been a participant in a criminal organisation *at any time* (including, retrospectively, any time prior to the commencement of this Act).

Clause 9 also inserts a transitional provision into the Bail Act (section 42(2)) to clarify that existing section 16(3A) operates retrospectively in that it applies to bail application hearings on or after 17 October 2013, but prior to the commencement of this Bill (and the transitional provision). It is deemed irrelevant (section 42(4)) whether the offence which was the subject of the bail application happened before or after 17 October 2013 (when section 16(3A) was originally inserted).

The remainder of section 42(4) evinces a similar intention to have **retrospective** application for certain bail applications under sections 6 and 15A.

Section 4(3)(d) *Legislative Standards Act 1992* -Does the bill reverse the onus of proof in criminal proceedings without adequate justification?

Existing section 16(3A)(a) reverses the onus of proof by creating a statutory presumption against bail for current and former alleged participants in criminal organisations and requiring they 'show cause' why their detention in custody is not justified. The (limited, existing) protection in section 16(3D) provides that section 16(3A) will not apply if the defendant proves that, at the time of their alleged participation in the criminal organisation, the organisation did not have, as one of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity. This 'safeguard' also reverses the onus of proof onto the defendant.

3.3 Enhancing the Crime and Misconduct Commission

Section 4(3)(f) *Legislative Standards Act 1992* - Does the bill provide appropriate protection against self-incrimination?

Clause 26 amends section 74 of the *Crime and Misconduct Act 2001* (the CMA) to provide that a person's fear of personal physical harm or damage to their property, or of harm or damage to the person/property of someone with whom they have a connection or bond, is not a reasonable excuse to fail to comply with a notice to produce information related to a criminal organisation or a participant in a criminal organisation. This effectively means that a (hostile) 'witness' at a star chamber hearing of the CMC cannot refuse to give evidence even where they apprehend that the giving of such evidence will likely place themselves or an associate/loved one's person or property in danger. This can be contrasted with the witness protection offered to other witnesses by the CMC when there is a reasonable concern that by their giving assistance to the CMC they may have jeopardised their personal safety.

Clauses 31-36 all increase the penalties for various refusals to answer questions, produce documents etc. at a CMC hearing under sections 82, 183, 185, 188, 190 and 192 of the CMA. The increases are all from a maximum penalty of 85 penalty units ($9,350) or 1 year imprisonment, to a maximum penalty of 200 penalty units ($22,000) or 5 years imprisonment. The gravity of the increase to maximum penalties and the impact on the rights and liberties of those subject to such penalties is self-evident.

Clause 44 amends section 331 of the CMA to, in section 331(4)(b), remove the usual protection against self-incrimination by allowing the CMC to require a person or witness to answer a question or produce a document or thing, that is relevant to a proceeding *brought against the person or witness for a criminal offence.*

Clause 53 inserts new section 265 which will allow an answer, document, thing or statement obtained by compulsion under section 197(1) of the CMA to be admissible as evidence in a confiscation proceeding under the *Criminal Proceeds Confiscation Act 2002*, with the court's leave, which leave may be given unless the court considers the unfairness to the respondent caused by admitting the evidence outweighs its probative value in the confiscation proceeding.

Section 4(3)(g) *Legislative Standards Act 1992* - Does the bill adversely affect rights and liberties, or impose obligations, retrospectively?

Clause 45 inserts a new chapter 8, part 10, section 395 which has retrospective effect in its combined operation with section 38 (amending section 197).

Clause 46 amends the dictionary in Schedule 2 of the CMA to provide that the definition of a participant in a criminal organisation will extend to a person who has been a person defined by the section as a participant in a criminal organisation *at any time within the preceding 2 years.* This provision therefore has potentially retrospective application in that it could extend the definition of a participant in a criminal organisation to a person who participated in a criminal organisation prior to the commencement of section 46.

3.4 Management of both remand and sentenced prisoners who have been identified as a participant in a criminal organisation

Section 4(3)(g) *Legislative Standards Act 1992* - Does the bill adversely affect rights and liberties, or impose obligations, retrospectively?

Clause 50 inserts new section 731 (transitional provision) into the *Criminal Code* to state that amended section 597C will apply to the arraignment of an accused person in a proceeding for an offence, whether the proceeding was started before, on, or after, commencement of section 731. To

the extent it applies to proceedings started before the commencement of section 731, the provision has potential to operate retrospectively.

Section 4(3)(b) *Legislative Standards Act 1992* - Is the bill consistent with principles of natural justice?

Clause 11 amends section 12 of the *Corrective Services Act 2006* to mandate either high or maximum security classifications for prisoners subject to criminal organisation segregation orders (COSO).

Clause 12 amends section 13 of that Act to provide that the chief executive of Corrections need not review the security classification of a prisoner subject to a COSO regardless of whether the prisoner's security classification is high or maximum, or whether a court order changes the term of the prisoner's imprisonment. This is in contrast to other prisoners classified as high security where classification reviews occur periodically.

Clause 13 amends section 41(1) to provide that an offender subject to a community based order who is an 'identified participant in a criminal organisation' may be required to give a test sample (of blood, breath, hair, saliva or urine) under section 41. The scope of the definitions of 'identified participant in a criminal organisation' and 'community based orders' means this provision has potential application to a significant number of persons and will apply to 'identified participants in a criminal organisation' who are subject to a community based order and not to other persons who are subject to community based orders. In this respect the provision is allowing test samples to be required from offenders based on their identification as belonging to a certain group, rather than their identification as being a person subject to a particular community based corrections order.

Clause 14 inserts Division 6A dealing with COSOs. It inserts, inter alia, section 65A to provide that the chief executive must cancel a COSO if the Police Commissioner advises the chief executive under section 344AA that a prisoner is no longer an identified participant in a criminal organisation. The Bill is silent as to what steps a prisoner could realistically take to be de-identified as a participant. The remaining provisions regarding conditions for prisoners under COSOs are similar to those already applying to maximum security prisoners.

Clause 16 inserts section 267A to provide that an offender who is an identified participant in a criminal organisation and subject to a parole order or community based order may have their movements in the community restricted and their location in the community monitored. It will allow the chief executive to order a corrective services officer to direct an offender remain at a stated place for a stated period, wear a monitoring device, and permit the installation of any necessary device/equipment in the offender's residence. The requirement to wear a monitoring device already exists for parolees (see section 267 *Corrective Services Act 2006*) but the other two permissible directives are new under this Bill. Because this applies to parole and community based orders, it will likely have potential application to a sizable number of offenders who are identified participants in a criminal organisation, even those who have committed comparatively minor offences (attracting community based orders).

Clause 18 inserts proposed section 350A which will allow hearings in the absence of the parties in the Supreme Court to allow the Court to consider and weigh confidential criminal intelligence information provided by the Police Commissioner as relevant to the review of a decision to make a COSO. It is a *prima facie* denial of natural justice for an applicant for a review to be denied access to the information upon which a decision has been based and to be denied an opportunity to refute the veracity of that evidence. The safeguard provided by this section is that the hearing is being conducted by the Supreme Court.

Clause 18 also inserts proposed section 350B which ousts judicial review for a decision of the chief executive that orders that an offender is to be the subject of a COSO or an order under section

267A(3) about wearing a monitoring device, remaining at a stated place for a stated period or having equipment installed in the offender's residence.

3.5 Amendments to the *Transport Planning and Coordination Act 1994*

Section 4(2)(a) *Legislative Standards Act 1992* – right to privacy of confidential personal information

Section 4(3)(h) *Legislative Standards Act 1992* - Does the bill confer immunity from proceeding or prosecution without adequate justification?

Parts 21 and 22 of the Bill amend the *Transport Planning and Coordination Act 1994* and the *Transport Planning and Coordination Regulation 2005* respectively, to permit an authorised member of an approved agency, in this case, ASIO, to have direct access to the transport information database for use for a law enforcement purpose. The information in the database includes details of vehicle registrations, driver licences, and authorisations for activities such as driving public passenger transport vehicles or conducting vehicle safety inspections.

The definition of 'law enforcement purpose' is very broad and would go beyond what would typically be regarded as law enforcement purposes, for example, policing, and include any purpose for which an approved agency has Commonwealth or State statutory authorisation. New section 36J is very broad and states that despite any other Act, the approved agency may use the information for a law enforcement purpose. The definition of 'use' is very broad. A person providing information under section 36I is given blanket protection from liability under section 36M. In addition, part 21 will permit agencies other than ASIO to be prescribed. There is potential for infringement of the legitimate expectation of individuals that their personal information will be subject to limited disbursement.

The only controls over the use made of the information will be found in an agreement between the Transport chief executive and the CEO of the approved agency. For administrative transparency it would be preferable if conditions on use of the information were set out in the Bill.

The explanatory notes indicate that this amendment is to enhance community safety and address an 'intelligence gap' identified by ASIO which is regarded as significant in the preparations for the G20 Summit in Brisbane in 2014.

3.6 Disclosure of criminal history by the Police Commissioner

Right and liberties of individuals - Section 4(2)(a) *Legislative Standards Act 1992* – release and publication of criminal history

Clause 123 inserts proposed new section 10.2AAB into the *Police Service Administration Act 1990*, which provides that the Commissioner of Police may disclose the criminal history of a current or former participant in a criminal organisation to any entity if the Commissioner is satisfied the disclosure is in the public interest. This power is absolute and overrides provisions of other Acts that may otherwise prevent or restrict the disclosure – including, for example, the *Criminal Law (Rehabilitation of Offenders) Act 1986* and *Youth Justice Act 1992*, part 9.

Clause 123 also inserts proposed new section 10.2AAC, which provides the Commissioner may also authorise publication of the criminal history if he or she is satisfied it is in the public interest. Clause 123 does not set out the grounds on which the Commissioner must base his or her assessment of the public interest.

The potential impact of these provisions is that someone with criminal convictions more than 20 years old, who has reformed and made a valuable contribution to society, may face disclosure of their old criminal convictions, without their consent, and the publication of their criminal past.

This matter is raised in the explanatory notes and the following justifications are provided:

> *Although there may be concerns that the amendment relating to the release of criminal histories will allow more personal information held by the QPS to be disclosed to another, these concerns are mitigated by limiting the information being released to criminal histories only and that the release must be in the public interest. Further, the Commissioner must exercise the discretion to release personally and cannot delegate to another officer.*
>
> *Any breach of fundamental legislative principles is considered to be justified as the community is protected through restricting the operations of identified participants in criminal organisations and preventing these groups from running their criminal enterprises.*

3.7 Use of video and audio links in criminal proceedings

Right and liberties of individuals - Section 4(2)(a) *Legislative Standards Act 1992* – right to fair trial and consistency with natural justice

Clause 82 is part of a suite of amendments to increase the use of audio and video links in Queensland Court proceedings. It should be read with clause 81, which introduces a broadened definition of 'correctional institution'.

Clause 82(6) amends section 178C of the *Justices Act 1886* to provide that the primary court may order a proceeding, other than a proceeding to which subsection 2 applies, to be conducted by video or audio link facilities at the order of the primary court, in the interests of justice. Clause 82 removes the requirement for all parties to consent to proceedings being conducted using video link facilities.[82]

The potential impact of this clause is that there is no scope for either the prosecution or the defence to insist on a proceeding being held other than by video or audio link by refusing to consent.

This clause may to cause practical and communication difficulties, especially as the definitions of audio link and video link facilities require only that these facilities enable reasonably contemporaneous and continuous communication. A poor Skype connection or radio transmission could result in words being omitted. In a criminal proceeding, omission of a simple 'yes' or 'no' could be vital. This would adversely impact on a key aspect of natural justice: the right to be heard. Further, prosecution or defence may have valid reasons for preferring a proceeding to be held other than by video or audio link, for example, a hearing impaired defence lawyer may prefer not to represent his or her client at proceedings conducted by audio link.

This matter of fundamental legislative principle is raised by the explanatory notes and the following justification is provided:

> *The amendments will, however, enhance the orderly and expeditious conduct of proceedings and the relevant proceedings may only be conducted using a link where the court considers it is in the interests of justice to do so.*

Section 4(3)(g) *Legislative Standards Act 1992* - Does the bill adversely affect rights and liberties, or impose obligations, retrospectively?

Clause 85 inserts proposed new section 280 and has retrospective effect – the 'amended provisions' apply to a proceeding even if it was started before the commencement of section 280. The Explanatory Notes do not identify the retrospective effect of clause 85 or offer any justification for it.

[82] Clause 120 amends section 15A of the *Penalties and Sentences Act 1992* to also remove the requirement that the prosecution and defence must agree to the use of the audio-visual or audio link.

The potential impact of this section is that a proceeding that has commenced in person may be finished by audio or video link. This has potential to cause practical and communication difficulties which may impact on a person's right to receive a fair trial.

Appendix A – List of Submissions

Sub #	Submitter
001	Queensland Council for Civil Liberties
002	Mr Don Willis
003	Law and Justice Institute (Qld) Inc.
004	Prisoners' Legal Service
005	Mr Edward Fricker
006	Queensland Police Union of Employees
007	Easyriders Australia Social Motorcycle Club
008	Townsville and District Motorcycle Riders' Association
009	Queensland Law Society
010	Parliamentary Crime and Misconduct Committee
011	Catholic Prison Ministry
012	Bar Association of Queensland
013	Confidential

Statement of Reservations

Statement of Reservations – Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013

I wish to make the following comments in relation to the Committee's examination of the Bill.

I am confident that the Committee has done the best job it could have done in the time provided by the House. However I believe the Committee's report could be vastly different if it had a reasonable time to consider the Bill and the policy objectives being pursued by the Government.

The referral to the Committee to consider the Bill for 1 working day is in my view a stunt by the Attorney-General and amounts to nothing more than an abuse of the Parliamentary Committee process.

The Government full well knows there are very serious issues being dealt with in this Bill which deserve the full scrutiny of the Parliament and its committees. It is once again an example of the growing trend by this Government to avoid proper scrutiny by refusing to refer matters to the appropriate Parliamentary Committee for a reasonable amount of time.

I draw to the attention of the House the following passages and recommendation of the Committee System Review Committee Report from 2011:

There are definite benefits in referring bills to portfolio committees for examination and report, in relation to both compliance with fundamental legislative principles and scrutiny of the underlying policy and content of the legislation. There should be a presumption that proposed legislation will be scrutinised by committees, who will seek public input. A committee should be able to recommend amendments to a bill but the power of making amendments must remain with the House.

The Committee System Review Committee recommended:

> *Recommendation 21*
>
> *The Committee recommends that all bills, with the exception of those deemed 'urgent', be referred to portfolio committees for inquiry and report, using a model that achieves the following:*
>
> - *there shall be a presumption that the Legislature will refer legislation to a committee, and <u>any exceptions must be transparent, narrowly-defined, and extraordinary in nature;</u>* (emphasis added)
> - *committees shall scrutinise legislation referred to them and have the power to recommend amendments*
> - *<u>opportunities shall be given for public input into the legislative process</u>.*

I can only say that the hopes of that committee for an effective committee system have been dashed by this Newman Government.

Turning to the matters in the Bill, I would like to highlight one matter which the Committee touched on at Part 2.8 – in relation to the appointment of acting commissioners of the CMC.

I agree entirely with the sentiments of the Committee expressed in that part however it is clear that this Government is not trying to drive for efficiencies, but is trying to undermine the PCMC by taking steps to remove the bipartisan PCMC from the appointment processes.

It would be remiss of me not to echo the recommendation of the PCMC provided in this regard, therefore I make the following recommendation to the Government.

Recommendation 1

Clause 42 of the Bill be amended to ensure proposed section 237A of the *Crime and Misconduct Act 2001* requires consultation with the Committee prior to appointment of a person as Acting part-time commissioner of the CMC. Similar amendments should be made in relation to existing section 237 of that Act.

Yours sincerely

Peter Wellington MP

Deputy Chair

Member for Nicklin

BILL BYRNE MP

SHADOW MINISTER FOR POLICE, EMERGENCY AND CORRECTIVE SERVICES, PUBLIC WORKS AND NATIONAL PARKS

MEMBER FOR ROCKHAMPTON

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21 November 2013

Mr Ian Berry MP
Member for Ipswich
Chairperson
Legal Affairs and Community Safety Committee
Parliament House
George Street BRISBANE QLD 4000

Statement of Reservation – *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013*

Dear Mr Berry

I wish to notify the committee that the opposition has reservations about aspects of Report No. 46 of the Legal Affairs and Community Safety Committee into the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013.*

The Opposition will detail the reasons for its concern during the parliamentary debate on the Bill.

Yours sincerely

Bill Byrne
Member for Rockhampton