CRIMINAL LAW (UNLAWFUL CONSORTING AND PROHIBITED INSIGNIA) BILL 2021

Receipt and First Reading

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

Second Reading

HON MATTHEW SWINBOURN (East Metropolitan — Parliamentary Secretary) [5.24 pm]: I move —

That the bill be now read a second time.

The Criminal Law (Unlawful Consorting and Prohibited Insignia) Bill 2021 introduces a reform package that will deliver on the McGowan Labor government's commitment to target serious and organised crime. The suite of reforms in this bill will disrupt and restrict communication and networking between offenders, criminalise the display of insignia of identified criminal organisations and disrupt the ability of members of identified organisations to gather in public places. The reforms in the bill will make Western Australia the jurisdiction with the toughest and most comprehensive laws in the country to fight serious and organised crime. These laws will make Western Australia the most inhospitable jurisdiction for serious offenders and criminal organisations to operate or expand their criminal activities.

The bill contains three key reforms. The first reform is the unlawful consorting scheme, which will disrupt and restrict the capacity of offenders to engage in criminal conduct by criminalising association and communication between offenders. The second reform is the prohibited insignia scheme, which will criminalise the display of insignia of identified organisations in public places and empower police to modify or remove publicly displayed insignia. The third reform is the dispersal notice scheme, which will empower police to require suspected members of identified organisations to cease associating and communicating in public for seven days.

Criminal groups, such as outlaw motorcycle gangs—often referred to as OMCGs—are organised, hierarchical and well funded. The Australian Criminal Intelligence Commission states that criminal syndicates in Australia are diverse and flexible, with high-threat organised criminal groups sharing a range of common characteristics, in particular transnational connections, activities spread over several markets and the intermingling of legitimate and criminal enterprises. This makes them difficult to stop via traditional law enforcement methods.

The nature of an organised crime group requires considerable communication and networking. The first reform contained in the bill—the unlawful consorting scheme—targets this very reliance on communication and networking. It will enable the Western Australia Police Force to target those individuals who involve themselves in the planning of criminal activity. The unlawful consorting scheme is, by design, a preventive tool that can be levied on individuals, informed by their criminal history and police intelligence. In addition to the unlawful consorting scheme, which targets a wide cohort of offenders, the prohibited insignia scheme and dispersal notice scheme target criminal organisations and their members. Violent conflict between OMCGs is common and often takes place in public, exposing members of the community to extreme risk. Most notably, in 1984 an incident now known as the Milperra massacre resulted in the death of seven people and the wounding of a further 28 when a gunfight erupted between members of the Comancheros OMCG and the Bandidos OMCG in regional New South Wales. Since 1984, there have been multiple OMCG murders, shootings, firebombings and violent assaults that have occurred in public places throughout Australia. In Western Australia, we have recently been exposed to escalating incidents of serious violence by members of rival OMCGs in public places. This includes the recent shooting of the Rebels OMCG president, who was fatally shot from long range while attending a public event at the Kwinana Motorplex in 2020. The shooting also injured a young boy when a bullet grazed his body before lodging in the arm of an unverified Bandidos OMCG member.

Incidents of serious crime by OMCGs in public have occurred with regularity in recent years, with offences committed against other gang members and members of the public, including violent assault, kidnapping, armed robbery, aggravated burglary and threats to kill. In one particularly cowardly incident last year, a member of the public was assaulted by an OMCG member for wearing a jacket emblazoned with the insignia of a fictional American OMCG popularised in the television program *Sons of Anarchy*. This act of violence against an innocent member of the community was in apparent retribution for the victim not having "earnt" the patch, and is demonstrative of the misguided value of insignia to the identity of OMCGs.

This government will not permit criminal gangs to advertise, recruit, intimidate and commit violent acts in public. By prohibiting the display of insignia, this bill will deprive identified organisations of the ability to spread their culture and better protect the community from harm. The offence of displaying insignia introduced by this bill is tougher and more comprehensive than similar offences in any other Australian jurisdictions, both in the conduct it captures and through exposing both individuals and corporations to criminal liability.

The dispersal notice scheme will provide a time-limited responsive tool for police to intervene when suspected members of identified organisations are consorting in a public place, whether they are part of the same gang or a different gang. A dispersal notice will compel a suspected gang member to cease consorting with other suspected gang members named in the notice for a period of seven days. Dispersal notices will assist police to protect the public from public disorder, intimidation and violence.

Although the bill confers strong powers on the WA Police Force, these are balanced by a range of statutory safeguards including procedural requirements, targeted defences, exclusion of children from the operation of the bill and a comprehensive monitoring and oversight regime that will be exercised by the Parliamentary Commissioner for Administrative Investigations, commonly referred to as the Ombudsman.

The reforms in this bill unapologetically target those individuals and organisations involved in carrying out criminal activity and causing public harm. These are unquestionably tough reforms, but they are necessary to significantly disrupt serious organised crime and criminal groups in WA.

The bill has been developed in consultation with the Solicitor-General, the State Solicitor's Office and subject-matter experts to ensure the reforms are targeted, efficient and robust. I am pleased to advise the house that the passage of these reforms will be supported by a comprehensive report prepared by the WA Police Force, which speaks, in particular, to the necessity of the reforms contained in part 3 of the bill. I now table *Report by way of justification of the provisions of part 3 of the Criminal Law (Unlawful Consorting and Prohibited Insignia) Bill 2021*.

[See paper 901.]

Hon MATTHEW SWINBOURN: I will now explain the bill in more detail.

Part 2: Unlawful Consorting Scheme: The current consorting offences contained in sections 557J and 557K of the Criminal Code are aimed at preventing declared drug traffickers under the Misuse of Drugs Act 1981 and convicted child sex offenders from consorting with people with like convictions.

There are several deficiencies in the current consorting legislation. The current consorting provisions only apply to two cohorts of offenders—child sex offenders and declared drug traffickers. Further, the WA Police Force advises that the current consorting legislation is impractical, difficult to prosecute and has not been consistently or effectively utilised since its introduction in 2004. The bill addresses these deficiencies by establishing a more detailed scheme that applies to a broader class of offenders. The unlawful consorting scheme will encompass an expanded cohort of relevant offenders defined in clause 6 of the bill to include child sex offenders, declared drug traffickers, persons who have been convicted of an indictable offence in WA or another jurisdiction and persons convicted of an offence under clause 25(2) of the bill, displaying insignia of an identified organisation, and clause 42(1) of the bill, consorting contrary to a dispersal notice.

Part 2, division 2 of the bill provides that an unlawful consorting notice can be issued by an authorised officer—being a police officer who is, or is acting as, a commander, or a more senior rank—if specific criteria are met. To issue an unlawful consorting notice, an authorised officer must first establish that the person is over 18 years of age and a relevant offender, as defined. Secondly, the relevant offender must have consorted, be consorting or be suspected on reasonable grounds as likely to consort with another relevant offender. Finally, the authorised officer must consider it is appropriate to issue the unlawful consorting notice in order to disrupt or restrict the capacity of relevant offenders to engage in conduct constituting an indictable offence. When a person is issued an unlawful consorting notice, the person is referred to as a restricted person. An unlawful consorting notice must contain a range of information, including the name of each relevant offender with whom the restricted person must not consort. A single notice may include the names of multiple relevant offenders with whom a restricted person must not consort.

The term "consort" is defined in clause 3 of the bill and includes direct and indirect communication with a person by any means or being in the company of a person, whether inside or outside of the state. The offence of consorting contrary to an unlawful consorting notice is committed when a restricted offender consorts with a named offender on two or more occasions. It does not matter whether the consorting occurred with the same named offender on each occasion or with different named offenders. The offence of consorting contrary to a consorting notice is indictable, punishable by a maximum penalty of five years' imprisonment on indictment, or two years' imprisonment if dealt with summarily. An unlawful consorting notice remains in effect for a period of three years once served on the restricted person and a further notice can be issued upon expiry. The unlawful consorting scheme also contains important safeguards in the form of targeted defences set out in clause 18 that cover an acceptable range of day-to-day law-abiding activities where it may be necessary or reasonable for a restricted person to consort with a named person. The defences also serve to direct police on what relationships and forms of consorting should be exempt from the operation of the consorting scheme.

Under clause 18(1) of the bill, it is a defence for the accused to prove, on the balance of probabilities, that the consorting was between family members and reasonable in the circumstances. The bill introduces a definition of

"family member" under clause 4 that extends to family or kinship relationships recognised by the customary law and culture of Indigenous communities. This is a safeguard to ensure that vulnerable members of the community are not targeted by the scheme for consorting with family members if it was reasonable in the circumstances.

Under clause 18(2) of the bill, it is a defence for the accused to prove, on the balance of probabilities, the consorting was necessary in the circumstances and occurred in the course of one of the specified circumstances listed in clause 18(2)(a). An example of the conduct covered by the defences includes attending an educational institution. To avail themselves of a defence, an accused will have to prove that the consorting occurred in the course of taking part in a particular educational or training course and that consorting with the named person was necessary in the circumstances. It would not, for example, be necessary to sit next to the named person in a lecture theatre when other seats were available 30 metres away in another part of the lecture theatre.

The bill contains a range of provisions to ensure the fair and effective administration of the scheme, including provisions that specify the content of an unlawful consorting notice, specify how notices must be served, and provide mechanisms by which notices can be corrected, varied or revoked in particular circumstances.

Part 2, division 3 of the bill confers a range of powers on police to administer and enforce the unlawful consorting scheme. These include powers in relation to service of an unlawful consorting notice, including to stop a person, stop and enter a vehicle, request personal details, and take a person into custody and convey them to a police station. The bill also empowers police officers to intervene when an officer reasonably suspects consorting has occurred in contravention of a consorting notice by requiring a person to leave a place or go beyond a reasonable distance from it.

A person who does not comply with the requirement of a police officer exercising powers under clause 19 will commit a summary offence, punishable by imprisonment for 12 months and a fine of $12 000.

Part 3: Prohibited Insignia Scheme and Dispersal Notice Scheme: I now turn to part 3 of the bill, which contains the insignia offence and the dispersal notice scheme. The reforms in this part are the toughest of their kind in Australia, while being appropriate and adapted to serve their objects, as outlined at clause 23 of the bill, of protecting the community from public harm, disorder and violence. The reforms in part 3 rely on the list of identified organisations in schedule 2 of the bill. The prohibited insignia offence will apply to the insignia of these identified organisations and the dispersal notice scheme will apply to suspected members of these identified organisations.

Schedule 2 contains 46 "identified organisations" that fall into four categories: OMCGs recognised as having a presence within Western Australia; OMCGs recognised as having a presence within Australia; OMCG affiliate gangs, also known as "feeder clubs"; and street gangs. The inclusion of these organisations in the bill is based on police intelligence at the state and commonwealth level.

Importantly, additional organisations can be added to the list in schedule 2 only through amendments passed by Parliament. There is no mechanism to add further organisations through regulations. This will preserve the sovereignty of Parliament and ensure that the reforms apply in a way that is targeted, supported by evidence and constitutionally robust.

I turn first to the prohibited insignia scheme. The offence of displaying the insignia of an identified organisation is set out at clause 25 and provides that a person commits an offence if the person displays insignia of an identified organisation in a public place. The penalty in the case of an individual is imprisonment for 12 months and a fine of $12 000. The penalty in the case of a body corporate is a fine of $60 000. I will refer to this offence as the "prohibited insignia offence" for convenience. As I have said, the prohibited insignia offence in this bill is tougher and goes further than in other Australian jurisdictions in a number of ways. Firstly, the offence will apply to individuals, corporations and the corporate officers of corporations. An officer of a corporation is criminally liable for an offence committed by a corporation unless the officer proves that they took all reasonable steps to prevent the commission of the offence by the corporation. We know that some identified organisations hide behind the guise of legitimate businesses to conceal their criminal activities. The prohibited insignia offence will hold those organisations to account. If an identified organisation is a body corporate, as defined by the commonwealth Corporations Act 2001, the corporation can commit the offence and its corporate officers will be held to account if they fail to take steps to prevent the commission of the offence.

Secondly, comparable with other jurisdictions, the offence will capture circumstances when a person is in physical possession of insignia that is displayed in public, including where a person wears or carries an item such as a jacket bearing insignia. However, this offence goes further and will also apply where a thing bearing insignia is possessed or controlled so it will be visible to a person in a public place. This will ensure that identified organisations cannot flout the law by displaying insignia from gang headquarters on a sign or a flag, for example. The organisation itself, its corporate officers or the individuals responsible for the display of the insignia will be held to account. It is important to point out that the offence is committed whether the person displaying the insignia is located in a public place or a private place. What matters is that the insignia would be visible to a person in a public place. This

will ensure that members of the public can go about their lawful business in public places without experiencing such intimidation, threat or fear.

Thirdly, the offence extends to where a person has a tattoo or body marking comprising insignia of an identified organisation and it is left uncovered in a manner that would be visible to another person in a public place. We make no apologies for cracking down on the public notoriety that members of identified organisations enjoy by the intimidatory and threatening display of tattoos bearing insignia. Those individuals will be required to cover up their tattoos or body markings or risk being charged and prosecuted.

Fourthly, the definition of "insignia" contained in clause 22 will ensure all insignia of identified organisations are captured, now and into the future. The bill provides that the insignia of an organisation includes the name, logo or patch of the organisation, and any other image, symbol, abbreviation, acronym or other form of writing or mark that indicates membership of, or an association with, the organisation. In addition, the symbol "1%" and the symbol "1%er" are also taken to be insignia of every identified organisation. We know members of OMCGs wear these symbols to demonstrate their affiliation with outlaw gangs and criminal conduct.

The definition will capture insignia even if an identified organisation changes or adopts additional insignia after the bill is passed. It will be a question of fact whether the insignia is that of the identified organisation. The effect of the definition of "insignia" in the bill is that the offence may capture insignia that has a dual purpose. For example, we know that some OMCGs routinely wear clothing bearing the name and logo of sports teams to indicate membership of the organisation. In some jurisdictions this practice has developed in an attempt to overcome bans on OMCG insignia. The offence in the bill closes that loophole. Similarly, where the organisation itself has changed names, it will be a question of fact whether the insignia displayed is actually that of the original organisation.

As the prohibited insignia offence will have strict application to the display of insignia, it is necessary to ensure the offence is balanced by a range of safeguards. Firstly, the offence will not apply to persons under the age of 18. Secondly, a number of defences contained at clause 26 will ensure that the operation of the offence is consistent with the objects of this part and members of the public do not face the risk of significant criminal penalty for reasonable conduct.

All the statutory defences to the prohibited insignia offence place an onus on the accused to prove, on the balance of probabilities, that a defence exists. The defences will afford appropriate protection to police and other investigators, prosecutors and other lawyers, the media and any genuine artistic or educational use of insignia. Defences will also be available to protect members of the community who can prove that they unwittingly displayed the insignia of an identified organisation, either by not knowing it was displayed or not knowing that it was the insignia of an identified organisation.

As the offence will capture insignia with dual purposes, a defence will also be available when the display of the insignia was only for the purposes of association with some other organisation, such as a sports team, or its only purpose or meaning was unrelated to an identified organisation, such as the use of the "1%" symbol in advertising. Finally, a defence will be available if the accused can prove the display is authorised under a written law of the state or commonwealth.

I now turn to the insignia removal notice scheme set out in subdivisions 2 and 3 of division 2 of part 3. The Criminal Investigation Act 2006 will, in most circumstances, provide police with appropriate powers to seize things bearing the insignia of identified organisations. However, there are some particular circumstances in which additional police powers are required to ensure insignia is modified or removed. This includes when a prohibited thing bearing insignia is immovable and cannot be seized, is displayed from private premises, or is displayed from a public place that is privately owned.

The insignia removal notice scheme will enable the Commissioner of Police to issue a notice requiring a person to modify or remove a prohibited thing within 14 days. If the person fails to comply, police will be empowered to take steps to remove or modify the prohibited thing. Importantly, the insignia removal notice scheme does not apply to tattoos or body markings.

I now turn to the dispersal notice scheme. Part 3, division 3 of the bill will introduce a scheme to empower police to issue and enforce dispersal notices, with the intention of disrupting consorting between members of identified organisations occurring in a public place. A dispersal notice will compel a person who is the subject of the dispersal notice not to consort in a public place with persons named in the notice for a period of seven days. A person who consorts with a person contrary to the notice will be committing an offence, punishable by imprisonment for 12 months and a fine of $12 000. The structure of the provisions contained in the dispersal notice scheme largely mirror the unlawful consorting notice scheme with some amendments to suit their particular purpose. This includes similar provisions regarding the content of notices, service of notices, correcting mistakes, revoking notices, and police powers.

A police officer may issue a dispersal notice in respect of a person if the person has reached 18 years of age, and the officer reasonably suspects that the person is a member of an identified organisation and has consorted, or is consorting, in a public place with another adult member of an organisation. The person who is the subject of the notice and the named persons are not required to be suspected members of the same identified organisation. This ensures that the notices can be used to intervene in consorting between members of the same different organisations.

The bill will provide police officers with a range of powers necessary to issue and serve a notice if the officer reasonably suspects the criteria for issuing a notice are met, including powers requiring a person to stop, provide their personal details and accompany the officer to a police station for the notice to be issued and served. These powers are broadly consistent with the powers contained in the unlawful consorting scheme. Failure to comply with these requirements is an offence, punishable by imprisonment for 12 months and a fine of $12 000. The same defences that are available to an accused in respect of the offence of consorting contrary to an unlawful consorting offence are available to a person charged with consorting contrary to a dispersal notice.

Part 4 refers to the Ombudsman's oversight. Under part 4 of the bill, the Parliamentary Commissioner for Administrative Investigations—that is, the Ombudsman—will have a broad scrutiny, oversight and reporting role. This oversight regime will ensure that the operation of the reforms and the use of police powers is transparent and subject to continuing oversight. To facilitate the monitoring functions of the Ombudsman, the Commissioner of Police must keep a register of the use of powers under the bill. In carrying out this role, the Ombudsman must scrutinise police records, may make recommendations to the Commissioner of Police to revoke or vary unlawful consorting notices issued under the bill and must prepare an annual report to the minister and Commissioner of Police, which the minister must table in both houses of Parliament. The annual report may include any observations the Ombudsman considers appropriate to make about the operation of the bill and review the impact of any scheme on a particular group if such an impact has come to the Ombudsman's attention.

The bill will introduce a major suite of reforms to add to the state's arsenal to deal with the growing threat of organised criminal groups. When enacted, Western Australia will have the strongest and most comprehensive serious and organised crime legislation in Australia. This bill will send a strong signal to organised criminal groups in Western Australia, or those thinking to expand their networks into our state, that their criminal activities will not be tolerated. This bill is constitutionally robust, fair and efficient, and will assist to protect our state from public harm.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party; nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

I commend the bill to the house and I table the explanatory memorandum.

[See paper 902.]

Debate adjourned, pursuant to standing orders.

House adjourned at 5.48 pm