CRIMINAL LAW (UNLAWFUL CONSORTING) BILL 2020

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Sue Ellery (Leader of the House)**, read a first time.

Second Reading

HON SUE ELLERY (South Metropolitan — Leader of the House) [10.17 pm]: I move —

That the bill be now read a second time.

The Criminal Law (Unlawful Consorting) Bill 2020 implements the government's commitment to fight organised crime by disrupting the communication and networking between convicted offenders who engage in organised criminal activity.

Criminal groups, such as outlaw motorcycle gangs, 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.

Organised crime entities are heavily involved in domestic and global illicit drug markets, as well as fraud, smuggling of goods and people, sexual exploitation of children, violence and intimidation, corruption, money laundering, firearm offences and cybercrime. The nature of these offences can be highly organised and sophisticated, with reliance on trusted networks and communication technologies to organise, plan and execute crimes.

These organised crime entities operate under a veil of secrecy designed to avoid law enforcement attention and to ensure their criminal operations can continue. The very nature of an organised crime group requires considerable communication and networking. This bill targets that very reliance on communication and networking.

The bill draws upon consorting legislation introduced in other Australian jurisdictions, including New South Wales. The New South Wales consorting legislation was the subject of a constitutional challenge in the High Court in Tajjour v New South Wales [2014] HCA 35. In that case, the High Court held that section 93X of the New South Wales Crimes Act 1900 was not invalid for contravening the implied freedom of communication about government and political matters because it was "reasonably appropriate and adapted" to serve the legitimate end of the prevention of crime in a manner compatible with the maintenance of the constitutionally prescribed system of representative government.

It is important to note that the New South Wales legislation was also thoroughly examined by the New South Wales Ombudsman in 2016. The New South Wales Ombudsman made a number of recommendations to improve the legislation, which are recognised in the drafting of this bill. The Ombudsman's report documented the use of the New South Wales law against Aboriginal and Torres Strait Islander people, people experiencing homelessness, children, and other vulnerable members of our community. As a result, this bill includes several safeguards to avoid this happening in Western Australia.

The current consorting offences contained in sections 557J and 557K of the Criminal Code are aimed at preventing declared drug traffickers under section 32A(1)(c) of the Misuse of Drugs Act 1981, which is in section 557J of the Criminal Code, and convicted child sex offenders from consorting with people with like convictions, which is in section 557K of the Criminal Code.

There are a number of deficiencies in the current consorting legislation. The current provisions apply to only two cohorts of offenders—child sex offenders and declared drug traffickers. Furthermore, the Western Australia Police Force has advised that the current consorting legislation, in particular the consorting offences, are impractical and difficult to prosecute and have not been consistently or effectively utilised since their introduction in 2004. The bill addresses these deficiencies, amalgamating all consorting offences into a single offence and instituting a more detailed scheme that applies to a broader class of offenders.

Unlawful consorting notice: Division 2 of part 2 of the bill deals with unlawful consorting notices. Provisions in this division outline the criteria for the issuing of a notice by a prescribed officer, how service of the notice is effected, the content of the notice, the duration of the notice and how the notice can be corrected or revoked. There are three prerequisites for the issuing of an unlawful consorting notice to a person by a prescribed officer. First, the person must be at least 18 years of age. Second, the person must be a convicted offender who has consorted, is consorting, or is likely to consort with another convicted offender. Third, the prescribed officer must consider that it is appropriate to issue the notice in order to disrupt or restrict the capacity of the convicted offender to organise, plan, support or encourage the carrying out of criminal activity.

The bill defines "convicted offender" in clause 3 as a person who has been convicted of one or more of the following offences: an indictable offence; a child sex offence; an indictable offence against a law of the commonwealth; an offence against a law of the commonwealth that, if committed in Western Australia, would constitute a child sex offence; and an offence against a law of another state, territory or country that, if committed in Western Australia, would constitute an indictable offence or child sex offence.

A "prescribed officer" means a police officer who is, or is acting as, a commander or an officer of a rank more senior than a commander, as outlined in clause 3 of the bill. The high-level rank of the officer issuing the unlawful consorting notice is one of several safeguards to prevent the scheme targeting persons who should not be subject to a notice. In practical terms, if a commander is considering issuing an unlawful consorting notice, he or she must first establish that the person is a convicted offender. Second, the commander must have evidence that the convicted offender has consorted, or is consorting, with another convicted offender, or suspects on reasonable grounds that the convicted offender is likely to consort with another convicted offender. Finally, the commander must then consider whether it is appropriate to issue the unlawful consorting notice for the purpose of disrupting or restricting the capacity of a convicted offender to engage in conduct that constitutes an indictable offence.

Clause 12 requires that once an unlawful consorting notice is issued, it must be served as soon as is practicable by a police officer, either orally or in writing. If the notice is not served within two months, it will expire. Regardless of how the unlawful consorting notice is served on a person, the bill requires the police officer serving the notice to explain the notice in language likely to be understood by that person. In explaining the notice, the police officer must advise the person of their obligations under the notice and the consequences of failure to comply with such obligations. When an unlawful consorting notice is served orally, it must be confirmed in writing within 72 hours and served via a prescribed service method, as outlined in clause 13 of the bill; otherwise the notice will lapse.

Clause 14 provides that an unlawful consorting notice takes effect when it is served and will remain in force for a period of three years, unless it is revoked sooner. The bill provides the Commissioner of Police with the ability to correct mistakes in an unlawful consorting notice under clause 15, to revoke a notice under clause 16, or to vary a notice under clause 17. During the period that the notice is in force, a restricted person may apply in writing to the Commissioner of Police to have their unlawful consorting notice either revoked or varied. The Commissioner of Police must revoke the notice if satisfied that it was invalidly issued or the requirements for issuing the notice are no longer met due to a change in circumstances. The Commissioner of Police has the power to vary the notice to remove the name of a specified person if satisfied that the requirements for issuing the notice under clause 10 are no longer met due to a change in circumstances.

Unlawful consorting offence: Part 2, division 1 contains the new crime of unlawful consorting. This offence is committed when, on two or more occasions within the three-year life of an unlawful consorting notice, a convicted offender who is served with a notice—known as a restricted person—consorts with a convicted offender with whom they are not to consort. A single notice may include the names of multiple convicted offenders with whom a restricted person must not consort. The consorting offence includes consorting by electronic or any other form of communication. This is necessary to mitigate against ever-evolving advancements in technology, which provide organised criminal groups with a diverse range of resources to conduct their activities and impede law enforcement investigations. These provisions will also ensure that consorting with other convicted offenders via social media outlets such as Facebook, Twitter or SMS messaging is covered by the offence provision.

As it is not the intent of the government to criminalise everyday relationships, I will now outline the defences to the consorting offence, which are also contained in part 2, division 1. Clause 9 provides that it is a defence to a charge of unlawful consorting if it is proved that the consorting was between persons who are family members and that the consorting was reasonable in the circumstances. The bill recognises in clause 5 that a family member includes a person who is, or was, part of the extended family or kinship group of an Aboriginal or Torres Strait Islander person, according to the customary law and culture of that person.

It is also a defence to a charge of unlawful consorting to prove that the consorting occurred in the course of one or more specified activities and was necessary in the circumstances. The specified activities are: engaging in a lawful occupation, trade or profession; attendance at an educational institution to take part in specified courses; receiving a health or social welfare service or obtaining such a service for a dependant; the provision of legal advice; lawful custody; complying with a written law or an order made by a court, tribunal or any other order, direction or requirement made under written law; official union activities; and, for Aboriginal and Torres Strait Islander people, fulfilling a cultural practice or obligation under the customary laws or traditions of the person's community.

In drafting these defences, the government has considered similar legislation in other jurisdictions and has implemented the lessons that they have learned. Although the bill builds upon the circumstances in which these defences apply as a result of the problematic practices revealed in the New South Wales Ombudsman's report, the defences, with the exception of family relationships, are narrowed in a way so that the application of the defences requires that the consorting be limited to what is necessary in those circumstances. This enables, for example,

a person who has received a consorting notice to sit in the same hospital waiting room as a person stated in the notice, but not to sit next to that person and carry on a conversation, as such a conversation would not be necessary for the purposes of receiving a health service.

Police powers: Part 2, division 3 of the bill contains a range of powers conferred on police to administer and enforce the unlawful consorting scheme. In particular, clause 18 outlines the powers that police officers can exercise, having regard to their training and professional judgement. Clause 18(1) outlines the authority for a police officer who suspects on reasonable grounds that a person is a person on whom an unlawful consorting notice must be served to require that person to do a number of things, including stop, disclose their personal details, and accompany the officer to a police station in order for a notice to be served. Clause 18(2) allows the police officer, in respect of a vehicle in which the officer suspects on reasonable grounds the person is located, to enter a vehicle and keep the vehicle in a designated place for as long as necessary, for at least up to two hours, to serve on the person an unlawful consorting notice and use reasonable force in doing so.

Clause 18(6) allows a police officer who suspects on reasonable grounds that a person on whom an unlawful consorting notice has been served is consorting with a convicted offender specified in the notice to require the person to move from that place. This is similar to the move-on notice powers that police have under the Criminal Investigation Act 2006 of Western Australia.

Clause 18(7) has been included to provide that a police officer cannot use the move on power in clause 18(6) if satisfied that the restricted person would have a defence to a charge of unlawful consorting in relation to the consorting. This subclause creates an additional safeguard to ensure that a move-on order is not given to a person who would have a defence to a criminal charge of unlawful consorting. In addition to the unlawful consorting offence, if a person does not comply with the direction of a police officer exercising powers under clause 18, they commit an offence punishable by imprisonment for 12 months and a fine of $12 000. The additional police powers introduced in this bill are consistent with those contained in the Restraining Orders Act 1997 and the Road Traffic Act 1974.

Parliamentary commissioner oversight: Part 3 of the bill provides for the Parliamentary Commissioner for Administrative Investigations—commonly known as the Ombudsman—to monitor and oversight the implementation of the provisions in the bill. Clause 21 requires the Ombudsman to scrutinise the powers conferred on police under this bill and enables the Ombudsman to inspect police records and obtain information relevant to the exercise of such powers. The Ombudsman is also empowered to recommend to the Commissioner of Police that an unlawful consorting notice should be revoked or varied. To enable the Ombudsman to perform such duties, clause 26 requires the Commissioner of Police to keep a register of, amongst other things, the use of powers, and provide this information to the Ombudsman. Clause 27 provides that the Ombudsman must prepare an annual report documenting the outcome of these monitoring activities, including any impact of the scheme on a particular group if such an impact has come to the Ombudsman's attention.

Transitional provisions: Part 5 deletes sections 557J and 557K(4) and (5) of the Criminal Code, as the offences of consorting between declared drug traffickers and convicted child sex offenders are proposed to be contained in this bill, meaning that such offenders will be subject to this new unlawful consorting scheme.

This bill has been developed in close collaboration with the Western Australia Police Force. Under its advice, the bill provides for a transitional period to accommodate the significant number of notices—approximately 620—issued to child sex offenders. Accordingly, notices issued to child sex offenders under section 557K of the Criminal Code will remain in force for a period of 12 months after proclamation to allow for the review of current notices and subsequent issuing of notices in accordance with the provisions of this bill. Notices issued under section 557J to declared drug traffickers will cease to have effect once the relevant provisions have been proclaimed, and new notices will be issued in accordance with the provisions of this bill. This bill is another tool to add to the state's arsenal to deal with the growing threat of organised criminal groups. When enacted, Western Australia will have one of the strongest unlawful consorting laws in the country that can be used by police to disrupt and restrict serious and organised crime. This bill sends 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, efficient and effective.

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 3995.]

Debate adjourned, pursuant to standing orders.