ACT HUMAN RIGHTS COMMISSION
Australian Capital Territory

Mr Jeremy Hanson MLA
Member for Murrumbidgee
Shadow Attorney General
GPO Box 1020
Canberra ACT 2601

Dear Mr Hanson,

RE: Crimes (Criminal Organisation Control) Bill 2017

Thank you for seeking the Human Rights Commission's input on the exposure draft of the Crimes (Criminal Organisation Control) Bill 2017.

The bill, which is modelled on the NSW *Crimes (Criminal Organisations Control) Act 2012*, will enable the Supreme Court to declare that an organisation is a 'criminal organisation' and make control orders which will prevent members from associating with each other, recruiting others to the organisation, and stop members from participating or working in certain industries. We note that this is a different, and, in certain respects, broader regime than the government's earlier proposals to introduce anti-consorting laws.

The Commission acknowledges the serious community concerns that the proposed scheme seeks to address. There can be little doubt that the escalation of violence linked to outlaw motorcycle gangs in recent months can lead to a range of serious harms to victims and the community.

The Commission fully supports appropriate and proportionate measures to deal with serious and organised crime, in particular, targeted measures taken to address specific gaps in the existing legislative framework. Therefore, for example, we have expressed our support in principle for the government's recent proposals to develop further legislative options to assist police target serious and organised crime, such as anti-fortification measures, enhanced crime scene powers, a new offence to directly address drive-by shootings, and firearm prohibition orders,[1] provided that they are accompanied by adequate safeguards. In the context of this bill, we support its basic underlying principle that there is no right to associate for the purpose of criminal activities.

Our comments below are focused on the human rights implications of introducing a criminal organisation control order scheme in the ACT that is based on the model enacted in NSW. Our analysis is grounded in the minimum standards contained in the *Human Rights Act 2004*

[1] See, Minister for Police and Emergency Services, Mick Gentleman, MLA, 'Targeting outlaw motorcycle gangs in ACT', Media Release, 17 August 2017, available at: http://www.cmd.act.gov.au/open_government/inform/act_government_media_releases/gentleman/2017/targeting-outlaw-motorcycle-gangs-in-act.

(HR Act), with which legislative proposals must comply to be compatible. There are several aspects of the bill that we consider could give rise to issues of incompatibility with the HR Act. We recommend that those aspects should not be retained without modification, as their inclusion would, in our view, result in disproportionate and/or unjustified interferences with human rights.

Human rights implications

By their nature, control order regimes and prohibitions on certain people working in specified industries will limit various rights contained in the HR Act, including the right to equality and non-discrimination (s 8), the right to freedom of association (s 15), the right to freedom of expression (s 16), and the right to a fair hearing (s 21).

The HR Act, however, permits rights to be limited where the limitation is reasonable, necessary and proportionate to the objective being sought (s 28). In short, to meet the requirements of s 28 of the HR Act, a limitation must (i) be aimed at a legitimate objective, and (ii) be rationally and proportionately connected to that objective.

Legitimate objective: A legitimate objective is one that addresses an area of public or social concern that is pressing and substantial enough to warrant limiting human rights. As noted above, the Commission considers that preventing, disrupting and responding to serious and organised crime, including outlaw motorcycle gang (OMCG) activity, in order to protect public safety is clearly a legitimate objective. We, however, note that seeking to align the ACT legislation with the NSW scheme purely for the purpose of achieving consistency between the two schemes is not in itself a legitimate objective for limiting rights in accordance with s 28 of the HR Act.

Rational connection: If the proposed scheme will not make a real difference in achieving its aim, the limitation on rights is not likely to be permissible for the purposes of s 28 of the HR Act. The evidence from other jurisdictions as to whether similar schemes have been effective is particularly relevant in this regard. The Commission notes that there does not appear to be a successful 'criminal organisation' declaration to date in any of the Australian jurisdictions with similar schemes. Notably, the NSW Ombudsman's recent report on the NSW scheme, on which this bill is modelled, recommended its repeal, citing that police found the scheme too cumbersome and resource-intensive and preferred instead to use the alternative powers available to them to disrupt criminal organisations.[2] The report says that the decision by police to stop working on applications under the scheme was made against the background that police have been provided with other powers they can more effectively use to target OMCGs and other criminal organisations, such as a modernised consorting offence, expanded powers to search for firearms, and restrictions on entry to licensed premises by people wearing OMCG 'colours' and insignia.[3] According to the report, police in other states and territories have experienced similar difficulties in successfully

[2] NSW Ombudsman, *Review of police use of powers under the Crimes (Criminal Organisations Control) Act 2012 - November 2016*, 9 March 2017, p 3, available at: https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0018/42417/Review-of-police-use-of-powers-under-the-Crimes-Criminal-Organisations-Control-Act-2012.pdf.

[3] Ibid.

implementing comparable legislation.[4] The evidence from other jurisdictions casts some doubt over the likely effectiveness of introducing such a scheme in the ACT. However, the Commission acknowledges that, in the absence of comparable alternative powers in the ACT, such as anti-consorting laws,[5] it may be that the control order scheme would be more readily used.

Proportionality: The inclusion of adequate safeguards is a key factor in determining whether the measures are proportionate. This includes ensuring that there are adequate processes for procedural fairness, as well as mechanisms for monitoring the operation and impact of the measures. The following aspects of the bill are, in our view, overbroad and/or subject to inadequate safeguards, and if left unmodified carry a significant risk of misapplication leading to disproportionate interferences with human rights, contrary to s 28 of the HR Act.

(i) Definition of a 'serious offence'

The bill provides that the Supreme Court may make a declaration that the respondent is a criminal organisation if it is satisfied, among other things, that members of the organisation in the ACT associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity. Similar to the NSW legislation, the bill links the definition of 'serious criminal activity' with the definition of a serious offence in confiscation of criminal assets legislation. Accordingly, the bill defines 'serious criminal activity' to mean (a) committing a serious offence within the meaning of s 13(2) of the *Confiscation of Criminal Assets Act 2003* (COCA Act), or (b) obtaining a material benefit from conduct that constitutes a serious offence, whether or not anyone has been charged with or convicted of the serious offence. The COCA Act defines a 'serious offence' as an offence punishable by imprisonment for 5 years or longer, or any other offence prescribed by regulation. This can be contrasted with the definition of a 'serious offence' in the NSW *Confiscation of Criminal Assets Recovery Act 1990* (s 6), which contains a more nuanced list of prescribed offences, which, in our view, is more aligned with offences associated organised crime.

To avoid overreach, the definition of a serious offence should be more closely aligned with group- type activity that involves organised crime. We consider that offences with a maximum of 5 years imprisonment would be setting the bar too low. The latter category covers a broad range of offences, many of which are unlikely to be related to organised crime, but which by virtue of their maximum penalty would be captured under the scheme. In our view, the NSW legislation contains a more appropriate definition for these purposes.

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[4] Ibid.

[5] We have previously advised that anti-consorting legislation modelled on the NSW laws involves unjustifiable limits on human rights, as it contains insufficient safeguards and goes beyond its stated purpose of combating organised crime, in particular because it empowers police to issue warnings without any judicial involvement and risks disproportionately impacting on vulnerable groups, including Aboriginal and Torres Strait Islander people. See: Submission to JACS Directorate Consorting Laws Discussion Paper, June 2016, available at: http://hrc.act.gov.au/humanrights/policy-systemic-work/law-reform-consultation-responses/djacs-discussion-paper-consorting-laws-act-june-2016/

(ii) Criteria for control orders

The bill provides that , once the Supreme Court declares an organisation as a criminal organisation (on the balance of probabilities), control orders can be sought from the court, which, among other things, will create an offence of association with or between specified people, as well as prohibit individuals from participating in a range of occupations. There is no requirement to show that the person is involved with any of the criminal activities of the declared organisation. Of particular concern is the power to impose a control order on members, including former members, of a declared organisation without any finding of previous or current criminal activity by that member. The Victorian model, by contrast, includes the safeguard of requiring the Supreme Court to be satisfied on the balance of probabilities that the order is likely to contribute to the purpose of preventing or reducing a serious threat to public safety and order. We recommend that a similar safeguard should be included in the bill: see s 43(2)(b) of the *Criminal Organisations Control Act 2012* (Vic).

In addition, we consider that control orders should not be used as an alternative in cases where a criminal prosecution would be possible but where it is considered to be too burdensome, due to the fair trial standards that would need to be met. To ensure compliance with the right to be presumed innocent in s 22(1) of the HR Act, we recommend that the bill should include an express requirement that the court must consider the possibility of whether the available evidence would support a criminal prosecution before a control order is made.

We also note that the bill does not provide for any differentiation of the treatment of members of organisations who are under the age of 18 years. While we accept that it may be counter-productive to exclude young people from the operation of the scheme, we recommend that appropriate safeguards should be included for the protection of young people subject to the scheme. In particular, young people should only be subject to a control order as a matter of last resort, and the court must be required to take account of their best interests in setting the conditions for the order.

(iii) Interim control orders

The bill will enable the Supreme Court to issue an interim control order pending the hearing and final determination of an application for a control order. An application for an interim control order may be heard without notice to, and in the absence of, the individual affected. An interim control order remains in force until it is revoked, an application for a control order confirming the interim control order is withdrawn or dismissed, or a control order is made confirming the interim control order and the person is in Court for that decision or, if the person is absent, when he or she is personally served with a copy of the control order.

It is not apparent why interim orders are considered necessary. We note that Victorian model, for example, does not make provision for interim orders. Of particular concern is the open-ended nature of such orders, (which as noted above can be made on an ex parte basis) - the bill contains no requirement to make a final order within a specified timeframe. Given the significant consequences that can flow from an interim control order, including prohibitions on participating in certain occupations, we consider that it is necessary to specify a fixed time limit for the operation of such orders. We recommend that, similar to

the time limits that apply to the Federal control order regime, a final order should be made no later than 72 hours after an interim order takes effect.

(iv) Duration of control orders

We are concerned that the bill does not provide for an express time limit for a control order to remain in effect. A control order can therefore potentially remain in force indefinitely unless it is revoked by the Court. In contrast, the Victorian model provides that a control order remains in force for 3 years unless it is revoked earlier or if the declaration that applies to the organisation is revoked or ceases to have effect. We recommend that a similar provision should be included in the bill.

(v) Limited rights of appeal and review

We are also concerned about the adequacy of the rights of appeal and review in the bill. While a respondent has a right to judicial review on questions of law, he or she must, however, seek leave to appeal against a decision of the court in relation to the merits/facts. We note that the Victorian legislation makes no such distinction, and is, in our view, a more consistent model with the right to a fair hearing.

(vi) Right of third parties to make representations

The consequences that can flow from a control order can affect not just the person subject to the order but other persons as well, such as family members and employers. We therefore recommend that the bill should also make provision to give third parties an opportunity to make representations in control order proceedings in circumstances where the making or variation of the order would be likely to have a significant adverse effect on that person. A right of third parties to make representations in appeals in relation to a control order should also be provided.

(vii) Secret criminal intelligence

The bill provides that the chief police officer may apply to the Supreme Court for a declaration that particular information is criminal intelligence. Hearings of criminal intelligence applications are special closed hearings. Organisations and their members in relation to whom declarations and control orders are to be sought are not notified of, or permitted to participate in, these closed hearings. Affected parties are therefore not given the opportunity to refute or test the allegations contained in the secret information. In order to provide a mechanism for the Court to assess the reliability of the information, the bill creates a role for a 'criminal intelligence monitor'. The criminal intelligence monitor participates in the closed hearings for the purposes of testing the appropriateness and validity of the application, but does not represent the interests of the respondent.

There are inherent dangers and unfairness associated with closed hearings and the use of secret criminal intelligence. Such provisions will not be compatible with the right to a fair hearing if it has the potential to result in the Court making a control order without the individual affected being afforded a fair opportunity to respond to evidence on which the declaration or order might be made. At minimum, to ensure compliance with the right to a fair hearing, consideration should be given to extending the role of the criminal intelligence monitor, who, while not acting for the respondent, is at least required to take account and

represent their interests in the closed hearings. This would provide the necessary safeguards for sensitive information while ensuring a minimum degree of protection of the respondent's right to equality of arms in the proceedings.

(viii) Defences for breach of control orders

The bill provides that is a criminal offence for 'controlled members' to associate with each other, with maximum penalties ranging from two to five years imprisonment depending on the number of associations or the number of offences committed. Further, there is no need for the prosecution to establish that a prohibited association was in some way linked to criminal activity or occurred for any particular purpose.

While the bill makes allowances for some associations (such as associations between close family members or that occur in the course of a lawful occupation), we are concerned that it proposes to place a legal burden on the person to prove those matters. While whether the matter is 'peculiarly within the defendant's knowledge' is relevant factor for reversing the burden consistently with the right to be presumed innocent, it must also be shown that the defendant's right to a defence is retained, ie it must relate to matters that the defendant is in fact able to prove. By placing a legal burden on the defendant to prove an essential element of the offence, there is a serious risk that a person may be convicted, not because he/she committed the criminal act, but because they were unable to overcome the burden placed upon them to show they did not. In our view, an evidential burden is more likely to be considered proportionate in these circumstances in accordance with the reasonable limits test in s 28 of the HR Act.

(ix) Prohibition on working in 'deemed' industries and occupations

A person subject to a control order will automatically lose their right to carry out particular prescribed occupations that require a licence. A 'controlled member of a declared organisation' is prohibited from applying for any authorisation) to carry on a prescribed activity so long as she or he is subject to an interim control order or control order. The definition of 'prescribed activity' encompasses a wide range of occupations such as carrying on a security activity within the meaning of the *Security Industry Act 2003*, carrying on the business of a pawnbroker within the meaning of the *Pawnbrokers Act 1902*, carrying on the business of a second-hand dealer within the meaning of the *Second-hand Dealers Act 1906*, operating a tow truck within the meaning of the *Road Transport (Vehicle Registration) Regulation 2000*, carrying on business as a motor vehicle repairer within the meaning of the *Fair Trading (Motor Vehicle Repair Industry) Act 2010*, carrying on business as a body art tattooist or performing body art tattooing procedures, and carrying out the activities of an owner, trainer, jockey or another person associated with racing who is regulated by a controlling body under the *Racing Act 1999*.

The automatic prohibition on people from working in a broad range of 'deemed' industries and occupations is, in our view, an unjustifiable limitation of rights, as the connection between eligibility to engage in such occupations and membership of a particular group has not been established. In contrast, the Victorian model does not automatically prohibit individuals subject to a control order from participating in lawful occupations and industries, but relies instead on existing 'fit and proper' person tests in the relevant licensing regimes.

We consider that such an approach is more proportionate. An alternative approach would be to provide the court with the necessary discretion to set the terms of the control order on a case by case basis.

(x) Sunset clause

We consider that the legislation should be subject to comprehensive review after an appropriate period of time, and provision should be made for periodic reports to the Legislative Assembly on their possible impact on vulnerable groups. It should also include a sunset clause – for example, after 5 years – if the scheme is found to be ineffective or remains unused after the designated period of time.

Once again, we thank you for seeking our input on this bill. In line with our usual practice, we note that we will make a copy of this submission available on our website in due course.

Yours sincerely,




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President and Human Rights Commissioner	Victims of Crime Commissioner	Public Advocate and Children and Young People Commissioner	Discrimination, Health Services, and Disability and Community Services Commissioner

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