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SERIOUS AND ORGANISED CRIME CONTROL BILL 2007 PARLIAMENTARY CIRCULAR

**TO: MEMBERS OF THE SOUTH AUSTRALIAN HOUSE OF
ASSEMBLY AND LEGISLATIVE COUNCIL**

DATE: 9 APRIL 2008

This circular is being issued to members of the South Australian House of Assembly and Legislative Council by SACOSS, the South Australian Council of Social Service Inc, the peak body representing the interests of the social and community services sector and low income and disadvantaged South Australians.

Our endorsed position on this bill has been informed by previously agreed policy positions and more recently, by work undertaken by the SACOSS Law & Justice Policy and Advocacy Group, a sub committee of the SACOSS Policy Council that comprises of individuals with expertise in the field.

We believe that the legislation contravenes some of the basic tenets of the South Australian political and judicial systems by:

- downgrading the burden of proof to that of civil litigation;
- removing safeguards such as judicial review,
- increasing the discretionary powers of SAPOL;
- enshrining anachronistic 'guilt by association' laws into the SA criminal justice system;
- removing the rights of people to gather in groups,
- removing freedom of association; and
- failing to protect and maintain the rights for people to gather and protest.

In considering this bill, we would respectfully ask members to consider these key points.

Serious and Organised Crime (Control) Bill 2007

Context:

On the 21st of November 2007 the Rann government introduced two pieces of legislation to Parliament that again attests to their outspoken stance on bikie gangs in South Australia: the *Serious and Organised Crime (Control) Bill 2007* (otherwise known as the 'Bikies' Bill'), and the *Statutes Amendment (Public Order Offences) Bill 2007*. What is concerning is that both of these bills have the potential to seriously impinge upon the civil liberties of specific groups (i.e. biker groups) while also having the potential to impact upon other groups in South Australia.

SACOSS attended a seminar at Parliament House on the 8th of February this year which was a forum to highlight the concerns held by many throughout the sector and the community (including biker groups) of the potential that these two pieces of legislation (particularly the Serious & Organised Crime (Control) Bill 2007) will have on the freedom to gather and on freedom of association.

These proposed pieces of legislation contravene some of the basic tenets of the South Australian political and judicial systems by: downgrading the burden of proof to that of civil litigation; removing safeguards such as judicial review, increasing the discretionary powers of SAPOL; enshrining anachronistic 'guilt by association' laws into the SA criminal justice system; removing the rights of people to gather in groups, removing freedom of association; and failing to protect and maintain the rights for people to gather and protest.

The provisions contained within the *Serious and Organised Crime (Control) Bill* suggest that this legislation has the potential to be more far reaching than just impacting upon motorcycle clubs. Evidence that has been obtained anecdotally through discussions with key stakeholders suggests that parts of the bill could be potentially discriminatory towards already vulnerable and disadvantaged groups. Statistically, these groups already represent much higher rates of engagement with the criminal justice system than the rest of the community.

The brief summary of the changes:

Serious & Organised Crime (Control) Bill 2007

➤ **Declarations**

The Commissioner can at any time apply to the Attorney General for a 'declaration' under Part 2 of the Act. The Attorney General can then make a declaration if he is satisfied that members of an organisation gather for the purposes of planning, facilitating, supporting or engaging in serious criminal activity.

➤ **Disclosure of evidence**

If the Attorney General approves a declaration, Section 13 (1) provides that the information or intelligence that led to the declaring of an organisation does not need to be disclosed (other than to a person conducting a review under Part 6 and only if that person requests the information).

➤ **Control Orders**

The Court must make a control order against a defendant who has been named as a member of a declared organisation or has engaged in serious criminal activity by the Attorney General.

Control orders prohibit individuals from:

- Associating or communicating with specified persons
- Entering into geographical areas containing specified premises
- Being in the possessing of specified articles

If the individual is deemed to belong to a declared organisation then they may be prohibited from:

- Associating or communicating with members of a declared organisation
- Being in possession of a dangerous article or a dangerous weapon

➤ **Public Safety Orders**

A senior police officer can make a public safety order against an individual if they are satisfied that:

- The presence of a person at any premises or event poses a serious risk to public safety or security.

In considering whether to make a Public Safety Order the police officer will have regard to the following;

- Whether the individual is or has been a member of a declared organisation
- Whether they have been subject to previous control orders
- Whether the individual associates or has associated with members of a declared organisation

Public Safety Orders may prohibit individuals from;

- Entering or being on specified premises
- Attending a specified event
- Entering or being in a specified area

➤ ***New offence of ‘Criminal Association’***

A person who associates with, on not less than 6 occasions within a 12 month period with a person who is a member of a declared organisation or someone who is subject to a control order has committed an offence under the Act and is subject to five years imprisonment.

The Bill also modifies the Offence of “Consorting” to include more modern forms of communication (such as mobile phones and the internet) and a broader definition of persons who will run the risk of prosecution should they meet under certain circumstances.

➤ ***Amendments to Bail Act (Presumption against bail)***

The presumption of Bail has been deleted from the Act in certain cases including the failure to comply with a control order or a public safety order.

➤ ***Amendments to anti-fortification provisions of the Summary Offences Act***

Fortification removal orders can be prepared for premises that are owned by a declared organisation or by a member of a declared organisation or are premises that are occupied habitually used by members of a declared organisation.

➤ ***A review of the effectiveness of the legislation***

As a way of ‘review’ of the effectiveness of the legislation, the Bill includes the provision that the Attorney General must appoint a retired judicial official to review the Act and its outcomes annually. The Bill also proposes a “sunset” clause of 10 years for the Act once proclaimed.

Immediate concerns with the following aspects of this proposed legislation:

➤ ***Standards of proof***

The burden of proof for Attorney General to make declarations under this act is “on the balance of probabilities”. Why is it that declarations under this act are not tested under the same burden of proof for other criminal proceedings?

➤ ***Non-disclosure of evidence***

It is of great concern that this bill contains a privative clause that allows the Attorney General to keep private evidence that constitutes ‘criminal intelligence’. This enables the Attorney General to prohibit judicial review of orders that have been made and accountability for providing just cause for issuing orders.

➤ ***Changes not being underpinned by crime data***

Rather than the Bill being based upon hard crime data pointing to significant problems from Motorcycle gangs (significant enough to instigate the enactment of legislative

changes) it seems as if populist notions of gang activity have instead instigated these Bills. Defence lawyer Craig Caldicott estimates that there are 150 active Bikies in SA, (SAPOL estimates 250 bikers plus affiliated “hangers on”) of which 20 or so would be engaged in criminal activity. With the provisions of this Bill this can be extrapolated to 1.5 Police Officers for each Bikie known to be engaging in criminal activity.

➤ ***Criminal association clauses***

Part 5 of the Bill pertains to ‘criminal association’. This part of the legislation means that if an individual associates with a member of a declared organisation (keeping in mind that the burden of proof for making declarations is now ‘on the balance of probabilities’) or with a person who is the subject of a control order on “not less than 6 occasions in a period of twelve months” can be found guilty of a criminal offence.

In addition to this, Part 5 section 2 of the Bill states that any individual with a criminal conviction who associates with another person with a criminal conviction is also guilty of an offence. Both offences are punishable with a maximum 5 year prison term.

➤ ***Presumption of bail***

The presumption of Bail is also removed by the Bill (see part two amendment to the Bail Act 1985).

➤ ***Changes modelling Federal counter terrorism laws***

The inception of Federal anti-terrorism laws were contentious in the way that the normal checks and balances present in the criminal justice system were stripped back or removed to enable suspected terrorists to be held in ‘preventative custody’ for up to 14 days and to be subjected to control orders for up to 12 months.

It was made clear during the Parliamentary briefing that was held on the 6th of February this year (that was conducted by SAPOL and led by Assistant Commissioner Tony Harrison) that many of the new control orders within the Bill are based upon the Federal counter terrorism legislation.

In the same way that there is concern that the anti-terrorism laws may be used against people simply by their ethnic origin or faith there is concern that this legislation will result in people becoming vulnerable to victimisation, suspicion and prejudice simply because they belong to a motorcycle group or any other group.

➤ ***How will these measures be policed?***

It is likely that to perform many of the measures that are provided for in this legislation it will stretch already constrained police resources. Police will now have to serve and enforce Declarations, Control Orders and Public safety orders. As police will be further constrained by the provisions of this legislation it is likely that outlaw motorcycle gangs will be able to easily circumvent strategies designed to curtail or cease communication and association.

➤ ***Questions of the actual success of Operation Avatar***

SAPOL has claimed that Operation Avatar has so far resulted in over 600 arrests since its inception in 2001. Even if we use police estimates that there are only around 250 criminally active bikers in South Australia this must mean that this group have been arrested at least twice during this period. Therefore if this rate of arrests was affected under existing legislation such as the Criminal Law Consolidation Act and the Summary Offences Act why is it that we need new legislation and new powers to tackle criminality in this group of 250 individuals?