

Not Relevant



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Regulations under the Serious and Organised Crime
(Control) Act 2008 (Michael Atkinson)

APPROVED

Not Relevant



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ATTORNEY GENERAL

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I refer to the current legislative reform being undertaken by the Government with advice from SAPOL and in particular the development of regulations in support of the *Serious and Organised Crime (Control) Act 2008* (hereinafter referred to as the "Act").

The regulations under this Act relate specifically to the definition of 'serious criminal offences' by virtue of Section 3; the definition of '*convictions of a prescribed kind*' relevant to the offence of Criminal Associations under Section 35 (3) and to a number of '*disregarded associations*' under Section 35 (6) of the Act.

In the preparation and drafting of these regulations I provide the following advice.

Definition of "Serious Criminal Offences"

'*Serious criminal offences*' are directly linked to 'serious criminal activity' under the Act. Serious criminal activity is a fundamental evidentiary requirement in support of a 'declaration' made against an organisation; and a 'control order' issued by a Magistrate's court against an individual. It further relates to one of a number of considerations a Senior Police Officer must have regard to when issuing a public safety order.

The definition of 'serious criminal offences' allows for all indictable offences, whether major or minor, relevant to either an organisation or an individual, to be presented as part of an application of a declaration or control order.

The broad and non prescriptive nature of this definition is intentional in its design, to capture historic, present and future serious offences committed by individuals or members of serious and organised crime groups.

Furthermore this definition seeks to counter the ability of serious and organised crime groups to diversify and re-focus future criminal activities outside the reach of more prescriptive legislation.

I understand that during the recent parliamentary debate in the Legislative Council on the Act, attempts were made through amendments by cross bench members to prescribe in legislation categories of crimes that would constitute this definition and that on each occasion fundamental crimes undertaken by serious and organised crime groups; for example, computer crime, identity theft and money laundering were overlooked. This highlights the dangers of being too prescriptive in the definition. Furthermore with further legislative initiatives currently being developed under the

My reasons for these specific offence types are outlined as follows:

Summary Firearms Offences

Firearms are key instruments of violence in OMCG culture. SAPOL investigations into OMCG related firearms and weapons offending over the past 7 years highlights continued possession and use of firearms and weapons by both OMCG members and associates. Possession and use of these weapons in public places (including licensed premises) has and continues to present a serious risk to public safety.

Firearms offences under Sections 11, 14, 14a, of the Firearms Act, 1977 relating to possession, use, acquisition and supply of firearms are relevant to the definition of 'serious criminal offence'. Whilst these are indictable offences by strict classification, the respective legislation provides for prosecutorial discretion to deal with these offences as summary matters, thereby resulting in summary convictions.

A number of outlaw motorcycle gang members and their associates have summary convictions for firearms offences under the Firearms Act 1977. Whilst SAPOL has charged outlaw motorcycle gang members and associates with major indictable firearms offences as a result of investigations, many of these have resulted in summary convictions.

Exclusion of firearms offences heard and determined summarily would leave a significant gap in being able to present relevant evidence of both serious criminal activity and the risk to public safety posed by OMCG members and associates as well as members of other serious and organised crime groups.

Firearms offences under Sections 15 (1a) and 15 (1f) *Summary Offences Act 1953* for example, relate to control of a loaded firearm or firearm and loaded magazine in a public place; and carrying or having control of a loaded firearm or firearm and loaded magazine in a public place. These types of summary offences are relevant to OMCG and gang related violence in public places.

Furthermore, I am advised that during the debate in the Legislative Council on this issue, the Member of the Legislative Council, Sandra Kanck was prepared to accept SAPOL advice that firearms offences of a summary nature should be included within the definition of 'serious criminal offences' and included this in her proposed amendment to prescribe crime types within the Act.

Possession of Dangerous Articles, Prohibited Weapons

Like firearms, weapons are also key instruments of violence in OMCG culture and there is a strong correlation between OMCG members and associates with the possession of prohibited weapons and dangerous articles. The possession of such weapons is more generally a feature of many crime groups. SAPOL investigations into OMCG possession of firearms and weapons specifically between 2006 and 2007 resulted in the continued seizure of such weapons including hand held stun-guns (some disguised as mobile telephones), knuckle dusters, double edged knives and the like. In many cases these weapons accompanied other illegal firearms.

Government's legislative reform program to address serious and organised crime, future offences may have been excluded.

I am advised that officers from within Legal Policy and Legislation Section of your department are currently assessing a number of non crime related indictable offences for your consideration of exclusion from the definition of 'serious criminal offences'. SAPOL is able to provide advice on these offences, once identified, for their relevance to serious and organised crime.

For the reasons I have outlined above, it is my recommendation that no indictable offence relating to criminal activity (major and minor) be excluded from the definition of 'serious criminal offences'.

The definition of 'serious criminal offences' also provides for prescribing summary offences. I note that the Summary Offences (General) Regulations currently list a number of summary offences for the purpose of anti-fortification proceedings under the Summary Offences Act, 1953 and that they have a direct relationship to OMCG. It is my view that that these offences remain relevant to the definition of 'serious criminal offences' and should be included.

These specific offences were confined to crimes likely to be found within or relevant to an outlaw motorcycle gang clubhouse, and in consideration of the broader application of the Act targeting criminal organisations, its members and their associates it is appropriate to expand upon these offences, with appropriate justification.

In addition to these offences I recommended the following summary offences with links to serious and organised crime activity be considered for inclusion:

1. Firearms offences under the Summary Offences Act 1953
2. Firearms offences under the Firearms Act 1977 that have been heard and determined as summary offences
3. Possession of 'dangerous articles' and 'prohibited weapons' under the Summary Offences Act 1953
4. Possession, manufacture, sale or supply of body armour under the Summary Offences Act 1953
5. Prostitution offences relating to 'procurement for prostitution'; 'living off the earnings of a prostitute'; 'keeping and managing brothels' and 'permitting premises to be used as a brothel'
6. 'Bribery' under the Summary Offences Act 1953
7. Attempt, counsel, procure, aid or abet and conspiracy to commit any of these offences

I consider it important that in drafting these regulations that they are not so specific in their reference to particular Section numbers within legislation that they exclude or limit the scope of relevant evidence of historic or future offences.

The relevance of this for the Act is that evidence put forward in support of a declaration, a control order, or public safety order allows for the use of evidence of past and present serious criminal activity.

Possession, manufacture, deal, sell, supply of Body Armour

Body Armour under Section 15A (1 (a) and (b) of the *Summary Offences Act 1953* relates to manufacture, sell, supply, or deals in body armour; and the possession of body armour. Possession of body armour amongst outlaw motorcycle gang members is a growing concern for SAPOL. In successive SAPOL Operations in 2006 and 2007, body armour was located in premises accompanied by firearms and ammunition. In some cases body armour contained concealed hand guns. The location and seizure of body armour from the general community is not an everyday occurrence. Like firearms and weapons, body armour is an attractive commodity for OMCG, associated with their history and potential for ongoing inter-gang conflict and violence.

Prostitution Offences

Sections 25A, 26, 28 and 29 of the *Summary Offences Act 1953* specifically relate to 'Procurement for prostitution'; 'Living off the earnings of a prostitute'; 'Keeping and managing brothels' and 'Permitting premises to be used as a brothel'. Links between prostitution and serious and organised crime is well established and documented. SAPOL has in recent times investigated brothels connected to OMCG. The recommended offences relate to the commercialisation of prostitution rather than the act of prostitution itself and therefore I suggest are appropriate for consideration of the definition of 'serious criminal offences'.

Bribery

Section 61 *Summary Offences Act 1953* relates specifically to bribery of a police officer. Infiltration of government agencies and corruption of public officials including police is an organised crime activity and notwithstanding the summary classification should be included in defining "*serious criminal offences*". Inclusion of this offence in the definition of 'serious criminal offences' will close any loop hole where a person involved in serious and organised crime is charged with an indictable corruption or bribery offence but negotiates a guilty plea at a summary level. This offence is not frequently charged and therefore would not unduly impact on the general community.

Convictions of a prescribed kind

Section 35 of the Act creates the new offence of 'Criminal Association'. Under Section 35 (3) an offence is constituted where a person with 'convictions of a prescribed kind' associates 6 times or more in a 12 month period with another person who has 'convictions of a prescribed kind'. The offence imposes a maximum penalty of 5 years imprisonment, which is classified as a minor indictable offence by virtue of the S5 (3) (ii) of the *Summary Procedures Act 1921*.

Targeting associations between persons with 'convictions of a prescribed kind' presents the Government with the opportunity to further reduce crime by targeting associations that have the potential to result in the commission of criminal offences.

Consideration of the offences that constitute 'convictions of a prescribed kind' is important as this category has the potential to impact across a wide variety of criminality.

I recommend that 'convictions of a prescribed kind' be limited to:

1. Convictions for all major indictable offences
2. Convictions under the *Serious and Organised Crime (Control) Act 2008*
3. Convictions for attempt, counsel, procure aid or abet, or conspiracy to commit one of the above offences

Inclusion of all major indictable offences ensures that the legislation targets only the most serious of crime offenders without limiting the scope of convictions to specific Acts. This is important when considering the evolving and diversified nature of serious and organised crime activities across legislation and jurisdictions.

Inclusion of conviction under the *Serious and Organised Crime (Control) Act 2008* is appropriate as these offences are aimed at disrupting and restricting the activities of criminal organisations, their members and associates.

I note that phase 2 of the Government's legislation reform program is intended to introduce specific organised crime offences and I am advised that these offences will be placed within the *Serious and Organised Crime (Control) Act 2008*. Including all offences under this Act ensures that future convictions for criminal offences aimed at disrupting and dismantling organised crime are captured by this criminal association offence and expand the disruption capacity within the target groups.

I recognise the impact of Section 35(3) of the Act has the potential to be much broader on the community than associations occurring with a 'member of a declared organisation' or persons subject to a control order. Unlike the membership in a declared organisation or a control order, a conviction remains with a person indefinitely. I also note that by virtue of Section 35 (8) of the Act at this time, persons with 'convictions of a prescribed kind' do not have access to the 'reasonable excuse' defence provided to the broader community by virtue of S35 (7). Their only ability to have an association disregarded for the purpose of this offence relies on the stated 'disregarded associations' under S35 (6).

In addressing these issues I recommend that a time limit of 10 years, not including any period of incarceration, apply to a 'conviction of a prescribed kind'.

Applying a time limit on a relevant conviction would provide the opportunity to remove from the reach of the legislation a person who had a 'conviction of a prescribed kind', but had demonstrated through the absence of any further indictable convictions or periods of incarceration that they are less likely to engage in serious criminal activity in the future.

Because of the broader application of the offence of Criminal Association, an argument may be put forward to restrict the 'convictions of a prescribed kind' to offences where there is a strong correlation between crime types; for example, robbery and drug dealing. I recommend against adopting this approach for the following reasons.

Serious and organised crime offenders are adaptive and have been prepared to diversify their criminal activities to meet the needs of individual criminal enterprises. Likewise the dynamic nature of organised crime syndicates and networks, outside OMCG, is often fluid in membership, determined more by experience and skills in a particular crime type. SAPOLs serious crime investigations in 2007 have confirmed that people with skills in vastly different crime types do associate for these reasons.


Disregarded Associations

Section 35 (6) of the Act provides that certain associations will be disregarded for the purposes of offences under Criminal Associations unless the Crown can prove to the court that a particular association was not reasonable in the circumstances. Of these associations the following require regulations:

1. associations occurring at a course of training or education of a prescribed kind between persons enrolled in the course;
2. associations occurring at a rehabilitation, counselling or therapy session of a prescribed kind;
3. associations of a prescribed kind.

I am advised that at this time Legal Policy and Legislation Section within your department is undertaking consultation with external agencies with respect to these specific regulations.

It is important in maintaining the effectiveness of the *Criminal Association* legislation that any prescribed course of training or education; prescribed rehabilitation, counselling or therapy session; or associations of a prescribed kind be linked to a legislative authority justifying the association. In addition to this requirement, it is also necessary that that the associations are of a kind that supports the existence of documentary or other sufficient evidence of a persons bona fide participation or requirement to attend so that police investigations can be undertaken to confirm or refute statements made by a person with respect to their associations.



(Malcolm A Hyde)
COMMISSIONER OF POLICE

6 June 2008