SLD;dgr

21 September 2015

The Hon Alan Wilson S.C.
Chairperson
Taskforce on Organised Crime Legislation
Department of Justice and Attorney-General
GPO Box 149
Brisbane Qld 4001

Dear Mr Wilson

Re: INQUIRY AREA SEVEN: Miscellaneous Amendments in the 2013 legislation including amendments to the *Liquor Act 1992* (Qld), *Police Powers and Responsibilities Act 2000* (Qld), *Criminal Proceeds Confiscation Act 2002* (Qld), *Penalties and Sentences Act 1992* (Qld), *Police Service and Administration Act 1990* (Qld) and the *Transport Planning and Co-ordination Act 1994* (Qld)

The Liquor Act, Disqualified Persons & Disclosure of Criminal Histories

1. The *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld) amended the *Liquor Act 1992* (Qld) and the *Police Service Administration Act 1990* (Qld).

2. The policy objective of the amending legislation was to combat the threat of "criminal motorcycle gangs" to public safety in certain licensed industries, which were identified as "high risk industries".[1]

3. The amendments set up the following scheme:

   3.1 A person is a disqualified person, and therefore disqualified from holding a licence, permit or approval under the *Liquor Act 1992* (Qld) if, and while the individual is an identified participant in a criminal organisation.

   3.2 The amendments permit the Commissioner of Police to disclose the "criminal history" of a current or former participant of a criminal organisation (as defined in the *Criminal Code 1899* (Qld)), to any entity (including the Commissioner for Liquor and Gaming), if satisfied such disclosure is in the public interest.

   3.3 The disclosure by the Commissioner of Police may be made despite another Act restricting such disclosure (e.g. the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) or *Youth Justice Act 1992* (Qld)).[2] The Commissioner of Police is also permitted to authorise the

1 The Explanatory Notes to the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013* (Qld) at pages 1 and 2.

2 Section 10.2AAB of the *Police Service Administration Act 1990* (Qld).

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entity to publish the disclosed information to the public or another entity.[3]

3.4 The Commissioner for Liquor and Gaming may make a decision to refuse a license or permit, or cancel an authority based on the information provided by the Commissioner of Police, which may include confidential criminal intelligence.

3.5 If a license or permit is refused, or authority is cancelled, the applicant or licensee will be informed of the decision, but may not be privy to the confidential criminal intelligence provided to the agency.

3.6 A full merit review process takes place through the Queensland Civil and Administrative Tribunal (QCAT).

3.7 The *Judicial Review Act 1991* (Qld) does not apply to the refusal to grant or decision to cancel a license permit or authority in relation to identified participants (except if there is a jurisdictional error).

3.8 In a QCAT appeal, the appellant may not be privy to the confidential intelligence, and some hearings may be closed.

4. The 2013 amendments to the *Liquor Act 1992* (Qld) and the *Police Service Administration Act 1990* (Qld) put in place a regime where such decisions are made on confidential information, unproven allegations, and in circumstances where the traditional role of the Supreme Court in administrative decision making has been excluded.

The disqualified person provisions

5. Various licences or permits may be issued under the *Liquor Act 1992* (Qld). The Commissioner for Liquor and Gaming may grant an application for a licence or permit only if satisfied that the applicant is not a disqualified person and is a fit and proper person to hold the licence applied for.[4]

6. The Bar Association of Queensland (the Association) is concerned by the manner in which a determination is made of whether an individual or an organisation is disqualified.

7. An individual is disqualified from holding a licence, permit or approval under the *Liquor Act 1992* (Qld) if, and *while* the individual is an "identified participant in a criminal organisation" (a section 228B decision *Liquor Act 1992* (Qld)). There are various other provisions in this Act that also hinge upon section 228B decisions, but it is not necessary to detail all of those separately.

8. The 2013 amendments require the Commissioner for Liquor and Gaming, in making a section 228B decision, to ask the Commissioner of Police a number of questions relating to (amongst other things) the person's involvement as an identified participant in a criminal organisation. The Commissioner of Police must comply with the request.[5]

9. The definition of an "identified participant" in a criminal organisation, means a person who is identified *by the Commissioner of Police* as a participant in

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3 Section 10.2AAC of the *Police Service Administration Act 1990* (Qld).

4 Section 107 of the *Liquor Act 1992* (Qld).

5 Section 47B of the *Liquor Act 1992* (Qld).

the organisation within the meaning of the *Criminal Code 1899* (Qld), section 60A(3).

10. The Association does not believe the test applicable under section 60A(3) of the *Criminal Code 1899* (Qld) is appropriate, in particular having regard to the unsatisfactory manner in which the Minister is permitted to declare an organisation to be criminal without the necessary transparent examination of the underlying facts. Further, the meaning of a "participant" is very broad. It is contended to be sufficient to attend (whether knowingly or not) a function involving a gathering of persons who participate in the affairs of the "criminal organisation", or seek to be a member of one, to fit the definition of a "participant". The Association is also concerned about the quality of the untested "information" that can be considered by the police commissioner in determining whether a person is identified as a participant in a criminal organisation.

11. Ultimately, if the person has been identified by the police commissioner as an "identified participant in a criminal organisation", then the Commissioner for Liquor and Gaming is not permitted to issue the licence or permit.[6]

12. The 2013 amendments exclude the operation of section 27B of the *Acts Interpretation Act 1954* (Qld), which therefore removes the requirement to set out the findings on material questions of fact and to refer to the evidence or other material on which those findings were based, to the extent to which the decision is the result of advice given by the Commissioner of Police.[7]

13. Whilst that decision of the Commissioner for Liquor and Gaming can be reviewed, those review processes are unfair and problematic.

14. Where there is a proceeding relating to an application for a review of a section 228B decision before the tribunal or Supreme Court, the police commissioner is required to give a statement of the reasons about the identification of the person or the person's associate by the police commissioner as an identified participant.[8]

15. The inability of an applicant to effectively test or challenge such "information", which itself is a remarkably low evidentiary threshold, is exacerbated by the confidentiality provisions contained in the new section 37 of the *Liquor Act 1992* (Qld), which allows the tribunal or the Supreme Court to receive and hear arguments about the criminal intelligence in the absence of the parties and their representatives. As reasons are not required at any point in relation to a section 228B decision, to the extent that the decision is the result of advice given by the Commissioner of Police, an applicant for a licence or permit will likely never know what allegations have been made against him or her in finding that he/she is a disqualified person under s228B. That decision can be made on unproven allegations and "information", falling far short of the proper rigours traditionally applied to evidence presented in judicial proceedings which affect the rights or expectations of citizens.

16. The traditional role of the Supreme Court in reviewing administrative decisions, is ousted by the new section 38 of the *Liquor Act 1992* (Qld). The loss of this safeguard is not supported.

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6 Section 107 of the *Liquor Act 1992* (Qld).

7 Section 47C of the *Liquor Act 1992* (Qld).

8 Section 37 of the *Liquor Act 1992* (Qld).

17. Where a person is not a disqualified person, the Commissioner for Liquor and Gaming must consider whether the person is a "fit and proper" person.[9] In making that decision, the Commissioner for Liquor and Gaming may obtain a report from the Commissioner of Police in relation to the "criminal history" of an applicant for a licence or permit.[10] The amendments to the *Police Service Administration Act 1990* (Qld) are considered below in the context of the *Liquor Act 1992* (Qld), but it should be noted that these amendments have wider application than just the *Liquor Act 1992* (Qld).

Amendments to the Police Service Administration Act 1990 (Qld) – *disclosure of criminal histories – current or former members of criminal organisations*

18. The amendments to the *Police Service Administration Act 1990* (Qld) permit the Commissioner of Police to disclose the "criminal history" of a current or former participant of a criminal organisation (as defined in the *Criminal Code 1899* (Qld)), to any entity (including the Commissioner for Liquor and Gaming), if satisfied such disclosure is in the public interest.

19. As has been previously noted, the Commissioner for Liquor and Gaming may then make a decision based on the disclosed information.

20. Various different definitions of "criminal history" are provided under the *Police Service Administration Act 1990* (Qld), depending upon the context. Where the criminal history is that of a current or former participant of a criminal organisation, section 10.2G applies.[11] Section 10.2G of the *Police Service Administration Act 1990* (Qld) has an unusually broad definition of a "criminal history" that is applicable to current or former participants in criminal organisations. That broad definition includes a person's convictions in relation to offences committed in Queensland or elsewhere - as well as *information* about:

    20.1 offences of any kind alleged to have been committed, in Queensland or elsewhere, by the person;

    20.2 cautions administered to the person under the *Youth Justice Act 1992* (Qld), part 2, division 2; and

    20.3 referrals of offences to conferences under the *Youth Justice Act 1992* (Qld).

21. By adopting an overly broad definition of "criminal history" as including alleged offences, a low threshold is once again set. The Association is concerned that in practice a person's criminal history will include acquittals, convictions set aside or quashed, or even mere allegations not charged let alone proved in court.

22. That definition is much wider than that contained in the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), with that definition relating only to the convictions recorded against a person in respect of offences. For those who are not current or former members of criminal organisations, it is that definition of criminal history that governs the criminal history that the police

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9 Section 107 of the *Liquor Act 1992* (Qld).

10 Section 107(5) of the *Liquor Act 1992* (Qld).

11 Section 10.2AAA of the *Police Service Administration Act 1990* (Qld).

commissioner is permitted to provide to the Commissioner for Liquor and Gaming.[12]

23. The Association is concerned that different types of information, namely, childhood offences, quashed convictions, offences for which no conviction is recorded, and even mere allegations that have not resulted in convictions, even though tested in a court, can form part of the criminal history provided for a person who has been "identified" by the Commissioner of Police as (even) a former participant in a criminal organisation. The low threshold for how this determination itself is made (i.e. identification as a former or current member) compounds the unreasonably low threshold of "alleged offences".

24. This information might all be taken into account despite the fact that that individual has never been convicted of an offence, or indeed, ever even appeared in court.

25. The new section 10.2AAB allows the Commissioner of Police to disclose the criminal history of a current or former member even where another act may prevent or restrict that disclosure, such as the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), or the *Youth Justice Act 1992* (Qld).[13]

26. The latter legislative provisions give people a second chance by relieving them of the stigmatising effect of their criminal conviction in certain limited circumstances. A sufficiently lengthy period must have arisen for those convictions to become "spent". Circumvention of such legislative provisions should not be taken lightly. It is concerning that offences might be taken into account from a person's childhood, or from many years earlier, where, through rehabilitation and the absence of re-offending, those convictions are otherwise spent.

27. The Commissioner of Police is also permitted to authorise the entity to publish the disclosed information to the public or another entity.[14] The Association is concerned about the potential injustices that might arise by reason of permitted re-publication.

28. In this context, the use of the term "in the public interest" as the test for disclosure does not necessarily adequately filter it. The use of the phrase "necessary in the public interest" in a statute confers a broad discretion upon a decision-maker to determine which considerations will be relevant to make a decision, subject only to the subject matter, scope and purpose of the Act:[15]

> Clearly, the expression 'the public interest' is one of wide import. It is an expression particularly apt to vest in a decision-maker a wide power to determine what considerations are to be taken into account and what weight is to be given to those which are taken into account. In *O'Sullivan v Farrer,*[16] Mason CJ, Brennan, Dawson and Gaudron JJ said that the expression 'in the public interest' when used in a statute, **classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as**

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12 Section 10.2A of the *Police Service Administration Act 1990* (Qld).

13 Section 10.2AAB of the *Police Service Administration Act 1990* (Qld).

14 Section 10.2AAC of the *Police Service Administration Act 1990* (Qld).

15 *Deloitte Touche Tohmatsu v Australian Securities Commission* (1995) 54 FCR 562 at 579-580 per Lindgren J.

16 (1989) 168 CLR 210.

> **the subject matter and the scope and purpose of the statutory enactments may enable**... given reasons to be (pronounced) definitely extraneous to any objects the legislature had in view.'[17] And in *Australian Broadcasting Tribunal v Bond,*[18] Toohey and Gaudron JJ said of the expression 'if it appears to the Tribunal that it is advisable in the public interest', that it indicates that 'the considerations which may be taken into account in determining whether a licensee is not or is no longer fit and proper are not closely confined.'

29. The phrase "necessary in the public interest" was recently interpreted as follows:[19]

> 78 Consistently with this construction of the word 'necessary', it may readily be accepted that it is 'a strong word'.[20] It can also be accepted that **disclosure cannot be permitted pursuant to s 152(4)(c) merely because it is 'reasonable' or 'convenient' or 'sensible'.[21] However, this construction of the word 'necessary' falls well short of the appellant's proposition that it means 'essential'** in the sense of absolutely necessary or indispensable to the maintenance or advancement of the public interest...
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> 79 There are a number of considerations which support this construction of the word 'necessary' in the context of s 152(4)(c). Foremost is the nature of the purpose to be achieved by disclosure - namely, the furtherance of the public interest. **The determination of what will advance the public interest is generally a discretionary judgment often confined only by the subject matter, scope and purpose of the Act** conferring the power to make the assessment.[22]

Conclusion

30. While the Association does not oppose a considered scheme in relation to regulation and licensing of certain industries,[23] the 2013 amendments to the *Liquor Act 1992* (Qld) and the *Police Service Administration Act 1990* (Qld) are unsatisfactory and accordingly, the Association urges the government to repeal the relevant amendments, and consider a fairer scheme with appropriate procedural safeguards, reasonable evidential thresholds and meaningful review mechanisms.

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17 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J).

18 (1990) 170 CLR 321 at 381-2.

19 *A v Corruption and Crime Commissioner* [2013] WASCA 288 per Martin CJ and Murphy JA.

20 See *Hogan v Australian Crime Commission* (2010) 240 CLR 651 [30].

21 *Hogan* [31].

22 See *O'Sullivan v Farrer* (1989) 168 CLR 210, 216; *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505 (Dixon J); *R v Australian Broadcasting Tribunal; ex parte 2HD Pty Ltd* (1979) 144 CLR 45, 49; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 368 (Mason J); *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 618 [24] (French CJ); [67] (Hayne, Kiefel and Bell JJ) (*Li*); *Re Minister for Resources; ex parte Cazaly Iron Pty Ltd* [2007] WASCA 175 [19] (Pullin JA).

23 See [8] to [31] of the Associations submission in relation to the Inquiry Area Three dated 31 July 2015.

"Bikie colours" in liquor licensed premises

31. The *Tattoo Parlours Act 2013* (Qld) amended the *Liquor Act 1992* (Qld) and the *Police Powers and Responsibilities Act 2000* (Qld).

32. The policy objective of the amending legislation was to prohibit patrons of liquor licensed premises from wearing or displaying material associated with the motorcycle clubs (commonly known as bikie "colours")[24] in order to protect members of the public from violence and intimidation by members of the motorcycle clubs.[25] The government considered that "without these symbols the gang members become just ordinary thugs".[26]

33. The amendments:

    33.1 defined a prohibited item as an item of clothing or jewellery or an accessory that displays:[27]

        33.1.1 the name of a declared criminal organisation;

        33.1.2 the club patch, insignia or logo of a declared criminal organisation; or

        33.1.3 any image, symbol, abbreviation, acronym or other form of writing that indicates membership of, or an association with, a declared criminal organisation, including the symbol '1%'; the symbol '1%er'; any other image, symbol, abbreviation, acronym; or other form of writing prescribed under a regulation for this paragraph;

    33.2 made it an offence for a person to enter or remain in liquor licensed premises wearing or carrying prohibited items;[28]

    33.3 made it an offence for a liquor licensee, permittee, approved manager or employee to knowingly allow a person wearing or carrying a prohibited item from entering or remaining on licensed premises;[29] and

    33.4 authorised a police officer, permittee, approved manager or employee to remove a person wearing or carrying a prohibited item licensed premises, and requires such person to immediately leave and not resist.[30]

34. The Association repeats its concerns about the definitions of "criminal organisation" and "participant".[31] As a result of these definitions, the provisions have the potential to be discriminatory by targeting specific minority groups (not necessarily only motorcycle club members).

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24 The Explanatory Note to the *Tattoo Parlours Bill 2013* (Qld) at page 1.

25 The Explanatory Note to the *Tattoo Parlours Bill 2013* (Qld) at page 1.

26 The introductory speech to the *Tattoo Parlours Bill 2013* (Qld) by J Bleijie.

27 Section 173EA of the *Liquor Act 1992* (Qld).

28 Section 173EC of the *Liquor Act 1992* (Qld).

29 Section 173EB of the *Liquor Act 1992* (Qld).

30 Section 173ED of the *Liquor Act 1992* (Qld).

31 See the Association's submission: at [10] to [15] in relation to Inquiry Area Five dated 5 August 2015; at [5] in relation to Inquiry Area Three dated 31 July 2015.

35. The Association opposes laws that infringe the rights and liberties of persons merely for association, or perceived association, not conduct, as those laws are contrary to the right of freedom of association.[32]

36. While the purpose of these amendments is to protect public from intimidation and violence, in practice, when no identifiers are worn, and motorcycle club members are forced to meet in secret locations, criminal activity will be forced further underground, making investigation more difficult.[33]

37. Accordingly, it is submitted these amendments should be repealed.

Use of audio and video links

38. The *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld) amended the *Penalties and Sentences Act 1992* (Qld).

39. The amendments remove the requirement that parties consent to the use of video or audio links in certain criminal proceedings, and in doing so remove the right for a defendant to elect to appear in person. The discretion will lie with the court to permit the use of such links if it is considered to be in the interests of justice. The purpose of these amendments was to assist with "orderly and expeditious" conduct of the proceedings.[34]

40. The Association does not oppose these amendments, provided the discretion lies with the court to exercise its judgment when taking into account circumstances of each case.

Additional powers to police

41. The *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) amended the *Police Powers and Responsibilities Act 2000* (Qld).

42. The amendments:

    42.1 provide additional powers to police:

        42.1.1 to search, without a warrant, a person reasonably suspected to be a participant in a criminal organisation or a motor vehicle in such person's use or possession;[35]

        42.1.2 to require a person reasonably suspected to be a participant in a criminal organisation, or a person found at a prescribed event or place,[36] to state their name and address;[37] and

        42.1.3 if there is insufficient evidence provided of the name and address, to detain a person to establish their identity[38] (this is

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32 See the Associations joint submissions with the Queensland Law Society dated 25 May 2009 at pages 1 and 2.

33 See the Associations joint letter with the Queensland Law Society dated 25 May 2009 at page 3.

34 The Explanatory Note to the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013* (Qld) at page 12.

35 Sections 29 and 32 of the *Police Powers and Responsibilities Act 2000* (Qld).

36 As defined in s60B of the *Criminal Code 1899* (Qld).

37 Sections 40 and 41 of the *Police Powers and Responsibilities Act 2000* (Qld).

intended to address the difficulty of identifying persons who do not carry sufficient proof to avoid identification by police);[39]

42.2 allow for impoundment and forfeiture of motor vehicles used in the commission of the following offences: the new offences under the *Criminal Code 1899* (Qld) (ss60A, 60B, 60C), and the existing offence of affray where circumstances of aggravation (of a person being a participant in a criminal organisation) exist[40] (this is intended to address the difficulty of willingness of criminal organisations to travel long distances to provide support to their members who are engaging in criminal activities and congregation of members in situations which can spill over into violence);[41]

42.3 increase the minimum penalty for offence of failing to stop a motor vehicle when directed to do so by police (s754):

42.3.1 for everyone to 50 penalty units or 50 days of imprisonment; and

42.3.2 for participants in criminal organisations to 100 penalty units or 100 days of imprisonment, as well as for imprisonment to be served wholly in a correctional facility[42] (this is intended to address the difficulty that participants in criminal organisations are not as easily deterred as other persons).[43]

43. The Association repeats its concerns about the definitions of "criminal organisation" and "participant".[44] As a result of these definitions, the provisions have the potential to be discriminatory by targeting specific minority groups (not necessarily only motorcycle club members).

44. The Association also repeats its submission that the police force and associated statutory crime bodies already have formidable powers to fights organised crime.[45]

45. The Association is not aware of any connection between motorcycle clubs and persons failing to stop a motor vehicle when directed to do so by police. It is of the view there must be a distinct connection to justify a severe increase in penalty against a specific group of persons. As a result, the Association opposes provisions increasing punishment for offenders for association, or perceived association, with a motorcycle club. The Association submits these laws should be repealed.

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38 Sections 40 and 41 of the *Police Powers and Responsibilities Act* 2000 (Qld).

39 The Explanatory Note to the *Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013* (Qld) at page 7.

40 Chapter 4A of the *Police Powers and Responsibilities Act 2000* (Qld).

41 The Explanatory Note to the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) at page 8.

42 Section 574 of the *Police Powers and Responsibilities Act 2000* (Qld).

43 The Explanatory Note to the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) at page 8.

44 See the Association's submission: at [10] to [15] in relation to Inquiry Area Five dated 5 August 2015; at [5] in relation to Inquiry Area Three dated 31 July 2015.

45 See [3] of the Associations submissions dated 31 July 2015.

Mandatory driver license disqualification

46. The *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) amended the *Penalties and Sentences Act 1992* (Qld) to provide for mandatory driver license disqualification for a minimum of three months for prescribed offences (regardless of whether the offence was committed in connection with driving of a motor vehicle).

47. The prescribed offences are defined to be the following offences in the *Criminal Code 1899* (Qld):

    47.1 participants in criminal organisation being knowingly present in public places (s60A);

    47.2 participants in criminal organisation entering prescribed places and attending prescribed events (s60B);

    47.3 participants in criminal organisation recruiting persons to become participants in the organisation (s60C);

    47.4 grievous bodily harm where the offender is a participant in a criminal organisation, and the victim is a police officer acting in the execution of that officer's duty (s320); and

    47.5 serious assault where the offender is a participant in a criminal organisation, and the victim is a police officer acting in the execution of that officer's duty (s340);

    47.6 affray with circumstance of aggravation (namely, the offender is a participant in a criminal organisation) (s72).

48. The Association repeats its submission about the definitions of "criminal organisation" and "participant".[46] As a result of these definitions, the provisions have the potential to be discriminatory by targeting specific minority groups (not necessarily only motorcycle club members).

49. Further, with respect to offences referred to in paragraphs 47.4 to 47.6, liability to mandatory license disqualification is not contingent upon any connection between the offence and the offender's participation in the criminal organisation.

50. The Association is opposed to such mandatory sentencing for the reasons set outlined at paragraphs 6, 7 and 18 of the Associations submissions in relation to Inquiry Area Five dated 5 August 2015.

Confiscation of criminal proceeds

51. The *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2012* (Qld) amends the *Criminal Proceeds Confiscation Act 2002* (Qld).

52. The amendments include introduction of a scheme for recovering "unexplained wealth", and to serious drug offender confiscation orders.

53. The purpose of these provisions is to target serious criminals and potential serious criminals by increasing the risk of involvement in serious criminal

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[46] See the Association's submission: at [10] to [15] in relation to Inquiry Area Five dated 5 August 2015; at [5] in relation to Inquiry Area Three dated 31 July 2015.

activity to such an extent that such involvement is no longer worthwhile.[47] Further, the serious drug offender confiscation orders are targeted to increase the risk associated with involvement in the illicit drug market, and compensate the community and the justice system for the burden.[48]

Unexplained wealth

54. The amendments set up the following scheme:[49]

    54.1 The State may apply to the Supreme Court for an order that a person pay to the State the value of the person's unexplained wealth.

    54.2 The State needs to satisfy the court there is a reasonable suspicion a person has engaged in activities related to a serious crime, or acquired property derived from serious crime without giving sufficient consideration (even if the person did not suspect where the property was derived from).

    54.3 After the State raises reasonable suspicion, the onus shifts to the person to prove their wealth was lawfully obtained.

    54.4 The Court has discretion to refuse to make an order or order a lesser amount to be paid to the State if such an order is in the public interest.

    54.5 The innocent dependants of persons against whom proceeds assessment orders are made can apply to the Supreme Court for relief from hardship.

Serious drug offender confiscation

55. The amendments set up the following scheme:[50]

    55.1 The *Penalties and Sentences Act 1992* (Qld) was amended to provide for the issuing of serious drug offence certificate. A sentencing court must issue such a certificate for each conviction for a serious drug offence.[51]

    55.2 The Supreme Court must make a serious drug offender confiscation order if a person has been convicted of a qualifying offence. The order requires the offender to forfeit all property, including property gifted to others in the six years before the person was charged, to the State. The offender may retain "protected property".[52]

    55.3 The Supreme Court has discretion to refuse the order or exclude property that would otherwise be forfeited if such an order is in the public interest.

    55.4 The innocent dependants of persons against whom proceeds assessment orders are made can apply to the Supreme Court for relief from hardship.

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47 The Explanatory Note to the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld) at page 2.

48 The Explanatory Note to the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld) at page 2.

49 Chapter 2, Part 5A of the *Criminal Proceeds Confiscation Act 2002* (Qld).

50 Chapter 2A of the *Criminal Proceeds Confiscation Act 2002* (Qld).

51 As defined in s62 of the *Penalties and Sentences Act 1992* (Qld).

52 As defined in the *Bankruptcy Act 1966* (Cth).

55.5 The court may make orders for examination compelling the person to give evidence about restrained property. There is no privilege of self-incrimination and this information may be disseminated to other agencies, however this evidence is not admissible in other criminal or civil proceedings (unless exceptions apply).

56. The Association opposes the above amendments as they represent significant inroads into the rights and liberties of citizens.

Deprivation of wealth

57. The provisions of both schemes are highly intrusive, as they are intended to deprive persons of privately owned wealth. This is an unnecessary interference by the State, with rights to privacy and with the right of property ownership.

Onus and standard of proof

58. The unexplained wealth scheme reverses the onus of proof. It is sufficient for the State to raise suspicion, and the onus shifts to the person to prove their wealth was acquired by lawful means.

59. As a result, there is a low statutory test to trigger the State's ability to trigger forfeiture of a person's home or business, which is complimented by an onus of disproval on the affected person. These provisions create a risk of confiscation of legitimately obtained assets if a person, for example, failed to keep track of financial records.

60. The reversal of onus undermines the presumption of innocence, and offends the common law principles.[53] Further, the State is provided with coercive powers, and there is at least the potential for these provisions to be used for improper purposes.

No conviction or link to property

61. The unexplained wealth scheme does not require a conviction to trigger confiscation. Both schemes also do not require a link between the property to be confiscated and the commission of a criminal offence. These provisions create the risk of confiscation of lawfully obtained assets, and in case of unexplained wealth scheme, from innocent persons.

Mandatory orders

62. The serious drug offender scheme requires the courts to make confiscation orders upon conviction, unless it is not in the public interest to do so. The Association is of the view this negatively impacts on the discretion of the courts and is not supported.

Conclusion

63. The Association submits the amendments should be repealed.

64. If the serious drug offender provisions are to be replaced, it is submitted the statutory test must be stricter by, for example, requiring the link between the criminal offence and the wealth in question to be established. Further, the court's discretion should not be impacted by any presumptions, and it should have discretion to order confiscation orders if it is in the interest of justice to do so.

65. If the unexplained wealth provisions are to be replaced, it is submitted that: the statutory test should be stricter by, for example, requiring some link between

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53 *Woolmington v DPP* [1935] AC 462.

the criminal offence and the wealth in question to be established; the onus of proof should remain on the State; and the court should have discretion to order confiscation orders if it is in the interest of justice to do so.

Mitigation by cooperation's with police

66. The *Vicious Lawless Association Disestablishment Act 2013* (Qld) amends the *Penalties and Sentences Act 1992* (Qld).

67. The amendments provide for a process for a vicious lawless associate to mitigate a sentence (of potentially over 25 years of imprisonment) by cooperating with law enforcement if the Commissioner of Police is satisfied such cooperation will be of significant use in a proceeding about a declared offence.

68. The purpose of this amendment was to create a mechanism to encourage informants to cooperate and by fracturing codes of silence and oaths of loyalty.[54]

69. The Association has addressed this matter at paragraphs 32 and 33 of its submissions in relation to Inquiry Area Five dated 5 August 2015.

Provision of the DTMR information to ASIO

70. The *Criminal Law (Criminal Organisations Disruption) and Other Legislation* Amendment *Act 2013* (Qld) amended the *Transport Planning and Co-ordination Act 1994* (Qld).

71. The amendments permit the chief executive of the Department of Transport and Main Roads to give the head of Australian Security Intelligence Organisation information from the transport information database for law enforcement purposes. This includes information about motor vehicle registrations, driver licenses and authorisations to undertake activities such as conducting motor vehicle safety inspections.

72. These amendments appear to relate to the G20 preparations, and not directed at the motorcycle clubs.[55] These provisions should be repealed given the completions of G20.

Use of evidence in other proceedings

73. The *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld) amended the *Criminal Proceeds Confiscation Act* (Qld).

74. The amendments provide for circumstances when the court may give leave to admit evidence that is referred to in s197(1)(c) of the *Crime and Misconduct Act 2001* (Qld) (which dealt with restriction on use of privileged answers, documents, things or statements disclosed or produced under compulsion) in a

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54 The Explanatory Note to the *Vicious Lawless Association Disestablishment Bill 2013* (Qld) at page 2; Introduction speech to the *Vicious Lawless Association Disestablishment Bill 2013* (Qld) by J Bleijie.

55 The Explanatory Note to the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013* (Qld).

proceeding other than a proceeding for an offence under the *Criminal Confiscation Act 2002* (Qld).

75. The Association repeats submissions in relation to Inquiry Area Six dated 9 September 2015, that it is inappropriate to use evidence obtained by coercion in confiscation proceedings.[56]

Anti-hooning laws

76. The *Police Powers and Responsibilities (Motor Vehicle Impoundment) and Other Legislation Amendment Act 2013* (Qld) amends the *Police Powers and Responsibilities Act 2000* (Qld).

77. The provisions are of general application and do not appear to be targeting criminal organisation.

78. The Association has addressed these amendments in the **attached** submission dated 1 February 2013.

Thank you for your consideration of this submission.

Yours faithfully

Shane Doyle QC
President

encl

[56] See the Association's submissions in relation to Inquiry Area Six dated 9 September 2015.

RNT:dgr

1 February 2013

BAR ASSOCIATION OF QUEENSLAND

The Hon Ian Berry MP
Chair
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: lacsc@parliament.qld.gov.au

Dear Mr Berry

Re: Police Powers and Responsibilities (Motor Vehicle Impoundment) and Other Legislation Amendment Bill 2012

Thank you for the invitation to make submissions regarding the Police Powers and Responsibilities (Motor Vehicle Impoundment) and Other Legislation Amendment Bill 2012.

The Explanatory Notes describe the principal objectives of the Bill to "introduce the toughest anti-hooning laws in the nation" and to "address administrative and operational inefficiencies in the type 1 and 2 vehicle impoundment schemes". To do so, various amendments are proposed to the *Police Powers and Responsibilities Act* 2000 ("PPRA"). Among them are proposals to increase the sanctions for both schemes, to considerably broaden the categories of offences that are the subject of those schemes, to introduce a range of new offences, to substantially increase the impoundment periods and to change the current impoundment and forfeiture processes to give them automatic operation (as opposed to a Court supervised operation). Moreover, the Bill includes provisions that, if passed into law, will have retrospective operation with respect to all type 2 related offences of the "same kind" that have been committed up to three years prior to the commencement of the legislation. As the Explanatory Notes say, the Bill "fundamentally changes the vehicle impoundment process in Queensland".

The measures together comprise a considerable interference with private property rights. There is, in the view of the Association real doubt as to whether the evidence justifies the extent of the interference. The Association urges the Committee critically to consider whether the evidence available as to the likely effectiveness of the proposed measures justifies the infringement of property rights.

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The absence of evidence that schemes such as this act as an effective deterrent was noted in the Research Brief prepared by the Queensland Parliamentary Library with respect to the 2011 Bill (Nicolee Dixon and Maggie Lilith, Research Brief 2012/No. 1, January 2012). There, the following appears:

> "11. There has been little research and few evaluations on the effectiveness of impoundment and forfeiture laws as a deterrent to hoon behaviour. However, a 2010 thesis for CARRS- Q (discussed in section 7 of this Research Brief) sought to examine hooning risks, the characteristics of offenders, and the effectiveness of current impoundment and forfeiture schemes. The results need to be viewed in light of acknowledged limitations in the studies and the fact they cover only traditional hooning type behaviour (e.g. street racing, burnouts) not other high risk driving offences (e.g. drink driving) now covered by Queensland's type 2 offence provisions.
>
> 12. Essentially, the results suggest that drivers, mainly male, who engage in hooning represent a significant road safety concern over and above the general young male driver problem (sections 7.1-7.2). Overall, the results indicated that there was a small but significant decrease in hooning offences and other traffic infringements by offenders whose cars were impounded compared with the comparison group. However, more research was needed to determine if impoundment was itself a deterrent or whether the decrease in offending was due to factors such as the offenders not having access to a vehicle post-impoundment because of licence suspension or the owner not permitting access, or because offenders changed the location of their hooning behaviour to avoid detection (section 7.4)."

Later, in Section 7 of the Research Brief, a more detailed consideration of the thesis referred to in the extract above appears. The Association commends that analysis to the Committee. It may be summarised as follows:

1. The evidence (on which the thesis was based) suggests that drivers likely to engage in "hooning" are young males who are also a known at-risk group involved in road crashes. This makes it difficult to determine whether any risks associated with "hooning" are due to the behaviours *per se* or the drivers engaging in them;

2. Legislation such as is now proposed is "unlikely to deter a complex group of people motivated by many different legal, social and psychological factors (e.g. thrill seeking, admiration from peers) from engaging in a variable range of hooning behaviours";

3. The studies underlying the thesis concluded that the road safety risks of "hooning" behaviours are low, with only a small proportion of the hooning offences studied in **Study 2** resulting in a crash and with around 20% of drivers in **Study 1** reported being involved in a hooning related crash in the previous 3 years (which is comparable to general crash involvement among Queensland drivers generally). As against that, there are reasons to believe

that the true involvement of "hooning" in crashes is underestimated but, if that is so, the absence of reliable evidence on the issue is underscored;

4. Although the author of the thesis noted growing evidence in the USA and Canada that impoundment is an effective deterrent to recidivism among drink drivers and drivers who drive while suspended or disqualified, it was "unclear if impoundment is effective in the Australian context or for hooning offenders". Specifically, this was said:

> "**Study 3,** an observational examination of official data to determine the effectiveness of impoundment on post-impoundment driver behaviour, found that there was a small but significant decrease in hooning offences and other general traffic infringements (pp 219-220) and an increase in the time between hooning infringements.
>
> While the reduction could be attributed to impoundment being a specific deterrent to hooning, it is also possible that it could be due, instead, to offenders becoming better at avoiding detection. There was also a possibility that offenders may have been denied access to a vehicle post-impoundment (e.g. due to a licence sanction or the owner not allowing the offender to drive the vehicle). As the study was observational, it was not possible to control for such extraneous variables. It was suggested that, due to this limitation and the small effect sizes, further research was needed (pp 221, 232) to determine the deterrent effect of impoundment.
>
> ...
>
> The author believed that evaluations were needed of the costs of impoundment and forfeiture laws compared to road safety benefits (with the available limited data suggesting low crash risks involved with hooning) to ensure that policing resources were appropriately allocated and that such severe sanctions were warranted. It was suggested that it might be more appropriate for such laws to be applied to drivers who indicate a pattern of persistent risky driving behaviour (demonstrated though large numbers of traffic infringements and licence sanctions etc.) rather than to drivers who commit a particular offence such as hooning."

5. The "major issue, identified by other CARRS-Q research, is that more police presence in problem areas may be needed so offenders know that they risk detection and punishment (because at) present, there may well be a feeling among hoon drivers that they will not be caught."

The Association submits that the available evidence is insufficient to draw any conclusions about the effectiveness of impoundment schemes. Indeed, what does emerge is that other forms of policing - such as increased police presence - may be significantly more effective as a deterrent.

Given these matters, the Association is concerned that the legislative scheme is insufficiently evidence based. On the other hand it involves a significant interference with property rights.

There is a particular aspect of the Bill to which we wish to direct the Committee's attention.

Under the current legislation, a vehicle may only become subject to impounding or forfeiture by order of the Magistrates Court. How that occurs is that an application must be made within 48 hours after charging the owner (or driver) with an impoundment offence. On the hearing of that application, the aggrieved person or persons have a right to be heard and a right to a proper adjudication by a judicial officer.

Under the current proposal the police may proceed to actual impoundment and forfeiture without any supervision by a court. The justification in the Explanatory Notes is that such a measure is necessary to "increase the efficiency of … the scheme" and to generate "considerable savings through the … reduction of time taken by police officers to prepare applications … and court time required to consider applications". Then, to "mitigate concerns about the impact of automatic impoundment and forfeiture", an aggrieved person may apply to the Commissioner of Police for the release of the vehicle but only on quite limited grounds. See: Clause 79B. Then, although a right of appeal to the Magistrates Court is provided for, the grounds under which the actions of the police may be undone by a magistrate are restricted in the same way. See: Clause 79O.

This proposed removal of court supervision in all but closely circumscribed group of cases is likely to lead to injustice. For example, severe financial hardship appears among the limited grounds proposed under the Bill for an application to the Commissioner for release of an impounded vehicle, but there is an important qualifier – the relevant hardship must be such as to deprive the "applicant of applicant's means of earning a living". See: Clause 79B(3)(a). Thus, it would be necessary (in addition to establishing severe financial hardship) to persuade the Commissioner that the impounded vehicle is required in order for that person to perform his or her employment. What then is the position of a person who is unemployed, but looking for work or that of a person who is relied on by a family member as a means of transport to and from the family member's place of work? Neither will have any ground on which to seek the release of their vehicle – whether on application to the Commissioner or on appeal to the Magistrates Court.

The Association submits that the powers of the Magistrates Court on appeal should be unfettered by any ground other than the justice of the individual case. It is one thing to reverse the current scheme to remove court supervision at the impoundment stage; it is quite another to tie the Court's hands on its review of that action.

Yours faithfully

Roger N Traves S.C.
President