SLD;dgr

BAR ASSOCIATION OF QUEENSLAND

9 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: Taskforce on Organised Crime Legislation - Inquiry Area Six: Amendments to the *Crime and Misconduct Act 2001* (Since renamed the *Crime and Corruption Act 2001*)

The *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* amended the then *Crime and Misconduct Act 2001*. That Act has since been renamed the *Crime and Corruption Act 2001* and this submission will refer to it as '*the CCC Act*' and the Crime and Corruption Commission as '*the Commission*'.

Amendments to the CCC Act by the Criminal Law (Criminal Organisations Disruption) Amendment Act 2013

The Act amended the CCC Act to:

a) give the Commission the power to hold intelligence gathering and immediate response hearings in relation to criminal motorcycle gangs;
b) permit information gained in Commission hearings to be used for proceedings under the *Criminal Proceeds Confiscation Act 2002*;
c) remove 'fear of retribution' as a reasonable excuse for refusing to give evidence to the Commission where the witness is a member of a criminal motorcycle gang and the hearing related to a criminal motorcycle gang related matter;
d) require that particular types of contempt must be punished by term of actual imprisonment for a first contempt, two and a half years of actual imprisonment for a second contempt and five years' actual imprisonment for a third contempt where the contempt relates to a refusal to take an oath, answer a question or produce a stated thing;

BAR ASSOCIATION
OF QUEENSLAND
ABN 78 009 717 739
Ground Floor
Inns of Court
107 North Quay
Brisbane Qld 4000
Tel: 07 3238 5100
Fax: 07 3236 1180
DX: 905
chiefexec@qldbar.asn.au
Constituent Member of the Australian Bar Association

e) authorise Queensland Police Service officers to detain individuals pending the contempt application being brought before the court;
f) permit Magistrates, rather than Judges, to issue warrants where people refuse to attend CMC hearings; and
g) remove any obligation to provide a defendant with information from a criminal motorcycle gang related intelligence hearing to assist in the defence of a criminal charge.

Summary of the Association's submissions in Area Six

In the Association's submission, there is no justification for the imposition of mandatory terms of actual imprisonment for contempt of the Commission. Further, the Association is concerned about the removal of the Commission's obligation to provide evidence to defendants in criminal matters.

The Association is not in a position to comment on the efficacy of intelligence gathering and immediate response hearings or the removal of 'fear of retribution' as a reasonable excuse for specified witnesses. That said, as noted elsewhere[1], the Association is opposed to laws which impose civil or criminal liability on an individual based upon association rather than conduct. The pre-existing law (as to establishment of reasonable excuse) has been construed to operate narrowly. The Court of Appeal had interpreted the pre-existing provisions such that a person had to give proper particulars of the fear and reasons for it before reasonable excuse was shown.[2] It is unclear why any further limitation of the reasonable excuse was appropriate. As the law presently stands a witness will be imprisoned for refusing to answer a question even if the Commission and the Supreme Court find that the witness has a well-founded fear that he or she will be killed if he or she co-operates with the Commission.

Mandatory punishment for contempt

The CCC Act now provides for mandatory punishment where a witness commits contempt of a Commission hearing.[3] An initial contempt must be punished by a period of actual imprisonment.[4]

The penalties for a second and a third contempt committed in the same proceedings are a mandatory minimum period of 2 ½ years and 5 years actual imprisonment, respectively.

---

1 Page 28 of the Association's submission dated 31 July 2015.
2 *Crime and Misconduct Commission v WSX* [2013] QCA 152
3 The specific forms or contempt covered are: s199(8A)(a)(i) failure to take an oath; s199(8A)(a)(ii) failure to produce a document, etc. and s199(8A)(a)(iii) failure to answer a question.
4 s199(8B)(a)

The Association respectfully submits that this review should recommend that these provisions be repealed because:

(a) they are unnecessary because the pre-existing legislative scheme and general law principles already give the Supreme Court unlimited power to punishment contempt;
(b) they remove judicial discretion in an area which should be the unique purview of the Supreme Court; and
(c) the provisions have been interpreted by the Courts as allowing repeated punishment for essentially the same contempt.

CCC Act mandatory sentencing Provisions are unnecessary

Punishment of contempt of the Commission is devolved to the Supreme Court and regulated by the provisions of the UCPR.[5]

At common law, a contemnor can be coerced by *indefinite* imprisonment until:

a. The contemnor purges his contempt;[6]
b. The proceedings in which the contemnor's evidence might be used are at an end;[7]
c. The Court is satisfied that, notwithstanding any further indefinite detention, there is no prospect of obtaining cooperation from the contemnor;[8] or
d. For some other reason, no good purpose is served by further detaining the contemnor.[9]

Where one of the circumstances listed above arises, the appropriate course is for the Court to either release the contemnor or to sentence the contemnor to a just finite period of imprisonment. Despite the imposition of a finite term of imprisonment, a contemnor may be released before the contemnor has served the full term of the contemnor's finite sentence.[10]

Prior to the amendments, the Commission, who appear as the applicant before the Supreme Court in contempt applications, had rarely if ever sought the indefinite imprisonment of a contemnor.[11] Contempt applications under the CCC Act and its predecessor generally involved applications for and the imposition of finite periods of imprisonment.

---

5 s199 generally.
6 For example see *Wood v Stanton (No 5)* (1996) 86 A Crim R 183 at 184.
7 For example see *R v Abdallah (No 2)* [2014] NSWSC 111; *Wood v Galea* (1997) 92 A Crim R 287;
8 For example see *Sage v K*, Unreported, QSC Mullins J, 28 September 2011
9 *Wood v Galea (No. 2)* (1996) 84 A Crim R 274 at 283-284.
10 UCPR r931(2). This usually occurs where the contemnor purges his or her contempt during his or her finite period of imprisonment.
11 The Association's research has not disclosed a case involving such an application in publicly searchable databases.

The Association submits that the pre-amendment contempt regime provided ample scope for the appropriate punishment of contempt.

The Association submits that mandatory penalties are inappropriate

The Association submits that mandatory sentences are inconsistent with the proper exercise of judicial power[12] but are of particular concern where the Supreme Court is exercising its powers in relation to contempt.

The power to punish contempt has been described as *"the distinguishing characteristic of a superior court..."*.[13] In *John Fairfax & Sons v McRae*[14] the contempt jurisdiction was grouped together with certiorari and mandamus as part of a State Supreme Court's suite of inherent and systemic supervisory powers. Dixon CJ, Fullagar, Kitto and Taylor JJ said in that case:

> *"[I]t has been said again and again that the court punishes contempts not in order to protect courts or judges or juries but in order to safeguard and uphold the rights of suitors and ensure that justice be done. So regarded, the power to punish for contempt of inferior courts and the power to issue mandamus or certiorari to inferior courts are seen as in truth but different aspects of the same function — the traditional general supervisory function of the King's Bench, the function of seeing that justice was administered and not impeded in lower tribunals."*

The Association submits that provisions interfering with the Supreme Court's discretion to punish contempt as it sees fit are inappropriate and should be repealed.

Potential injustice in provisions' practical effects

Among the cases decided since the amendments is the case of *Scott v Witness JA*[15]. The witness in that case had previously been sentenced to a finite term of seven months imprisonment for a refusal to answer the Commission's question about the whereabouts of certain cash.[16] After the amendments were introduced the Commission recalled the witness and asked him the same question, which he again refused to answer. The Commission brought further contempt proceedings and successfully argued that, whatever the general law in relation to punishing a second refusal to answer the same question, s199(8B)(b) permitted further punishment for a second refusal to answer the same question. The witness was sentenced to the

---

12 The Association refers the Panel to the Law Council's writings on the inappropriateness of mandatory sentencing available at http://www.lawcouncil.asn.au/lawcouncil/index.php/library/policies-and-guidelines.

13 *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union* (1951) 82 CLR 208, 242

14 (1955) 93 CLR 351, 363.

15 [2015] QSC 48

16 See *O'Connor v Witness G* [2013] QSC 281. The term actually imposed was less than seven months but when pre-hearing imprisonment was taken into account the term was effectively seven months.

mandatory minimum of two and a half years of actual imprisonment for the 'second' contempt.

The Association submits that s199(8B)(b) should be repealed to the extent that it permits further punishment for a second refusal to answer the same question.

Withholding evidence from defence in criminal trials

Section 201(1A) now gives the Commission an absolute discretion to refuse to give information obtained in the exercise of its intelligence function to a defendant in criminal proceedings. The Association submits that there is no apparent justification for the exclusion of information gathered under the Commission's intelligence function from the pre-existing disclosure regime which allows the Commission to apply to the Supreme Court for an order preventing disclosure to a defendant if it would be unfair or contrary to the public interest.[17] The continued existence of this provision risks bringing the system of justice into disrepute because a defendant could potentially be tried for a criminal offence despite exculpatory evidence being in the possession of one of the State's key investigative agencies. It otherwise causes potential bases for trials to be stayed until such materials are disclosed raising the potential for further unnecessary costs being expended in criminal trial litigation.

The Association submits that s201(1A) should be repealed.

Yours faithfully

Shane Doyle QC
President

[17] S201(4)