



# QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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## Taskforce on Organised Crime Legislation

Dear Judge

### Inquiry Area Five

Thank you for your letter setting out the Taskforces 10 areas of enquiry. This submission relates to inquiry area five.

The Queensland Council for Civil Liberties ("QCCL") is a voluntary organisation which focuses on defending and preserving civil liberties and human rights in Queensland. The legislation which has given rise to this inquiry has significant impacts on fundamental rights and threatens the integrity of our legal system. This submission contains QCCL's concerns with a number of Acts of Parliament introduced in 2013 by the then Queensland government, including the *Vicious Lawless Association Disestablishment Act 2013* (Qld), and several Acts which involved amendments to the *Criminal Code 1899* (Qld). The main controversies of these pieces of legislation are outlined, followed by recommendations made with a view to remedy unjustifiable encroachments upon civil liberties.

### Research

We submit that the taskforce ought to have research undertaken to identify whether there is any person charged under these and related laws who could not have been charged with an offence under the law as it existed prior to their enactment. If, contrary to our initial impression, there are at most a few such persons the question must be asked whether it was just that they should have been charged given the level of criminality involved.

### General Concerns:

#### **Focusing on minorities, missing the bigger picture**

The 'bikie laws' are a group of laws specifically tailored towards suppressing and eradicating the activities of a minority group - namely motorbike organisations.<sup>1</sup> Although there are links between bikie organisations and criminal activity, it is doubtful that the legal ammunition aimed against these organisations are proportionate to their contribution to criminal activities across the State. A study by Assistant Professor Dr Terry Goldsworthy of Bond University of arrests made since the introduction of the bikie laws in 2013 (totalling 348 at the time) revealed that only 1% of those

<sup>1</sup> Harry Hobbs and Andrew Trotter, 'How far have we really come? Civil and political rights in Queensland,' (2013) 25. *Bond Law Review*, 167, 177; Anthony Gray, 'The Constitutionality of Queensland's Recent (Legal) War on Bikies' 2014 19(1) *Deakin Law Review* 51, 86; Neil Morrissey, 'The Queensland Anti-Bikie Laws: Good Governance or a Human Rights Disaster?' (2014) *Brief*, 29. <<http://search.informit.com.au.ezproxy.library.un.edu.au/fullText;dn=20151021;res=AGISPT>>

*Watching them while they are watching you!*

arrested were bikies, and only 3.4% of crime was considered 'organised crime', i.e. gang-related.<sup>2</sup> Furthermore, bikies contributed to a mere 0.8% of total drug supply offences in Queensland, 5% for drug trafficking offences, and 1.3% for production of dangerous drugs.<sup>3</sup> As Queensland's Attorney-General Yvette D'Ath points out, focusing on one 'criminal' group at the expense of others is a flawed approach to dealing with crime;<sup>4</sup> it also has the tendency to drive criminal organisations further underground.<sup>5</sup> Targeting one group in society in order to combat organised crime is not only ineffective but discriminatory. It sets an undesirable precedent which could potentially justify the discrimination of other minority groups in the future.

### **Criminal Law (Criminal Organisations Disruption) Amendment Act 2013**

#### **Freedom of association**

One of the key concerns relating to the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* is the offence which criminalises association. Section 60A makes it illegal for 'participants' of a 'criminal organisation' to be 'knowingly present in a public place with two or more other persons who are also 'participants'.<sup>6</sup> The penalty for such an offence is anywhere between six months to three years imprisonment.<sup>7</sup>

This provision constitutes an unjustifiable restriction on the ability of individuals to associate. Ironically, as Evan Verner points out in relation to talks of legal challenges to the validity of the anti-bikie legislation, "if a group of three or more members of groups designated under the VLAD laws attended the High Court hearing they would face being arrested and placed in solitary confinement for six months."<sup>8</sup>

While some of the identified motorcycle clubs are notorious for their association with criminal activity, it is the principles behind these laws and their stringent penalties that concern QCCL. As Hobbs and Trotter note in their article *How far have we really come? Civil and political rights in Queensland*, "The principle of freedom of association recognises that non-governmental organisations must be permitted to exist and is inherent to a free society."<sup>9</sup>

As QCCL expressed in an earlier press statement, "the right to association is vital for any modern democracy and represents a fundamental civil and human right."<sup>10</sup> Our organisation believes that this legislation overcompensates community security to the detriment of individual civil rights.

#### **Reversal of the onus of proof**

Sections 60A, 60C and 60C reverse the onus of proof for individuals charged with a crime. As Amnesty International's spokesperson Michael Hayworth points out, such laws "severely

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<sup>2</sup> Terry Goldsworthy, 'Why Queensland Is Losing the Bikie War', *Civil Liberties Australia*, 20 January 2014, <http://www.cla.asn.au/News/qld-govt-is-losing-the-bikie-war>

<sup>3</sup> *Ibid.*

<sup>4</sup> Australian Broadcasting Corporation, 'Replacement VLAD 'anti-bikie' laws expected by end of 2015, Queensland Attorney-General Yvette D'Ath says', 28/07/15 <http://www.abc.net.au/news/2015-02-17/taskforce-to-have-replacement-vlad-laws-by-end-of-year/6126626>.

<sup>5</sup> Lawyers Weekly, 'A year of eroded rights for Queensland', 28 January 2010, <http://www.lawyersweekly.com.au/opinion/5736-a-year-of-eroded-rights-for-queensland>

<sup>6</sup> s60A (1) *Criminal Code 1899* (QLD).

<sup>7</sup> s60A (1) *Criminal Code 1899* (QLD).

<sup>8</sup> Evan Verner, 'Motorcyclists fight VLAD laws in High Court' (2014) *Greentest*, 7.

<sup>9</sup> Hobbs and Trotter, *above n 1*, 176.

<sup>10</sup> Verner, *above n 8*, 7.

undermines the right to be presume innocent until proven guilty that all Queenslanders enjoy.”<sup>11</sup>

### **Recommendations**

- The anti-association offences should be repealed.
- Re-position the onus of proof onto the Crown.
- Legislative protection of the freedom of association.

### **Criminal Code (Criminal Organization) Regulation 2013**

*The Criminal Code (Criminal Organisations) Regulation 2013* gives the Minister the power to recommend an entity be declared a criminal organisation with the consequent penalties or infirmities for members. This power was previously exercised by the Supreme Court, and its transferal to the executive raises the question of whether procedural fairness safeguards will be observed (as would be the case with decisions made by a court).<sup>12</sup>

This is simply a form of proscription. The Council makes 3 points against proscription:

1. It is actions that should be the subject of criminal sanctions not indications of support or involvement in organisations. All of the conduct which is alleged against the organisations to be proscribed which is said to justify that proscription could be the subject of an ordinary criminal charge.
2. Proscription introduces into our law the principle of guilt by association. In doing so it undermines one of the fundamental principles of our criminal legal system. By doing so proscription makes it more likely that innocent persons will be convicted of offences.
3. Finally, there is no explanation in the legislation which introduces the regulation (*the Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld)*) or its explanatory memorandum, which provides a basis for the Minister's decision to include the listed organisations.<sup>13</sup> As a consequence it is a power which is capable of being used in the most arbitrary manner.

Australian history is replete with examples of the arbitrary misuse of proscription powers. The first being the proscribing of the Industrial Workers of the World in 1916 <sup>14</sup>

There are serious questions about the effectiveness of proscription. The British *Inquiry into legislation against terrorism* while putting a case for proscription in the end conceded "that the primary purpose of proscription was to give a legislative expression to public revulsion and

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<sup>11</sup> Amnesty International 'Queensland bikie laws breach international fair trial standards', 5 November 2013, <http://www.amnesty.org.au/news/comments/33255/>

<sup>12</sup> Queensland Law Society 'VLAD tidings: key features of the new legislation' 2013 33(11) *Practor* 22, 24; Verner *above n 7*.

<sup>13</sup> Gray, *above n 1*, 51, 54.

<sup>14</sup> PJ Rushton "The revolutionary ideology of the Industrial Workers of the World in Australia" *Historical Studies* volume 15 page 424 at page 435 | Turner *Industrial Labour and Politics* pages 123-138 and 214-5 and Raymond Evans *Loyalty and Disloyalty: Social Conflict on the Queensland Home front 1914-18* Sydney Allen & Unwin

reassurance that fair measures were being taken.”<sup>15</sup>

The parliamentary library<sup>16</sup> has described the inconsistency in the approach of the Australian Government to proscribing organisations.

### **Recommendation**

The *Criminal Code (Criminal Organization) Act and Regulation 2013* should be repealed

### **Vicious Lawless Association Disestablishment Act 2013**

There are a number of important concerns with the *Vicious Lawless Association Disestablishment Act 2013* (VLAD Act). It introduces a list of 'declared offences' which attract stringent and disproportionate penalties, contributes to a growing trend towards mandatory minimum sentencing, and reduces access to community based sentencing.<sup>17</sup>

### **'Declared offences' and mandatory sentencing**

Section 7 provides that, if an individual commits a 'declared offence' whilst a 'participant' of a criminal organisation, and the offence was committed 'for the purposes of, or in the course of participating in the affairs of, the relevant association' then an additional 15 years imprisonment must be added to the original sentence.<sup>18</sup> A further 10 years is added (thereby totalling 25 years plus the original sentence) if the individual is an 'office bearer of the association'.<sup>19</sup> In both cases the additional sentences are to be applied cumulatively.<sup>20</sup>

Particularly concerning is the broad range of offences which fall under the list of 'declared offences' in the VLAD Act. Relatively minor offences such as drug possession are included. An individual who falls under the ambit of the Act and is charged and convicted of possession of a small amount of a schedule 2 drug (such as cannabis) could be facing up to 25 years in prison, plus the original sentence, without the option of a suspended sentence or a period of parole.<sup>21</sup>

Part 2 of the *Penalties and Sentencing Act 1992* identifies a list of requirements which must be taken into account when a judge is making a sentencing decision. For example, the judge must take into consideration whether there is a guilty plea and the offender's character. However, the imposition of mandatory minimum sentencing in the VLAD Act displaces these requirements, providing that the sentences imposed under section 7 'must not be 'mitigated or reduced under any other Act or law.'<sup>22</sup>

The Law Council of Australia and Queensland Law Society are opposed to mandatory minimum sentences, declaring them as contrary to rule of law, judicial precedent, judicial independence

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<sup>15</sup> Quoted in "Terrorism and the Law in Australia: Legislation Commentary and Constraints" Department of the Parliamentary Library Research Paper No. 12 2001-02 See also the Report of the Security Legislation Review Committee June 2006 at paragraph 7.1.

<sup>16</sup> "The Politics of Proscription in Australia" Research Note No. 63 21 June 2004

<sup>17</sup> See ss 3,7 and Schedule 1 *Vicious Lawless Association Disestablishment Act 2013* (Qld).

<sup>18</sup> s7(1)(b) *Vicious Lawless Association Disestablishment Act 2013* (Qld).

<sup>19</sup> s7(1)(c) *Vicious Lawless Association Disestablishment Act 2013* (Qld).

<sup>20</sup> s7(1)(c) *Vicious Lawless Association Disestablishment Act 2013* (Qld).

<sup>21</sup> Gray, above n 1, 57.

<sup>22</sup> *Vicious Lawless Association Disestablishment Act 2013* (Qld) s7.

and the doctrine of the separation of powers, and a clear affront to judicial discretion.<sup>23</sup> Further, there is little evidence that mandatory sentencing in fact deters crime.<sup>24</sup>

### **Broad definitions of 'participant' and 'association'**

Given the severity of the penalties under the VLAD Act and Criminal Code 1899 (Qld), the broad definitions for 'participant' and 'association' are cause for concern.<sup>25</sup> The Queensland Law Society argues that 'association' could include "groups such as workplaces, social clubs, sporting associations or teams" and 'participants' may encapsulate individuals operating in a professional capacity associated with the organisation.<sup>26</sup> To fall under the title of participant, an individual need merely seek to be a member or seek to be associated with the association, attended more than one meeting or gathering of persons participating in the affairs of the association, or take part in the affairs of the association in any other way.<sup>27</sup> These broad definitions lead to fears that innocent bystanders may be captured and convicted under the legislation.<sup>28</sup>

### **Removal of community based sentencing options**

Section 8 of the VLAD Act provides that 'a vicious lawless associate is not eligible for parole during any period of imprisonment for a further sentence.' Not only will prisoners be forced to serve excessively long and disproportionate sentences, but the option of serving a portion of that time in the community through the justice system's community based sentencing regime is removed from the ambit of choice available to the judiciary. Parole and other community based sentencing options facilitate the rehabilitation of prisoners, both through their gradual reintroduction into community living and in providing some measure of hope for prisoners serving lengthy sentences.

### **Recommendations:**

- Remove the provisions imposing mandatory minimum sentencing periods. Short of that, reduce the severity of sentences, and/or provide that they should be served concurrently rather than cumulatively, and/or give judges more discretion in nominating a sentence.
- Remove from the list of 'declared offences' offences of a less serious nature
- Revise the definition of participant to ensure there are no unintended consequences.
- Remove the provision which removes the possibility of parole and the option of community based sentences.

We trust this is of assistance to you in your deliberations.

Yours faithfully

<sup>23</sup> The Law Council of Australia 'The Mandatory Sentencing Debate' 6 May 2014, <http://www.lawcouncil.asn.au/lawcouncil/index.php/law-council-media/news/352-mandatory-sentencing-debate>; Queensland Law Society 'Mandatory Sentencing Laws Policy Position' 4 April 2014, file:///C:/Users/uqehoare/Downloads/QLS\_Advocacy\_-\_Mandatory\_sentencing\_policy\_paper\_FNL.pdf.

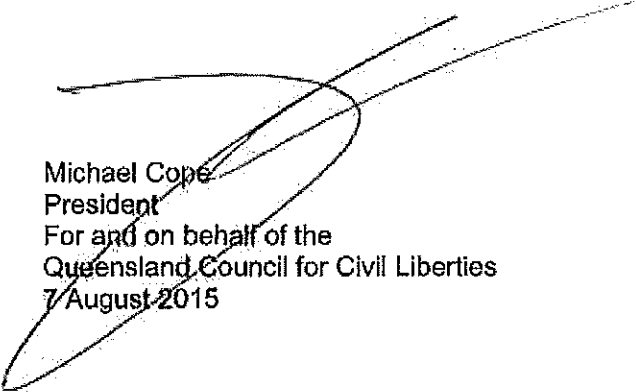
<sup>24</sup> Louise Floyd, 'Punch and Jarrod: The pitfalls of Attorney-General (rather than judicial) activism' (2014) 34 Qld Lawyer 66, 73; Morgan N, 'Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to June 2002' (2002) 26 Criminal Law Journal 293; Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' (2000) 24 *Criminal Law Journal* 164.

<sup>25</sup> See *Vicious Lawless Association Disestablishment Act 2013* (Qld); ss 3,4 and *Criminal Code 1899* (Qld) s 60A.

<sup>26</sup> The Queensland Law Society, above n 12, 24.

<sup>27</sup> *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 4.

<sup>28</sup> Floyd, above n 22, 73.



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