2015

SUBMISSIONS TO THE TASKFORCE INTO ORGANISED CRIME LEGISLATION 2015 ON BEHALF OF THE UNITED MOTORCYCLE COUNCIL OF QUEENSLAND (UMCQ)

CONTACT

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1. EXECUTIVE SUMMARY

1.1. The United Motorcycle Council of Queensland (the UMCQ) thanks the Taskforce for the opportunity to provide some import into this very important review process. The UMCQ also acknowledges the Taskforce's recognition as an important stakeholder in this process.

1.2. The UMCQ is an organisation formed to lobby the interests of motorcycle enthusiasts in Queensland. It consists of representatives from various motorcycle clubs (including a number of clubs described by outsiders as "outlaw" or "1%"). It is loosely affiliated with similar organisations in a number of States and a national organisation who have similar objectives in their various jurisdictions.

1.3. The UMCQ submits that whether or not motorcycle clubs (or as we submit – errant members of motorcycle clubs without the knowledge or sanction of the clubs) are involved in committing criminal offences in this State, the legislation has been completely unsuccessful in either enhancing public safety or disrupting organised crime. On this basis alone, there is no justification for the continuance of legislation which significantly affects the rights of a particular segment of society (motorcycle riders generally).

1.4. Among the UMCQ's primary concerns is the proliferation of misinformation and false information about the nature, make up, structure and activities of its member clubs by in particular the QPS (with Task Force Maxima being a significant offender feeding misinformation and untruths to the popular media simply to justify their increased budget) but also the popular media and a number of misinformed (likely by the QPS) politicians on both sides of the parliament (though primarily members of the government that introduced the 2013 legislation).

1.5. The UMCQ is also seriously concerned about the way in which members of the QPS have gone about enforcing and subsequently prosecuting the VLAD provisions. Anecdotally, the UMCQ has seen a significant increase in the harassment of motorcyclists generally and in relation to the "1%" clubs a significant increase in violence and intimidation and unlawful conduct by specifically Task Force Maxima but also by other members of the QPS. Motorcyclists and their families have been unlawfully assaulted (including as detailed below in a case study the pointing of firearm at a child), have had their premises and vehicles searched unlawfully and been intimidated into providing confessions largely using the threat of refusal bail (but also in some other instances other abuses such as threatening to arrest family members).

1.6. However, far and away the most disturbing feature of this suite of legislation to the UMCQ is that it is taken away the very essence of the clubs. VLAD has prevented members from going to their clubhouses and associating with people who to them are family (often the only family

some of them have ever known), receiving the spiritual and emotional support that only their peers can bring and socialising away from members of the public who don't understand or accept their culture. Clubhouses are not a place where criminal activity is planned but a refuge for troubled souls from a society which has outlawed them.

1.7. The vast majority of members of the outlawed clubs work for a living and earn a living honestly, mostly in blue-collar work either as employees or self-employed in small businesses. They have families and pay mortgages and belong to the clubs for social reasons only. They enjoy the brotherhood of the clubs and share a love of motorcycling. Most have no or limited criminal convictions although many have been arrested (since the implementation of the VLAD laws) and either not charged or charges laid are later withdrawn.

1.8. The licensing provisions of various acts but in particular in relation to tattooed parlours by targeting specifically UMCQ members have no impact on crime but in fact have a very deleterious effect on the livelihoods of many hard-working family men who would otherwise be contributing to society by paying taxes and earning an honest living. Whilst anecdotally the UMCQ has not at this stage seen any evidence of it, it could be argued that by taking away a person's livelihood the legislation may in fact be driving people commit crimes out of economic necessity. It certainly has no effect on protecting the community. At the very least it has cause many of our members to engage in alternative employment (that is not their usual occupation) which is usually for less remuneration and therefore still causing economic hardship for them and their families.

1.9. The UMCQ makes no submissions in relation to interstate legislation other than to reaffirm its opposition to the implementation of any legislation aimed particularly at them, their affiliated clubs and members.

1.10. In relation to the review of the *Criminal Organisation Act* (2009), the UMCQ submits that like the 2013 suite of legislation that followed this legislation too has failed to have any effect on organised crime but are consoled by the fact that it has had much less of an impact on law-abiding motorcyclists.

1.11. The UMCQ's ultimate submission is that all of the 2013 provisions be repealed.

2. INTRODUCTION

2.1. The submissions that follow have been prepared by Counsel instructed by Irish Bentley Lawyers on behalf of the United Motorcycle Council of Queensland (the "UMCQ") and following invitation to do so by the Task force in an undated letter attached as **Appendix 1.** The UMCQ would like to thank the Taskforce for both the offer to participate in the process and your indulgence with extensions of due dates for the lodgement of these submissions.

2.2. The UMCQ request that the Taskforce treat the material referred to as "examples" and "case studies" as confidential and to consider that the material is provided on a without prejudice basis to assist the Taskforce by providing contrary information to that provided by the Queensland Police Service (QPS) and other government agencies. It is submitted that this information may well attract legal professional privilege and the provision of that information here is in no way a waiver of that privilege.

2.3. The UMCQ is an organisation formed to lobby the interests of motorcycle enthusiasts in Queensland. It consists of representatives from various motorcycle clubs (including a number of clubs described by outsiders as "outlaw" or "1%"). It is loosely affiliated with similar organisations in a number of States and a national organisation who have similar objectives in their various jurisdictions.

2.4. The UMCQ represented a coming together of groups which previously had not been on the best of terms united in the common purpose of advocating for the repeal or amendment of firstly *The Criminal Organisation Act* (2009) and then for the suite of legislation that forms the subject of the Taskforce's inquiry (hereafter for convenience "VLAD").

2.5. Among the UMCQ's primary concerns is the proliferation of misinformation and false information about the nature, make up, structure and activities of its member clubs by in particular the QPS (with Task Force Maxima being a significant offender feeding misinformation and untruths to the popular media simply to justify their increased budget) but also the popular media and a number of misinformed (likely by the QPS) politicians on both sides of the parliament (though primarily members of the government that introduced the 2013 legislation).

2.6. Associated with and flowing on from this, the UMCQ is also seriously concerned about the way in which members of the QPS have gone about enforcing and subsequently prosecuting the VLAD provisions. Anecdotally, the UMCQ has seen a significant increase in the harassment of motorcyclists generally and in relation to the "1%" clubs a significant increase in violence and intimidation and unlawful conduct by specifically Task Force Maxima but also by other members of the QPS. Motorcyclists and their families have been unlawfully assaulted (including as detailed below in a case study the pointing of firearm at a child), have had their premises and vehicles searched unlawfully and been intimidated into providing confessions largely using the threat of refusal bail (but also in some other instances other abuses such as threatening to arrest family members).

2.7. The UMCQ accepts that largely the investigation of these complaints are beyond the scope of the Taskforce's inquiry however, it is in our submission a significant enough of a problem to justify the repeal of all the legislation including (and especially) the additional powers provided to police who in the submission of the UMCQ have done little more than use these powers to harass law-abiding citizens. The VLAD legislation and the increased powers have had no impact

on organised crime and the serious criminal activity it is supposed to be targeting despite an exponential increase in funding for that purpose.

2.8. The UMCQ's greatest concern however is that VLAD has prevented members from going to their clubhouses and associating with people who to them are family (often the only family some of them have ever known), receiving the spiritual and emotional support that only their peers can bring and socialising away from members of the public who don't understand or accept their culture. Clubhouses are not a place where criminal activity is planned but a refuge for troubled souls from a society which has outlawed them. If they were indeed such places then simple law enforcement techniques would have provided evidence of this. It has not and will not because this is not the purpose of clubhouses. Indeed all of the clubs have strict rules which are enforced vigourously about the conduct of criminal activity at clubhouses.

2.9. The licensing provisions of various acts but in particular in relation to tattooed parlours by targeting specifically UMCQ members have no impact on crime but in fact have a very deleterious effect on the livelihoods of many hard-working family men who would otherwise be contributing to society by paying taxes and earning an honest living. Whilst anecdotally the UMCQ has not at this stage seen any evidence of it, it could be argued that by taking away a person's livelihood the legislation may in fact be driving people commit crimes out of economic necessity. It certainly has no effect on protecting the community. At the very least it has cause many of our members to engage in alternative employment (that is not their usual occupation) which is usually for less remuneration and therefore still causing economic hardship for them and their families.

2.10. The final and perhaps most compelling reason why the VLAD legislation should be repealed is that (in particular ss 60 A, 60 B and 60 C of the *Criminal Code*) are currently unable and likely never able to allow for a successful conviction.

3. OUTLAWS V CRIMINALS

3.1. INTRODUCTION

3.1.1. Singularly the most contentious point for the UMCQ about the VLAD legislation and the political rhetoric that surrounds it is the inaccurately drawn conclusion (presented as fact) that Outlaw Motorcycle Clubs are organised criminal groups with the sole purpose of committing serious crime. It is assumed and regularly articulated that the clubs themselves (through their organisational structure) are responsible for the organisation (and presumably collection of the profits) of criminal activity carried out by their members. This is simply not the case. There may well be small numbers of club members

who do commit criminal offences but it is not done on behalf of the club or sanctioned by the club. Clubhouses are not used for the organising of crimes but rather for the social benefits of members who share a similar interest (not unlike your local Bowls club, RSL or golf club).

3.1.2. The clubs exist as a result of a common interest in motorcycling and are formed around an old-fashioned concept of "brotherhood" (this term is intentionally sexist – there are no known female members of clubs affiliated with the UMCQ). Whilst not originating in Australia, the concept piggy backed the traditional is Australian notion of mate ship and develop into a very strong bond between club members. In some of the affiliated clubs it can take in excess of 10 years to be known well enough by the chapter members to be invited to join.

3.1.3. Inherent in this concept of mateship/brotherhood and the often long deeply intimate relationships that are involved, it is a completely foreign concept for members to interfere with, "rat" on or even question other members who may be involved in criminal activity. The clubs in fact has very strict rules preventing members engaging in criminal activity when on club premises or engaging in club activities. The effect of this is that members do turn a blind eye to other members who may be involved in criminal activities but the majority are not involved in criminal activity.

3.1.4. The essential reality of the make up of club membership is that for the majority of clubs, the majority of members work for a living (for an employer or it in a small business they run), they support families and receive no income from the club. In fact, most members contribute a substantial part of their disposable income to the objectives of the club, for example the organization of social events, motorcycle and tattoo exhibitions. Most of these members have no criminal history and are productive members of the community.

3.1.5. Universally, the clubs exist for the purpose of furthering motorcycling and brotherhood. They do not exist to commit serious criminal offences. The UMCQ concedes that a small number of members of some of its affiliated clubs have in the past been convicted of serious criminal offences including drug trafficking. It is perhaps noteworthy that both the QPS and the Queensland Parliament also have a small number of now former members who have been convicted of serious criminal offences. Neither of these organisations have been labelled criminal organisations as a result, despite there being a highly persuasive argument that these organisations could be declared a criminal organisation considering the criteria and evidentiary thresholds to make such a declaration. It follows that neither should motorcycle clubs.

3.2. THE UMCQ

3.2.1. The UMCQ was established following the establishment of similar organisations in other States and a national body to present an advocate a united response on behalf of affected clubs to an ever-increasing collection of "Anti-Bikie" legislation which was being introduced around the country.

3.2.2. The Council consists of representatives from participating clubs. All of these representatives are senior members of the clubs and most have no criminal history. Most to be involved in their club for long periods of time (some in excess of 20 years). These representatives have a long and detailed understanding of the operations of these clubs. They have come together with the aim to advocate against laws which affect all of them in a similar catastrophic way.

3.2.3. The majority of participating clubs can be described as "1%" or "outlaw" motorcycle clubs but the Council's overall goals includes the furthering of motorcycling as a recreational activity for all Queenslanders. The Council does not advocate the engagement by its members in serious criminal activities, and in fact prohibits it. The UMCQ supports law-abiding motorcyclists and exist to advocate for the removal of laws which infringe on their basic Human and Civil Rights.

3.3. THE CONCEPT OF OUTLAW

3.3.1. The concept of outlaw motorcycle gangs is said to have originated in the United States following the Second World War. An early Hells Angel is reported to have said , "that they were a gang of criminals, not a criminal gang". This essentially is and remains the position of the UMCQ that whilst many of our clubs' members have criminal histories, none of the clubs are responsible for organising criminal activity. It is also noteworthy that many of our clubs' members (including the members of the Council) do not have any criminal history whatsoever.

3.3.2. Acting outside the law (the usual meaning of outlaw) therefore is a different concept to criminal. Criminal behaviour connotes a (usually) deliberate disobedience of criminal law provisions in legislation usually in the context of organised crime for profit. Our members gather together to have a good time and ride motorcycles. Their social mores are different to the wider community with their general behaviour and appearance considered to be outrageous and as a consequence they deliberately keep to themselves and as a result become society outcasts.

3.3.3. The extent to which the majority of members of our affiliated clubs act outside the law is anecdotally limited to minor things such as drinking in public and breaking minor traffic regulations. But it is about lack of conformity to other public (in this country Christian) mores that is the essence of being an outlaw – such things as tattoos, unique clothing and rowdy behavior and swearing.

3.3.4. Associated with this concept of "outlaw" is the concept of belonging to the "gang". Otherwise described as brotherhood or in the Australian context mate ship. Members of our clubs have a very strong sense of loyalty to their "brothers" and to their club. [This concept is dealt with further below.]

3.3.5. Our members broadly accept the outlaw tag and are content remain apart from the general community. The line has been crossed however by laws targeting our members specifically on the false pretense of disrupting criminal organisations. The wider community has by the 2013 legislation made outlaws into criminals by simple declaration they have no input into. VLAD (and specifically ss 60 A, 60 B and 60 C) has created criminal offences which require no criminality designed to prevent people the legislature thinks likely to commit crimes from gathering together. The wider community would not allow this to happen to any other social organisation (for example a golf club) and perhaps only allowed to occur in this instance because of the distorted misinformation provided to them through the commercial media by police and politicians.

3.4. ORGANISED CRIME

3.4.1. The concept of organised crime as the UMCQ understands it, is relatively simple. It requires an organised group who set about together to commit criminal offences. They would normally be remunerated either by receiving a share of the proceeds or by being paid for the services they provided.

3.4.2. The affiliates of the UMCQ do not engage in organising within the structure of their clubs the committing of criminal offences by members of the club. Whilst the UMCQ cannot rule out that there may be small groups of "organised" criminals who are also members of affiliated clubs, there is no organised crime facilitated through the organisational structure of any of our clubs. As previously stated the sole purpose of the organisational structure of the club's is to facilitate the clubs objectives of advancing motorcycling in the sense of brotherhood.

3.4.3. If it was the case that any club or a club or a chapter of a club were using their clubhouse (as the police suggests) to hide money drugs and guns and to organise criminal activity then available police investigative techniques would have (indeed should have) provided admissible evidence of this. The use of listening devices, other surveillance techniques

and search warrants (which have been extensively used against clubs and clubhouses) would certainly have provided evidence of this activity if it was occurring.

3.4.4. It is the UMCQ's view that despite there being no evidence of it, police continue to be convinced that such activity occurs and they are just not able to catch the members out. So they have pressured a conservative government (which was unduly influenced by an incident on the Gold Coast witnessed by one of its Ministers) to create offences which make it a crime to be a member of an outlaw motorcycle club. This obsession with the belief that motorcycle clubs are criminal organisations and need to be the target of extensive resources was highlighted in the findings of the Queensland Organised Crime Commission of Inquiry. All of these resources, all of these extended powers and additional laws have failed to provide evidence that outlaw motorcycle clubs are engaged in organised criminal activity. There is a simple explanation for this – they are not involved in organised crime.

3.5. FREEDOM OF ASSOCIATION – THE CLUBHOUSE

3.5.1. Anecdotally, one of the primary reasons that our members are associated with the clubs is because there they find kindred spirits, the only people who truly understand and support them – in essence their family or in the case of those with families their other family. It is not disputed that our members are different from the majority of modern society. Within the clubs they are able to associate with, for and friendships and bonds, trust other individuals and feel a sense of belonging that would otherwise be unavailable to them. The result of this is they gain spiritual and emotional peace, they are not restrained or constrained by society's mores.

3.5.2. The key to all of this is being able to go to their safe haven (the clubhouse) to enjoy the friendship, support and general socialising experience that is not possible for them to experience anywhere else. The clubhouse is in essence their church, their sanctuary where they can be themselves.

3.5.3. By drawing the incorrect conclusion (based on flawed intelligence and misinformation rather than real evidence) that the clubhouses are places where crimes are organised and criminals protected, the legislature has deprived the members of these clubs of their heart and soul.

3.5.4. The rabid enforcement of this legislation by overzealous unprofessional police who clearly have not taken the time to read (or the ability to understand) the judgement of the High Court in *Kuczborski v Queensland* [2014] HCA 46 has also had the effect of denying members the right to attend funerals of their friends and family, weddings and other

celebratory functions unless they attend in twos. [Members often joke about Noah's Ark – where else would they be going in twos.]

3.5.5. The UMCQ is also somewhat bewildered by will the rationale behind closing clubhouses (the effect of section 60 C and the declaration of the clubhouses as declared places). If these are indeed the places where organised criminals congregate then is in it far better to know where they are so that they can be watched enforcement action taken as required. Once disestablishment takes place it is impossible to know where criminals (if indeed they are criminals) are organising the criminal activity.

3.6. CONCLUSIONS

3.6.1. The UMCQ is an organisation representing a collection of outlaw motorcycle clubs formed for the purpose of advocating to protect the interests of the members of these clubs from laws designed to take away individual rights and freedoms and make criminals out of law-abiding motorcyclists because of the group to which they belong.

3.6.2. The concept of outlaw is different to that of criminal and an outlaw motorcycle club is not an organised crime entity. Our members live outside general societal mores and their behaviour and appearance is not accepted in many public places. This does not make them criminals. They simply seek to remain outside and be left alone.

3.6.3. There is no evidence (admissible in a criminal court) that the clubs organise criminal activity from their clubhouses. This is despite years of intense scrutiny which included audits of members affairs, surveillance, use of listening devices, telephone intercepts and execution of search warrants using the almost unlimited resources of Taskforce Maxima and the Crime and Corruption Commission (CCC). If such evidence existed it surely would have been found. The only reasonable conclusion to draw is that as the UMCQ submits the clubs are not organised criminal entities.

3.6.4. The primary reasons that motorcycle club members associate with clubs is because there they find kindred spirits, the only people who truly understand and support them – in essence their family or in the case of those with families their other family. These members wish to go to their safe haven (the clubhouse) to enjoy the friendship, support and general socialising experience that is not possible for them to experience anywhere else.

4. INQUIRY AREA ONE

4.1. EVIDENCE ON THE IMPACT OF THE LEGISLATION SET OUT AT PARAGRAPH ONE OF THE TERMS OF REFERENCE (THE 2013 LEGISLATION) ON CRIME RATES AND COMMUNITY SAFETY[1]

4.1.1. The UMCQ notes the findings of the Queensland Organised Crime Commission of Inquiry and although it does not accept the Commission's findings that some motorcycle clubs are criminal organisations involved specifically in production and distribution of drugs, the UMCQ wishes to adopt and endorse the findings that suggest the VLAD legislation has had no impact on crime rates or community safety.

4.1.2. In particular the UMCQ draws to the attention of the Taskforce the following conclusions summarised by the Commission:

> "However, when considering the extreme legislation introduced by the former Government and the significant extra funding that was granted to the Queensland Police Service (QPS) ($14.2 million over two years) and the Crime and Corruption Commission (CCC) ($6.7 million over four years) to target outlaw motorcycle gangs, it is revealing to note that in the 21 month period from 1 October 2013 to 30 June 2015, outlaw motorcycle gang members accounted for only 0.52 per cent of criminal activity in Queensland.
>
> While the Commission acknowledges that the CCC has fruitfully used its extra resources and enhanced intelligence function hearings (enhanced by the 2013 laws) to gather information on outlaw motorcycle gangs which has been of intelligence, tactical and strategic value, the Commission was concerned to learn that the heavy focus on outlaw motorcycle gangs has meant the CCC has lost visibility of other areas of organised crime active in Queensland.

[1] [TOR 6]Inquire into whether the introduction of the 2013 legislation has had any impact on crime rates and community safety in Queensland.

> Further, the evidence before the Commission suggests that the focus upon—and resources solely dedicated to—the threat of outlaw motorcycle gangs by the QPS, has meant that other types of organised crime have not been able to be appropriately investigated."[2]

4.1.3. The UMCQ submits that whether or not motorcycle clubs (or as we submit – errant members of motorcycle clubs without the knowledge or sanction of the clubs) are involved in committing criminal offences in this State, the legislation has been completely unsuccessful in either enhancing public safety or tackling organised crime. On this basis alone, there is no justification for the continuance of legislation which significantly affects the rights of a particular segment of society (motorcycle riders generally).

4.2. EXAMINATION OF THE DECISION OF *KUCZBORSKI –V- STATE OF QUEENSLAND [2014] HCA 46*[3].

4.2.1. INTRODUCTION

4.2.1.1. The first thing to note is that the decision (largely because of the limited scope of the argument and the issue was standing) does not limit the scope (except for the relatively narrow "Kable"[4] arguments run) of future challenges (either on appeal or by way of initiating application in the original jurisdiction of the High Court (as in Kuczborski[5]).

4.2.1.2. The decision (also partly because of the way it was argued) does however provide some very clear guidelines as to how the provisions (and in particular sections 60A, 60B and 60C of the criminal code) should properly be interpreted and ultimately says that in any prosecution the Crown cannot rely on the declaration (of a criminal organisation) but must in fact prove it is by admissible evidence.

4.2.1.3. In the interests of completeness, the revised provisions are found in Chapter 9 of the Criminal Code which provide:

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[2] Queensland Organised Crime Commission of Inquiry 2015, Final Report, Queensland Government, Brisbane, p 2.

[3] [TOR 9] Have regard to the decisions of the High Court of Australia in the matters of *Kuczborski v The State of Queensland [2014] HCA 46* and *Assistant Commissioner Michael James Condon v Pompano Pty Ltd [2013] HCA 7*.

[4] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51

[5] *Kuczborski –v- State of Queensland* [2014] HCA 46

60A Participants in criminal organisation being knowingly present in public places

(1) Any person who is a participant in a criminal organization and is knowingly present in a public place with 2 or more other persons who are participants in a criminal organization commits an offence.

Minimum penalty – 6 months imprisonment served wholly in a corrective services facility.

Maximum penalty – 3 years imprisonment.

(2) It is a defence to a charge of an offence against subsection (1) to prove that the criminal organization is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity.

(3) In this section –

***member**, of an organisation, includes an associate member, or prospective member, however described.*

***participant**, in a criminal organisation means –*

(a) if the organisation is a body corporate – a director or officer of the body corporate; or

(b) a person who (whether by words or conduct, or in any other way) asserts, declares or advertises his or her membership of, or association with, the organisation; or

(c) a person who (whether by words of conduct, or in any other way) seeks to be a member of, or to be associated with, the organisation; or

(d) a person who attends more than 1 meeting or gathering of persons who participate in the affairs of the organisation in any way; or

(e) a person who takes part in the affairs of the organisation in any other way;

but does not include a lawyer acting in a professional capacity.

public place *means –*

(a) a place, or part of a place, that the public is entitled to use, is open to members of the public or is used by the public, whether or not on payment of money; or

(b) a place, or part of a place, the occupier of which allows, whether or not on payment of money, members of the public to enter.

60B Participants in criminal organisation entering prescribed places and attending prescribed events

(1) Any person who is a participant in a criminal organisation and enters, or attempts to enter, a prescribed place commits an offence.

Minimum penalty – 6 months imprisonment served wholly in a corrective services facility.

Maximum penalty – 3 years imprisonment.

(2) Any person who is a participant in a criminal organisation and attends, or attempts to attend, a prescribed event commits an offence.

Minimum penalty – 6 months imprisonment served wholly in a corrective services facility.

Maximum penalty – 3 years imprisonment.

(3) It is a defence to a charge of an offence against subsection (1) or (2) to prove that the criminal organisation is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity.

(4) In this section –

participant*, in a criminal organisation, see section 60A.*

prescribed event *means an event declared under a regulation to be a prescribed event.*

(5) ***prescribed place*** *means a place declared under a regulation to be a prescribed place.*

60C ***Participants in criminal organisation recruiting persons to become participants in the organisation***

(1) Any person who is a participant in a criminal organisation and recruits, or attempts to recruit, anyone to become a participant in a criminal organisation commits an offence.

Minimum penalty – 6 months imprisonment served wholly in a corrective services facility.

Maximum penalty – 3 years imprisonment.

(2) It is a defence to a charge of an offence against subsection (1) to prove that the criminal organisation is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity.

(3) In this section –

***criminal organisation** does not include a criminal organisation under the Criminal Organisation Act 2009.*

***Participant**, in a criminal organisation, see section 60A.*

***recruit**, a person, to become a participant in a criminal organisation, includes counsel, procure, solicit, incite and induce the person, including by promoting the organisation, to become a participant in the organisation.*

4.2.1.4. Ultimately the High Court stated that in any prosecution the Crown cannot rely on the declaration of a criminal organisation, but must in fact prove it is by way of admissible evidence. In review of the High Court's view, notwithstanding the dismissal of the Application, the decision does not appear to assist the Crown. In a practical sense the High Court's interpretation provides that charges under sections 60A, 60B and 60C and the circumstances of aggravation established by the Vicious Lawless Association Disestablishment Act 2013 ("VLAD") become impossible to prove from a simple evidentiary basis.

4.2.1.5. It therefore appears that the Crown will only successfully prosecute in limited circumstances where there is sufficient evidence to prove that "participants" of an organisation were actually involved in "serious criminal activity". Therefore, the motorcycle club member who is only involved on a social or recreational basis cannot, as a matter of law, be liable by these provisions.

4.2.1.6. In relation to the executive functions of this legislation, whilst these offences and circumstances of aggravation will remain on the statutes, very few will ever be charged and even less will ever be successfully prosecuted and convicted under these provisions. Further it is unlikely that in the event of a successful prosecution very few, and more relevantly perhaps no one, will be sentenced to additional terms of imprisonment.

4.2.2. THE DECISION

4.2.2.1. Crennan, Kiefel, Gageler and Keane JJ

4.2.2.1.1. The majority judgment (CRENNAN, KIEFEL, GAGELER AND KEANE JJ (hereafter the "plurality") holds the key to how the provision should be interpreted and how they must be prosecuted and what the Crown (and the defence if required) must prove. Each of the minority judgements (with the exception of Hayne J who dissented) add some important additional considerations.

4.2.2.1.2. Dealing with the plurality, which itself constitutes the majority judgment of the Court. The plurality found that, in respect of the VLAD Act, ss.72(2), 92A(4A), 320(2) and 340(1A) of the Criminal Code, the Plaintiff lacked standing (paragraph [151], and then [159] to [188]).

4.2.2.1.3. The sections are the aggravating amendments of the Criminal Code and provide:

Section 72 Affray

(2) *If the person convicted of an offence against subsection (1) is a participant in a criminal organisation, the offence is punishable on conviction as follows –*

Minimum penalty – 6 months imprisonment served wholly in a corrective service facility.

Maximum penalty – 7 years imprisonment.

Section 92A(4A) Misconduct in relation to public office

(4A) The offender is liable to imprisonment for 14 years if, for an offence against subsection (1) or (2), the person who dishonestly gained a benefit, directly or indirectly, was a participant in a criminal organisation.

Section 320(2) Grievous Bodily Harm

(2) If the offender is a participant in a criminal organisation and unlawfully does grievous bodily harm to a police officer while acting in the execution of the officer's duty, the offender must be imprisoned for a minimum of 1 year with the imprisonment served wholly in a corrective services facility.

Section 340(1A) Serious Assaults

(1A) If the offender is a participant in a criminal organisation and assaults a police officer in any of the circumstances mentioned in paragraph (a) of the maximum penalty for subsection (1), the offender must be imprisoned for a minimum of 1 year with the imprisonment served wholly in a corrective servicers facility.

4.2.2.1.4. In respect of the Criminal Code, and also the Liquor Act 1992 ("the Liquor Act"), the Majority held at paragraph 152 that:

"... the laws in the second category [being the Criminal Code and the Liquor Act] do restrict the plaintiff's freedom to conduct himself as he wishes, and as he would be free to do if there laws had not been enacted. It is an agreed fact that the plaintiff does wish to continue to attend at the HAMC clubhouse, to attend social events in public places in company with other members of the HAMC, to wear the HAMC's colours on licensed premises under the Liquor Act, and to promote to other individuals the benefits of membership of the HAMC."

4.2.2.1.5. The majority further stated that although the defendant, namely the State of Queensland, was not disposed to make a general objection to the plaintiff's standing it should be held that the plaintiff has a sufficient interest to challenge the validity of the provisions because they have an immediate effect upon his liberty.

4.2.2.1.6. The Majority considered the definition of a "criminal organisation" pursuant to section 1 of the Criminal Code and noted that it includes:

> *(a) An organisation of 3 or more persons –*
>
> *(i) who have as their purpose engaging in, organising, ... serious criminal activity, and*
>
> *(ii) who by that association represent an inacceptable risk to the community;*
>
> *(b) A criminal organisation under the Criminal Organisation Act 2009 ("the CO Act"); and*
>
> *(c) An entity declared under a Regulation to be a criminal organisation.*

4.2.2.1.7. The Majority further considered section 708A(1) of the Criminal Code which sets out the matters to which the Minister may have regard for the purpose of declaring an organisation as a criminal organisation. Accordingly, section 708A(1) provides:

> ***708A Criteria for recommending an entity be declared a criminal organisation***

(1) In deciding whether to recommend an amendment of the Criminal Code (Criminal Organisations) Regulation 2013 to declare an entity to be a criminal organisation, the Minister may have regard to the following matters –

(a) any information suggesting a link exists between the entity and serious criminal activity;

(b) any convictions recorded in relation to—

(i) current or former participants in the entity; or

(ii) persons who associate, or have associated, with participants in the entity;

(c) any information suggesting current or former participants in the entity have been, or are, involved in serious criminal activity (whether directly or indirectly and whether or not the involvement has resulted in any convictions);

(d) any information suggesting participants in an interstate or overseas chapter or branch (however described) of the entity have as their purpose, or 1 of their purposes, organising, planning, facilitating, supporting or engaging in serious criminal activity;

(e) any other matter the Minister considers relevant.

(2) In this section—

conviction means a finding of guilt by a court, or the acceptance of a plea of guilty by a court, whether or not a conviction is recorded.

serious criminal activity see the Criminal Organisation Act 2009, section 6.

participant, in an entity, means a person who—

(a) (whether by words or conduct, or in any other way) asserts, declares or advertises his or her membership of, or association with, the entity; or

(b) (whether by words or conduct, or in any other way) seeks to be a member of, or to be associated with, the entity; or

(c) has attended more than 1 meeting or gathering of persons who participate in the affairs of the entity in any way; or

(d) has taken part on any 1 or more occasions in the affairs of the entity in any other way.

4.2.2.1.8. In relation to the provisions of the Bail Act 1980 ("the Bail Act") the Majority took the same approach as that of the sections of the Criminal Code and found that the plaintiff did not have standing on the basis that he was not subject to the Bail Act as those provisions "have no practical application in relation to the plaintiff, they do not affect his legal position in any way" (paragraph [151], and then [256] to [259]).

4.2.2.1.9. Sections 16(3A), (3B), (3C) and (3D) of the Bail Act provide:

(3A) If the defendant is charged with an offence and it is alleged the defendant is, or has at any time been, a participant in a criminal organisation, the court or police officer must-

(a) Refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified; and

(b) If bail is granted or the defendant is released under section 11A-

(i) require the defendant to surrender the defendant's passport; and

(ii) include in the order a statement of the reasons for granting bail or releasing the defendant.

(3B) If the defendant is required to surrender the defendant's current passport under subsection (3A)(b)(i), the court or police officer must order that the defendant be detained in custody-

(a) until the court or police officer is satisfied about whether the defendant is the holder of a current passport; and

(b) if the defendant is the holder of a current passport- the passport is surrendered.

(3C) For subsection (3A), it does not matter-

(a) whether the offence with which the defendant is charged is an indictable offence, a simple offence or a regulatory offence; or

(b) whether the defendant is alleged to have been a participant in a criminal organisation when the offence was committed; or

(c) that there is no link between the defendant's alleged participation in the criminal organisation and the offence with which the defendant is charged.

(3D) Subsection (3A) does not apply if the defendant proves that, at the time of the defendant's alleged participation in the criminal organisation, the organisation did not have, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity.

4.2.2.1.10. In respect of what the plurality called the second category, the Criminal Code ss.60A, 60B and 60C, and also the Liquor Act ss.173EB, 173EC and 173ED, the plurality held that -

"... the laws in the second category do restrict the plaintiff's freedom to conduct himself as he wishes, and as he would be free to do if these laws had not been enacted. It is an agreed fact that the plaintiff does wish to continue to attend at the HAMC clubhouse, to attend social events in public places in company with other members of the HAMC, to wear the HAMC's colours on licensed premises under the Liquor Act, and to promote to other individuals the benefits of membership of the HAMC." (Paragraph [152])

4.2.2.1.11. The plurality noted that:

"The defendant (the State of Queensland) was not disposed to make a general objection to the plaintiff's standing to challenge the validity of these provisions, nor did it argue that his challenge to these laws is in any way hypothetical. Accordingly, it should be held that the plaintiff has a sufficient interest to challenge the validity of the provisions because they have an immediate effect upon his liberty."

4.2.2.2. The reasoning in respect of the second category of cases begins at paragraph [189]. In respect of each of the provisions it was found that the prosecution had to prove that the Defendant was a participant in a criminal organisation.

4.2.2.3. Their Honours then looked at Criminal Code s.1, the meaning of "criminal organisation", and noted that it included –

- an organisation of three or more persons who have as their purpose engaging in, organising, ... serious criminal activity, and by that association represent an unacceptable risk to the community;

- a criminal organisation under the Criminal Organisation Act 2009 ("CO Act");

- an entity declared under a Regulation to be a criminal organisation.

4.2.2.4. In respect of the latter dot point, their Honours looked at s.708A(1) of the Criminal Code which set out the matters to which the Minister may have regard for the purposes of declaring an organisation a criminal organisation, and that included –

- information suggesting a link between the entity and serious criminal activity;

- any convictions recorded in relation to current or former participants in the entity or persons who associate with participants of the entity;

- information suggesting current or former participants in the entity have been, or are, involved in serious criminal activity;

- information suggesting participants in an interstate or overseas chapter or branch have as their purpose organising, planning, facilitating criminal activity;

- any other matter the Minister considers relevant.

4.2.2.5. The plurality then looked at the definition of "serious criminal activity" in s.6 of the Criminal Organisation Act for the purposes of determining what that term meant in s.708A. It meant -

- a serious criminal offence;

- an act done or omission made outside of Queensland, including outside Australia that would have been a serious criminal offence.

4.2.2.6. The CO Act, by s.7 defines "serious criminal offence" as an indictable offence punishable by at least seven years imprisonment, or an offence against the CO Act, or certain specified provisions of the Criminal Code.

4.2.2.7. At paragraph [208] their Honours looked at "participant" for the purposes of s.60A and said that a person becomes a participant:

".. only if he or she 'has attended more than one meeting of persons who participate in the affairs of the entity in any way'. It is arguable that a person does not become a participant, under this definition, merely by meeting 'other persons who participate in the affairs of the entity'; rather, it would seem, the definition contemplates that a participant is a person who attends the meetings as one of the persons who, together, participate in the affairs of the entity."

4.2.2.8. At paragraph [211] their Honours made the point that the power to declare a group of persons to be a criminal organisation would be confined "to those associations whose activities are believed by the Minister to be connected to serious criminal offences, as distinct from lesser offences, such a regulatory offences against public order". That is because, in paragraph [212], it is stated that the Minister must consider connections between the entity and "serious criminal activity", which would exclude regulatory offences. It is required that the Minister "may take into account only apprehended connections between the entity and serious criminal activity. It is also significant that these provisions are to be found in the Criminal Code".

4.2.2.9. Leaving aside the declaration under the CO Act, a Court would have to apply the definition of criminal organisation in s.1 of the Criminal Code at a trial of a person, and s.10(1) of the CO Act would inform such considerations (paragraph [213]).

4.2.2.10. Paragraph [214] is significant. If the offences were but regulatory offences, "as opposed to serious criminal offences", the organisations would not be within the regulation making power because there would be no apprehended link between the entity and serious criminal offences. Section 2 of the Criminal Code defines an "offence", whereas s.3(1) of the Code divides offences into two categories, criminal offences and regulatory offences. The plurality then said that it would be arguable that a matter which was purely a regulatory offence was not criminal activity, much less serious criminal activity, so the entity would be outside the scope of the power of the Minister to declare an entity to be a criminal organisation.

4.2.2.11. Paragraph [215] made it clear that the subjective view of the Minister would be objectionable. It is further said that at that point an argument would be enlivened in respect of freedom of communication and association on matters of political and government interest.

4.2.2.12. However, the Court considered those matters to be hypothetical in the present case.

4.2.2.13. The plurality then turned its attention to the Kable arguments. At [224] their Honours summarized Totani as follows –

"... in terms of the Kable principle, as the requirement that the Magistrates Court create new norms of conduct the content of which was determined by the executive and legislature, and which restricted the liberty of the subject (over and above the norms binding the public under the general law), without any enquiry by the court into past or threatened contraventions by the individual of any existing legal norm. The Court was called upon to implement, under the forms of judicial process, an executive judgment to restrict the liberty of any person who was a member of a declared organisation. It was this combination of features which warranted the description of section 14 of the SOCC Act as a provision which sought to enlist the court to implement the policy of the executive and legislature under the guise of judicial determination."

4.2.2.14. In Totani Kiefel J, who formed part of the plurality here, said at paragraphs [467] and following –

"[467] ... The court acting under s 14(1), is not involved in a determination as to whether an offence has been committed. There is no offence to which its processes are directed; yet it is obliged to make an order, the nature of which suggests that some such process has been undertaken. ..."

4.2.2.15. Her Honour summarized the matter at paragraph [480] –

"[480] It is to be inferred from the Act that it is the aim of the executive that all persons identified by the declaration made by the Attorney-General are to have their liberty to associate restricted. This is the end which the declaration serves but to which it cannot give effect. The court is directed to bring this result about. Its action, in making the order, gives the appearance of its participation in the pursuit of the objects of the Act. Properly understood, however, the making of the order serves to disguise an unstated premise and the lack of any illegality attaching to membership of a declared organisation."

4.2.2.16. What is it that the plurality say is the distinction between Totani and this case?

4.2.2.17. It seems to be this. The Criminal Code amendments create offences, and it is for the Court to determine whether the offence has been committed –

"They require the courts to find facts that impose punishment as a result of the contravention of norms of conduct laid down by the legislature ... It is at the heart of judicial power to determine whether a person has engaged in conduct which is forbidden by law, and if so, to make an order as to the consequences which the law imposes by reason of that conduct."
(Paragraph [225])

4.2.2.18. On the other hand, in Totani everything apart from membership was predetermined, including the consequences of being a member, and the contravention of norms.

THE FUTURE OF THE CRIMINAL CODE AMENDMENTS

4.2.2.19. Let us take s.60A. It seems to us that the Crown must prove by admissible evidence, and beyond reasonable doubt –

- that there is an organisation;
- that that organisation is a criminal organisation in that there is a link between that organisation and serious criminal activity;
- that the individual was a participant in the criminal organisation;
- the elements of the particular offence, namely being present in a public place with two or more others who were participants in a criminal organisation; and
- knowing that those other persons were participants in a criminal organisation.

4.2.2.20. We have said that it is necessary for the Crown to establish the criminal organisation, even though they can rely upon a declaration. At pargraph [235] the plurality says, "The only legal effect of a declaration is to establish an ingredient of an offence, the contravention of which must still be proved in the ordinary way." And further at paragraph [238], "...the declaration that a group of persons is a criminal organisation does not conclusively establish, without judicial process, the nature of the organisation in which the defendant is alleged to be a participant." And at paragraph [239], "..., the substantive operation of these laws is confined to cases where the accused is found by a jury[sic] to be a participant in

an organisation which has as one of its purposes an intention to engage or an actual engagement in criminal activity."

4.2.2.21. The plurality discussed the effect of using a declaration further at paragraphs [245] and following.

4.2.2.22. At paragraph [245] they said –

"[245] It needs to be kept in mind that the declaration does not create a presumption that one or more of the organisation's purposes involve serious criminal activity. As explained earlier, the purpose of an organisation is a matter which should inform the making of a declaration by regulation (or by statute). However, a declaration so made is not to be equated with a presumptive finding of fact.

[246] In such a case, evidence from the defendant or his or her witnesses to the effect that, to his or her knowledge, the activities of the association were entirely innocent would, if left uncontradicted by the prosecution, support the inference that the 'criminal organisation is not an organisation that has, as one of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity'.

[247] In this hypothetical case, the only evidence before the court of the only purposes of the association would be those purposes which could be inferred from the activities of the association of which the defendant gave evidence. On this hypothesis, there would be evidence to contradict that of the defendant. It is necessary to bear in mind as well that the defendant's burden is discharged on the balance of probabilities.

[248] Of course, the prosecution might not be content to rely upon the declaration, and might itself adduce evidence of the purposes of the association. But in such a case, the question of guilt or innocence would still depend on the curial evaluation of the evidence, not some presumptive effect of the declaration."

4.2.2.23. The plurality has read down the effect of any declaration made by regulation.

4.2.2.24. Therefore we say that the Crown will still necessarily have to prove, in each case, and for each person, that they were a member of a criminal organisation.

4.2.2.25. We suspect that the Crown will be very hard pressed to prove all of those things.

4.2.3. VLAD, CRIMINAL CODE SS.72, 92A, 320 AND 340, AND THE BAIL ACT

4.2.3.1. All of these matters are open for another challenge on the basis that our Plaintiff had no standing.

4.2.3.2. We are told that there will be still some considerable difficulty in finding somebody with sufficient standing, given that, as we understand the information, only one person who is a member of a bikies' club has been charged.

4.2.3.3. At paragraph [224] the plurality said –

"[224] The judgments of the members of the majority in Totani identified the vice of s 14 of the SOCC Act, in terms of the Kable principle, as the requirement that the Magistrates Court create new norms of conduct the content of which was determined by the executive and legislature, and which restricted the liberty of the subject (over and above the norms binding the public under the general law), without any enquiry by the court into past or threatened contraventions by the individual of any existing legal norm. The court was called upon to implement, under the forms of judicial process, an executive judgment to restrict the liberty of any person who was a member of a declared organisation."

4.2.3.4. Applying that then to the provisions referred to above, whether it be VLAD, the other provisions of the Criminal Code where additional sentencing is imposed, and the Bail Act, we think we can say the following –

"In terms of the Kable principle the requirement that a court create new norms of conduct the content of which, namely the sentencing provisions, were determined by the executive and the legislature, and which restricted the liberty of bikie members (over and above the norms binding the public under the general law), without any inquiry by the court into past or threatened contraventions by the individual of any existing legal norm. In that way the court is called upon to implement, under the forms of judicial process, an executive judgment to restrict the liberty of any person who was a member of a declared organisation."

4.2.3.5. The opposing argument would be that the Court makes a determination of the Plaintiff's guilt or innocence of a charge which is not a charge in respect of the bikies alone. Therefore, they would say, it fits, so far, within the judgment in respect of ss.60A and following. It is, they would say then, just a question of sentencing and VLAD and the other provisions apply only to that.

4.2.3.6. We think there remains an argument that the sentencing provisions are over and above the norms binding the public under the general law, and there is no enquiry by the Court into the past or threatened contraventions by the individual of any norms existing in respect of sentencing, or provisions of bail.

4.2.3.7. It will be necessary to find somebody who has the necessary standing. The Bail Act would be the easiest of the cases to run in that respect.

4.2.4. FREEDOM OF COMMUNICATION AND ASSOCIATION ON MATTERS OF POLITICAL AND GOVERNMENT INTEREST

4.2.4.1. This argument was not run, because we had no agreed facts in the procedure that was implemented. Therefore there was nothing that we could argue. However, the High Court made two comments in the course of discussing s.60A and following.

4.2.4.2. The first comment was that the right of free association under the common law should not be limited save by clearly expressed legislative intention. Their Honours said, in effect, that if activity was of the nature of a regulatory offence then the argument might well be open. If the activity was criminal, then we doubt that the argument would be open.

4.2.4.3. The second proposition is that there may be a limitation on the executive and legislative function implied by the freedom of communication and association on matters of political and governmental interest.

4.2.4.4. Our concern in respect of that always has been the second aspect of the Lange test namely -

"Second, if the law effectively burdens that freedom of communication about government or political matters in its terms, operation or effect, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government ..."

4.2.4.5. In respect of serious crime it is our view, and was at the time of formulating the questions for the High Court, that preventing serious crime would be sufficient justification also for interfering with the right to freedom of communication. However, the plurality has suggested that the prevention of regulatory offences might not have that effect.

4.2.5. BEYOND POWER

4.2.5.1. There is an argument that in respect of regulatory offences it would be beyond power of a Minister to make a determination because the activity would not be criminal activity or serious criminal activity. However, that does not arise in the present situation.

4.2.6. SUMMARY

4.2.6.1. First, it will be difficult for the Crown to prove the cases under s.60A and following, but not impossible.

4.2.6.2. Second, there remains open for determination VLAD, the other amendments to the Criminal Code, and the Bail Act. That must await the appropriate vehicle to take that into the courts.

4.3. CHALLENGES STILL POSSIBLE AGAINST EXISTING LEGISLATION

4.3.1. INTRODUCTION:

4.3.1.1. The aftermath of *Kuczborski* is that (most likely because of the strong resistance by the State to standing) for appropriate individuals and organisations a large number of possible challenges to the legislation still remain. This section analyses these.

4.3.2. BACKGROUND:

4.3.2.1. In September 2014 the High Court of Australia heard a general challenge to the suite on the constitutional grounds based upon the principle originally enunciated in Kable v DPP (NSW) (hereafter "Kable").

4.3.2.2. On 14 November 2014, the High Court delivered its judgement and found that the provisions of the Criminal Code, (S 60 A, S 60 B, S 60 C) and the liquor act provisions were valid and found that the current plaintiff (Stefan Kuczborski) did not have standing to challenge the other legislation including VLAD.

4.3.3. THE IMPUGNED LEGISLATION:

4.3.3.1. The suite of legislation contains a wide variety of provisions in a large number of current and new legislation. It was largely contained in the following four acts:

- *Criminal Law (Criminal Organisations Disruption) Amendment Act* 2013 (Qld);
- *Vicious Lawless Association Disestablishment Act* 2013 (Qld);
- *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act* 2013 (Qld); and
- *Tattoo Parlours Act* 2013 (Qld).

4.3.3.2. The original challenge focused on the following provisions:

- *Vicious Lawless Association Disestablishment Act* 2013 (Q);
- *Criminal Code* (Q), ss 60A, 60B(1), 60B(2) and 60C, 72(2), 72(3), 72(4), 92A(4A), 92A(4B), 92A(5), 320(2), 320(3), 320(4), 340(1A), 340(1B) and 340(3);
- *Bail Act* 1980 (Q), ss 16(3A), 16(3B), 16(3C) and 16(3D); and
- *Liquor Act* 1992 (Q), ss 173EB, 173EC and 173ED

4.3.4. TYPES OF CHALLENGES:

4.3.4.1. Challenges which result in a declaration that the law is invalid can be made in a number of courts on several different grounds.

4.3.4.2. Constitutional Challenges:

4.3.4.2.1. The first and most obvious type of challenge is a constitutional challenge but because of the nature of our political system the scope of these challenges is somewhat limited. Our founding fathers did not envisage the possibility that a State government would take away from (at least some of) its citizens, basic human rights. They felt it unnecessary to include a Bill of Rights which would have ensured State governments could not legislate in

this way. And unfortunately there is not the political will in this country to incorporate one at this stage.

4.3.4.2.2. Kable Principle

4.3.4.2.2.1. Challenges based on Kable have been many and varied but despite the frequency of such applications very few have been successful. Including Kuczborski, there have been more than 40 constitutional challenges to legislation based on the Kable principle since Kable itself in 1995. Only three (including Kable itself) have been successful.

4.3.4.2.2.2. The statistics aside this still represents one of the strongest tools available to challenge bad legislation. However in respect of this legislation, this race has been run and lost and given the breadth of the Kuczborski challenge it is unlikely that there is any further challenge possible using this basis.

4.3.4.2.3. Freedom of Association

4.3.4.2.3.1. In Australia there is no constitutional right of freedom of Association, however, there is an implied right that association and assembly related to political matters will be protected from undue legislative interference.

4.3.4.2.4. Implied Freedom of Political Communication

4.3.4.2.4.1. Despite the lack of a Bill of Rights and the failure to include the right to communicate on political matters explicitly in the Constitution, the implied freedom of political communication as a ground for challenging legislation has developed progressively over the last 20 or so years.

4.3.4.2.4.2. The High Court in *Lange v Australian Broadcasting Corporation* , developed two-stage test which essentially said that legislation would be invalid if it impugned the right of an individual essentially to express a political opinion unless there was some valid public purpose in enacting the legislation.

4.3.4.2.4.3. The provisions of the Criminal Code (in particular sections 60 A, 60 B and 60 C) and perhaps in some circumstances the provisions of the Liquor Act certainly have the potential to interfere with the right of individuals to meet together in public places and express political views (even protest about the current laws for instance).

4.3.4.2.4.4. Unfortunately, especially given the approach taken recently by the High Court in Tajjour , it is most likely that the court will find that preventing members of motorcycle clubs from meeting is a legitimate purpose.

4.3.4.2.5. Treaties

4.3.4.2.5.1. Treaties are entered into by governments. Australia is a party to the following instruments:

4.3.4.2.5.2. Australia is a signatory country of the International Convention on Civil and Political Rights (ICCPR). Therefore, it is arguable that:

4.3.4.2.5.2.1. The freedom to associate is recognised in article; and

4.3.4.2.5.2.2. Article 9 enshrines the right against arbitrary detention. It is perhaps arguable that the indefinite prison regime introduced in Queensland amounts to arbitrary detention.

4.3.4.2.5.3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT):

4.3.4.2.5.3.1. Article 16 prohibits all other acts of cruel, inhuman or degrading treatment or punishment which fall below torture; and

4.3.4.2.5.3.2. The indefinite prison regime introduced in the Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act (CODOLA Act) breach article.

4.3.4.2.5.4. The difficulty however with treaties are even if they have been ratified the courts have taken the view that treaties are not part of Australian law and less they have been subject of an act of Parliament (Commonwealth). Unfortunately this is not the case in relation to both of these treaties.

4.3.4.3. Non-constitutional Grounds:

4.3.4.3.1. There are also a number of other non-constitutional grounds including judicial review and ultimately examination of the legislation by the appeal courts considering the construction and meaning of each of the impugned sections.

4.3.4.4. Judicial Review

4.3.4.4.1. Whilst the failure of the legislation to allow for proper judicial review is a constitutional matter the structure of the legislation may itself falling into jurisdictional error. This is certainly evident in the licensing provisions (particularly the Tattoo Parlours Act). The forced reliance upon criminal intelligence and the requirement to refuse licences on the basis of criminal intelligence is clearly a jurisdictional error.

4.3.5. SPECIFIC EXAMPLES/ CASE STUDIES:

4.3.5.1. UMCQ is aware of a number of matters which may be appropriate to fund for further appeal and/or other challenge.

4.3.5.2. Liquor Act – section 173EB

4.3.5.2.1.

4.3.5.3. Tattoo Parlour Act – Licensing

4.3.5.3.1.

4.3.5.4. Criminal Code – S 60 B

4.3.5.4.1.

4.3.6. CONCLUSION

4.3.6.1. The nature of the legislation under review makes it vulnerable for further challenges in various courts and given the determination of the UMCQ and its members to see the end of this legislation it will continue to be litigated until there are final determinations by superior courts. This will inevitably result in considerable expense to ultimately club members and to the State of Queensland.

4.4. PROGRESS OF SS 60 A 60 B AND 60 C MATTERS CURRENTLY BEFORE THE COURTS

4.4.1. INTRODUCTION

4.4.1.1. There are a number of these matters currently before Magistrate's courts in Queensland. This section details some of those matters of which the UMCQ has some knowledge.

4.4.1.2. The general approach of most of the courts currently appear to be to simply adjourn the matters for mention until the handing down of your report. To the best of our knowledge there is currently only one exception to this.

4.4.1.3.

BACKGROUND

4.4.1.4.

4.4.1.5. The relevant legislation was introduced by the Queensland Parliament in October 2013 and since that time in the vicinity of 100 persons have been charged with offences under the legislation but perhaps most importantly, no one has yet been convicted and perhaps even more importantly none of the matters have been finalised by way of a hearing in a Court of competent jurisdiction.

4.4.1.6. A number of matters have been finalised by dismissals following the offering of no evidence by the Police Prosecutions Corps. Of the matters remaining the majority have been adjourned for mention pending the outcome of the current Taskforce inquiry.

4.4.1.7.

4.4.1.8.

4.4.2. SUMMARY OF PERCEIVED ISSUES

4.4.2.1. The following are relevant issues that the courts will needs to consider prior to and during the conduct of the hearing of any of these matters:

4.4.2.1.1. Incomplete and late disclosure by the prosecution;

4.4.2.1.2. Admissibility of certain evidence proposed to be led by the prosecution;

4.4.2.1.3. Identification; and

4.4.2.1.4. Interpretation of the relevant legislation.

4.4.2.3. Admissibility of Evidence

4.4.2.3.1. The matters involved a lengthy and complex and there is a dearth of decided cases which are relevant. It will therefore be necessary for the parties to refer to first principles thus making the arguments lengthy and perhaps complicated.

4.4.2.3.2.

4.4.2.3.3.

4.4.2.4. Identification

4.4.2.4.1.

4.4.2.2. Disclosure

4.4.2.2.1.

4.4.2.2.2.

4.4.2.2.3.

4.4.2.5. Interpretation of Legislation

4.4.2.5.1. As indicated above, this legislation was introduced in October 2013 and to date no matter has been finalised by way of hearing. It will therefore be incumbent upon this court to analyse and interpret the meaning of the legislation and in particular the interpretation of a number of new terms. Some assistance was provided by the High Court of Australia in Kuczborski .

4.4.2.5.2. It was made clear by the plurality of the High Court (Crennan, Kiefel, Gageler and Keane JJ.) in Kuczborski , that in a case where the prosecution is relying upon the declaration, evidence given by the defendant that he was only aware of innocent purposes that that would in ordinary circumstances be sufficient for the defendant to prove the organisation was not a criminal organisation for the purposes of this section. The relevant paragraphs from Kuczborski are reproduced below:

"246 *In such a case, evidence from the defendant or his or her witnesses to the effect that, to his or her knowledge, the activities of the association were entirely innocent would, if left uncontradicted by the prosecution, support the inference that the "criminal organisation is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity."*

247 In this hypothetical case, the only evidence before the court of the only purposes of the association would be those purposes which could be inferred from the activities of the association of which the defendant gave evidence. On this hypothesis, there would be no evidence to contradict that of the defendant. It is necessary to bear in mind as well that the defendant's burden is discharged on the balance of probabilities.

248 Of course, the prosecution might not be content to rely upon the declaration, and might itself adduce evidence of the purposes of the association. But in such a case, the question of guilt or innocence would still depend on the curial evaluation of the evidence, not some presumptive effect of the declaration."

4.4.2.5.3. It is submitted that this is just one of many exercises in statutory interpretation that the court will be required to undertake in this matter and whilst this is most likely properly done during the hearing of the matter it will certainly extend the length of the hearing by perhaps one or two more days.'

4.4.3. CONCLUSIONS

4.4.3.1. The majority of charges laid under sections 60 A, 60 B and 60 C to this point in time have been discontinued by the prosecution. As such no person has yet been convicted of an offence under these provisions.

4.4.3.2. Currently, with the exception of one matter all matters that are still before the courts have been adjourned for mention until the completion of this Taskforce's inquiry.

4.4.3.3. Subject to any Magistrates court's determination of the meaning of these provisions and the significant evidentiary issues which have been identified above it appears unlikely that any of the matters currently before the courts will result in a conviction of the person or persons charged. This represents a catastrophic failure of the legislation which can only be remedied by repeal and if the government is so minded a new approach to the tackling organised crime.

4.4.3.4. Criminal Code – S 60 B

4.4.3.4.1.

4.4.3.5. *Police Powers and Responsibilities Act* – Execution of Search Warrants

4.4.3.5.1.

4.4.3.5.2.

4.4.3.5.3.

4.4.3.5.4.

4.4.3.5.5.

4.4.3.5.6.

4.4.3.5.7.

4.4.3.5.8.

5. INQUIRY AREA TWO

LEGISLATION IN OTHER JURISDICTIONS WHICH TARGETS ORGANISED CRIME.[6]

5.1. The UMCQ makes no submissions in relation to interstate legislation other than to reaffirm its opposition to the implementation of any legislation aimed particularly at them, their affiliated clubs and members.

6. INQUIRY AREA THREE

ALL AMENDMENTS IN THE 2013 LEGISLATION WHICH RELATE TO OCCUPATIONAL AND INDUSTRY LICENSING. THIS INCLUDES AMENDMENTS IN THE *TATTOO PARLOURS ACT 2013* AND AMENDMENTS IN THE 2013 LEGISLATION TO THE *ELECTRICAL SAFETY ACT 2002, LIQUOR ACT 1992, QUEENSLAND BUILDING SERVICES AUTHORITY ACT 1991, RACING ACT 2002, SECOND-HAND DEALERS AND PAWNBROKERS ACT 2003, SECURITY PROVIDERS ACT 1993, TOW TRUCK ACT 1973, WEAPONS ACT 1990.*[7]

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[6] [TOR 12] Have regard to legislation in other jurisdictions that targets organised crime.

[7] [TOR 1] review the provisions in the following legislation:
- *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013;*
- *Tattoo Parlours Act 2013;*
- *Vicious Lawless Association Disestablishment Act 2013;*
- *Criminal Law (Criminal Organisations Disruption) and Other Legislation Act 2013;* and
- *Criminal Code (Criminal Organisations) Regulation 2013.*

6.1. TATTOO PARLOURS ACT 2013

6.1.1. The *Tattoo Parlours Act 2013*[8] ("**the Tattoo Act**") is a legislative instrument enacted by the former Queensland Government purposely designed for disrupting the operation of criminal organisations in Queensland. The Tattoo Act, through imposing an occupational licensing regime and regulatory framework, seeks to prevent criminal organisations and more relevantly their members engaging in illegal activities under the pretense of tattoo parlours and performing works of body art.

6.1.2. As a result of the previous government's efforts to disrupt criminality by way of this regime, it is submitted that we are of the view consistent with the current Government's position, which is that this regime has had an adverse effect on the community and legitimate businesses operating in the industry. These concerns have been expressed to the Department of Justice and Attorney-General.

6.1.3. In considering the operational effect that the Tattoo Act has had before the relevant issues of same may be discussed. Pursuant to section 15(b)[9] of the Tattoo Act the Chief Executive of the Office of Fair Trading must refer any application that is considered to have been properly made, along with any supporting information, to the commissioner for an investigation and determination as to either or both of the following:

(i) whether the applicant is a fit and proper person to be granted the licence;

(ii) whether is would be contrary to the public interest for the licence to be granted.

[TOR2] consider the prosecution of persons charged with committing a criminal offence/s or an aggravated offence/s created by the 2013 legislation by:

- noting the results of bail applications and the reasons given for the bail determinations (where reasons are available);
- noting the details of time served in prison on remand by defendants and for what charges;
- noting the outcomes of relevant prosecutions including any sentence imposed;
- noting the delay of prosecutions pending the outcome in *Kuczborski v The State of Queensland [2014] HCA 46*; and
- noting the reasons why some prosecutions did not result in a conviction.

[TOR 3] analyse and inquire into the necessity of, amendments to occupational licensing requirements (including provisions in the *Tattoo Parlours Act 2013* as passed), made by the 2013 legislation (including commenced and uncommenced provisions; and provisions that may have since been repealed);

[8] *Tattoo Parlours Act 2013 (QLD).*

[9] Ibid, s 15(a),(b).

6.1.4. Section 68[10] of the Tattoo Act allows the commissioner to delegate the commissioner's functions under the Tattoo Act, which specifically includes a power, to an appropriate qualified police officer. In execution of these statutory duties, the commissioner subsequently delegates his power and function pursuant to section 68 to Queensland Police Service, State Crime Command, Drug & Serious Crime Group and Licensing Enforcement Unit ("**the Delelgate**").

6.1.5. The Role of the Commissioner, and the Delegate by virtue of section 68, are constructed under section 20[11] of the Tattoo Act which provides:

20 Commissioner to make security determinations about applicants and licensee

(1) If an application for a licence is referred to the commissioner for investigation under section 15, the commissioner is to inquire into and determine, and report to the chief executive on, either or both of the following –

(a) whether the applicant is a fit and proper person to be granted the licence;

(b) whether it would be contrary to the public interest for the licence to be granted.

(2) The commissioner mat also investigate and determine, whether at the chief executive's request or on the commissioner's own initiative, either or both of the following and report to the chief executive on them –

(a) whether a licensee continues to be a fit and proper person to hold his or her licence;

(b) whether it would be contrary to the public interest for the licensee to continue to hold his or her licence.

(3) For making a determination on a matter mentioned in subsection (1) or (2), the commissioner may have regard to a criminal intelligence report or other criminal information held in relation to the applicant or licensee, or a close associate of the applicant or licensee, that-

(a) is relevant to the business or procedures carried on or performed, or proposed to be carried on or performed, under the licence; or

[10] Ibid, s 68.
[11] Ibid, s20.

(b) *causes the commissioner to conclude improper conduct is likely to occur if the applicant is granted the licence or the licensee continues to hold the licence; or*

(c) *causes the commissioner not to have confidence improper conduct will not occur of the applicant is granted the licence or the licensee continues to hold the licence.*

6.1.6. In the spirit of clarity, and briefly submitted, the duty of the Delegate is to undertake investigations to determine whether an applicant is a fit and proper person to hold a licence and whether the granting of a licence would be contrary to the public interest.

6.1.7. The amendments in the 2013 Legislation have resulted in a significant number of applications be suspended on the basis that preliminary enquiries reveal that an applicant appears to be a participant associated with a criminal organisation by way of declaration pursuant to section 2 of the *Criminal Code (Criminal Organisations) Regulation 2013.*[12] Purporting to execute the powers as delegated, the Delegate advises that such a determination may adversely impact on the assessment of whether such person is a fit and proper person, or whether it would be contrary to the public interest to issue such a person a tattoo licence. Notwithstanding the dicta of the High Court in the matter of *Kuczborski* the Delegate expressly indicates that any declaration of a criminal organisation must, and will by their own volition, be considered upon the applicant in relation to test of fit and proper. It is then indicated to an applicant that in offering of procedural fairness they will have an opportunity to respond to the allegations that they are, as a matter of fact, a participant in a declared criminal organisation prior to a determination be made.

6.1.8. In relation to the practical effect of this scheme, issues arises in the form of disclosure as an applicant is denied the opportunity to review any material discovered during preliminary enquiries rely on section 22 of the Tattoo Act[13]. For clarity, section 22 provides:

(1) *The commissioner is not, under this Act or another law, required to give reasons for determining a matter under section 20 if the giving of the reasons would disclose the*

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[12] *Criminal Code (Criminal Organisations) Regulation 2013, s 2 – "Entities declared to be criminal organisations – For the Criminal Code, section 1, definition criminal organisation, paragraph (c), the following entities are declared to be criminal organisations..."*

[13] *Tattoo Parlours Act 2013 (QLD), s 22.*

existence or content of a criminal intelligence report or other criminal information mentioned in section 20(3).

(2) The Chief executive is not, under this Act or another law, required to give reasons for not granting a licence to, or for suspending or cancelling a licence of, a person on the basis of an adverse security determination made by the commissioner about the person if the giving of the reasons would disclose a criminal intelligence report or other criminal information mentioned in section 20(3).

6.1.9. In light of this denial the applicant is afforded the opportunity to provide submissions and further probative material that would prove the person is not a participant in a criminal organisation; essentially placing the applicant in an indirect "*show cause*" position. It is respectfully submitted that the legislative scheme and executive mechanism directly breach the administrative law principle of procedural fairness.

6.1.10. As the Taskforce is undoubtedly aware procedural fairness forms the basis for a ground of judicial review under the common law and the *Administrative Decisions (Judicial Review) Act 1977* ("**the ADJR Act**") which requires specific standards and procedures to be observed through the administrative decision making process. The Commissioner and Delegate duly authorised is not, as a matter of law, exempt or excused from conducting investigations and determinations in accordance with these principles.

6.1.11. In accordance with the legislative framework it is submitted that the Commissioner or a Delegate is obligated to comply with the broad principles of natural justice and procedural fairness as required by the administrative law jurisdiction and not allow for an applicant's rights to be infringed in any way which, understandably, remain strictly reserved. It is submitted that Delegations have erred on this point by refusing, neglecting or failing to disclose material intended to be relied upon pursuant to section 22 of the Tattoo Act despite repeated formal requests for same. Certainly, conduct of in such a manner must not be considered anything other than a deprivations and denial of those applicant rights and erosion of fundamental administrative law principles.

6.1.12. It is submitted that Delegates have further refused, neglected or failed to disclose material before conducting an interview on the basis that the intended line of questioning to the applicant is "*merely procedural and standard*" in substance. As a result of the relatively new and controversial nature of the Tattoo Act, and indeed the legislative scheme at large, it is submitted that any line of questioning could not be, by any interpretation, be considered as standard and procedural. It is further submitted that

should a line of questioning be deemed to be standard and procedural the nature of same must be considered to be uncontroversial and therefore disclosure must occur.

6.1.13. Should the Commissioner or a Delegate fail to uphold these obligations reserved by an applicant during enquiries and the relevant determination or decision, such a failure may give rise to review on the basis that:

1. A breach of the rules of natural justice has occurred, is occurring, or is likely to occur, in connection with the conduct of the Commissioner of Delegate;
2. Procedures that are required by law to be observed in respect of the conduct have not been, are not being, or are likely not to be, observed;
3. An error of law has been, is being, or is likely to be, committed in the course of the conduct or is likely to be committed in the making of the proposed decision; and
4. There is no evidence or other material to justify the making of the proposed decision and the making of that decision would be otherwise contrary to law.

6.1.14. Considering the above grounds for review it is submitted that an improper exercise of power may be construed as:

1. Taking an irrelevant consideration into account;
2. Failing to take a relevant consideration into account;
3. Exercising the power for a purpose other than for which the power is conferred;
4. A discretionary exercise of power in bad faith;
5. An exercise of a personal discretionary power at the direction of another person;
6. Exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case; and
7. An exercise of a power that is unreasonable that no reasonable person could have so exercised the power or any other exercise of power that is uncertain or constitutes an abuse of power.

6.1.15. In order to avoid such issues applicants have insisted upon the strict adherence to the principles of natural justice and procedural fairness, namely the disclosure of specific documents which the Commissions or Delegate intend to rely on in their ultimate determination by way of instructing legal representatives. It cannot be argued that an applicant is afforded adequate opportunity to reply or respond while refusing, failing or neglecting to disclose material which may give rise to an adverse finding in relation to the common law fit and proper test.

6.1.16. Already discussed herein, section 15 of the Tattoo Act provides that the Commissioner and Delegate accordingly must have regard to whether, or not, an applicant is a fit and proper person.

6.1.17. The common law tests of 'fit and proper' and 'public interest' are well established principles of Australian Common Law and therefore it is submitted that the usual and ordinary common law understanding of the concepts of fit and proper and public interest be applied in these circumstances. As the tests of fit and proper and public interest are somewhat distinct, the following will discuss each concept separately.

6.1.18. We note that the conduct of Delegates in relation to the application of the fit and proper test have been, in our view, in direct contravention of same and Australian Law. It is submitted that Delegates seeking to apply the fit and proper tests concede that the Tattoo Act omits an explanation of fit and proper and therefore the Delegate is guided by the observations of a number of Australian courts.

6.1.19. It is submitted and also agreed that the observations of Toohey and Gaudron JJ in *Australian Broadcasting Tribunal v Bond* [1990] HCA 33[14] are to be accept as the High Court helpfully states:

> "The expression "fit and proper person", standing alone, carries no precise meaning. It takes its meaning from its context, form the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of "fit and proper" cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the

[14] *Australian Broadcasting Tribunal v Bond* [1990] HCA33; (1990) 170 CLR 321.

question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question."[15]

6.1.20. By way of the High Court's guidance, a Delegate has been minded to interpret this statement as authority to permit the Commissioner or Delegate to consider criminal intelligence and other criminal information held in relation to an applicant and close associates of the applicant in making an ultimate determination. It is submitted that this view is erroneous in circumstances where the material, namely criminal intelligence and other criminal information, is not disclosed for the purposes of responding to allegations or properly testing the accuracy of that information which may lead to an adverse determination.

6.1.21. It is submitted that a Delegate in undertaking their enquiries is minded to consider the High Courts comments in the matter of *Hughes and Vale Pty Ltd v New South Wales (No. 2)*[16] at paragraph 156 where their Honours said:

"the expression 'fit and proper' is of course familiar enough as traditional words when used with reference to offices and perhaps vocation. But their very purpose is to give the widest scope for judgment and indeed for rejection. 'Fit' (or idoneus') with respect to an office is said to involve three things, honesty, knowledge and ability... When the question was whether a man was a fit an d proper person to hold a licence for the sale of liquor it was considered that it ought not to be confined to an inquiry into his character and that it would be unwise to attempt any definition of the matters which may legitimately be inquired into; each case must depend upon its own circumstances."

[15] Ibid, at para 380.
[16] *Hughes and Vale Pty Ltd v New South Wales (No.2)* [1955] HCA 28; (1955) 93 CLR 127.

6.1.22. The Delegate is further mindful that in *Sobey v Commercial and Private Agents Board* 20 SASR 70[17], Walters J said:

> "In my opinion what is meant by that expression is that the Applicant must show not only that he is possessed of a requisite knowledge of the duties and responsibilities evolving upon him as the holder of a particular licence... but also that he is possessed of sufficient moral integrity and rectitude of character as to permit him to be safely accredited to the public... as a person to be entrusted with the sort of work which the licence entails".

6.1.23. It is argued by the delegate that fitness and propriety are flexible concepts and that a consideration of whether a person is fit and proper involves an assessment of their, knowledge honesty and ability in the context of the role they are seeking to undertake. It is further erroneously argued that the courts have emphasised the connection that assessment of repute, fitness and propriety have in a regulated context with public interest considerations by reference to the matter of *Australian Broadcasting Tribunal v Bond* in that that test should be narrowly construed or confined and may extend to any aspect of fitness, propriety that is relevant to public interest.[18]

6.1.24. Before considering the above arguments by the Delegate regarding their interpretation and specific application of the fit and proper test, section 15 of the Tattoo Act must once again be considered and provides:

Section 15 Investigations, inquiries and referrals in relation to licence applications

If the chief executive receives an application for a licence, the chief executive –

(a) May carry out the investigations and inquiries in relation to the application the chief executive considers necessary for a proper consideration of the application; and

(b) Must refer any application that the chief executive considers to have been properly made, along with any supporting information, to the commissioner for an investigation and determination as to either or both of the following-

(i) Whether the applicant is a fit and proper person to be granted the licence]

(ii) Whether it would be contrary to the public interest for the licence to be granted.

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[17] *Sobey v Commercial and Private Agents Board* 20 SASR 70.

[18] *Australian Broadcasting Tribunal v Bond* [1990] HCA33; (1990) 170 CLR 321 per Mason CJ at para 64.

6.1.25. It is argued that the above is to be interpreted in the usual and ordinary common law understanding of the concepts of fit and proper and public interest. It is conceded that a Delegate must be able to utilise their unfettered power by virtue by way of delegation; however, this does not permit the Delegate to form independent criteria, application or otherwise in regard to fit and proper and public interest. Accordingly the Delegate is prohibited from relying on *Sobey v Commercial and Private Agents Board* where the intended purpose is to limit or narrowly interpret these tests.

6.1.26. Although somewhat persuasive, it is argued that the dicta of the High Court regarding the expression of fit and proper is, at least for the purposes of a matter in relation to the Tattoo Act, conclusive and the opinion of Walter J is precluded from being accepted as an endorsed furtherance of the High Court's discussion in *Hughes and Vale Pty Ltd v New South Wales.* The Delegate seeks to rely upon a South Australian matter of an inferior Court to that that of the High Court, the facts of which are fundamentally distinguished from any relevance to the factual matrix of a matter subject to the Tattoo Act.

6.1.27. Accordingly, the Delegates argument and conduct is rejected and we do not regard the comments of Walter J to apply, and certainly do not agree that his *obiter* did expand the conceptual and executive application of a fit and proper person to be more than the High Court's prescribed elements of honesty, knowledge and ability in the context of the role an applicant is seeking to undertake.

6.1.28. It is further noted that the Delegate has intended to rely on the dicta of Mason J in *Australian Broadcasting Tribunal v Bond* at paragraph 64 which states, inter alia, *"it* [presumably the concept of fir and proper] *must extend to any aspect of fitness and propriety that is relevant to the public interest..."*. It is therefore argued that the High Court can be taken only so far as to say that whether an applicant is, or is not, a fit and proper person is conditional on his honesty, knowledge and ability in the context of the role subject to the application, namely tattoo propriety and any aspect giving rise to issues of public interest directly relevant to same.

6.1.29. For the purposes of this submissions and in the interest of clarity, the Delegate may only make an adverse determination regarding an applicant's eligibility for a tattoo licence after giving consideration to:

1. Any actual event in the course of providing Professional Services giving rise to circumstances relating to dishonesty; and
2. Any actual circumstance bringing into question our Client's knowledge and ability in providing Professional Services.

6.1.30. Due to the burden on the Delegate to establish negative indicia regarding the applicant in the absence of the above circumstances, the assumption must be consistent with a finding of an applicant being a fit and proper in the context of providing tattoo propriety. It is submitted that a Delegate as refer to in this submission has directly intended to narrow the parameters of the common law tests and to rely solely on the declaration or any other material which the Delegate finds appropriate disregarding the principles of administrative law.

6.1.31. In relation to the parameters of character and reputation and the distinction of fit and proper as discussed by Toohey and Gaudron JJ in *Australian Broadcasting Tribunal v Bond*, we note the High Court's guidance in relation to matters concerning these principles is that an applicant that may be subject to material which would give rise to ill-reputation or poor character, perhaps by way of criminal history or current criminal proceedings although not discussed, then that is a matter which is highly probative and must be taken into account by the Delegate.

6.1.32. It is clearly not the intention of the High Court to provide a Delegate with the absolute discretion to infer ill-reputation or poor character indirectly by reference to unrelated subject matter, namely a declaration of a criminal organisation or other unverified intelligence or date. To clarify, it is submitted that the declaration of a criminal organisation can only be taken as far as that, the declaration in itself, and must not be inferred or provide indicia that may be place on an individual, namely an applicant, for reasons which are guarded and reserved heavily by a Delegate without specific application, corroboration or reference to the applicant.

6.1.33. As submitted above, and discussed by the High Court in *Kuczborski* the effect of the declaration is to restrict the liberties of identified persons which is a mechanism that is incapable of executing this function. The High Court in *Kuczborski* at paragraph said:

> "It is to be inferred from the Act that it is the aim of the executive that all persons identified by the declaration made by the Attorney-General are to have their liberty to associate restricted. This is the end which the declaration serves but to which it cannot give effect. The court is directed to bring this result about. Its action, in making the order, gives the appearance of its participation in the pursuit of the objects of the Act. Properly understood, however, the making of the order serves to disguise an unstated premise and the lack of any illegality attaching to membership of a declared organisation."

6.1.34. For clarity, the High Court when referring to the objects is referring to section 3 of the CO Act which provides:

Section 3 ***Objects of the Act***

(1) The objects of this Act are to disrupt and restrict the activities of –

(a) Organisations involved in serious criminal activity; and

(b) The members and associates of the organisations.

(2) It is not Parliament's intention that powers under this Act be exercised in a way that diminishes the freedom of persons in the State to participate in advocacy, protest, dissent or industrial action.

6.1.35. The significance in light of these circumstances is that the Act which purports that the powers in issue are warranted by Parliament to not diminish the freedom of persons in the State, which is directly contradicted by the delegation powers in the Tattoo Act which have ensured that the freedoms of person in Queensland have been infringed.

6.1.36. As stated previously, a Delegate intends to rely on the declaration as a criminal organisation for the basis of giving rise to adverse indicia in relation to the test of fit and proper, being the fundamental issue to this enquiry. In the interest of clarity the court is permitted to make a declaration of a criminal organisation if satisfied pursuant to section 10 of the CO Act, inter alia:

(a) The respondent is an organisation;

(b) Members of the organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity; and

(c) The organisation is an unacceptable risk to the safety, welfare or order of the community.

6.1.37. When considering whether or not to make a declaration, the court must have regard to any indicia considered relevant and the following:

(i) Information suggesting a link exists between the organisation and serious criminal activity

(ii) Any conviction for current or former members of the organisation;

(iii) Information suggesting current or former members of the organisation have been, or are, involved in serious criminal activity, whether directly or indirectly and whether or not the involvement resulted in convictions; and

(iv) Information suggesting members of an interstate or overseas chapter or branch of the organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity.

6.1.38. It is crucial to note that the onus and burden of proof in order to appease the threshold that the court must consider should it see fit to prescribe an organisation by way of a declaration that the applicant, namely the party seeking the declaration, does not need to prove beyond a reasonable doubt or on the balance of probabilities that a link exists between the organisation and serious criminal activity. Rather, the applicant in this case merely needs to show information suggesting such a link exists. It is submitted, on a strictly hypothetical basis that any organisation in Queensland could be declared a criminal organisation where there information suggests a link between a member, current or former, and serious activity including the Queensland Police Service for example.

6.1.39. We are minded to consider and draw your attention, once again, to the High Court's discussion regarding the effect of the CO Act and a declaration of a criminal organisation in the *Kuczborksi.* It is submitted that any intention of a Delegate to rely on the declaration

is inappropriate in these circumstances which is supported by the dicta of the Majority at paragraph 235 and 238 which provides:

> "The only legal effect of a declaration is to establish an ingredient of an offence, the contravention of which must still be provided in the ordinary way... the declaration that a group of persons is a criminal organisation does not conclusively establish, without judicial process, the nature of the organisation in which the defendant is alleged to be a participant."

6.1.40. Clearly the High Court reserves the absolute jurisdiction of the Judiciary to establish the nature of an organisation which the CO Act inadvertently attempts to usurp. The Majority further discussed the effect of a declaration in relation to specific members, which fur the purposes of this submission would include an applicant for a tattoo licence pursuant to the Tattoo Act, and stated at paragraph 245:

> "... it needs to be kept in mind that the declaration does not create a presumption that one or more of the organisations purposes involve serious criminal activity... a declaration so made is not to be equated with a presumptive finding of fact."

6.1.41. The specific application of the High Court's reasoning in relation to his inquiry is that despite an applicant allegedly being a participant in a criminal organisation subject to a declaration of same does not, and must not, give rise to the view of a positive or actual finding of fact confirming or presuming criminality. Returning for the moment to the above discussion regarding fit and proper, reconsidering the High Court's dicta results in the preclusion of any consideration of the declaration on the basis that it does not give rise to circumstances of criminality directly related to an applicant by mere imposition of the declaration.

6.1.42. It is somewhat conceded that the above may be directed primarily towards the criminal jurisdiction as distinct from the administrative jurisdiction, although we submit that it would be highly unlikely that the rules of evidence and the effect of presumptive findings of fact would be suspended from in these circumstances by way of this jurisdictional distinction.

6.2. SECOND-HAND DEALERS

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7. INQUIRY AREA FOUR

ALL AMENDMENTS IN THE 2013 LEGISLATION WHICH RELATE TO BAIL, REMAND AND CORRECTIVE SERVICES.[19]

[19] [TOR 2] consider the prosecution of persons charged with committing a criminal offence/s or an aggravated offence/s created by the 2013 legislation by:

- noting the results of bail applications and the reasons given for the bail determinations (where reasons are available);
- noting the details of time served in prison on remand by defendants and for what charges;
- noting the outcomes of relevant prosecutions including any sentence imposed;
- noting the delay of prosecutions pending the outcome in *Kuczborski v The State of Queensland [2014] HCA 46*; and
- noting the reasons why some prosecutions did not result in a conviction.

7.1. In relation to the provisions of the *Bail Act 1980* ("**the Bail Act**") the Majority took the same approach as that of the sections of the Criminal Code and found that the plaintiff did not have standing on the basis that he was not subject to the Bail Act as those provisions "*have no practical application in relation to the plaintiff, they do not affect his legal position in any way*"[20]

7.2. In the spirit of completeness, section 16(3A), (3B), (3C) and (3D) of the Bail Act provide:

> *(3A) If the defendant is charged with an offence and it is alleged the defendant is, or has at any time been, a participant in a criminal organisation, the court or police officer must-*
>
> *(a) Refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified; and*
> *(b) If bail is granted or the defendant is released under section 11A-*
>
> *(I) require the defendant to surrender the defendant's passport; and*
> *(II) include in the order a statement of the reasons for granting bail or releasing the defendant.*
>
> *(3B) If the defendant is required to surrender the defendant's current passport under subsection (3A)(b)(i), the court or police officer must order that the defendant be detained in custody-*
>
> *(a) until the court or police officer is satisfied about whether the defendant is the holder of a current passport; and*
> *(b) if the defendant is the holder of a current passport- the passport is surrendered.*
>
> *(3C) For subsection (3A), it does not matter-*
>
> *(a) whether the offence with which the defendant is charged is an indictable offence, a simple offence or a regulatory offence; or*
> *(b) whether the defendant is alleged to have been a participant in a criminal organisation when the offence was committed; or*
> *(c) that there is no link between the defendant's alleged participation in the criminal organisation and the offence with which the defendant is charged.*
>
> *(3D) Subsection (3A) does not apply if the defendant proves that, at the time of the defendant's alleged participation in the criminal organisation, the organisation did not have, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity.*

[20] *Kuczborski v State of Queensland [2014]* HCA 46 at para 151, 256 to 259.

7.3. At the time of this matter the High Court conceded that although the plaintiff did not have standing because he was not subject to the provisions of the bail act, it would be difficult to find someone who did have standing on the basis that one person had been charged with an offence and was subject to bail. At paragraph 224 the Majority said:

> *"The judgements of the members of the majority in Totani identified the vice of section 14 of the SOCC Act in terms of the Kable principle, as the requirement that the Magistrates Court create new norms of conduct the content of which was determined by the executive and legislature, and which restricted the liberty of the subject (over and above the norms binding the public under the general law), without any enquiry by the court in to past or threatened contraventions by the individual of any existing legal norm. The court was called upon to implement, under the forms of judicial process, an executive judgment to restrict the liberty of any person who was a member of a declared organisation."*

7.4. The opposing argument is therefore that the court makes a determination of guilt or innocence of a charge which is not a charge in respect of the "bikies" alone. Therefore it would be argued in opposition that it is then just a question of sentencing. It is submitted that there remains an argument that the sentencing provisions are over and above that of the norms which would ordinarily bind the public under the general law and there has clearly been no enquiry by the court into the past or threatened contraventions by the individual of any norms existing in respect of sentencing, or provisions of bail.

7.5. It has been a long time standing principle of bail that the presumption must be for the granting of bail unless the prosecution raises issues which would give rise to circumstances where the accused:

7.5.1. would fail to appear and surrender into custody; or

7.5.2. would while released on bail –

7.5.3. commit and offence;

7.5.4. endanger the safety and welfare of a person who is claimed to be a victim of the offence with which the defendant is charged or anyone else's safety or welfare; or

7.5.5. interfere with witnesses or otherwise obstruct the course of justice, whether for the defendant or anyone else.

7.5.6. The amendments to the Criminal Code successfully supersede these provisions of the Bail Act by placing the accused in a 'show cause' position without regard to the above matters and by virtue of sections 60A, B and C of the Criminal Code. Essentially, where the accused is charged under certain offences, the principle giving rise to the presumption of bail is rebutted without consideration of the above aggravating circumstances and therefore the onus is on the accused to show cause in order for a Magistrate to be able to exercise their discretion in granting bail. Simply put, this is a complete suspension of the long established

principles of bail and rejection of the usual show cause circumstances in specific circumstances, generally relating to bikies.

7.5.7. For clarity, the defendant will be in a show cause positon where he or she is charged:

7.5.7.1. With an indictable offence that is alleged to have been committed while the defendant was at large with or without bail between the date of the defendant's apprehension and the date of the defendant's committal for trial or while awaiting trial for another indictable offence; or

7.5.7.2. An offence o which section 13 applies, namely in circumstances were jurisdiction is reserved for the Supreme Court of Queensland;

7.5.7.3. With an indictable offence in the course of committing which the defendant is alleged to have used or threatened to use a firearm, offensive weapon or explosive substance;

7.5.7.4. With an offence in contravention of the Bail Act;

7.5.7.5. With an offence against section 24 or 38 of the CO Act, namely contravention of control order or registered corresponding control order and contravention of a public safety order; or

7.5.7.6. With an offence against the Criminal Code including the amended sections by virtue of this legislative regime.

7.6. It is submitted that the effect of the amendments in consideration of the direct application of the Bail Act and relevant principles that placing a person in a show cause position on the basis of a declaration or association is an extreme instrument that directly impacts the liberties of persons in Queensland. It is very well established by the principles of bail and the provisions of the Bail Act that a person should not be awarded bail where they pose and unacceptable risk to comply with a grant of bail and therefore must provide specific reasons as to why they can be trusted in the community and to surrender into the custody of the Court.

7.7. It is the respectful submissions of the UMCQ, which joins concerns with the High Court, that the amendments do intend to directly and unfairly impact on the liberties of a person charged with offences that do not give rise to the ordinary aggravating circumstances prescribed by the Bail Act.

8. INQUIRY AREA FIVE

All amendments to the Queensland Criminal Code (including the Criminal Code (Criminal Organisations) Regulation 2013) in the 2013 legislation and the *Vicious Lawless Association Disestablishment Act 2013*.[21]

8.1. The UMCQ refers to and relies upon the submissions discussed at Inquiry 1 through 4 and the case studies discussed herein in respect to these matters.

9. INQUIRY AREA SIX

All amendments in the 2013 legislation made to the then *Crime and Misconduct Act 2001* (since renamed the *Crime and Corruption Act 2001*).[22]

9.1. The UMCQ makes no submissions in relation to amendments in the 2013 legislation made to the then *Crime and Misconduct Act 2001* (since renamed the *Crime and Corruption Act 2001*)

10. INQUIRY AREA SEVEN

Miscellaneous Amendments in the 2013 legislation including amendments to the *Liquor Act 1992*, *Police Powers and Responsibilities Act 2000*, *Criminal Proceeds Confiscation Act 2002*, *Penalties and Sentences*

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[21] [TOR2] consider the prosecution of persons charged with committing a criminal offence/s or an aggravated offence/s created by the 2013 legislation by:

- noting the results of bail applications and the reasons given for the bail determinations (where reasons are available);
- noting the details of time served in prison on remand by defendants and for what charges;
- noting the outcomes of relevant prosecutions including any sentence imposed;
- noting the delay of prosecutions pending the outcome in *Kuczborski v The State of Queensland [2014] HCA 46*; and
- noting the reasons why some prosecutions did not result in a conviction.

[TOR 3] analyse and inquire into the necessity of, amendments to occupational licensing requirements (including provisions in the *Tattoo Parlours Act 2013* as passed), made by the 2013 legislation (including commenced and uncommenced provisions; and provisions that may have since been repealed);

[22] ibid

Act 1992, Police Service and Administration Act 1990 and the *Transport Planning and Co-ordination Act 1994*.[23]

LIQUOR ACT 1992

10.1. Amendments to the Liquor Act 1992 (the Liquor Act) were enacted for the primary purpose to prohibit people from entering and remaining in licensed premises if they are wearing or carrying certain material which is associated with a declared criminal organisation. The laws burden the occupier of the business to direct persons wearing prohibited material to immediately leave the venue and it is an offence for that person to remain at the premises.

10.2. Section 173EA of the Liquor Act provides:

In this division-

Declared criminal organisation *means an entity declared to be a criminal organisation under the Criminal Code, section 1, definition criminal organisation, paragraph (c).*

Prohibited item *means an item of clothing or jewellery or an accessory that displays-*

(a) The name of a declared criminal organisation; or

(b) The club patch, insignia or logo of a declared criminal organisation; or

Note –

The things mentioned in paragraph (b) are also known as the 'colours' of the organisation.

(c) Any image, symbol, abbreviation, acronym or other form of writing that indicates membership of, or an association with, a declared criminal organisation, including-

(i) The symbol '1%'; and

(ii) The symbol '1%er'; and

(iii) Any other image, symbol, abbreviation, acronym or other form of writing prescribed under a regulation for this paragraph.

[23] ibid

10.3. The Act burdens business operators to discriminate against members of motorcycle clubs who are wearing material which would fall within section 173EA of the Liquor Act or risk significant fines (approximately $11,000.00) allowing people to contravene this law by remaining on their premises.

10.4. The amendments to the Liquor Act on an operational basis promote discrimination against motorcycle club members by instilling fear of being fined significant sums of money. On the face of the amendments, it appears that the basis of this discrimination is placed on arbitrary items of clothing for the mere fact that this is, presumably, something which motorcycle enthusiast have in common and wear frequently.

10.5. The suite of legislations, including the Liquor Act, all purport to disrupt organised crime as a whole; however the operation of this law targets motorcycle enthusiasts, regardless of their association with '1%' clubs. It cannot be argued that such a provision is intended to disrupt organised crime as a whole wear the application of the mechanism only attracts an allegedly small sector of the organised crime community. For clarity, not all organised criminal organisation wear motorcycle paraphernalia, or any other uniform item or theme for that matter, and therefore it is not a compelling argument to say that these laws are intended to protect the public as a whole by targeting the organised crime community at large.

10.6. It is submitted by the UMCQ that the amendments to the Liquor Act primarily, whether intended or not, force members of the public to discriminate against motorcycle enthusiasts and fail to disrupt organised crime at all. It is further submitted that these provisions infringe on the rights of business owners as they are legislatively prohibited from allowing a person to engage their services in circumstances where that person is wearing arbitrary items of clothing.

11. INQUIRY AREA EIGHT

REVIEW OF THE CRIMINAL ORGANISATION ACT 2009.[24]

11.1. The UMCQ adopts and endorses the submissions of the Civil Liberties Council of Queensland attached as **appendix 2.**

[24] [TOR 10] have regard to the recommendations of the statutory review of the *Criminal Organisation Act 2009* which is required to commence as soon as practicable after 15 April 2015.

12. INQUIRY AREA NINE

12.1. THE PROPOSAL FOR A NEW 'SERIOUS ORGANISED CRIME OFFENCE'.[25]

12.1.1. We note the current Queensland Government's intention to repeal, and replace the controversial 2013 legislative regime by way of substantial amendment and/or new legislation for the purpose to advise:

12.1.1.1. If provisions in the legislation are effectively facilitating the successful detention, investigation, prevention and deterrence of organised crime;

12.1.1.2. If provisions in the legislation are effectively facilitating the successful prosecution of individuals;

12.1.1.3. If the legislation strikes an appropriate balance between ensuring the safety, welfare and good order of the community and protecting individual civil liberties; and

12.1.1.4. How best to replace or amend the 2013 legislation, in accordance with the Queensland Government's election commitments.

12.1.2. It is respectfully submitted that the current legislation fails all of the above for the following reasons:

12.1.2.1. The legislation has not effectively facilitated the successful detention, investigation, prevention and deterrence of organised crime in that is has merely disrupted the civil liberties of members of motorcycle clubs by way of declaration pursuant to the CO Act;

[25] [TOR 7] note the Queensland Government's intention that the new 'serious organised crime' offence will carry a maximum penalty of life imprisonment and any person convicted of this offence would serve a mandatory minimum non-parole period of 80% of their term of imprisonment or 15 years imprisonment, whichever is the greater.

12.1.2.2. The legislation is not effectively facilitating the successful prosecuted of individuals on the basis that no person of the State of Queensland has been successfully prosecuted; and

12.1.2.3. The legislation has not struck a balance between ensuring the safety, welfare and good order of the community and protecting individual civil liberties as there is no source evidence to suggest an improvement to public safety due to this regime; and

12.1.2.4. The civil liberties of individuals have been grossly affected due to the legislative regime for the reasons discussed in this submission.

12.1.3. In relation to the new offence of "serious organised crime", we note that the taskforce intends to review an offence which is punishable by a maximum penalty of life imprisonment. It is further noted that an accused convicted of this offence must serve a mandatory minimum parole period of 80% of the term of imprisonment or 15 years imprisonment, whichever is the greater.

12.1.4. In the report published by the Queensland Organised Crime Commission of Inquiry in October 2015, the application of a new offence for serious organised crime, on the face of the report at least, intends to directly combat the growing levels of fraud and online child sex offending and child exploitation material; particularly in south-east Queensland.

12.1.5. It is purported that the new offence may model provisions in the Victorian Crimes Act 1958 as the 'party provisions' of the Queensland Criminal Code Act 1899 have limited application in these circumstances. In review of the Victorian legislation, it seems that the term "serious" is merely a synonym for an indictable offence in Queensland. For example, the Victorian position does not seek to provide a distinct basis between a fraud and a serious fraud and it is therefore submitted that this approach is not appropriate where the intended outcome is to enact a circumstance of aggravation to an existing offence.

12.1.6. In relation to the definition of "organised crime" and more importantly the distinction from that of serious organised crime, it is submitted that a definition must be adopted before an offence may effectively be established. We note that there are several definitions of organised crime, which are as follows:

Article 2 ***The United Nations Convention Against Transnational Organized Crime***

*"**Organized criminal group**" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.*

Section 4 ***The Australian Crime Commission Act 2002 (Cth)***

*"**Serious and organised crime**" means an offence:*

(a) That involves 2 or more offenders and substantial planning and organisation;

(b) That involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques;

(c) That is committed, or is of a kind that is ordinarily committed, in conjunction with other offences of a like kind; and

(d) That is a serious offence, an offence against Subdivision B or C of Division 471, or D or F of Division 474, of the Criminal Code, an offence of a kind prescribed by the regulations or an offence that involves any of the following:

(i) Theft;

(ii) Fraud;

(iii) Tax evasion;

(iv) Money laundering;

(v) Currency violations;

(vi) Illegal drug dealings;

(vii) Illegal gambling;

(viii) Obtaining financial benefit by vice engaged in by others;

(ix) Extortion;

(x) Violence;

(xi) Bribery or corruption of; or by; an officer of the commonwealth, an officer of a State or an officer of a Territory;

(xii) Perverting the course of justice;

(xiii) Bankruptcy and company violations;

(xiv) Harbouring of criminals;

(xv) Forging passports;

(xvi) Firearms;

(xvii) Armament dealings;

(xviii) Illegal importation or exportation of fauna into or out of Australia;

(xix) Cybercrime;

(xx) Matters of same general nature as one or more of the matters listed above; and

(da) That is:

(xxi) Punishable by imprisonment for a period of 3 years or more; or

(xxii) A serious offence:

But:

(e) Does not include an offence committed in the course of a genuine dispute as to matters pertaining to the relations of employees and employers by a party to the dispute, unless the offence is committed in connection with, or as part of, a course of activity involving the commission of a serious and organised crime other than an offence so committed; and

(f) Does not include an offence the time for the commencement of a prosecution for which has expired.

Schedule 2 Crime and Corruption Act 2001(Qld)

*"**Organised crime**" means criminal activity that involves –*

(a) Indicatable offences punishable on cionviction by a term of imprisonment not less than 7 years; and
(b) 2 or more persons; and
(c) Substantial planning and organisation or systematic and continuing activity; and
(d) A purpose to obtain profit, gain, power or influence.

Schedule 6 Police powers and Responsibilities Act 2000

*"**Organised crime**" means an ongoing criminal enterprise to commit serous indictable offences in a systematic way involving a number of people and substantial planning and organisation.*

12.1.7. Clearly there are a number of competing definitions adopted by the state and federal government and before a new charge of serious organised crime is enacted this issue must be resolved.

12.1.8. Notwithstanding the seemingly trivial issues of definitions, the enactment of a new charge which requires a burden of proof to be similar to that of the current regime, it is respectfully submitted that surely any prosecution under this new charge will raise the same issues which are currently before Queensland courts in regards to sections 60A, B and C of the Criminal Code Act. To clarify, should the new offence require a participation element by reference to an organisation or group then it is likely that no persons will be successfully prosecuted for that charge as, in the course of the criminal proceedings, as it would be likely that an alternative serious charge would have been made out in the circumstances where the prosecution are able to prove the new charge. This proposition is once again supported by the majority of the High Court in Kuczborski.

12.1.9. Hypothetically and provided by way of an example of the above; should the prosecution be successful in proving that 3 or more people were conspiring for a common purpose to commit criminal offences, namely trafficking of drugs, then it is likely that in discharging that evidentiary burden for the new charge of serious organised crime a charge for drug trafficking must have been made out also. Therefore, the prosecution may well rely on the charge of trafficking were the evidence is able to establish such a charge and convict on that basis. The practical result of this means that the new charge is, as a matter of law, redundant unless the true spirit of the mechanism is to raise circumstances of aggravation or provide more severe terms of imprisonment and parole for those who commit crimes of this nature.

12.1.10. Therefore it is submitted that it is unclear as to what a new charge would provide to the State of Queensland other than to provide circumstances of aggravation or to heighten the severity of crimes which would otherwise attract a lesser penalty or term of imprisonment.

13. INQUIRY AREA TEN

CONSIDERATION OF THE REPORT AND RECOMMENDATIONS OF THE COMMISSION OF INQUIRY INTO ORGANISED CRIME IN QUEENSLAND.[26]

13.1. The UMCQ has addressed the recommendations of the Commission of Inquiry above.

[26] [TOR 8] have regard to the report and recommendations of the Commission of Inquiry into organised crime in Queensland in so far as it is relevant to these Terms of Reference.

14. CONCLUSIONS AND SUBMISSIONS

EVIDENCE ON THE IMPACT OF THE LEGISLATION SET OUT AT PARAGRAPH ONE OF THE TERMS OF REFERENCE (THE 2013 LEGISLATION) ON CRIME RATES AND COMMUNITY SAFETY

14.1. The UMCQ submits that whether or not motorcycle club members are involved in committing criminal offences in this State, the legislation has been completely unsuccessful in enhancing public safety or disrupting organised Crime. Accordingly there is no justification for the continuance of the legislation which significantly affects the rights of a small segment of society.

EXAMINATION OF THE DECISION OF *KUCZBORSKI –V- STATE OF QUEENSLAND [2014] HCA 46*

14.2. Despite the plaintiff lacking standing, Kuczborski was not a win for the former Queensland Government in that the High Court provided valiable consideration in relation to the practical application of the VLAD laws in Queensland. Further, the High Court provided some very clear guidelines as to how the provisions of the suite of legislations should properly be interpreted and ultimately says that in any prosecution the Crown cannot rely on the declaration of a criminal organisation but, instead, must prove it by way of admissible evidence. The UMCQ agrees with the High Court in relation to the dicta provided which predicts that there will be very few charged under these provisions and even less will resolve by way of conviction. The UMCQ ultimately submits that the sentencing provisions are over and above the norms binding the public under general law.

14.3. In light of the Kuczborski decision, the current legislation remains liable to be challenged on both Constitutional and Non-constitutional grounds. The nature of the legislation under review makes it vulnerable for further challenges in various courts and given the determination of the UMCQ and its members to see the end of this legislation it will continue to be litigated until there are final determinations by superior courts. This will inevitably result in considerable expense to ultimately club members and to the State of Queensland.

14.4. The majority of charges laid under sections 60 A, 60 B and 60 C to this point in time have been discontinued by the prosecution. As such no person has yet been convicted of an offence under these provisions.

14.5. Currently, with the exception of one matter all matters that are still before the courts have been adjourned for mention until the completion of this Taskforce's inquiry.

14.6. Subject to any Magistrates court's determination of the meaning of these provisions and the significant evidentiary issues which have been identified above it appears unlikely

that any of the matters currently before the courts will result in a conviction of the person or persons charged. This represents a catastrophic failure of the legislation which can only be remedied by repeal and if the government is so minded a new approach to the tackling organised crime.

ALL AMENDMENTS IN THE 2013 LEGISLATION WHICH RELATE TO OCCUPATIONAL AND INDUSTRY LICENSING. THIS INCLUDES AMENDMENTS IN THE *TATTOO PARLOURS ACT 2013* AND AMENDMENTS IN THE 2013 LEGISLATION TO THE *ELECTRICAL SAFETY ACT 2002, LIQUOR ACT 1992, QUEENSLAND BUILDING SERVICES AUTHORITY ACT 1991, RACING ACT 2002, SECOND-HAND DEALERS AND PAWNBROKERS ACT 2003, SECURITY PROVIDERS ACT 1993, TOW TRUCK ACT 1973, WEAPONS ACT 1990.*

THE TATTOO ACT

14.7. The specific application of the High Court's reasoning in relation to his inquiry is that despite an applicant allegedly being a participant in a criminal organisation subject to a declaration of same does not, and must not, give rise to the view of a positive or actual finding of fact confirming or presuming criminality. Regarding the fit and proper test and reconsidering the High Court's dicta results in the preclusion of any consideration of the declaration on the basis that it does not give rise to circumstances of criminality directly related to an applicant by mere imposition of the declaration.

14.8. The UMCQ submits and agrees with the High Court when it reserves the absolute jurisdiction of the Judiciary to establish the nature of an organisation which the CO Act inadvertently attempts to usurp.

14.9. It is the ultimate submission of the UMCQ that the delegation of power continues to prejudice applicants on the basis that they have a complete disregard to principles of administrative law, namely an applicant's right to respond to allegations and accordingly is a direct erosion of civil liberties.

THE LIQUOR ACT

14.10. It is submitted by the UMCQ that the amendments to the Liquor Act primarily, whether intended or not, force members of the public to discriminate against motorcycle enthusiasts and fail to disrupt organised crime at all. It is further submitted that these provisions infringe on the rights of business owners as they are legislatively prohibited from allowing a person to engage their services in circumstances where that person is wearing arbitrary items of clothing.

THE PROPOSAL FOR A NEW 'SERIOUS ORGANISED CRIME OFFENCE'.[27]

14.11. Notwithstanding the seemingly trivial issues of definitions, the enactment of a new charge which requires a burden of proof to be similar to that of the current regime, it is respectfully submitted that surely any prosecution under this new charge will raise the same issues which are currently before Queensland courts in regards to sections 60A, B and C of the Criminal Code Act.

14.12. It is submitted by the UMCQ that it is unclear as to what a new charge would provide to the State of Queensland other than to provide circumstances of aggravation or to heighten the severity of crimes which would otherwise attract a lesser penalty or term of imprisonment.

[27] [TOR 7] note the Queensland Government's intention that the new 'serious organised crime' offence will carry a maximum penalty of life imprisonment and any person convicted of this offence would serve a mandatory minimum non-parole period of 80% of their term of imprisonment or 15 years imprisonment, whichever is the greater.