QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
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Taskforce on organized crime legislation

Dear Judge

Occupational Licensing

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

Inquiry area three deals with the 2013 changes to occupational and industry licensing. These changes covered a vast range of occupations and industries including electricians, plumbers, painters, secondhand dealer dealers, Pawnbrokers, security providers and car salespeople.

Amendments to the legislation relevant to each type of industry occupation took a similar form. The description below comes from the *Motor Dealers and Chattel Auctioneers Bill.*

The Provisions

Under these provisions the Chief Executive of the Department when considering an application for a licence or to renew a licence or to restore a licence must inquire of the Commissioner of Police as to whether or not the applicant or a director of the applicant in the case of a corporation is a participant in a criminal organisation.

The Chief Executive may cancel the licence if they become aware that the licensee or an executive officer of the licensee if it is a corporation has been identified as a participant in a criminal organisation. The source of the information is not specified. Presumably then the information could come from somebody other than the Commissioner of Police.

Should the Chief Executive decide to refuse an application for, or cancel a licence on the participant ground (to use a shorthand) the Chief Executive is not required to specify in his or her statement of reasons the fact a person is *alleged* to be a participant in a criminal organisation as the reason for their decision.

Critique

A more flagrant denial of the principles of natural justice is hard to imagine.

A member of the public who maybe entirely innocent of any offence may be deprived of their livelihood on the untested say so of a member of the executive namely the Commissioner of Police.

This is particularly so when you consider the definition of participant as contained in section 60A of the Criminal Code which includes "a person who attends more than one meeting or gathering of persons who participate in the affairs of the organisation in any way." That provision of course requires no proof that the person knew that the organisation engaged in criminal activity nor that they did anything to either actively support or encourage the organisation to engage in criminal activity.

These laws are particularly perplexing when it is said that the purpose of the so called Anti Bikie laws is to stop people from making money out of the sale of drugs. How depriving a person of their right to make an income in a legitimate fashion is going to encourage them to give up making an income from the sale of illicit drugs is unfathomable.

This is quite simply a return to the old English practice of the "Bill of Pains and Penalties". [1] The parliament by this law "legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protection of a judicial trial."-*Selective Service System v Minnesota Public Interest Research Group* 104 SCt 3348 at page 3352.

To deprive a person of their source of income is clearly punitive. In *Cummings v Missouri* the America Supreme Court struck down a provision of the Missouri post-Civil War Reconstruction Constitution that barred persons from various professions unless they stated under oath that they had not given aid or comfort to persons engaged in hostility to the United States and had never "been a member of, or connected with, any order, society or organisation inimical to the government of the United States". On the same day, the court struck down a law that required a similar oath for admission to practice law in Federal Courts. In both cases the persons in the disqualified group were defined entirely by irreversible acts committed by them – discussed in ***Selective Services System*** referred to previously at pages 3352-3353.

This violates the fundamental right of due process (to use the American nomenclature) and the separation of powers. This latter point was recognised by the High Court in *Polyunkhovic v The Commonwealth of Australia* 101 ALR 545 where six judges of the High Court ruled that Bills of Attainder are unconstitutional by reason to the separation of powers in the constitution. In his judgment the then Chief Justice Mason referred with approval to the decision of the United States Supreme Court of *United States v Brown (1965) 381 US 437* in which the Court struck down a law which prohibited persons who had been members of the Communist Party from having executive positions in trade unions as a Bill of Pains and Penalties. The US Supreme Court has recognised that the prohibition on Bills of Attainder cannot be got around by giving the power to the executive – *Joint Anti Fascist Refugee Committee V McGrath* 71 S. Ct 624 at 634 per Black J.

We note that of course there is a right of review to QCAT for a person who has had their application refused or their licence cancelled. Of course, the right of review is entirely otiose if the person in question does not know the real reason for the decision.

But even if at the review stage in the QCAT the reason is identified to them the Tribunal is then given the power, in the absence of the parties, to review the information provided by the Commissioner and determine whether or not it is criminal intelligence. It seems clear that if the Tribunal decides that the information is criminal intelligence the QCAT will consider it without reference to the person accused of the conduct. If the Tribunal is of the view that it is not criminal intelligence then the Commissioner has the option of withdrawing the information so that the applicant to the Tribunal is left having had their reputation besmirched but unable to address the allegations.[2]

The QCCL objects strongly to this cult of secret evidence. It is a violation of the most fundamental right to a fair trial.

The problems with Secret Evidence were considered in a report by Justice, which is the British section of the International Commission of Jurists.

In a major report in June 2009 Justice observed in its Executive Summary:

- It is a basic principle of a fair hearing that a person must know the evidence against him.

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[1] The difference between a Bill of Pains and Penalties and a Bill of Attainder is simply that the latter resulted in execution

[2] The decision in *Kable* has seen the High Court extend the principle of the separation of powers (even if in a somewhat modified sense) to the State Courts. It is acknowledged that in the light of decisions such as *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638 this argument is unlikely to result in a finding that the legislation is unconstitutional. However what follows is a statement of the QCCL's principled opposition to this type of procedure

- This core principle of British justice has been undermined as the use of secret evidence in UK courts has grown dramatically in the past ten years.

- This report calls for an end to the use of secret evidence. Secret evidence is unreliable, unfair, undemocratic, unnecessary and damaging to both national security and the integrity of Britain's courts.[3]

In considering the case against secret evidence, the Justice report quoted the noted British Jurist Jeremy Bentham. Bentham was a vicious critic of secrecy in the courts and he wrote that:

> "In the darkness of secrecy ... sinister interest and evil in every shape, have full swing. Only in proportion as publicity has placed can any of the checks, applicable to judicial injustice, operate. Where there is no publicity, there is no justice".[4]

The Justice report makes the following observations as to secret evidence:

- Secret evidence is unreliable.[5]
- Secret evidence is unfair.[6]
- Secret evidence is undemocratic.[7]
- Secret evidence damages the integrity of the courts.[8]
- Secret evidence weakens security.[9]
- Secret evidence is unnecessary.[10]

Justice notes that in the absence of the defendant's side of the story, a court may well arrive at what seems to be a credible conclusion but, as long as it is based upon secret evidence, it will never arrive at the correct one.[11]

The maxim that justice must not only be done but seen to be done goes deeper than is first apparent. For, despite the importance of open justice, it remains possible to have a fair hearing behind closed doors, so long as all the parties have had an equal opportunity to make their case. Whatever the outcome, the participants themselves will understand that the procedure adopted was fair. But in a hearing in which secret evidence is used, it is not merely that justice is not being seen to be done, it is actually that justice itself is not being done. It is not simply the *perception* of fairness that matters, but the practice of fairness too.[12] This point applies to the Chief Executive in arriving at a decision with equal force to that of a Court.

The Justice report notes that the resort to secret evidence is not necessary. This claim covers two different points. First, the government sometimes claims secrecy in respect of things which, it later emerges, are already in the public domain. Or the government wrongly claims that the disclosure of some item of information would damage some vital public interest when it would not. Secondly, the resort to secret evidence is unnecessary in the larger sense that there are inevitably better means of protecting the relevant public interest in a way that is compatible with the defendant's right to a fair hearing or an applicant for a licence whose income depends on a successful outcome.[13]

The criticisms of secret evidence could be more fulsome however time does not permit.

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[3] See "Secret Evidence", a Justice report June 2009 p.5
[4] See "Secret Evidence" p.214
[5] See "Secret Evidence" pp.215-220
[6] Ibid pp.220-221
[7] Ibid pp.222-223
[8] Ibid pp.224-225
[9] Ibid pp.226-227
[10] Ibid pp.227-228
[11] Ibid p.219
[12] Ibid p.224
[13] Ibid p.227

The legislation does not even provide for the COPIM to have a role before the QCAT. It should be noted that in the view of the QCCL the COPIM is no substitute for proper disclosure of the case to the applicant. COPIM is a more recent development of the concept of the Public Interest Monitor which was introduced in Queensland in the mid 1990s. The Public Interest Monitor is a Special Advocate by another name. The use of Special Advocates has come in for significant criticism in the UK. In a report of the Joint Committee on Human Rights in February 2010 a number of very pertinent criticisms of the limitations of Special Advocates were made. Those criticisms are equally applicable to the Queensland concept of Special Advocates, especially COPIM. The point made here is simply that not even this is an adequate response to the serious issues raised.

Finally, the complete abrogation of due process is continued by clause 203 which excludes the operation of the *Judicial Review Act*. Whilst of course, fortunately, following the decision of the High Court in *Kirk* it is not possible for this parliament to entirely exclude the jurisdiction of the Supreme Court on judicial review it is no doubt the case that the *Judicial Review Act* gives broader grounds of review and is a more flexible device.

Amendments

The Council has as its principal objective the implementation in Queensland of the Universal Declaration of Human Rights. Article 23 of that Declaration provides:

> "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."

Under this legislation individuals who have committed no offence or have engaged in the most trivial of misconduct could be deprived of their livelihood including businesses which they have built up over many years. Many individuals could be effectively punished not for what they have done but with who they know. This is in our view a clear violation of article 23.

The government's preferred position as stated in your Terms of Reference is to develop a multi-industry "fit and proper person" test[14] which ensures individuals are not prohibited from holding a licence on the basis of mere Association.

Suffice to say then, that the QCCL would support amending legislation which removed the prohibition of individuals from holding an industry license on the basis of mere association.

Clearly it is our view that these decisions should not be made by the decision maker without the licensee or applicant being advised beforehand of any allegation against them and being allowed to respond to the allegation. On any review and before the decision maker the applicant needs to be provided with all the evidence against them or a sufficient summary of it to enable them to respond to it.[15]

This topic also raises the question of the place of spent convictions in this regime. In its report number 37[16] the Australian Law Reform Commission recommended that persons making decisions or exercising judgement under statutory powers and duties be prohibited from taking into account spent convictions. The Law Reform Commission took the view that this principle should be extended to

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[14] The "fit and proper person" test is essentially a character based test. We concede that some character based test exists in most, if not all, of this licensing legislation. However, the whole concept of "character" has come under significant criticism in the social psychological literature for example in his *Lack of Character: Personality and Moral Behaviour* John Doris criticized the concept of "character" on the basis that social psychological evidence demonstrates that human beings do not demonstrate some of the major qualities allegedly associated with character. People are not consistent in a variety of situations and "stability" namely that particular traits are reliably manifested in many different situations. And finally what he refers to as "evaluative integration" namely that in a given character or personality the occurrence of a particularly valuable trait is generally related to the occurrence of other traits for example the honest person will tend to be compassionate rather than callous.

[15] *Secretary of State for the Home Department v A F and another* [2009] UK HL 28

[16] *Spent Convictions* paragraphs 4.28, 19 and 22

applications for the emissions to professions and employment in certain occupations and the granting of licences

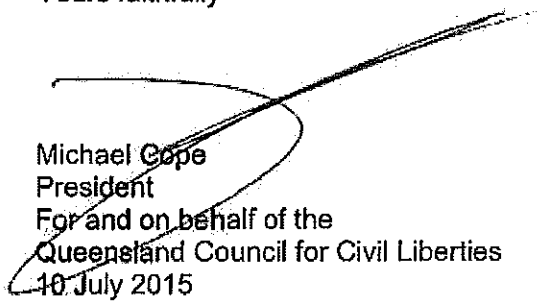
The convictions that a decision maker should be entitled to take into account should be strictly limited and be identified by reference to the principles laid down by the Australian Law Reform Commission namely the:

1. convictions should be substantially relevant to the capacity of the person to perform the occupation the subject of a licence.

2. harm that might be caused to the exempted convictions or convictions of that kind had to be disregarded to stab substantially outweigh the harm the convicted persons would be caused by taking them into account.

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

Yours faithfully



Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
10 July 2015