

Taskforce on  
**Organised Crime  
Legislation**



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## ABBREVIATIONS

|                              |  |
|------------------------------|--|
| 2013 suite                   | the <i>Vicious Lawless Association Disestablishment Act 2013</i> (Qld), the <i>Tattoo Parlours Act 2013</i> (Qld), the <i>Criminal Law (Criminal Organisations Disruption) Amendment Act 2013</i> (Qld), the <i>Criminal Law (Criminal Organisation Disruption) and Other Legislation Act (2013)</i> (Qld) and the <i>Criminal Code (Criminal Organisations) Regulation 2013</i> |
| ABS                          | Australian Bureau of Statistics  |
| ACC                          | Australian Crime Commission  |
| BAQ                          | Bar Association of Queensland  |
| Byrne Report                 | Report of the Queensland Commission of Inquiry into Organised Crime by Mr Michael Byrne QC, 2015   |
| CCA                          | <i>Crime and Corruption Act 2001</i> (Qld)   |
| CCC                          | Crime and Corruption Commission  |
| CEM                          | child exploitation material  |
| CLG                          | Commissioner of Liquor and Gaming  |
| CLROA                        | <i>Criminal Law (Rehabilitation of Offenders) Act 1986</i> (Qld)   |
| COA                          | <i>Criminal Organisation Act 2009</i> (Qld)  |
| COA Review                   | statutory review of the <i>Criminal Organisation Act 2009</i> (Qld), 2015  |
| CODALA                       | <i>Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013</i> (Qld)   |
| Commissioned Officers' Union | Queensland Police Commissioned Officers' Union of Employees  |
| COPIIM                       | Criminal Organisation Public Interest Monitor (appointed under section 83 of the <i>Criminal Organisation Act 2009</i> (Qld))  |
| COSO                         | Criminal Organisation Segregation order  |
| DJAG                         | Department of Justice and Attorney-General   |
| Fitzgerald Inquiry           | Report of the Queensland Commission of Inquiry into Possible Illegal Activities and Associate Police Misconduct by Mr Tony Fitzgerald AC QC, 1989  |
| FLP                          | fundamental legislative principle – see, LSA   |
| ICCPR                        | <i>International Covenant on Civil and Political Rights</i>  |
| LACSC                        | Legal Affairs and Community Safety Committee   |

|       |  |
|-------|--|
| LAQ   | Legal Aid Queensland   |
| LSA   | <i>Legislative Standards Act 1992 (Qld)</i>  |
| MSNPP | mandatory minimum standard non-parole period   |
| MSO   | Maximum Security Order   |
| NCA   | National Crime Agency  |
| OFT   | Office of Fair Trading   |
| OLGR  | Office of Liquor and Gaming Regulation   |
| OMCG  | outlaw motorcycle gang   |
| OQPC  | Office of Queensland Parliamentary Counsel   |
| PCMC  | Parliamentary Crime and Misconduct Commission  |
| PIM   | Public Interest Monitor (appointed under section 740 of the <i>Police Powers and Responsibilities Act 2000 (Qld)</i> to act as an <i>amicus curiae</i> during proceedings relating to surveillance device warrants, retrieval warrants, and search warrants) |
| PPRA  | <i>Police Powers and Responsibilities Act 2000 (Qld)</i>   |
| PSAA  | <i>Police Service Administration Act 1990 (Qld)</i>  |
| QBCCA | <i>Queensland Building and Construction Commission Act 1991 (Qld)</i>  |
| QCAT  | Queensland Civil and Administrative Tribunal   |
| QCS   | Queensland Corrective Services   |
| QLS   | Queensland Law Society   |
| QPS   | Queensland Police Service  |
| QPU   | Queensland Police Union  |
| RICO  | <i>Racketeer Influenced and Corrupt Organizations Act of 1970, 18 USC §§ 1961-8</i>  |
| SCPO  | Serious Crime Prevention Order   |
| SDOCO | Serious Drug Offender Confiscation Order   |
| UN    | United Nations   |
| VLAD  | <i>Vicious Lawless Association Disestablishment Act 2013 (Qld)</i>   |

# PART 1

## CHAPTER ONE

### INTRODUCTION

*The Taskforce was charged with reviewing the 2013 anti-bikie (VLAD) legislation.*

*It saw its job as one which also required the consideration of those laws in the context of framing effective anti-organised crime legislation for Queensland.*

*While it has recommended the repeal of the greater part of the 2013 suite it has, to that end, gone a further step and developed a renewed **Organised Crime Framework** – a package of laws which preserves some parts of the suite but overcomes what the Taskforce concluded were excessive, disproportionate or unnecessary elements of it; and, is better suited for combating not just OMCGs, but organised crime in all its forms.*

This is the Report of the Taskforce on Organised Crime Legislation.

The purpose and the work of the Taskforce was contained in Terms of Reference signed by the Attorney-General and Minister for Justice and Minister for Training and Skills, the Honorable Yvette D’Ath, on 7 June 2015. Those Terms of Reference are Attachment 1.

They initially called for the Taskforce to report on 15 December 2015. Later, when its chair was asked to simultaneously review earlier anti-OMCG, anti-organised crime legislation – the *Criminal Organisations Act 2009* (Qld) (COA) – that date was extended to 31 March 2016.

A primary purpose of the Taskforce under the Terms was to review and make recommendations about legislation introduced and passed in the Queensland Legislative Assembly in 2013.

Those laws (**the 2013 suite**) were represented to target organised crime but were principally directed at outlaw motorcycle gangs (**OMCGs**) and their members.

The Terms required the Taskforce to consider the repeal and replacement of the 2013 suite (whether by substantial amendment or new legislation) but also, in doing so, to consider whether the provisions of the 2013 suite were effectively facilitating the successful detection, investigation, prevention and deterrence of organised crime.

They also asked it to develop a new ‘*serious organised crime*’ offence, with mandatory penalties.

The Taskforce took this to mean that it was neither compelled nor constrained in its consideration of the 2013 legislation (ie, if the Taskforce considered that the 2013 suite did not require amendment then the Terms of Reference did not prevent such a recommendation being made).

The Taskforce also took the Terms to mean that, in light of the range and depth of

expertise amongst its members, it was charged with considering the 2013 suite in the overall context of anti-organised crime legislation and, if possible, advising on the form that legislation should take. Members accepted that responsibility and developed a new legislative package which it called the *Organised Crime Framework*.

## TASKFORCE MEMBERSHIP

Membership of the Taskforce was determined by invitation from the Attorney-General.

It was comprised of nominees of the Queensland Police Service, the Queensland Police Commissioned Officers' Union of Employees, the Queensland Police Union, the Bar Association of Queensland, the Queensland Law Society, the Department of the Premier and Cabinet and the Department of Justice and Attorney-General. The Public Interest Monitor was also a member. The Taskforce was chaired by a retired judge.

The work of the Taskforce took place in the period June 2015 – March 2016. Under the Terms it was required to address a wide range of topics and its work was demanding and time-consuming for members. Many, of course, were volunteers.

Some nominees were obliged by circumstance to send different representatives to Taskforce meetings at different times. This meant that the identity of attendees changed from time to time, but not in a way which impeded or distracted from its work. A list of meetings and attendees is Attachment 2.

The Taskforce has been assisted throughout by a Secretariat comprised of legal officers and staff from the Department of Justice and Attorney-General, who also attended its meetings.

## PARTICULAR ASPECTS OF THIS TASKFORCE

The word 'taskforce' has military origins. In the non-military world it commonly suggests a

group whose members are jointly charged with a particular task.

In the normal course, the members of an organisation are presented with a problem and asked to come up with recommendations about ways the organisation might address it. Usually the desired outcome is clear and the primary focus of this 'taskforce' group is on the best way to achieve it.

The term has seeped over into different areas of government and in recent years groups have been appointed to address particular social problems, and make recommendations about desirable laws and policies.

Recent examples in the legal/legislative sphere include the *Special Taskforce on Domestic and Family Violence in Queensland* chaired by a former Governor-General<sup>1</sup>, and the *National Ice Taskforce* headed by a former state Police Commissioner<sup>2</sup>.

The first was comprised of a number of retired politicians, and persons eminent in the sociological aspects of domestic violence; the second, by the retired police commissioner, an eminent medical specialist and a high-ranking medical academic.

In both cases the problem addressed by the taskforce was universally acknowledged to be a very serious one calling for government intervention, and the primary question was how best to go about that.

This Taskforce was obviously different.

Firstly, there are real questions about the nature and extent of OMCG crime in Queensland with one commentator arguing it is as low as 0.17% of all crime,<sup>3</sup> the Byrne Report setting it at 0.52%, and senior law enforcement officers contending it was much greater and that these figures did not represent the seriousness of OMCG crime.

The Taskforce was, then, confronted from the outset with questions about the true size and nature of the problems it had to address. Plainly, this was of paramount importance to the work of deciding on an appropriate legislative response.

Second, Taskforce members represented groups and organisations within our society known to hold different and sometimes diametrically opposed views about the best, and most just and effective, ways to combat crime.

An example is the historical tension between the police service and the legal professions – unsurprising, in light of the fact their work brings them into daily circumstances of opposition. One group is charged with the protection of society from crime and criminals; the other sees itself as carrying historic responsibility for ensuring that individual rights and liberties are also protected, and not wrongly or unjustly traduced.

That is not to deny mutual respect, and cooperation, and the best of motives on both sides; only, to recognise that their respective competing interests in a myriad of criminal cases can colour their views about things like the best legislative approach to deterring crime.

The make-up of this Taskforce, then, carried with it the probability of high-level disagreement.

It must have been anticipated, then, that its work would necessarily involve a ‘dialectical’ exercise: that is, a debate between its members which involved opposed or contradictory ideas, and an effort to resolve them.

Certainly, that is what happened.

The Taskforce was supported in its work by a Secretariat of experienced lawyers from DJAG who provided it, before each meeting, with relevant information and research material. Members also provided their own submissions, and research.

The result was informed, high-level discussion about both the 2013 suite and the approach it took to crime (and whether it was necessary, and justified) and organised crime more generally.

Inevitably, in light of the make-up of the Taskforce those discussions at times became a debate which revealed disagreement about some matters: for example, the utility and effectiveness of mandatory sentences for fixed terms for some serious ‘organised’ crimes, and the use of criminal intelligence material.

Topics like these were exhaustively explored and debated (some, over several meetings) without always reaching a clear consensus, or a compromise position acceptable to all members.

These differences were not necessarily rooted in policy questions involving profound constitutional issues, or matters to do with ancient rights and liberties, and the like; rather, as remarks made by senior police officers from time to time made clear, their primary arguments for retaining some elements of the 2013 suite unchanged were captured in the word ‘*operational*’.

What this meant is that elements of the 2013 suite had, in the view of very senior police officers, measurably helped the QPS as its officers went about the work of protecting and serving the citizens of Queensland. OMCGs and their members were less visible on the Gold Coast, in particular. Some ‘handed in’ their colours and announced their disassociation. Unsurprisingly, many were alarmed about the prospect of huge sentences (15, or even 25, years) for even relatively minor offending, like affray. Overall, then, an immediate (if, perhaps, short-term) effect of the 2013 suite was to lighten the burden of serving police officers.

The work of the police service is always difficult, often unpleasant, and not infrequently dangerous. Officers do that work, of course, within the parameters set by Parliament – in effect, following its orders. It is not surprising that serving officers would

embrace legislation which, they perceive, makes their work less dangerous and confronting. As one commentator has remarked:

*'And if police are asked whether they need bigger guns and more powers to do their job, they would be fools to argue. They want to get home to their kids like anybody else.'*<sup>4</sup>

This is not to suggest that the senior QPS officers who made such a valuable contribution to the work of the Taskforce were wholly motivated by self-interest or self-preservation. They engaged with discussion around these high-level policy questions in a thoughtful, balanced and objective way.

Ultimately, however, as one senior officer said at a Taskforce meeting, QPS believes it is legitimate and reasonable for a police service to advance purely 'operational' points or arguments. That proposition is, for the reasons just touched on, both unexceptional and valid. By implication, in making it the police service acknowledges that it does not set and ought not be seen as attempting to influence questions and matters of government policy; but, that it is entitled to hold and express clear views about the practical efficacy and utility of legislation. Neither can be gainsaid.

QPS helpfully provided a summary of its position as a Taskforce member. That summary is Attachment 3.

#### THE TASKFORCE DIALECTIC: DEBATE, AND COMPROMISE

Discussions at Taskforce meetings, then, sometimes gave rise to occasions where 'operational' views advanced by QPS were in apparent conflict with arguments about principles said to underpin, and to be central to, our criminal justice system; or, which involved high-level debate about just and effective stratagems to be used in that system.

An illustration is the deterrent effect or other uses of mandatory sentencing: the legal

professional bodies came to the Taskforce opposed to its use for any purpose, while the police service and its member organisations supported its retention (albeit with lower mandatory sentences than under the 2013 suite).

Other examples of divergent positions are the uses of criminal intelligence, anti-consorting laws, and police powers to stop, detain and search citizens.

Ultimately the recommendations in this Report on some of these matters gives complete satisfaction to neither group – police, or lawyers – but each is prepared to accept what is proposed in this Report (and, in particular, the suggestion for a renewed Organised Crime Framework).

Without compromise of that kind a Taskforce like this could do no more than report the different, conflicting arguments advanced during its deliberations and leave it to the Government to pick and choose between the alternatives.

All Taskforce members came to accept, as its work progressed, that this would not be a satisfactory or helpful outcome.

The creation of a taskforce comprised of representatives of organisations whose views are known to (or be likely to) differ about the important matters it had to consider must have been undertaken in anticipation that its members would attempt, through debate and discussion, to reach a measure of consensus. That, it might be said, is the highest and best use of such a group.

#### RESOLVING DIFFERENCES WITHIN THE TASKFORCE

Instances of persisting disagreement within the Taskforce could have been resolved, of course, in other ways.

A democratic process, involving resolution of those matters by vote, could have been undertaken.

The Terms of Reference impliedly anticipate a report from the Taskforce chair who might take that opportunity to ignore or downplay areas of disagreement or difference.

Neither is appropriate. The Taskforce is not representative of the community and has no claim to be democratic; it is more akin to a gathering of experts (of whom the chair is one among equals – but whose views cannot, fairly, be allowed to prevail).

The chair and the Secretariat strove to identify consensus positions and, in effect, to achieve compromise.

Where differing views nevertheless remain they have been highlighted in the body of the Report.

While the Terms of Reference contain plain statements of intention by the current Government in the form of guidelines and goalposts for the Taskforce, its work proceeded in a properly neutral environment without government interference or any attempt to influence its deliberations and conclusions. The same is true of Opposition and independent Members of Parliament.

Over the past nine months, of course, there has been periodic debate, discussion and commentary in the media.

## HOW THE TASKFORCE WENT ABOUT ITS WORK

Taskforce membership represented an impressive range of expertise in the matters it was asked to consider and, of course, drew upon that.

The Taskforce was, in effect, a gathering of experts in criminal law. Recognising that, members saw their individual roles as carrying the responsibility usually attached to expert witnesses in courts of law – ie, as having a primary obligation to give properly (even fiercely) independent, unbiased advice.

Certainly again, that is what happened. As the work of the Taskforce unfolded it became

clear that no member arrived with immutable, pre-determined views, or took an early position and staunchly never budged.

Examples are many: despite their deep-rooted opposition to mandatory sentencing in any form, the representatives of the legal professions accepted a form of it in the Framework; and, despite their perception that, in an operational sense, the very harsh sentences imposed under the VLAD Act (the *Vicious Lawless Association Disestablishment Act 2013* (Qld)) provided a useful tool for police in encouraging admissions from accused persons, QPS and the police unions accepted that those sentences need not be so high to be effective.

The Taskforce also took, of course, outside advice. Its Terms of Reference required it to invite and solicit submissions from outsiders with relevant expertise and, also, ‘... any individual, business, group, association or other entity that has been affected by the 2013 legislation’.

At the outset the Secretariat prepared, and the Taskforce adopted, a breakdown of the work required under the Terms into ten issue headings which are reflected in expanded form in the Chapter headings in this Report. Those issues determined the sequence and timing of invitations and deadlines for submissions, and for Taskforce meetings.

The Taskforce first met in full session on 22 June 2015 and then on 10 occasions up to 29 January 2016, and, thereafter, in smaller groups to finalise the drafting of this Report.

## COLLECTING EVIDENCE: THE TASKFORCE RESOLVED TO USE THE BEST AVAILABLE EVIDENCE

One of the primary objectives of the Taskforce was to identify, and collect, evidence about the nature of organised crime including, of course, motorcycle gangs and their members.

In theory, statistical data should have provided the best ‘scientific’ evidence about these

matters and the Taskforce naturally sought it out.

As a later Chapter on the various data collected by the Taskforce shows, however, the degree of certainty and reliability (and, hence, confidence) which can be attached to information presented as ‘statistics’ is variable.

Variations in what should be uncontentious matters like OMCG member arrest rates were surprising. Figures provided by senior police officers to the media were shown, on analysis, to be exaggerated (but, in circumstances where that exaggeration may well have been inadvertent).

The Taskforce had to do the best it could with the available figures. Despite variations in some important data it is possible to conclude, for example, that OMCG member crime rates before the 2013 suite were (as a proportion of overall crime) less than 1% and, according to some figures, much lower.

(The actual extent of OMCG crime was, however, doubted by QPS and Police Union representatives and it has been necessary to address their concerns about levels of concealed or unreported crime.)

The point is that, for the purposes of something as important as anti-crime legislation, governments usually strive to base decisions on reliable evidence – as a way of measuring the nature of the threat presented to the community by different kinds of crime, and criminals.

In the course of the work of the Taskforce it became apparent that, notwithstanding high-level and commendable efforts by the Queensland Police Service and the Crime and Corruption Commission, and other organisations like Queensland Courts to collate relevant data and statistics, what is lacking in Queensland and what is needed is an independent body charged with that specific, ongoing responsibility.

## SUBMISSIONS

A large number of submissions were received. It includes written submissions made by Taskforce members. Submissions were distributed to, and read by, Taskforce members upon receipt.

Published submissions are accessible at the Taskforce website:

<http://www.justice.qld.gov.au/taskforce-into-organised-crime>

## CONSULTATIONS

The Taskforce held meetings with the Director of Public Prosecutions (Mr Michael Byrne QC) and was addressed at meetings by officers of the Queensland Police Service and the Crime and Corruption Commission.

The chair met with the other Mr Michael Byrne QC in the course of his work as Commissioner of the Commission of Inquiry into Organised Crime. The chair and Secretariat also met with officers of the Crime and Corruption Commission.

## TASKFORCE MEETINGS

Taskforce meetings were held on the dates shown in Attachment 2. Before each meeting the Secretariat prepared and supplied members with a Discussion Paper containing information and research about the issue topics for that meeting. The Discussion Papers were accompanied by or included a list of possible options for members to consider and discuss.

Discussion at Taskforce meetings was considered and informed and, at times, lively. As noted earlier, while consensus was possible on most matters, some areas of disagreement remained. In some important areas the conclusions and recommendations contained in this Report reflect compromise positions accepted, for the purpose of achieving consensus, by different parties.

## WRITING THIS REPORT

Drafting by committee has long been recognised as a challenging and, potentially, unsatisfactory exercise. The work of initial drafting inevitably fell upon the Secretariat, and the chair.

The Secretariat was obliged in the course of that work to ensure different and sometimes conflicting views were adequately ventilated and accommodated but, more importantly, to attempt to distil something in the nature of consensus views so as to provide the Government with useful recommendations.

It did this by providing members with draft Chapters (called ‘topics’) during February and March 2016 and inviting members to attend at meetings, scheduled weekly at times which they could nominate to suit their convenience, to discuss those drafts.

Some members chose, rather, to make detailed and sometimes quite complex suggestions for changes, additions or subtractions from the Secretariat drafts in writing. Time pressures made it impossible for the Secretariat to distribute, and invite comment upon, all of these written suggestions to other Taskforce members.

Rather, the Secretariat recorded and logged all suggestions from all parties, and information about whether the changes sought had, or had not, been made in the final draft – and, if not, why not.

## EDITORIAL DECISIONS BY THE CHAIR

The process, inevitably, led to the need for some final editorial decisions by the chair whose criteria, in making them, included both the requirement for this Report to contain useful recommendations to government, and the need to strike a reasonable balance between sometimes quite polarized positions which, in the chair’s opinion, reflected ‘solutions’ which were inimical to announced government policy or lacked statistical support – or (while the Taskforce did not, of course, purport to operate on democratic lines) did

not have the support of a plain majority of members.

## THE PRIMARY FOCUS OF THE TASKFORCE: ORGANISED CRIME IN QUEENSLAND

As mentioned at the start of this Chapter, the Taskforce Terms of Reference seek a report not only upon the 2013 suite but, also, ask it to develop a new ‘serious organised crime’ offence.

The Taskforce took that to mean that it should, in considering the 2013 suite, take a broad view – ie, to examine the suite in the overall context of organised crime.

Other aspects of the suite, and the Terms of Reference, mean that any other approach would be too limited and constrained; plainly, the focus on OMCGs in the suite was not exclusive and, in any event, a central question about them is whether their members are involved in organised crime and to what extent.

This aspect of the work of the Taskforce required it to reflect upon some broad, fundamental questions: in particular, how great a risk does organised crime present to our society?

If that risk is serious, does it warrant a response which intrudes upon traditional, sometimes hard-won, rights and liberties (including things like the right of an accused person to know the case against them, and rights of lawful association); and, if so, to what extent, and with what safeguards?

These questions fall to be answered in the context of particular social problems which Australian state and federal governments have chosen to address in a number of ways, including through our criminal law via legislation aimed at the distribution and use of illegal drugs; crimes against children; fraud; and, the involvement of ‘organised’ groups (including OMCGs) in these and other kinds of criminal activity.

## THE 2013 LAWS - VLAD

The 2013 suite of legislation considered by the Taskforce is comprised of:

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

All of the Explanatory Notes for these pieces of legislation spoke of them as reactive to events involving OMCGs on the Gold Coast in 2013 and the policy objectives for each described them as ‘... *tougher laws to tackle criminal gangs.*’

VLAD was the centerpiece of the 2013 suite. The acronym is catchy (redolent, as it is, of a famous medieval ruler) and unforgettable. In the result the suite of anti-OMCG laws introduced in 2013 has been almost universally known as the VLAD laws.

VLAD has, amongst media commentators and in public debate, had a polarising effect. Strong views are expressed about its perceived strengths and benefits or, on the other side of the debate, its alleged excesses and injustices.

Those polarised positions have been usefully and vividly summarised by two legal academics.<sup>5</sup>

*On the one hand, the bikie laws challenge fairness, openness, proportionality, justice, judicial integrity, and the rule of law. On the other hand, they represent Parliament responding to a political issue by legislative means that, on present authorities, appear*

*to be in keeping with the constitutional rules and principles enunciated by the High Court.*

These questions are central to this Report – but, for the reasons just advanced, the Taskforce took the view that its examination of the 2013 suite should properly begin in the larger context of organised crime.

## THE FORM AND CONTENT OF THIS REPORT

The Report does not address the Terms of Reference in the order set out in them; but, all matters are considered and traversed.

The report begins then, in **Part 1**, by considering what organised crime is and the part OMCGs play in it. It then explores legislative responses elsewhere in Australia and overseas.

The **Byrne Report**, published in October 2015 after a Commission of Inquiry into Organised Crime by Mr Michael Byrne QC, contains very detailed information about the nature and extent of organised crime in Queensland in all its forms, including statistical evidence.

The Taskforce did not believe it was necessary to replicate that work and, instead, focused upon evidence and data about OMCGs. **Part 2** explores the available statistical evidence about OMCGs – including information about unreported crime, and public perceptions about OMCGs and effects upon those perceptions since the 2013 suite was introduced.

**Part 3** analyses the events which lead to the introduction of the suite and its constituent elements. It also contains a discussion of the challenge to it in the High Court in a case called *Kuczborski v Queensland*, and analyses what the court did, (and did not) decide.

Next, the Report goes directly to the primary Taskforce recommendation – the repeal of most of the 2013 suite and its replacement with a renewed *Organised Crime Framework*, intended to provide a fairer and more

effective method of combating organised crime (including OMCG member crime). The Framework is introduced in **Part 4**.

**Part 5** is the longest. It contains chapters analysing the constituent parts of the 2013 suite, explaining Taskforce conclusions and decisions about them, and then particularising how Taskforce recommendations arising from those decisions can be incorporated in the Framework.

The length of Part 5 is explained by the wide reach of the 2013 suite. It touched many different parts of the lives of those it overtly focused upon – their rights to gather and meet, to wear clothing of their choice, to go to hotels and bars, and to ride their motorcycles together (or at all).

They were put in hard places, as it were, in terms of the use of their criminal histories, and their chances of getting bail if arrested – and, if they were incarcerated.

In the community, too, persons caught by the legislation were inhibited in their work and employment choices and pursuits under the suite's new vocational licensing laws.

Extraordinary new police and CCC powers were also introduced.

Each and every one of these aspects of the suite is explored in Part 5 which, having analysed its strengths and shortcomings, then uses that analysis to develop recommendations for the *Organised Crime Framework*.

Finally, **Part 6** addresses the request, in the Taskforce Terms of Reference, that it develop a new *serious organised crime offence* with high mandatory minimum penalties. The Taskforce explains – aided by the detailed analysis, in Part 5, of the compelling arguments against that course – why it respectfully recommends to the contrary.

## ENDNOTES

- <sup>1</sup> *Not Now, Not Ever: Putting an end to domestic violence in Queensland*, Report of the Special Taskforce on Domestic and Family Violence, 28 February 2015, Queensland Government.
- <sup>2</sup> *Final Report of the National Ice Taskforce*, 6 October 2015, Commonwealth of Australia.
- <sup>3</sup> Goldsworthy, *The Organised Crime Commission got it wrong – bikies actually commit far less than .52% of crime*, <http://www.linkedin.com/pulse>, accessed 8 February 2016.
- <sup>4</sup> Adam Shand, *Outlaws: the Truth about Australian Bikers* (Allen and Unwin, 2011, Australia) 60.

# PART 1

## CHAPTER TWO

### ORGANISED CRIME

*With the benefit of the recent **Byrne Report**, the Taskforce examined the nature and extent of organised crime in Queensland.*

*It also examined the extent to which criminal activity by OMCG members is gang-related and 'organised'.*

#### THE CONCEPT

Organised crime is constantly evolving. It exists in a dynamic environment 'not exclusive to certain geographical areas, to singular ethnic groups or to particular social systems'.<sup>1</sup>

Family-run, Mob-style mafia groups like those made famous in *The Godfather* and *The Sopranos*, once thought of as the defining stereotype, no longer dominate organised crime.

The nature of the modern-day crime landscape is such that those old-style traditional groups are no longer so prominent.

Organised crime syndicates are now, in the main, more fluid in size, structure and make-up. They form, coalesce and dissolve, crossing environmental and social boundaries, infiltrating a diverse range of crime markets, adjusting to new technologies, and adapting to law enforcement interventions.

#### TYPES OF CRIMINAL ORGANISATIONS

Traditional organised crime groups are characterised by a strict hierarchy – participants are life members of an 'enduring entity' which is typically, in structure, quasi-militaristic.<sup>2</sup>

There is a strict chain of command and rank and file members are bound by rules and codes. Aberrations from authority and the laws of the group are often met with fierce discipline. Typical of this style of organised crime group are the Italian Mafia and the Japanese Yakuza.

OMCGs share some of these elements but with differences (which may be increasing), discussed later.

The older kinds of relatively well-organised groups have diminished over recent decades and our understanding of organised crime has been forced to evolve with that change. Less structured and more loosely affiliated networks have emerged as, conceivably, the

most pervasive form of organised crime group in modern society.

These networks are free-floating, flat structured groups of individuals who often form on an *ad hoc* basis for a common criminal purpose. Decision-making is decentralised and ties between participants are informal, making the networks less susceptible in some respects to detection by law enforcement.<sup>3</sup>

The very nature of this new form of 'organisation' leaves them camouflaged and adaptable, and it is these characteristics which render these groups a serious threat to the public.

#### WHAT MOTIVATES THEM?

The factors which motivate organised crime groups are diverse, depending on their nature – honour, prominence and influence over certain markets (licit or illicit) are just a few.

Some are driven, for example, by a need for esteem and control – where the maintenance of reputation is important and activities are conducted with a view to strengthening and expanding the power of the group.

Recently (and, with respect, unsurprisingly) the Commonwealth Parliamentary Joint Committee on the Australian Crime Commission identified that a primary motivator, common across a majority of organised crime groups, is financial gain.<sup>4</sup>

An accompanying idea – viewing organised crime groups as akin to profit-seeking enterprises – sits comfortably with a broader understanding of how criminal organisations operate.<sup>5</sup>

Evidence of the involvement of organised crime groups in the illicit drug market, sophisticated financial crime schemes, and the exploitation of legitimate businesses, which are all profit-driven operations, is reflective of this motivator.

An exception is networks of paedophile rings involved in online child sex offending. The

structure and nature of these groups is discussed in more detail later but they effectively represent an 'outlier' to the conventional understanding of organised crime.

These networks of individuals (who are otherwise usually unknown to each other and would not be connected but for their offending behaviour) are motivated principally by illicit sexual gratification.

#### THE TIES THAT BIND

While it may appear that there is a clear divide between the traditional model and these more modern criminal organisations, research into organised crime groups indicates that there are certain features which run as common threads through the organised crime world.

The social structure of organised crime groups is largely characterised by a ready disregard for rules, laws and general social order.<sup>6</sup> These attitudes, combined with self-interest and a desire for personal gain are, ultimately, the ties that bind members of an organisation together.

These attitudes are also arguably no lesser and no greater in any one particular category of criminal organisation, traditional or modern; *all* organised crime groups embody a deliberate, considered and persistent defiance of the authority of the law.

#### A DEFINITION OF 'ORGANISED CRIME'

In 1989 the report of the Fitzgerald Inquiry observed that the term organised crime was '*frequently used but rarely defined.*'<sup>7</sup>

Almost 30 years on the term has necessarily required some definition across international and domestic jurisdictions. But, because attempted definitions have been developed in different contexts and for particular or unique purposes, they lack uniformity.

Most are comprised of relatively consistent core elements – for example, that the activity involves a number of persons, acting together, to organise the commission of a criminal offence – but some are characterised by their own idiosyncrasies.

Some place a focus on the *purpose* of the criminal activity as being for a material benefit (ie, financial, influential, etc.), which is absent from others.<sup>8</sup> Other definitions require a *substantial degree of planning* to be involved in the criminal activity or that the activity be *systematic and persistent*. Again still, others exclude groups which form for the immediate commission of a particular offence and dissolve afterwards.<sup>9</sup>

With some definitions encompassing loosely arranged criminal activity and others requiring a strict enterprise element, the lack of consistency (eg, in Queensland statutes) creates practical issues for the prosecution of organised crime.

This tension across the statute books is discussed in further detail in Chapter 8.

## OUTLAW MOTORCYCLE GANGS AND THEIR ROLE IN ORGANISED CRIME

On any view, OMCGs have an ‘image’ problem. They are seen by many to be the public face of organised crime, even though the most reliable statistical data shows that they are charged with a small proportion (no more than 0.52%) of all offences committed across the state.<sup>10</sup>

Their confronting public appearance, riding in packs and vividly displaying club loyalty via tattoos and insignia, means that members of the public are acutely aware of their presence. Their reputation today can be better understood by a short examination of their history.

On balance it is probable that motorcycle clubs were *not* originally formed for purely or even primarily criminal purposes. Historically clubs were based on a cohesive brotherhood, joined through a common love for Harley Davidson

(or Indian but, in any event, American) motorcycles and the enjoyment of riding together.<sup>11</sup>

Some were comprised of restless WWII veterans while others were made up of persons on the fringes of society who rejected Western middle-class social norms.<sup>12</sup>

Non-conformity, a separation from mainstream society and an acceptance of the social stigma that went with it was typical of a group of bikers who embraced their own ‘wild west ethic’.<sup>13</sup>

The operational style of original OMCGs sits at the extreme end of the traditional model – ruled by authoritarian command, structured by militaristic hierarchy, and identified through tattoos and various insignia. This structure seems to have stood the test of time and survived historical transformation.

OMCGs have of course changed over time; there seems, in particular, to have been a cultural shift away from the original, motorcycle-focused camaraderie and an emergence of a more radical subculture.

This shift raises an important controversy that is central to any discussion about OMCGs and crime:<sup>14</sup>

*Are they clubs united by a love of biking and brotherhood, or gangs predominated by criminals and criminal behaviour?*

The question is not easily answered. OMCGs maintain they are the former, but many law enforcement bodies insist they are the latter.

In truth, it is difficult to definitively label modern OMCGs as either ‘conventional’ motorcycle clubs whose members are primarily law-abiding, or a group whose members are principally motivated by criminal activity because many of them exhibit a mixture of the two.<sup>15</sup>

A more radical and disturbing subculture has, it appears, grown out of (and within) the original biker clubs and has brought about an

environment where OMCGs, either as a whole or as discrete groups or chapters within the clubs, have become increasingly crime-focused.

The criminal element within OMCGs is often difficult to isolate and identify. Distinguishing between non-criminal and criminal members is, as a result, complex.<sup>16</sup>

The recent Queensland statutory review of the *Criminal Organisation Act 2009* (Qld) (the COA Review) hypothesised that the criminal activity of OMCGs is ‘a ‘dark network’ which does not correlate with the ‘bright network’ of the official club, but operates beneath it and/or on its fringes’.<sup>17</sup>

OMCGs provide a context and an environment within which crime can occur; but the level of sophistication of that crime (organised, or spontaneous) and the degree to which the crime is ‘club-sponsored’ (as opposed to an individual act) varies greatly.<sup>18</sup>

Scholarly research has developed a continuum of criminal activity to reflect that variation. In effect, OMCG criminality can be broken down into four distinct types:<sup>19</sup>

- *spontaneous expressive acts* of individuals or small groups, without planning – for example, bar fights;
- *planned expressive acts* by established groups or chapters of OMCGs, targeted to reflect the priorities of the OMCG – for example, damage to a rival club house;
- *short-term instrumental acts* of individuals or small groups, taking advantage of opportunities or responding to the individual needs of a member – for example, motorcycle theft; and
- *ongoing instrumental enterprises* by established groups or chapters of OMCGs, organised and designed to make profit – for example, illicit drug production and/or distribution.

No matter which category the criminal behaviour of an OMCG member may fit, the club itself frequently plays a role.

Commentators suggest that a ‘symbiotic relationship’ exists between an OMCG and its members<sup>20</sup> and the Byrne Report concludes that clubs either wholly facilitate criminal enterprises, or provide both leverage and a type of catch-all safety net which sustains criminal activity.<sup>21</sup>

Taken at the lowest possible level the role of the OMCG club *per se* may be as a platform for discrete individual criminal behaviour.

At worst the OMCG may be a criminal organisation wholly supporting and facilitating large-scale profit-driven organised criminal activity.

## THE QUEENSLAND EXPERIENCE

When Mr Tony Fitzgerald AC QC conducted his lengthy inquiry into police misconduct and illegal activity in the late 1980s he touched upon the influence of organised crime.

At that time the state of criminal activity in Queensland was very different: there was a systemic culture of corruption amongst law enforcement and other officials, and organised crime groups were using that corruption as leverage for their criminal endeavours.<sup>22</sup>

Jump forward 26 years and Mr Michael Byrne QC’s Commission of Inquiry into Organised Crime saw a different state of affairs, finding no evidence of corruption of public officials by organised crime entities but illuminating the substantial role of organised crime across various crime markets in Queensland.

The Byrne Report concluded that organised crime plays a significant role in a number of discrete areas of criminal activity across Queensland.

It identified that the biggest crime threats for Queensland are the illicit drug market, online child sex offending (including the child exploitation material market), and

sophisticated financial crimes (such as ‘boiler-room’ investment frauds).

The Byrne Report highlighted the role of organised crime groups in these areas and accepted evidence that, in some of them, OMCGs feature quite prominently; but in others their role is either minor, or non-existent.

#### ILLICIT DRUG MARKETS

Organised crime groups are heavily entrenched in the illicit drug market in Queensland. More than 70% of the identified organised crime networks in the state are involved in the production, sale and distribution of illicit drugs.<sup>23</sup>

Consistent with the idea that organised crime groups have progressively become more enterprise-driven, their dominance in the illicit drug marketplace is influenced heavily by opportunities for profit.

The methylamphetamine market is highly lucrative across Australia and organised crime is well-established in all aspects of the trade.<sup>24</sup>

While it is not possible to separate out the precise percentage of the market for which different organised crime groups are responsible, the Byrne Report suggests that OMCGs play a major role in the amphetamine-type stimulant market (including the infiltration of legitimate businesses to source precursor chemicals).<sup>25</sup>

Other drug markets are not necessarily or identifiably controlled by any one organised crime group.

The Byrne Report acknowledged the role of transnational networks in certain illicit drug trades (in particular the involvement of South-East Asian, Latin American and Middle-Eastern syndicates in the heroin, cocaine and ecstasy markets) and observed that these groups have infiltrated, to varying extents, the Queensland drug market.<sup>26</sup>

In most cases these transnational networks are a prime example of the modern organised crime group discussed earlier: they are loosely organised, flexible groups of transient individuals who come together for a specific criminal enterprise, and then dissipate.<sup>27</sup>

Their fluid and dynamic nature presents serious challenges to law enforcement in respect of detection and policing.

#### ONLINE CHILD SEX OFFENDING

Child sex offending has been identified as a high-risk crime threat in Queensland. While not a new phenomenon, the internet has provided an environment for the proliferation of online child abuse and child exploitation material (CEM) and an expanding global market for its consumption.<sup>28</sup>

The use of various anonymous internet networks within the Deep Web usually accessible only through the use of encryption programs (not traditional browsers like Google) such as the Darknet, and the exploitation of virtual currencies such as Bitcoin has led to the emergence of a child abuse market which seems to know no boundaries.

Compared to other international jurisdictions child sex offending in Australia is not dominated by organised crime groups.

The Australian Crime Commission and the Byrne Report both acknowledged that child sex offending and CEM are neither a primary activity nor a source of income for organised crime groups operating in Queensland.<sup>29</sup>

Formal organised crime groups which facilitate child sex offending as a business (and are motivated by financial return) are, instead, largely based overseas.<sup>30</sup>

Within Australia individual child sex offenders operate in a manner which does, however, share some consistencies with the modern understanding of organised crime.

While not strictly a formal organised crime group *per se* (and in fact in most cases offenders operate solely for the demands of the individual) they *are* a network of offenders who are linked by their criminality.

Offenders, mostly individual predators acting alone, are connected to other like-minded persons through the internet and file-sharing sites on the Deep Web. Those networks encourage, or in some cases require, offenders to continually produce new CEM (or provide the most disturbing material) which in turn incites further offending against children.

The child sex offending market is, horribly, an unquantifiable commodity and fast-evolving avenues for its dissemination mean it presents serious challenges to legal and policy bodies.

The operation of these networks highlights the diverse and complex nature of organised crime and emphasises the importance of understanding and appreciating the organised crime landscape in a way which acknowledges and captures these non-traditional sets of offenders.

#### FINANCIAL CRIME

Consistent with the hypothesis that organised crime groups have increasingly become profit-driven criminal enterprises is their extensive involvement in serious financial crimes.

The Byrne Report identified that investment and financial market fraud schemes are dominated by organised crime groups – it went so far as to declare it to be a brand of organised crime that was ‘rife’ in Queensland.<sup>31</sup>

Particularly common are cold-call ‘boiler-room’ investment frauds which promise, but do not deliver, high returns to victims. While these schemes were previously largely attributable to offshore groups, the Byrne Report shone the light on the prevalence of Queensland organised crime groups operating in this space (and in particular on the Gold Coast).<sup>32</sup>

It noted that in most cases Queensland organised crime groups were using the profit derived from these financial crime schemes to fund other illicit activity, such as drug importation.<sup>33</sup>

The role of organised criminal groups in these sophisticated financial crimes highlights just how broad their scope of criminal activity is.

The ability of organised crime groups to infiltrate legitimate businesses, such as lawyers and accountants, and the sophisticated nature of the schemes (including the formation of complex corporate structures and the use of intricate measures to disguise the identity of owners, operators and locations) is but one demonstration of this.<sup>34</sup>

It is vivid and compelling that organised crime groups in Queensland have grown and developed in ways far beyond their once more basic, thug-like reputation.

#### VIOLENCE

Violence is a key facilitator of organised crime in Australia, and more locally, in Queensland. Across various crime markets, organised crime groups use violence and extortion to enforce their presence – to secure territory, collect debts, and to warn and retaliate.<sup>35</sup>

It is this use of violence, which is often played out in public spaces, that informs and explains community perceptions of organised crime.

OMCGs are the most extreme example of an organised crime group present in Queensland whose members are regularly, if intermittently, involved in acts of brazen public violence. Aggression is in their architecture – rival OMCGs are not infrequently at war with each other and are well-known for their unpredictable and dangerous behaviour.<sup>36</sup>

In most cases the use of violence and extortion by OMCGs is a means to facilitate a bigger-picture criminal enterprise (such as their stake in the drug market) or for financial gain.

Violence and extortion are employed as enablers of the broader criminal activities of the club and as a means of neutralising any perceived threat (either internally or from a rival gang).

Any focus on OMCG violence should not, however, detract from the recognition of violence employed by other organised crime groups across the state. It is important not to lose sight of the fact that at least *some* violence will be employed by most organised crime groups and that it is not solely a tactic employed by OMCGs.

The Byrne Report, accepting evidence from the Queensland Crime and Corruption Commission, identified an increase in gang-style violence by ethnic crime groups as just one example of this.<sup>37</sup> As a result of a perceived escalation in OMCG-driven violence in 2013 and a period of intense media focus upon it, however, these other elements of the larger picture have tended to be overlooked.

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# PART 1

## CHAPTER THREE

### AUSTRALIAN AND INTERNATIONAL APPROACHES TO ORGANISED CRIME

*Many attempts have been made to find effective and just legislative tools to combat organised crime. The road is strewn with good intentions and high hopes.*

*Ultimately, what appears to work best are stratagems primarily tailored to addressing the criminal activities of individuals, rather than the groups with whom they might associate for criminal purposes.*

*The Taskforce has incorporated successful legislative tools found elsewhere into its proposed **Organised Crime Framework.***

Attempts to deal effectively with organised crime (including OMCGs) are not, of course, unique to Queensland.

Other countries and states have adopted strategies which may be useful here or, at least, provide lessons.

It was also relevant to the work of the Taskforce to place, and consider, the 2013 suite in its historical and legislative context.

That context includes legislation in other Australian states and territories (and, federally) to combat organised crime including OMCGs and, also, international responses in the United Kingdom, United States of America, Canada and New Zealand.

#### REFERENCE TO THE COA REVIEW

During the time the Taskforce was conducting its work, its chair independently conducted a statutory review of the *Criminal Organisation Act 2009* (COA) and his report was delivered to the Attorney General on 15 December 2015.

As at the date of this report the COA Review has not been tabled in Parliament but, because the Taskforce Terms of Reference required members to consider it in the course of their work, the Attorney General authorised its confidential release to them.

It contained an exhaustive analysis of legislation in those other countries, states and territories, including reported results and outcomes.

Research into what other jurisdictions in Australia and internationally have done is contained in Chapter 8 of the COA Review. That analysis runs to over seventy pages. Reinventing the wheel seemed unnecessary, and this part of the Taskforce report draws heavily upon it.

## AUSTRALIA

A variety of legislative approaches have been undertaken at state and territory, and federal, levels to combat organised crime.

There has been some cross-pollination amongst the states as different approaches are ventured, and survive or are struck down in subsequent High Court challenges. Some efforts have proved more or less successful in practice, and their effectiveness 'on the ground' is also discussed.

A Queensland example was, of course, COA itself which survived a strong challenge to its validity<sup>1</sup> while similar efforts by South Australia<sup>2</sup> and New South Wales<sup>3</sup> did not. That said, the COA approach (and similar efforts in other states) have not proved successful – something the COA Review strongly confirms.

## LEGISLATIVE EFFORTS IN AUSTRALIA HAVE BEEN REGULARLY CHALLENGED IN THE COURTS

It is a reasonable hypothesis that it is the novelty of this kind of legislation, with its new and primary focus upon a person as a member of an association rather than as an individual offender (in the past, the traditional approach of our criminal justice system) – plus, arguably, some very harsh effects in many of the legislative packages – which has led to a plethora of matters going up to the High Court.

It is also reasonable to venture that this trend will not abate: that is, legislation like Queensland's 2013 suite will continue to be exposed to challenges in the courts as and when alleged offenders are exposed to its elements.

## QUEENSLAND

Relevant legislative intervention here is comprised of COA, and the 2013 suite.

The former is exhaustively discussed in the COA Review; the latter has, arguably,

everything that might conceivably be said about it within this Report.

## NEW SOUTH WALES

The premier state has tried a variety of legislative tools to tackle OMCGs and organised crime generally, responding to High Court decisions as new legislation there and in other states was struck down, or survived challenges.

## 2006 – NSW FIRST ATTEMPT

In 2006 NSW became the first Australian jurisdiction to introduce specific legislation to 'criminalise gang participation and gang-related activity' following 'tit-for-tat shootings' in south-western Sydney.<sup>4</sup>

The *Crimes Legislation Amendment (Gangs) Act 2006* (NSW) introduced several new offences relating to 'participation in criminal groups' into the *Crimes Act 1900* (NSW) making it an offence for a person to participate in a criminal group knowing it is a criminal group and knowing, or being reckless as to whether, their participation contributes to criminal activity.

A 'criminal group' was defined as a group of three or more people who share a common objective of either profiting from serious offences or seeking to engage in serious violence.<sup>5</sup>

Participation carried, and continues to carry, a maximum penalty of five years imprisonment.<sup>6</sup> If the participation in the criminal group involves assault or property damage, the maximum penalty increases to 10 years,<sup>7</sup> and 14 years if it involves assaulting a police officer.<sup>8</sup>

A separate offence of recruiting was also introduced, carrying a maximum penalty of seven years imprisonment unless the recruit was a child, in which case the penalty increases to 10 years.<sup>9</sup>

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## DEALING WITH 'FORTIFIED' PREMISES

A recurring feature of this kind of anti-bikie legislation is an attempt to 'break down' OMCG clubhouses, which are often difficult for authorities to access or penetrate because they are, to one degree or another, 'fortified'.

NSW introduced what have come to be called *fortification removal orders* in 2006.<sup>10</sup>

Under Part 16A of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), the Commissioner of Police can apply to the Local Court for a fortification removal order.<sup>11</sup>

The Local Court is to make the order if satisfied, among other things, that the premises are *used to commit serious indictable offences, to conceal evidence of such offences or to store the proceeds of them*.<sup>12</sup>

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## 2009 – THE SYDNEY AIRPORT INCIDENT LEADS TO A SECOND MAJOR LEGISLATIVE EFFORT

In 2009, ten days after a violent brawl between bikies at Sydney Airport in which one of them died, Premier Nathan Rees introduced the Crimes (Criminal Organisations Control) Bill 2009 (NSW), stating that the *'bikie gangs [had] crossed the line'* by spilling their violence *'into public places'* and *'threatening the lives and safety of innocent bystanders'*.<sup>13</sup>

At the core of this legislative response was an attempt (the forerunner to Queensland's COA and the 2013 suite) to criminalise organisations as a means of controlling their members – and, in doing so, to use 'criminal intelligence' to achieve that end.

Under the *Crimes (Criminal Organisations Control) Act 2009* (NSW), the Attorney-General could appoint Supreme Court judges to be 'eligible judges'.<sup>14</sup> The Commissioner of Police could then apply to an eligible judge for a declaration that an organisation is a 'declared' organisation.<sup>15</sup> If the Commissioner relied upon criminal intelligence, the eligible judge was required to take steps to maintain its

confidentiality, provided the information was properly classified as criminal intelligence.<sup>16</sup>

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## NSW – CONTROL ORDERS

Once an organisation was 'declared',<sup>17</sup> the Commissioner of Police could apply for interim control orders and control orders against members of the organisation.<sup>18</sup>

(Unlike the South Australian legislation at the time, the court retained a discretion whether to make a control order.<sup>19</sup> These orders would have the effect of criminalising any association between controlled members<sup>20</sup> and preventing them from working in certain fields such as the gambling industry, and tow truck driving.)<sup>21</sup>

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## FAILURE IN THE HIGH COURT: WAINOHU'S CASE

Crucially, in making a declaration, eligible judges were relieved of the obligation to provide reasons – an explanation, and a justification – for their decisions.<sup>22</sup> (The giving of reasons by judges in all courts is, nowadays, seen as a vital and indispensable feature of our judicial system.)

It was for this reason that, in the case of *Wainohu v New South Wales*<sup>23</sup> a majority of the High Court found the legislative scheme repugnant to the institutional integrity of the NSW Supreme Court.<sup>24</sup> Because the other parts of the Act hinged upon the validity of the declaration provisions, the entire Act was struck down.<sup>25</sup>

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## 2010 – CONFISCATION OF PROCEEDS OF CRIME: 'UNEXPLAINED WEALTH ORDERS'

A decade after Western Australia first introduced unexplained wealth laws, NSW followed suit in 2010. Under new provisions inserted into the *Criminal Assets Recovery Act 1990* (NSW), the NSW Crime Commission may apply to the Supreme Court for an unexplained wealth order.<sup>26</sup>

Unlike unexplained wealth laws in Western Australia and South Australia, the nexus to criminal activity is not completely removed.

The Supreme Court may only make the order if it has a reasonable suspicion (a lower threshold, of course, than satisfaction on the balance of probabilities) that the respondent has engaged in serious crime related activity or acquired serious crime derived property.<sup>27</sup>

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### 2012 – ANTI-CONSORTING LAWS: NSW THIRD FORAY

In early 2012 NSW reworked all three of its legislative approaches to organised crime.

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#### NSW – CONSORTING LAWS

First, it ‘modernise[d] the offence of consorting’.<sup>28</sup> The new consorting offence in section 93X of the *Crimes Act 1900* (NSW) prohibits consorting with at least two convicted offenders on at least two occasions after having been given an official warning from a police officer.<sup>29</sup>

The requirement of repeated interaction with more than one person ‘recognises the fact that the goal of the offence is not to criminalise individual relationships but to deter people from associating with a criminal milieu’.<sup>30</sup>

Despite the manifest parliamentary intention that the consorting provision would be used to combat criminal gangs, the available evidence suggests that police have used their discretion in issuing warnings to disproportionately target marginalised groups.

In a study of the consorting provisions in the first 12 months of operation, the NSW Ombudsman found that ‘Aboriginal people accounted for 38% of all people who were issued an official warning’ despite only accounting for 2.5% of the total population.

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#### THE NEW CONSORTING LAWS SURVIVE A HIGH COURT CHALLENGE: *TAJJOUR’S CASE*

The new consorting offence was the subject of an unsuccessful High Court challenge in 2014 in the case of *Tajjour v New South Wales*.<sup>31</sup>

A majority of the High Court found that, although section 93X imposes a burden on freedom of political communication and association,<sup>32</sup> it is reasonably appropriate and adapted to serve the legitimate end of preventing the formation, maintenance or expansion of criminal networks.<sup>33</sup> The new offence was, therefore, upheld.

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#### NSW – PARTICIPATION IN A CRIMINAL GROUP

The second reform introduced in early 2012 related to the offence of *participating in a criminal group* found in section 93T (formerly section 93IK) of the *Crimes Act 1900* (NSW).

The mental element of participation was extended from subjective knowledge to include objective knowledge so as to capture ‘those on the periphery’ of criminal gangs. That is:

*... rather than requiring a person to have known that the group was a criminal group and to know or be reckless as to whether the participation contributed to criminal activity, a person will commit an offence where he or she ought reasonably to have known those things.*<sup>34</sup>

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#### NEW INCREASED MAXIMUM PENALTIES IF AGGRAVATING CIRCUMSTANCES APPLY

Two new circumstances of aggravation were also introduced. If the participation in the criminal group involves ‘directing’ the activities of the group, the penalty increases from a maximum five years imprisonment to 10 years<sup>35</sup> in order to reflect the ‘greater degree of responsibility’.<sup>36</sup>

If the activities being directed are ‘organised and on-going’, the penalty further increases to a maximum of 15 years’ imprisonment.<sup>37</sup>

In 2012 NSW dealt with the High Court’s decision in *Wainohu*. The *Crimes (Criminal Organisations Control) Act 2009* (NSW) was repealed<sup>38</sup> and re-enacted ‘in a form which repaired the identified constitutional shortcomings’.<sup>39</sup>

### 2013 – NSW FOLLOWS QUEENSLAND

In 2013 Queensland’s successful defence of COA in the High Court in *Pompano* prompted NSW to ‘adopt those aspects of the Queensland model which were considered and upheld by the High Court’.<sup>40</sup>

The tests in Queensland and NSW are now identical except that, whereas in Queensland the purpose of association must be ‘engaging, or conspiring to engage in serious criminal activity’,<sup>41</sup> in NSW the purpose may also be ‘organising, planning, facilitating, [or] supporting’ serious criminal activity.<sup>42</sup>

Despite the overhaul of the NSW criminal organisation legislation in 2012 and the significant amendments in 2013, as in Queensland (under COA) only one abortive attempt has ever been made to have a criminal organisation declared.<sup>43</sup>

### 2015 – NSW IS PROMISED A FIFTH ATTEMPT: NEW UK-STYLE CONTROL ORDERS?

Lastly, the NSW government made an election commitment in 2015 that it would introduce UK-style *Serious Crime Prevention Orders*. They are discussed later, with reference to legislation in the United Kingdom.

This form of control order is discussed in Chapter 14, and forms part of the renewed *Organised Crime Framework* recommended by the Taskforce.

### POSTSCRIPT: NEW NSW CONTROL ORDERS

As this Report was in its final stages the NSW government announced, on 22 March 2016, a new *Crimes (Serious Crime Prevention Orders) Bill* providing for both pre-and post-conviction control orders. The late hour prevented re-convening the Taskforce to consider and discuss the Bill. Its provisions are discussed in detail in Chapter 14 of this Report.

### SOUTH AUSTRALIA

South Australia has a long history of attempts, by government, to disrupt and dismantle OMCGs there.

Successive governments have been in the vanguard amongst Australian states in pursuing strong legislative (and law enforcement) measures to achieve that end.

### 2003 – SA FIRST ATTEMPT

In early 2001 during the annual run of the South Australian Gypsy Joker Motorcycle Club, an affray broke out between members of the club and a newly formed policing unit called the Tactical Response Group. The incident had some of the hallmarks of the appearance of bikies outside Southport Police Station after the Broadbeach incident in September 2013 – ie, conduct which, at least, appeared to be a blatant challenge to police as the protectors and enforcers of our laws.

Some commentators have described the SA government’s announced subsequent ‘war on bikies’ as ‘a highly successful policy platform’ for the Rann Government, leading South Australia to become perhaps the ‘most innovative’ source of legislative experiments to deal with organised crime.<sup>44</sup>

### SA – FORTIFICATION REMOVAL

South Australia’s experiments began in 2003 with the adoption of Western Australia’s fortification removal orders. The 2003 amendments to the *Summary Offences Act 1953* (SA) provide for the Commissioner of

Police to apply to the Magistrates Court for a fortification removal order.<sup>45</sup>

At the beginning of 2015 *The Advertiser* newspaper revealed that the power had only been exercised four times since the laws came into effect in 2004.<sup>46</sup>

#### SA – GUN CONTROL AND THE USE OF CRIMINAL INTELLIGENCE

Earlier in 2002, following a shooting at Monash University in Victoria, the Australasian Police Ministers' Council resolved to adopt 'laws allowing the Commissioner of Police to refuse and revoke handgun licences [sic] and applications on the basis of criminal intelligence or any other relevant information'.<sup>47</sup>

The laws were to be modelled on amendments made by NSW earlier that year<sup>48</sup> as part of a suite of laws 'designed to inhibit the illegal supply of firearms'.<sup>49</sup>

South Australia delivered on its promise the following year by enacting the *Firearms (COAG Agreement) Amendment Act 2003* (SA).

Although the perpetrator at Monash University had suffered from paranoid delusional disorder and was not alleged to have any links to gangs, the use of criminal intelligence to refuse or revoke firearms licences was justified on the basis of preventing organised crime.

In his second reading speech, the South Australian Deputy Premier said that: '*...criminal intelligence should be recognised in the critical area of firearms as a basis on which the Registrar [Commissioner of Police] can prevent organised crime, particularly motor cycle gangs, from obtaining and using these lethal weapons*'.<sup>50</sup>

The amendments allowed the Commissioner of Police to refuse or cancel a firearms licence on the basis of criminal intelligence. If the Commissioner of Police relied upon criminal intelligence, s/he was also relieved of the obligation to provide reasons.<sup>51</sup> On appeal,

the Magistrate was required to '*... take steps to maintain the confidentiality of the information classified as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the appellant and the appellant's representative*'.<sup>52</sup>

#### 2005 – SA SECOND ATTEMPT: WIDENING THE USE OF CRIMINAL INTELLIGENCE

These amendments served as a prototype for further provisions introduced in 2005.<sup>53</sup>

South Australia acted upon police concerns about 'the infiltration of organised crime into the security and hospitality industries' by extending the use of criminal intelligence to licensing decisions under the *Security and Investigation Agents Act 1995* (SA), the *Liquor Licensing Act 1997* (SA) and the *Gaming Machines Act 1992* (SA).

According to the Attorney-General the amendments were '*crafted in light of police information indicating a significant level of involvement by, in particular, outlaw motorcycle gangs in these industries*'.<sup>54</sup>

#### HIGH COURT CHALLENGE TO THE USE OF CRIMINAL INTELLIGENCE: THE K-GENERATION CASE

The use of criminal intelligence in licensing decisions under the *Liquor Licensing Act* was the subject of a High Court challenge in 2009 in the case of *K-Generation Pty Ltd v Liquor Licensing Court*.<sup>55</sup>

Section 28A of that Act required the Liquor and Gambling Commissioner, the Licensing Court of South Australia and the Supreme Court of South Australia to take steps to maintain the confidentiality of information classified by the Commissioner of Police as criminal intelligence.<sup>56</sup>

The High Court unanimously upheld the provision.<sup>57</sup> Their Honours found that the courts were not impermissibly directed by the executive because '*the courts could determine*

*for themselves both whether the information met the definition of criminal intelligence in the Liquor Licensing Act and what steps to take to maintain the confidentiality of the information’.*<sup>58</sup>

Thereafter, the obligation to ‘take steps to maintain the confidentiality of ... criminal intelligence’ was ‘rolled out’<sup>59</sup> across South Australian legislation.<sup>60</sup>

### 2007 – SA THIRD ATTEMPT: ADAPTING ANTI-TERRORIST LAWS

On 2 June 2007 four people were injured in a shooting in an Adelaide nightclub during an argument between members of two motorcycle gangs.<sup>61</sup>

A month later Premier Rann ‘announced legislative reforms aimed at tackling the menace of outlaw motorcycle gangs and other criminal associations’.<sup>62</sup>

The resulting *Serious and Organised Crime (Control) Act 2008 (SA)* was said to ‘grant unprecedented powers to the police and the Attorney-General to combat serious and organised crime’.<sup>63</sup> It is true that the legislation was unprecedented in the organised crime sphere, but it plainly ‘drew directly upon the Commonwealth’s national security laws’<sup>64</sup> enacted in 2005.<sup>65</sup>

The adoption of the anti-terror model was accompanied by statements drawing parallels between OMCG members and terrorists. Premier Rann told the media, ‘*We’re allowing similar legislation to that that applies to terrorists, because these people are terrorists within our community*’.<sup>66</sup> Once enacted, the Premier proclaimed the Act to be ‘*the world’s toughest anti-bikie laws*’.<sup>67</sup>

The Act allowed the Attorney-General to ‘declare’ an organisation for the purposes of the Act if satisfied that:<sup>68</sup>

- (a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or

engaging in serious criminal activity; and

- (b) the organisation represents a risk to public safety and order in SA.

In making a decision the Attorney-General was directed to a number of discretionary considerations,<sup>69</sup> including ‘*any other matter the Attorney-General considers relevant*’.<sup>70</sup>

The Attorney-General was not required to provide any reasons for a decision to declare an organisation, nor disclose any information relied upon if the information was classified as criminal intelligence by the Commissioner of Police.<sup>71</sup>

The Attorney-General’s decision was also immune from judicial review and could not be ‘*challenged or questioned in any proceedings*’.<sup>72</sup>

Once an organisation had been declared, the Commissioner of Police could apply to the Magistrates Court for control orders against its members. Among other things, these orders could prohibit association with other members,<sup>73</sup> on penalty of up to five years imprisonment.<sup>74</sup>

Subject to limited exceptions, any other person would also be prohibited from associating with a controlled person more than six times in a 12 month period.<sup>75</sup> If the Commissioner of Police relied upon criminal intelligence, the Magistrates Court was required to take steps to maintain its confidentiality.<sup>76</sup>

The inherent weakness in the scheme was that, where an organisation had been declared, the Magistrates Court was deprived of any discretion whether to make the control order.

Upon application by the Commissioner of Police the court was required by section 14(1) to make the order ‘if satisfied that the defendant is a member of a declared organisation’. In contrast, under section 14(2), the Magistrates Court had a discretion to

make a control order if satisfied the defendant engaged in serious criminal activity and also regularly associated with others who engaged in such activity or who are members of a declared organisation.

The SA Attorney-General declared the Finks Motorcycle Club to be a declared organisation on 14 May 2009 and tabled the reasons for his decision in parliament.<sup>77</sup>

The Commissioner of Police then applied to the Magistrates Court for control orders against 12 alleged Finks members. Of these, eight were granted and four were adjourned.<sup>78</sup> Two persons affected (or potentially affected) by these orders began proceedings to have section 14(1) declared invalid. All of the control orders which had been granted were stayed pending the outcome.

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#### IN 2010 THE HIGH COURT STRIKES DOWN THE THIRD ATTEMPT: SOUTH AUSTRALIA V TOTANI

A majority of the Full Court of the South Australian Supreme Court held the provision invalid,<sup>79</sup> as did a majority of the High Court on appeal.<sup>80</sup> Their Honours found that section 14(1) authorised the executive to enlist the Magistrates Court to implement decisions of the executive in a manner incompatible with the court's institutional integrity.

In any event, the legislation has been shown to have the same drawbacks as the COA Review identified in Queensland's legislation. Only one successful application has ever been brought, against the Rebels MC. South Australian Police have recently said that '*despite the success of this application ... Section 14(2)(b) is unworkable*'.<sup>81</sup>

The application involved 18 months' police work, 21 police witnesses, nine civilian witnesses, a large volume of sworn affidavits and evidence, and 12 appearances before the Magistrate. According to police, '[t]he resulting single control order did not justify the considerable expenditure of time and effort'.<sup>82</sup>

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#### SA – SUCCESSFUL USE OF PUBLIC SAFETY ORDERS

Another measure introduced by the *Serious and Organised Crime (Control) Act 2008* (SA) which was not invalidated in *Totani* is the use of public safety orders.

Under section 23, a senior police officer may make a public safety order if satisfied that the presence of certain people at a certain place would pose a serious risk to public safety, and that the order would be appropriate in the circumstances.<sup>83</sup>

The order can prohibit specified people from entering certain premises, an event, or an area<sup>84</sup> generally for up to 72 hours unless extended by the Magistrates Court.<sup>85</sup> The power was used for the first time on 3 December 2010 to prohibit members of the Hells Angels Motorcycle Club and the New Boys from attending a concert function called *Stereosonic 2010*.<sup>86</sup>

By early 2013, a total of 155 public safety orders had been issued against individual OMCG members in respect of 12 to 15 public events.<sup>87</sup> According to South Australian Police: '*The orders have been very effective in preventing violent activity at public events. There has only been one arrest for breach of a Public Safety Order and the accused received a six month suspended sentence of imprisonment*'.<sup>88</sup>

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#### SA – UNEXPLAINED WEALTH

Shortly before the High Court challenge South Australia also passed the *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA).

Unlike the previous confiscation regime<sup>89</sup> the unexplained wealth laws do not require proof that a serious offence has been committed. Rather, the Crown Solicitor may apply to the District Court for an order confiscating a person's wealth merely because it cannot be explained;<sup>90</sup> that is, any wealth in excess of lawfully obtained wealth.<sup>91</sup>

In making an application the Crown Solicitor is entitled to rely on criminal intelligence and the District Court is required to take steps to maintain its confidentiality.<sup>92</sup>

According to evidence before the Crime and Public Integrity Policy Committee in late 2015 no unexplained wealth orders have been made yet.<sup>93</sup>

## 2012 – SA FOURTH ATTEMPT: FOLLOWING THE NSW EXAMPLE

After the High Court decisions in *Totani* and *Wainohu*, South Australia enacted a raft of amendments in early 2012 – seemingly in tandem with major reforms in NSW.

### SA – PARTICIPATION IN A CRIMINAL ORGANISATION

The centrepiece of the amendments was the introduction of a new offence of participation in a criminal organisation,<sup>94</sup> evidently based upon similar provisions introduced in NSW in 2006.<sup>95</sup>

Now, under section 83E of the *Criminal Law Consolidation Act 1935* (SA),<sup>96</sup> it is an offence to participate in a criminal organisation, knowing or being reckless as to both (a) whether it is a criminal organisation, and (b) whether the participation contributes to the occurrence of any criminal activity. Knowledge is presumed if the person was wearing the organisation's insignia at the time.<sup>97</sup>

A 'criminal organisation' may be either an organisation declared under the *Serious and Organised Crime (Control) Act 2008* or a group of two or more people who engage in, or facilitate engagement in, a serious offence of violence or a serious offence they intend to profit from.<sup>98</sup>

Participation carries a maximum penalty of 15 years imprisonment, increasing to 20 years if the participation involves assault or property damage, and to 25 years if it involves an assault on a public officer.<sup>99</sup>

Any term of imprisonment for participation is to be cumulative upon a sentence for the underlying serious offence.<sup>100</sup>

A total of 84 people have been charged with participating in a criminal organisation, only 10 of whom were OMCG members.<sup>101</sup> Many of these charges have, however, been withdrawn by the Office of the Director of Public Prosecutions, something which is reflected in very few references to the offence in the case law.<sup>102</sup>

In a recent submission to the Crime and Public Integrity Policy Committee the South Australian Director of Public Prosecutions explained why:

*In my view, it is not always (if ever) appropriate that both a section 83E(1) offence and the substantive offence (for example, trafficking in a relevant drug or money laundering) be charged when the conduct alleged in each offence is the same. This is so as commonly the conduct that would demonstrate the act/s of participation for section 83E(1) is/are the very same act/s that are alleged to establish the substantive offence. **To charge both the substantive offence and the section 83E(1) offence inevitably raises legal arguments about abuse of process and autrefois convict.***<sup>103</sup>

(emphasis added)

### AGGRAVATING CIRCUMSTANCE – CRIMINAL ACTIVITY WITH OR FOR A CRIMINAL ORGANISATION

Separate to the offence of participation, another amendment made it a general circumstance of aggravation to commit an offence for the benefit of, at the direction of, or in association with a criminal organisation. Likewise, identifying as a member of a criminal organisation in the course of committing an offence is also a circumstance of aggravation.<sup>104</sup>

## SA – CONSORTING OFFENCE

Next, South Australia re-enacted a consorting offence, which had previously been repealed in 2008.<sup>105</sup>

The decision to do so was based on an understanding that the High Court, in *Totani*, had criticised the control order scheme – but one member of the court had discussed traditional consorting offences, apparently without criticism.<sup>106</sup>

Under the new offence in section 13 of the *Summary Offences Act 1953* (SA), it became an offence punishable by imprisonment for two years to habitually consort with a person either found guilty of a serious and organised crime offence or reasonably suspected of having committed such an offence.<sup>107</sup>

Similarly under section 66K a person who continues to consort after having been issued a consorting prohibition notice is guilty of an offence punishable by imprisonment for two years.<sup>108</sup>

A consorting prohibition notice may be issued by a senior police officer if satisfied that the recipient has habitually consorted with someone found guilty of certain offences or who is reasonably suspected of having committed such offences during the previous three years.<sup>109</sup>

The prescribed offences include indictable offences of violence and organised crime offences.<sup>110</sup>

Until early in 2015 a senior police officer could also issue a notice to a person subject to a control order to prohibit their association with any other person regardless of the criminality of the other person.<sup>111</sup>

Consorting includes consorting by electronic means,<sup>112</sup> although the offence does not extend to prohibit associations between close family members or certain other innocent associations such as for genuine political purposes.<sup>113</sup>

The consorting prohibition notice is ‘indefinite in duration’<sup>114</sup> unless the recipient of the notice applies to the Magistrates Court for cancellation or variation of the notice.<sup>115</sup>

If the Commissioner of Police relies upon any criminal intelligence at such a review, the Magistrates Court must take steps to maintain its confidentiality.<sup>116</sup>

Only two consorting prohibition notices have been issued, one each to the president and sergeant-at-arms of the Finks/Mongols Motorcycle Club.<sup>117</sup>

South Australia also introduced an ‘overlapping’ and ‘complementary’ measure<sup>118</sup> designed to restrict liaisons *by* criminals rather than *with* criminals.

A police officer can now apply to the Magistrates Court under section 78(1) of the *Summary Procedure Act 1921* (SA) for an order prohibiting a person from associating with another specified person or from visiting a certain place.<sup>119</sup>

Having ‘full judicial discretion’,<sup>120</sup> the court may make the order if satisfied the person has been convicted of certain offences within the previous two years and that the order is reasonably necessary to ensure the person does not commit further offences of a similar nature.<sup>121</sup>

The order lasts for up to two years<sup>122</sup> and contravention carries a maximum penalty of six months imprisonment on the first occasion and then two years for subsequent breaches.<sup>123</sup> The non-association and place restriction orders can also be made as a ‘sentencing option’<sup>124</sup> without the need for a separate court application being made.<sup>125</sup>

Such orders have been made in sentencing Comancheros members for an aggravated assault in 2012 and, more recently, against Hells Angels members for an affray.<sup>126</sup>

Lastly, South Australia ‘repaired’ the constitutional defects of the *Serious and Organised Crime (Control) Act 2008* in the

wake of the High Court decisions in *Totani* and *Wainohu*.<sup>127</sup> The key amendments:

- take the power to declare an organisation away from the Attorney-General and give it instead to ‘eligible judges’ of the Supreme Court,<sup>128</sup> as was then the case under equivalent legislation in NSW, Western Australia and the Northern Territory;<sup>129</sup>
- require eligible judges to give reasons for their decisions to declare an organisation, unlike the legislation struck down in *Wainohu*;<sup>130</sup>
- give the power to make a control order to the Supreme Court rather than the Magistrates Court;<sup>131</sup> and
- provide that the Supreme Court *may* (rather than *must*) make a control order if satisfied of the test, unlike the provision found unconstitutional in *Totani*.<sup>132</sup>

#### SA – USING CRIMINAL INTELLIGENCE

In 2012 South Australia also standardised criminal intelligence provisions across its statute books.<sup>133</sup> Now, whenever criminal intelligence may be relied upon, a court:<sup>134</sup>

- (a) must, on the application of the Commissioner of Police, take steps to maintain the confidentiality of information classified by the Commissioner of Police as criminal intelligence, including steps to receive evidence and hear argument about the information in private, in the absence of the parties to the proceedings and their representatives; and
- (b) may take evidence consisting of or relating to information that is so classified by the Commissioner of Police by way of the affidavit of a police officer of or above the rank of superintendent.

#### SA COPIES QUEENSLAND’S COA – AND ENCOUNTERS THE SAME PROBLEMS

In 2013, following the High Court decision in *Pompano*, South Australia transitioned its *Serious and Organised Crime (Control) Act 2008* from an ‘eligible judge’ model to the Queensland model of having a criminal organisation declaration made by the Supreme Court.<sup>135</sup>

According to the Attorney-General the reason for preferring the Supreme Court is that constitutionality in *Pompano* depended upon the Supreme Court’s ability to rely upon its inherent jurisdiction to prevent unfairness. In contrast, an eligible judge acting in their personal capacity ‘has no such inherent jurisdiction or inherent characteristics to fall back upon’ to prevent unfairness and therefore avoid the invalidity of the legislative scheme.<sup>136</sup>

Despite the amendments, according to a recent submission of the annual reviewer of the Act, ‘the impetus to use the Declaration and Control provisions of the Act was largely lost’ following *Totani*. Overall, ‘[t]he provisions of the ... Act in relation to Declared Organisations and Control Orders have not proven to be a success’.<sup>137</sup>

Likewise, the South Australian Police have submitted that ‘due to the legislative complexity and police resources required’ to obtain declarations and control orders, police have been more ‘effective using traditional policing legislation to prevent, disrupt and investigate serious organised crime’.<sup>138</sup>

#### 2015 – SA FIFTH ATTEMPT: FOLLOWING QUEENSLAND’S LEAD

South Australia made further changes in mid-2015 in light of the High Court decisions in *Tajjour* (upholding consorting offences in NSW) and *Kuczborski* (upholding certain anti-association provisions in Queensland).

These amendments had no impact, however, upon the *Serious and Organised Crime (Control) Act 2008*.

## KEEPING BIKIES OUT OF HOTELS – AND, OUT OF THEIR COLOURS

First, South Australia inserted new offences into the *Criminal Law Consolidation Act 1935*,<sup>139</sup> ‘mirroring those enacted in Queensland, both those in their Criminal Code and those in their Liquor Act’.<sup>140</sup>

As in Queensland it is now an offence for a participant in a criminal organisation to be knowingly present in a public place with two other participants;<sup>141</sup> to enter a prescribed place or attend a prescribed event;<sup>142</sup> or to recruit new members.<sup>143</sup> Each of these new offences carries a maximum penalty of three years imprisonment.

It is also now an offence for a person to enter or remain in licensed premises while wearing the insignia or colours of a declared criminal organisation.<sup>144</sup> The penalties escalate from \$25,000 for a first offence to \$100,000 or 18 months imprisonment for third and subsequent offences.

## EXECUTIVE DECLARATIONS OF ‘CRIMINAL ORGANISATIONS’ AND ‘PRESCRIBED PLACES’

South Australia also followed Queensland’s lead in the 2013 suite in ‘declaring’ a list of criminal organisations and prescribed places by way of legislation, to take effect as regulations.<sup>145</sup>

According to the Attorney-General, the reason for this was that ‘while the making of a regulation is open to judicial review, the decision of Parliament is not’.<sup>146</sup>

## SA – STRONGER ANTI-CONSORTING LAWS

Second, South Australia amended its consorting offence to accord with NSW’s consorting offence, given that it had been ‘subjected to a thorough and searching examination by the High Court and found to be constitutional’.<sup>147</sup>

Now, in South Australia, consorting can extend to consorting with any convicted offender

rather than only those convicted of a serious and organised crime offence.<sup>148</sup> Habitual consorting has, however, been narrowed to require proof of consorting with at least two such convicted offenders on at least two occasions.<sup>149</sup>

There are also a number of innocent forms of consorting which are to be disregarded, such as consorting with family members.<sup>150</sup> As in NSW, the notable omission is a defence when consorting is for genuine political purposes.

Early media reports indicate that the new laws have resulted in most declared OMCGs abandoning their clubrooms, with their members now gathering in secret.<sup>151</sup> By the beginning of November 2015 South Australian police had issued 12 consorting prohibition notices to members of declared organisations. The Attorney-General is reported to have said that a legal challenge will be ‘inevitable’ once a gang member faces charges.<sup>152</sup>

## SA – STRONGER CONFISCATION LAWS

Successive governments in South Australia have attempted on five occasions to pass legislation allowing the ‘total confiscation of property of a declared [drug offender]’,<sup>153</sup> either following conviction for a commercial drug offence, or following three convictions for less serious drug offences in a 10 year period.<sup>154</sup>

As in Western Australia, the Northern Territory, Queensland and now Victoria the property is to be forfeited regardless whether the offender can show that it was acquired lawfully and without any connection to criminal activity.

The primary justification for this proposed law is that ‘outlaw motorcycle gangs and their members are notoriously involved in drug trafficking’.<sup>155</sup>

The most recent attempt passed the lower house on 26 February 2015.<sup>156</sup> The upper house passed the Bill with substantial amendments on 10 September 2015.<sup>157</sup>

These amendments require that 50 percent of confiscated assets be ‘applied as additional government funding for drug rehabilitation programs’<sup>158</sup> and allow an appeal court to discharge or vary a confiscation order ‘regardless of whether th[e] Act authorised or required the order to be made’.<sup>159</sup>

It remains to be seen whether the lower house will agree or whether these amendments will effectively kill the Bill, as on previous occasions.<sup>160</sup>

## WESTERN AUSTRALIA

### 2001 – WA FIRST ATTEMPT

On 1 September 2001 a retired police officer, Don Hancock, and his friend Lou Lewis were killed in a car bombing. Due to Don Hancock’s active pursuit of OMCGs while Police Commander his ‘death was widely seen as an act of revenge by bikies and the death of Lou Lewis as “collateral damage”’.<sup>161</sup>

In the wake of the bombing a cabinet taskforce was established ‘to develop a comprehensive strategy to tackle organised crime’.

Two months later Premier Gallop introduced into parliament what he described as ‘...*the toughest laws in Australia for combating the sinister and complex activities of criminal gangs*’.<sup>162</sup>

The resulting *Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002* (WA) sought to enhance the powers of the police to investigate criminal activity<sup>163</sup> as well as to remove fortifications.<sup>164</sup> These powers were subject to oversight by a retired judge, appointed as a special commissioner.<sup>165</sup>

### WA – ANTI-FORTIFICATION

When the WA Corruption and Crime Commission was established a year later it was given a supervisory role in relation to police investigations into organised crime.

Accordingly, the 2002 Act was repealed but substantially reproduced in the *Corruption and Crime Commission Act 2003* (WA).<sup>166</sup>

Police were also given new investigatory powers such as the power to assume identities, and conduct integrity tests and controlled operations.<sup>167</sup>

Now, under the renamed *Corruption, Crime and Misconduct Act 2003* (WA), the Commissioner of Police may apply *ex parte* to the Corruption and Crime Commission for the issue of a fortification warning notice.<sup>168</sup>

The Commission must issue the notice if satisfied on the balance of probabilities that there are reasonable grounds for suspecting that the premises are heavily fortified and that they are habitually used by people involved in organised crime.<sup>169</sup>

The notice is to be given to the owner or occupier of the premises, following which they have 14 days to make a submission to the Commissioner of Police.<sup>170</sup> The Commissioner must then consider the submissions, but if s/he still reasonably believes that the premises are heavily fortified and habitually used by people involved in organised crime, a fortification removal notice may be issued.<sup>171</sup>

The fortifications must then be removed within seven days, failing which the police may enter the premises to remove them.<sup>172</sup>

Judicial review in the Supreme Court is limited to the question whether the Commissioner of Police held the relevant reasonable belief.<sup>173</sup> At the review the Commissioner of Police may also rely upon criminal intelligence, which can be withheld from the applicant for review ‘if its disclosure might prejudice the operations of the Commissioner of Police’.<sup>174</sup>

### WA ANTI-FORTIFICATION LAWS UPHELD IN THE HIGH COURT: THE GYPSY JOKERS CASE

The High Court upheld these provisions in *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police*.<sup>175</sup> A majority of the judges found that, properly construed, the Act

requires the Supreme Court to decide for itself whether the disclosure of the information would prejudice the operations of the Commissioner of Police.<sup>176</sup>

The Corruption and Crime Commission's annual reports from 2003 to 2015 reveal, however, that only three fortification removal notices have ever been issued.<sup>177</sup>

In 2009 media reports revealed that other powers of investigation under the *Corruption and Crime Commission Act* had been underutilised in the previous five years.<sup>178</sup>

The Attorney-General who had introduced the Act in 2003 also questioned its effectiveness: he said that *'toughening the law is fine at a political, rhetorical level ... [but] our experience in Western Australia has shown that they haven't been used and therefore have not been effective'*.<sup>179</sup>

## 2012 – WA SECOND ATTEMPT

Following a state election in 2008 the new government committed to a *'multi-million dollar fighting fund to combat outlaw bikie gangs and other organised crime'*.<sup>180</sup>

The government 'closely monitored' the new declaration and control order regime in South Australia, but preferred to await the result of the High Court challenge in *Totani* 'before committing resources and money to something without knowing the potential pitfalls'.<sup>181</sup>

With the benefit of the High Court decisions in *Totani* and *Wainohu* the Western Australian Attorney-General introduced the Criminal Organisations Control Bill in 2011.

In his second reading speech he drew particular attention to the rate of offending among OMCG members but emphasised that 'while outlaw motorcycle gangs have the highest profile in the community', the legislation would be directed at all criminal organisations.<sup>182</sup>

He acknowledged that the model adopted from South Australia and NSW would be resource intensive, and likely to be a 'decade-long process',<sup>183</sup> involving litigation at 'every step of th[e] legislation'.<sup>184</sup> The government's intention was that the Act would be used in a 'sufficiently targeted' way, so as 'to make the legislation a worthwhile tool'.<sup>185</sup>

When the *Criminal Organisations Control Act 2012* (WA) was passed, the Western Australian government heralded it as the *'nation's toughest organised crime laws'*.<sup>186</sup>

The Act allows for a judge or retired judge to be appointed as a 'designated authority', akin to the 'eligible judge' under the original NSW scheme.<sup>187</sup>

Out of an abundance of caution, the Act stipulates that the designated authority is *not* subject to control by the executive.<sup>188</sup>

Unlike interstate legislation, Western Australia has not moved away from the 'eligible judge' model despite the High Court's vindication of the different Queensland model in *Pompano*.

The Commissioner of Police or the Commissioner of the Corruption and Crime Commission can apply to the designated authority for a declaration that an organisation is a criminal organisation.<sup>189</sup>

The designated authority has a discretion to make the declaration if satisfied that the respondent is an organisation, that its members associate for the purpose of 'organising, planning, facilitating, supporting or engaging in serious criminal activity', and that it represents a risk to public safety and order.<sup>190</sup>

Whether or not the designated authority decides to make a declaration, it must give reasons for its decision.<sup>191</sup>

Once made, the declaration remains in force for five years unless revoked or extended.<sup>192</sup>

## WA – CONTROL ORDERS

The Commissioner of Police can then apply to the Supreme Court for interim control orders and control orders against the members of a declared organisation.<sup>193</sup>

The Supreme Court may make either order if satisfied that the person is a member of a declared organisation, was previously a member and has a continuing involvement with the organisation, or associates with members of the organisation and has engaged in serious criminal activity.<sup>194</sup> The court must also be satisfied that the order is appropriate in the circumstances.<sup>195</sup>

The control order then continues for up to five years.<sup>196</sup>

A person subject to a control order may not associate with other controlled persons, be involved with the funds of the declared organisation, be involved in any public event, or recruit people into the declared organisation.<sup>197</sup>

The Supreme Court may also include other conditions in a control order: for example, conditions preventing a person from going to certain places, possessing certain things, using certain types of technology or working in certain industries such as gambling and security.<sup>198</sup>

Breach of a condition is an offence with a penalty ranging from two to five years imprisonment.<sup>199</sup>

Even without a control order it is an offence for an owner, occupier or lessee to permit their premises to be habitually used by members of a declared organisation, or to be 'knowingly concerned' in the management of premises used by members of such an organisation.

Both offences carry a maximum penalty of two years in prison.<sup>200</sup>

As in South Australia, if criminal intelligence is relied upon in an application for a declaration

or control order the designated authority or the Supreme Court must 'take all reasonable steps to maintain the confidentiality of information [it] considers to be properly classified ... as criminal intelligence'.<sup>201</sup>

The key provisions of the Act only came into force in November 2013.<sup>202</sup> According to the Ombudsman's report for the first monitoring period ending November 2014, no powers under the Act have yet been exercised.<sup>203</sup>

A number of amendments to other legislation were also introduced by the *Criminal Organisations Control Act 2012* (WA). Foremost among these were two new offences inserted into the *Criminal Code* (WA).<sup>204</sup>

It is now an offence under section 221E of the *Criminal Code* to participate in the activities of a criminal organisation 'for the purpose of enhancing [its] ability ... to facilitate or commit an indictable offence'. The offence carries a penalty of up to five years in prison.

Under section 221F it is an offence punishable by 20 years imprisonment to instruct someone else to commit an offence for the benefit of a criminal organisation. A criminal organisation is either one declared under the *Criminal Organisations Control Act 2012* (WA), or which meets the same criteria.<sup>205</sup>

The *Sentencing Act 1995* (WA) was also amended to include mandatory minimum sentences of between two and 15 years imprisonment where declared criminal organisations are involved.<sup>206</sup>

Further, for the purposes of confiscation proceedings under the *Criminal Property Confiscation Act 2000* (WA), if the respondent is a member of a declared organisation, 'all the property that the person owns or effectively controls' is now presumed to be crime-derived property'.<sup>207</sup>

There is no evidence that any of these new provisions have been used to date.

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## WA – UNEXPLAINED WEALTH LAWS

Western Australia was the first Australian jurisdiction to introduce unexplained wealth laws.<sup>208</sup>

Facing a ‘new era of organised crime’, the government sought to overcome the difficulty in existing confiscation legislation of having to ‘prove a relationship between unexplained wealth and criminal conduct’. It did this by making it irrelevant ‘whether or not the person has committed any offence’.<sup>209</sup>

Now, under the *Criminal Property Confiscation Act 2000* (WA), the Director of Public Prosecutions may apply to a court<sup>210</sup> for an unexplained wealth declaration.<sup>211</sup>

The court must make the declaration if it finds that a person’s ‘wealth is greater than the value of the person’s lawfully acquired wealth’.<sup>212</sup>

As a result, the unexplained wealth is payable to the state.<sup>213</sup>

Lawfully obtained wealth may also be confiscated if it belongs to a person who has been declared a ‘drug trafficker’ on conviction of a single drug trafficking offence or their third serious drug offence in 10 years.<sup>214</sup>

## NORTHERN TERRITORY

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### NT – UNEXPLAINED WEALTH LAWS

To ‘assist in fighting serious crime’<sup>215</sup> the Northern Territory passed unexplained wealth laws based upon the Western Australian model in 2002.<sup>216</sup>

The *Criminal Property Forfeiture Act* (NT) allows the Director of Public Prosecutions to apply to the Supreme Court for an unexplained wealth declaration.<sup>217</sup>

The court must make the declaration if satisfied on the balance of probabilities that the respondent’s total wealth is greater than their lawfully acquired wealth.<sup>218</sup>

The respondent’s property is presumed ‘not to have been lawfully acquired unless the respondent establishes the contrary’.<sup>219</sup> The assessed value of the unexplained wealth is then forfeited to the territory.<sup>220</sup>

Like Western Australia, the Northern Territory also went further than the unexplained wealth model.

Section 94(1) requires lawfully acquired wealth to be forfeited to the territory where the owner or effective controller of the property has been declared a drug trafficker<sup>221</sup> and the property is subject to a restraining order.<sup>222</sup>

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### NT UNEXPLAINED WEALTH LAWS SURVIVE A HIGH COURT CHALLENGE: *ATTORNEY GENERAL V EMMERSON*

The High Court recently upheld section 94(1) in 2014, finding that it does ‘not require the Northern Territory Supreme Court to give effect to any decision by the Executive’ and hence does not infringe the *Kable* principle.<sup>223</sup>

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### 2006 – NT FIRST MAJOR LEGISLATIVE PACKAGE

In response to ‘emerging gang-related activity’, the Northern Territory inserted three new offences into the *Summary Offences Act* (NT) in 2006, targeted according to the criminality of the group.

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#### NT – LOITERING

For ‘groups of suburban youth involved in low-level crimes’,<sup>224</sup> the legislation introduced an offence of loitering.<sup>225</sup>

Under section 47B, a police officer may issue a notice requiring a person to stay away from an area for up to 72 hours.<sup>226</sup> Failure to comply with the notice carries a maximum penalty of six months imprisonment.<sup>227</sup>

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#### ‘VIOLENT DISORDER’

For ‘low- and mid-level, intimidating and aggressive gang activity’,<sup>228</sup> the legislation

introduced a new offence of violent disorder.<sup>229</sup>

Hence under section 47AA it is an offence to commit a violent act in the company of at least one other person if it causes a member of the public to fear for their safety. The maximum penalty for violent disorder is 12 months imprisonment.

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## NT – ANTI-CONSORTING

Lastly, in order ‘to stop organised, high-level criminal group behaviour’,<sup>230</sup> the Northern Territory enacted a consorting offence.<sup>231</sup>

Under section 55A the Commissioner of Police may give a notice to a person preventing them from associating with another person provided both the recipient and subject of the notice have previously been found guilty of certain offences carrying a maximum penalty of at least 10 years imprisonment.

The Commissioner of Police must also have a reasonable belief that the notice will likely prevent an offence involving multiple offenders and a substantial degree of planning.<sup>232</sup> The punishment for contravening the notice is imprisonment for up to two years.<sup>233</sup>

The 2006 amendments also introduced non-association and place restriction orders as sentencing options.<sup>234</sup>

A non-association order prohibits a person from being in company or communicating with specified people, and a place restriction order prohibits a person from visiting a certain place for up to 12 months.<sup>235</sup>

Either may be imposed in sentencing a person for a significant offence (carrying a maximum penalty of at least one year in prison) if the court is satisfied that such an order may prevent the commission of another significant offence.<sup>236</sup> Contravention of the order is itself an offence, punishable by up to six months imprisonment.<sup>237</sup>

As a general sentencing consideration a new ‘non-exhaustive list of aggravating circumstances relating to gang activity’<sup>238</sup> was also introduced.<sup>239</sup> These include, for example, that ‘the offence involved substantial planning and organisation’.<sup>240</sup>

Despite being home to only ‘a small number of motorcycle gang members’ the Northern Territory became concerned in 2009 that the ‘tough stance taken in South Australia and New South Wales’ may make the Northern Territory an attractive destination for interstate OMCG members.<sup>241</sup>

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## 2009 – NT SECOND ATTEMPT

Accordingly the Territory enacted the *Serious Crime Control Act 2009* (NT) which provides for the making of declarations about organisations, control orders, public safety orders and fortification removal orders.

As under the NSW legislation at the time, the criminal organisation declaration was to be made by an ‘eligible judge’ who was not required to give reasons.<sup>242</sup>

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## ONLY THE COURTS CAN ‘DECLARE’ CRIMINAL ORGANISATIONS

The Northern Territory was the first jurisdiction to amend its criminal organisation regime in the wake of the High Court’s decision in *Wainohu*, handed down in mid-2011. The amendments provided for declarations to be made by the Supreme Court instead of ‘eligible’ judges.<sup>243</sup> The provision exempting judges from the requirement to give reasons was also repealed, leaving in place the ‘usual practice’ of the Supreme Court to ‘give reasons when deciding matters under the [A]ct’.<sup>244</sup>

The Supreme Court may now ‘declare’ an organisation if satisfied on the balance of probabilities<sup>245</sup> that its members ‘associate for the purpose of organising, planning, facilitating, supporting or engaging in’ the commission of offences punishable by imprisonment for five years or more, and that

the organisation is a risk to public safety and order.<sup>246</sup>

#### NT – CONTROL ORDERS

The Commissioner of Police may then apply to the Supreme Court for control orders in respect of a declared organisation's members, former members or associates.<sup>247</sup>

As in South Australia, it is also possible to obtain a control order without first declaring an organisation. That is, a control order may be made against a person who has committed an offence punishable by at least five years in prison and who regularly associates with others guilty of similar offences.<sup>248</sup>

Once made, a person subject to a control order is prohibited from recruiting and associating with other controlled persons.<sup>249</sup>

A control order also potentially prevents a person from working in a number of industries such as gambling, security and tow truck driving.<sup>250</sup>

#### NT – PUBLIC SAFETY ORDERS

Where there is a serious risk to public safety or security, the Act also allows a senior police officer to make a public safety order.

The effect of such an order is to prohibit the people specified in the order from being at a specified place, generally for up to 72 hours.<sup>251</sup>

#### NT – FORTIFICATION REMOVAL

The Act allows the Commissioner of Police to apply to the Court of Summary Jurisdiction for a fortification removal order where premises are fortified and it is reasonable to believe the premises are being used or are likely to be used in connection with the commission of an offence punishable by at least five years in jail.

Additionally, the Commissioner of Police may apply for such an order if the fortified premises are owned or habitually used by a declared organisation or its members.<sup>252</sup>

As in other jurisdictions, if the Commissioner of Police relies upon criminal intelligence in any proceeding for a declaration or order under the Act, the court 'must take steps to maintain the confidentiality of [the] classified information' provided 'the court considers the classified information is [in fact] criminal intelligence'.<sup>253</sup>

The *Serious Crime Control Act* (NT) came into force on 1 December 2011, at the same time as the amendments.<sup>254</sup>

Since then, it is understood that Northern Territory Police devoted considerable effort to developing an application against the Darwin Chapter of an OMCG. The operation was reviewed after six months and discontinued, possibly in light of the significant additional resources that would have been required to progress the application. Thus, no declarations or orders have been made under the Act.

A review of the *Summary Offences Act* (NT) revealed that there had been no prosecutions for the offence of consorting as at 30 June 2013.<sup>255</sup>

This was confirmed at a recent public hearing of the Ice Select Committee on 19 June 2015.

The Northern Territory Police said that the existing consorting legislation '*has not been successfully utilised and its application has been limited.*'

They revealed that, in the interests of efficiency, the Department of Attorney-General and Justice is considering repealing the existing offence and replacing it with one modelled on section 93X of the *Crimes Act 1900* (NSW).<sup>256</sup>

#### VICTORIA

Victoria had 'for many years publicly stood against the policing need for control order legislation',<sup>257</sup> preferring instead to rely upon its existing police powers to combat organised crime.<sup>258</sup>

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## 2012 – VIC’S FIRST ATTEMPT

In the 2010 state election, however, one party made an election commitment to ‘introduce tough legislation to outlaw criminal bikie gangs’.<sup>259</sup>

The newly elected government delivered on that promise in 2012 with the enactment of the *Criminal Organisations Control Act 2012* (Vic).

Introducing the Bill, the Attorney-General said that ‘traditional criminal laws are limited in their effectiveness to respond to these organisations, as such laws can only be used to prosecute illegal activity on a case-by-case basis after the event’.<sup>260</sup>

The ‘significant and far reaching’ powers introduced to fight organised crime were, however, to be ‘subject to carefully framed safeguards’.<sup>261</sup>

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### ‘DECLARING’ CRIMINAL ORGANISATIONS

Like Queensland’s COA, the *Criminal Organisations Control Act 2012* (Vic) provides for a two-stage process of applying for a declaration in respect of a criminal organisation and, if successful, then applying for a control order in respect of that organisation — although, at the time of its enactment, the Victorian legislation was different in four respects.

First, in addition to criminal organisations, the Supreme Court could (and still can) ‘declare’ an individual who has inveigled themselves into an innocent organisation for criminal purposes.<sup>262</sup>

The second difference was, until recently, that a declaration required proof beyond reasonable doubt. For an organisation, the Supreme Court had to be satisfied beyond reasonable doubt that the organisation is or was engaged in serious criminal activity or that at least two of its members used the organisation for a criminal purpose.<sup>263</sup>

Before declaring an individual, the Supreme Court had to be satisfied beyond a reasonable doubt that the individual was a member of an organisation and used it for a criminal purpose.<sup>264</sup>

In addition, the Supreme Court had to be satisfied on the balance of probabilities that the activities of the organisation or individual posed a serious threat to public safety and order.<sup>265</sup>

The third difference to the Queensland legislation was that, in addition to individuals, a control order could (and still can) be made against an organisation.<sup>266</sup>

Lastly, the Victorian and Queensland criminal intelligence provisions differ considerably.

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### VIC – CONSTRAINTS ON THE USE OF CRIMINAL INTELLIGENCE

The Victorian legislation derives from provisions introduced into a number of other Victorian statutes in 2009.<sup>267</sup>

If the Chief Commissioner applies to have criminal intelligence kept confidential, the court may appoint a special counsel.

Unlike the Criminal Organisation Public Interest Monitor (the COPIM) under Queensland’s COA, a ‘special counsel’ is appointed in Victoria to represent the interests of the affected party.<sup>268</sup>

At any time prior to having access to the criminal intelligence, the special counsel is entitled to communicate with the respondent, or the respondent’s representative, for the purpose of obtaining information necessary to represent the interests of the respondent.<sup>269</sup>

Thereafter, the special counsel may seek further information<sup>270</sup> but not so as to compromise the confidentiality of the information.<sup>271</sup> If criminal intelligence is protected and relied upon in a substantive application, the court ‘may appoint the same person or a different person as special counsel’ to act in the respondent’s interests.<sup>272</sup>

In addition, the court retains a discretion about whether to close the court when considering criminal intelligence<sup>273</sup>. The Victorian criminal intelligence provisions were designed having regard to the right to a fair hearing in section 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).<sup>274</sup>

As one commentator points out, the Victorian legislation 'reflect[s] the European standard for compatibility with Art 6 of the *European Convention on Human Rights*' in requiring that the special advocate have an opportunity to 'communicate robustly with the respondent and the respondent's legal representatives'.<sup>275</sup>

That said, the Victorian provisions do not go so far as allowing the special advocate to disclose the 'essence of the case' against the respondent, as required in Europe.<sup>276</sup>

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#### VIC – FORTIFICATION REMOVAL

Soon afterwards, the Victorian government delivered on the second part of its commitment to 'introduce laws to allow criminal bikie and similar gangs to be outlawed and fortifications of their premises to be demolished'.<sup>277</sup>

Under the *Fortification Removal Act 2013* (Vic), the Chief Commissioner of Police may apply to the Magistrates Court for a fortification removal order.<sup>278</sup>

The Magistrates Court may make the order if satisfied that the fortified premises are used in connection with certain offences, to conceal evidence of such offences or to keep the proceeds of such an offence.<sup>279</sup> The owner or occupier then has three months in which to remove the fortification, unless the time is extended by the Chief Commissioner or the Magistrates Court.<sup>280</sup>

Police may inspect the premises while the order is in effect<sup>281</sup> and, if the fortifications are not removed within time, can issue an enforcement notice and enter the premises to enforce the order.<sup>282</sup>

To ensure the fortifications are not rebuilt, the Chief Commissioner can then apply to the Magistrates Court for permission to inspect the premises for up to three years afterwards.<sup>283</sup>

As part of the policing strategy of Echo Taskforce, the first application for a fortification removal order was filed in October 2013 in respect of the Thomastown clubhouse of the Nomads, a chapter of the Hells Angels.<sup>284</sup> A second clubhouse belonging to the Bros motorcycle club was targeted in May 2014.<sup>285</sup>

In late 2013 Victoria Police revealed that they had not made any applications under the Act, apparently due to the complexity of the process, the high burden of proof and the time involved.<sup>286</sup>

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#### 2014 – VIC SECOND LEGISLATIVE PACKAGE

Victoria then introduced significant amendments in 2014 based, among other things, on 'feedback from Victoria Police'.<sup>287</sup>

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#### WIDENING THE NET

These amendments broadened the offences captured by 'serious criminal activity' from offences punishable by 10 years imprisonment to offences punishable by only five years' imprisonment, and without any requirement that the offence involve substantial planning or organisation.<sup>288</sup>

The burden of proof to declare an individual was lowered from the criminal standard to the civil standard,<sup>289</sup> and declarations about organisations were tiered into 'prohibitive declarations' and 'restrictive declarations' depending on whether the test could be satisfied to the criminal or civil standard.<sup>290</sup>

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#### STRENGTHENING CONTROL ORDERS

Restrictive declarations are now accompanied by control orders with lower thresholds.

Rather than having to show that a control order would likely 'contribute to the purpose of preventing or disrupting serious criminal activity',<sup>291</sup> it is sufficient to show that the order is 'necessary or desirable ... in order to end, prevent or reduce a serious threat to public safety and order'.<sup>292</sup>

Another amendment was directed to the problem of '*organisations ... seeking to frustrate control orders by purporting to hand in their club colours or by "patching over" to organisations with no criminal history in Australia*'.<sup>293</sup>

To this end, section 45(4) now clarifies that a person who was a member of a declared organised 'on the day of the initial application' may still be subject to a control order, even though they have quit the organisation.

Despite these changes, Victoria Police has yet to bring any application under the Act.

#### VIC – STRONGER UNEXPLAINED WEALTH/CONFISCATION POWERS

At the same time as the changes to the control order regime Victoria introduced amendments to its *Confiscation Act 1997* (Vic) to '*better enable law enforcement to target profits generated by very serious drug offences*'.<sup>294</sup>

This was seen as 'one of the most effective methods of targeting and disrupting serious and organised crime'.<sup>295</sup>

Now, when a person is convicted of a serious drug offence, the court is required to declare that they are a serious drug offender.<sup>296</sup> A serious drug offence includes trafficking or cultivating a large commercial quantity of drugs.<sup>297</sup> The effect of the declaration is 'the mandatory forfeiture to the state of almost all of the offender's property',<sup>298</sup> exempting only a 'modestly priced vehicle', necessary clothing, ordinary household items and tools of trade.<sup>299</sup>

A person with an interest in the property other than the serious drug offender may apply to have their property interests excluded; otherwise, the property is automatically

forfeited after 60 days of being restrained, regardless whether the property is derived from criminal activity.<sup>300</sup>

Curiously, the power to confiscate lawfully acquired property preceded unexplained wealth laws introduced two months later.

Victoria introduced unexplained wealth laws similar to NSW towards the end of 2014.<sup>301</sup> According to the Attorney-General, such laws 'are a powerful tool to target and disrupt serious and organised crime'.<sup>302</sup>

Under the new provisions inserted into the *Confiscation Act 1997* (Vic) the Director of Public Prosecutions may apply *ex parte* to the Supreme Court or the County Court for an unexplained wealth restraining order.<sup>303</sup> This ensures that 'the assets are not disposed of before the court can consider whether they were lawfully acquired'.<sup>304</sup>

The court must make a restraining order if it has a reasonable suspicion that the person with an interest in the property has engaged in serious criminal activity or that the property was illegally acquired.<sup>305</sup> Where the basis of the order is reasonable suspicion of serious criminal activity, the property must also be worth at least \$50,000.<sup>306</sup>

The reason for this requirement is that 'the laws are targeted at those making significant profits from crime'.<sup>307</sup> If a restraining order is made, any person with an interest in the property may apply to have their interest excluded from the operation of the restraining order.<sup>308</sup> The court may grant an exclusion order if satisfied that the property was lawfully acquired, however the starting presumption is that the property was illegally acquired.<sup>309</sup>

Unless an exclusion order is made or the Director of Public Prosecutions applies to set aside the restraining order,<sup>310</sup> after six months the unexplained wealth is automatically forfeited to the state.<sup>311</sup>

The *Criminal Organisations Control Act 2012* (Vic) was further amended in October 2015,

although the amendments have not yet come into effect.<sup>312</sup>

According to the second reading speech, the impetus for the change is that '*gangs — including bikie gangs — have become significantly more sophisticated*' and that '*associations between gang members ... occur not only in meetings at clubhouses but through social media and online*'.<sup>313</sup>

#### VIC – MOVING AWAY FROM CONTROL ORDERS AND TOWARDS ANTI-CONSORTING LAWS

In order to meet the challenge of this dynamism Victoria has joined NSW and South Australia by shifting from a control order model to an anti-consorting model.<sup>314</sup>

Once commenced, the Bill will introduce a new Part 5A into the Act which will prohibit individuals from associating with others convicted of serious criminal offences.<sup>315</sup>

The pivotal provision of the new part will be section 124A(1), which provides that an individual who has been served with an unlawful association notice must not associate with people specified in the notice on three or more occasions in a three month period, or on six or more occasions in a 12 month period.

A notice may only be issued by a senior police officer, and only on the basis of a reasonable belief that the person has previously associated with someone who has been convicted of certain offences (generally, an indictable offence punishable by five years imprisonment<sup>316</sup>) as well as that the prevention of their association would inhibit criminal activity.<sup>317</sup> A young person may not be issued with a notice.<sup>318</sup>

Failure to comply with the notice will be an offence punishable by three years imprisonment or 360 penalty units.

There will be a number of exclusions, such as for associating with family members or for genuine political purposes.<sup>319</sup>

A person who has been served with an unlawful association notice will also be able to seek internal review by Victoria Police,<sup>320</sup> as well as apply for a special authority to associate,<sup>321</sup> such as to attend the funeral of a mutual acquaintance.<sup>322</sup>

## TASMANIA

### A LESSER PROBLEM

Organised crime has had a lower profile in Tasmania. According to 2004 data from the Australian Crime Commission, Tasmania was the only Australian jurisdiction without any high-threat organised crime groups.<sup>323</sup>

In 2009, the Tasmanian Attorney-General noted '*we are fortunate in Tasmania not to have the same problems with organised crime*'.<sup>324</sup>

The genesis of most organised crime legislation in Tasmania has been through interstate agreements to ensure consistency across borders.

The first of these came in 2006, following agreement between the states and territories on reforms for dealing with multi-jurisdictional crime in the wake of the September 11 terrorist attacks.

### STRONGER INTELLIGENCE-GATHERING

Tasmania passed four cognate Bills dealing with controlled operations, surveillance devices, assumed identities and witness anonymity.<sup>325</sup>

According to the Minister for Justice at the time, '*while the joint working party report [which formed the basis of interstate consensus] was a response to the terrorism attacks in the US, the bills provide[d] powers to tackle not only terrorism but also other serious crimes and offences*'.<sup>326</sup>

In particular, the new investigative powers were seen as necessary to confront '*highly organised criminal networks such as drug*

*cartels, motor vehicle rebirthing gangs and motorcycle gangs operating with relative ease across State and Territory borders*.<sup>327</sup>

#### TAS – FORTIFICATION REMOVAL

In the following year, Tasmania introduced fortification removal orders.<sup>328</sup>

Now, under Part 2 Division 3 of the *Police Offences Act 1935* (Tas) the Commissioner of Police may apply *ex parte* to a Magistrate for a fortification warning notice.<sup>329</sup> The Magistrate may issue the notice if satisfied ‘on the balance of probabilities that there are reasonable grounds for suspecting’ that the premises are heavily fortified.<sup>330</sup> The owner then has 14 days after being served to make submissions.<sup>331</sup>

If the Commissioner of Police has a reasonable belief that the premises are still heavily fortified, they may issue a fortification removal notice.<sup>332</sup> The owner then has seven days to remove the fortification or face forcible removal by police.<sup>333</sup>

As in Western Australia, judicial review is limited to whether the Commissioner of Police could have reasonably held a belief that the premises were heavily fortified.<sup>334</sup>

If the Commissioner of Police relies upon criminal intelligence at the review, the ‘information so identified is for the magistrate’s use only and must not be disclosed to any other person, whether or not a party to the proceedings, or publicly disclosed in any way’.<sup>335</sup>

#### TAS – UNEXPLAINED WEALTH/CONFISCATION ORDERS

Tasmania enacted unexplained wealth laws in 2013 following agreement to introduce legislation of this kind by the Standing Committee of Attorneys-General at a meeting in 2009.

The laws are ‘intended to deter organised crime by targeting the profit’ of those ‘who

may be difficult to prosecute and convict of specific crimes’.<sup>336</sup>

In completely removing the link to an offence, Tasmania’s legislation follows unexplained wealth laws in Western Australia and the Northern Territory.<sup>337</sup>

Now, under Part 9 of the *Crime (Confiscation of Profits) Act 1993* (Tas),<sup>338</sup> the Director of Public Prosecutions may apply to the Supreme Court for an unexplained wealth declaration against a person.<sup>339</sup>

The Supreme Court is required to make the declaration if it finds that ‘it is more likely than not that the value of the person’s total wealth is greater than the value of his or her lawfully acquired wealth’,<sup>340</sup> with the respondent bearing the onus of showing that the wealth was legitimately acquired.<sup>341</sup> If a declaration is made, the respondent’s unexplained wealth is payable to the state.<sup>342</sup>

#### STRENGTHENING LAW ENFORCEMENT

The present Tasmanian government came to power in 2014 with an election commitment to establish a Serious and Organised Crime Squad funded by \$7.2 million over four years.<sup>343</sup>

Since then, a Serious Organised Crime Division has been created, comprising the Serious Organised Crime Unit, Fraud and e-Crime Investigation Services and the Computer Forensics Unit.<sup>344</sup>

However, there do not appear to be any plans to introduce control orders or other legislation to deal further with organised crime.

#### AUSTRALIAN CAPITAL TERRITORY

##### ANTI-CONSORTING: A NOVEL APPROACH

In 2005 the ACT introduced ‘two new, important preventative tools for courts’ as sentencing options: *non-association orders* and *place restriction orders*.<sup>345</sup>

A non-association order prohibits an offender from associating with a specified person for a specified time.

A place restriction order prohibits an offender from being, or attempting to be, in a specified place.<sup>346</sup>

Either order can be made if the offence for which the person is being sentenced involves personal violence, and the court is satisfied that such an order is necessary to prevent them from committing further offences or from harassing someone<sup>347</sup> but the conditions imposed must 'not be disproportionate to the purpose for which the order is made'.<sup>348</sup>

As an example of a disproportionate condition, the explanatory statement suggests an order preventing a stalker from visiting the *suburb* where their victim works, rather than simply the particular workplace.<sup>349</sup>

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#### STRENGTHENING LAW ENFORCEMENT

Like other jurisdictions the ACT enacted a suite of investigative powers between 2008 and 2011 based on model legislation prepared by the Standing Committee of Attorneys-General.<sup>350</sup>

The laws provide for 'modern tools' to help 'dismantle organised crime',<sup>351</sup> namely controlled operations, assumed identities, surveillance devices and the protection of witness identities.

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#### ACT – A REFUSAL TO RUSH TO LEGISLATE

Only nine days after the bikie affray at Sydney Airport on 22 May 2009 the ACT Attorney-General responded to 'sensationalist headlines and media coverage' by calling for evidence gathering and reflection rather than '**a knee-jerk reaction to put in place similar laws to those in one or two other jurisdictions just because they suddenly seem like a good idea at the time**'.<sup>352</sup>

The following day, the ACT Legislative Assembly passed a motion resolving that the

government provide advice to the Assembly about the effectiveness of organised crime legislation in the ACT as well as in other jurisdictions, particularly the control order regimes in South Australia and NSW.<sup>353</sup>

Nearly two months later the Attorney-General tabled a comprehensive review of serious organised crime legislation in the ACT.<sup>354</sup>

The report found that it was still too early to tell whether the legislation in South Australia and NSW had any impact on reducing organised crime, but based on evidence from overseas jurisdictions, doubted it would.<sup>355</sup>

It noted that similar legislation in the ACT would engage a number of rights under the *Human Rights Act 2004* (ACT), including freedom of association, and the rights to a fair trial and to examine prosecution witnesses.<sup>356</sup> The report instead suggested a number of other 'legislative enhancements'.<sup>357</sup>

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#### ACT – A DIFFERENT LEGISLATIVE APPROACH

These enhancements were delivered in 2010 in a series of amendments to the *Crimes Act 1900* (ACT) and the *Criminal Code 2002* (ACT).<sup>358</sup>

The amending legislation introduced offences of affray,<sup>359</sup> participation in a criminal group<sup>360</sup> and recruiting people to participate in criminal activity.<sup>361</sup> It also expanded the offences relating to the protection of people involved in court proceedings to cover those involved in criminal investigations.<sup>362</sup>

Other amendments extended criminal responsibility for substantive offences by reintroducing concepts of joint criminal enterprise<sup>363</sup> and being 'knowingly concerned' in the commission of an offence.<sup>364</sup>

Although unexplained wealth laws were considered in the 2009 report they were not included in the package of amendments in 2010.<sup>365</sup> There are recent signs that the ACT may introduce such laws in the near future.<sup>366</sup>

Recently, the ACT has confirmed that it ‘*will not introduce [the] types of bills and laws that we have seen in other jurisdictions that proscribe people on the basis of their membership of an organisation*’.

Rather, the ACT’s approach is to ‘*tackle [organised crime] based on the offending behaviour, based on the offence, [and] based on the criminality*’.<sup>367</sup>

#### COMMONWEALTH OF AUSTRALIA

Under our federal system and its division of powers and responsibilities, the states and territories have primary responsibility for law enforcement.

The Commonwealth’s law enforcement responsibilities are more limited and generally ‘reflect its constitutional powers ... including immigration, social security, taxation, border control, banking regulation and national security’.<sup>368</sup>

#### COMMONWEALTH/STATE AGREEMENTS

Both levels of government recognise, however, that their law enforcement responsibilities often overlap, such that a national coordinated response to organised crime is required.

To this end in April 2009 the Standing Committee of Attorneys-General agreed to implement a number of legislative reforms.

#### SUBSEQUENT NEW COMMONWEALTH LEGISLATION

The Commonwealth delivered on its commitment in two pieces of legislation in 2010 which together effected the following key changes.

#### COMMONWEALTH – CONFISCATION ORDERS

First, a number of changes were made to the Commonwealth’s confiscation legislation, most notably through the introduction of unexplained wealth laws.

By removing the need to prove a link to a specific offence, the new confiscation measure was said to ‘represent a quantum leap in terms of law enforcement strategy’.<sup>369</sup> Now, under Part 2-6 of the *Proceeds of Crime Act 2002* (Cth), a person’s property may be forfeited to the Commonwealth if they cannot satisfy a court that their wealth was not derived from a Commonwealth offence, a foreign indictable offence, or a State offence that has a federal aspect.<sup>370</sup>

In line with the recommendation of the Senate Legal and Constitutional Affairs Committee,<sup>371</sup> the court has a discretion to refuse to make an unexplained wealth order if it would be contrary to the public interest.<sup>372</sup>

The court also has a general discretion to refuse over and above a public interest criterion but, following a recent amendment this year, that broad discretion may only be exercised if the unexplained wealth is less than \$100,000.<sup>373</sup>

#### STRENGTHENING LAW ENFORCEMENT

Second, police investigation powers were enhanced by implementing the model laws for controlled operations, assumed identities and witness identity protection.<sup>374</sup>

These laws were developed (in the wake of the September 11 terrorist attack) at the 2002 Leaders’ Summit on Terrorism and Multi-Jurisdictional Crime. They were later endorsed by the Standing Committee of Attorneys-General in 2004 and thereafter implemented in most states and territories.<sup>375</sup>

#### COMMONWEALTH – A SUBTLE ATTACK ON ORGANISED CRIME

Third, an amendment to the *Criminal Code Act 1995* (Cth) extended criminal responsibility for Commonwealth offences using the concept of ‘joint commission’.<sup>376</sup>

It adds to other means of extending criminal responsibility such as aiding, abetting,

counselling, procuring, committing by proxy, inciting and conspiring.<sup>377</sup>

The Attorney-General explained the new concept of joint commission in these terms: ‘... if a group of two or more offenders agree to commit an offence together, the effect of joint commission is that responsibility for criminal activity engaged in under the agreement by one member of the group is extended to all other members of the group’.<sup>378</sup>

The new provision is intended to be used against ‘organised groups who divide criminal activity between them’.<sup>379</sup>

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#### GATHERING EVIDENCE/CRIMINAL INTELLIGENCE

Fourth, amendments to the *Telecommunications (Interception and Access) Act 1979* (Cth) facilitated greater access to telephone interception for the purpose of investigating criminal organisations.<sup>380</sup>

The information gathered in this way may also be used in applications for declarations and control orders under state criminal organisation legislation.<sup>381</sup>

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#### COMMONWEALTH – ANTI-ASSOCIATION LAWS

Last, the Commonwealth inserted a new Part 9.9 into the *Criminal Code Act 1995* (Cth) which contains four new offences involving criminal organisations and associations.<sup>382</sup>

These new offences carry maximum penalties of between three and 15 years in prison. Under section 390.3 it is an offence to associate with another person on at least two occasions in a way that facilitates their engagement in serious organised crime.<sup>383</sup>

The crime committed by the other person must involve at least two people, and be an offence punishable by at least three years in prison.<sup>384</sup>

Under section 390.4 it is an offence to provide material support or resources to a criminal

organisation so as to aid the commission of certain offences punishable by at least one year in prison.<sup>385</sup> It is also an offence under section 390.5 to commit certain offences punishable by at least 12 months imprisonment for the benefit of, or at the direction of, a criminal organisation.<sup>386</sup>

Conversely, it is an offence under section 390.6 to direct the activities of a criminal organisation, if those activities either constitute offences punishable by at least 12 months imprisonment or aid the commission of such offences.<sup>387</sup>

For each of the last three offences, a criminal organisation is one whose aims or activities include committing crimes punishable by at least three years imprisonment for the benefit of the organisation.<sup>388</sup>

Because the Commonwealth’s power to enact criminal laws is limited, the underlying offences must also have a connection with the Commonwealth: they must be foreign, Commonwealth or territory offences, or state offences with a federal aspect.<sup>389</sup>

It is unclear whether the new criminal organisation offences have been useful in combating organised crime. There is certainly no evidence in the case law of anyone being charged with an offence under Part 9.9 of the Act.

This may be due to the apparent complexity of the elements of the offences, as well as the evidentiary difficulty in proving the existence of criminal organisations.

The *Criminal Code Act 1995* (Cth) contains many substantive offences which more directly target the activities of criminal organisations, for example: people smuggling, firearms trafficking, drug importation and money-laundering.<sup>390</sup>

## UNITED STATES

## RICO V THE MAFIA

**DECADES OF ANTI-ORGANISED CRIME LAWS IN THE US: RICO**

The *Racketeer Influenced and Corrupt Organizations Act of 1970*, 18 USC §§ 1961-8 (RICO) was passed by the US Congress in 1970.

It overlays existing state and federal criminal laws to provide a second-order means of targeting organised crime.

RICO was enacted amid concerns about the Italian American mafia and was oriented — as its references to ‘loansharking’, ‘racketeering’ and property ‘fencing’ make clear — toward a highly ‘traditional’ model of criminal organisation and activity.<sup>391</sup>

**CRIMINAL ORGANISATIONS AS BIG BUSINESS – ATTACKING THE ‘BUSINESS MODEL’**

The RICO equivalent of Queensland’s ‘criminal organisation’ is the ‘enterprise’. This term embraces both any sort of official or legal entity (a partnership, corporation, association, union and so on) and any ‘group of individuals associated in fact although not a legal entity’.<sup>392</sup>

The US courts have kept the definition of ‘enterprise’ broad and flexible in order to keep up with the fluid and changeable nature of criminal associations.

Schools and political associations have been covered by RICO provisions, as have governmental units such as mayors’, governors’, legislators’ and judges’ offices, police departments, tax bureaux, sheriffs’ and prosecutors’ offices, fire departments, and even whole local and state governments.<sup>393</sup>

‘Enterprise’ covers both legal and illegal ventures, and the *association-in-fact* provisions capture nameless or informal associations for criminal purposes.

The COA Review analysed decisions of the US Supreme Court which showed that three elements need to be proved in order to establish an association-in-fact enterprise: (1) a purpose; (2) relationships among those associated with the enterprise; and (3) longevity sufficient to permit these associates to pursue the enterprise’s purpose.

Coordination and patterns of activity, joint commission of crimes, ‘interlocking’ or ‘overlapping’ wrongdoing, financial ties and shared interests or objectives are some of the factors that can support a finding that multiple individuals amount to a single enterprise.<sup>394</sup>

The elements of an ‘enterprise’ and a ‘pattern of racketeering activity’ are combined with one of four further variables to create the substantive RICO offences.<sup>395</sup>

These variables — the substantive ones being investment, maintaining an interest and participation — provide links between the enterprise and the pattern.

Thus, it is an offence for a person who accrues income from a pattern of racketeering activity to invest that income in an enterprise. It is an offence for a person to acquire or maintain an interest in, or to control an enterprise, through a pattern of racketeering activity. And it is an offence for a defendant to participate in the affairs of an enterprise through a pattern of racketeering activity. The fourth variation consists of conspiracy to commit one of the aforementioned offences.

This short description of RICO suggests quite a different creature from legislative anti-organised crime structures almost everywhere else. The COA Review identified, however, that RICO and COA (and its other variants in the Australian States) share some common features.

RICO and Australia’s ‘COA’-type legislation both focus on an entity relatively new (at least, outside the US) to crime-related legislation — the ‘enterprise’ or ‘organisation’, rather than the individual.

Both establish liability on the basis of participation by group members in criminal activity ('serious criminal activity' or 'racketeering activity'). Both were informed by a deeply traditional and hierarchical model of organised crime.<sup>396</sup>

That said, the COA Review's detailed consideration of RICO illustrates how the latter operates in a vastly different milieu in the US, in terms both of our present understanding of the organised crime world in the US compared with Australia, and in significant differences in our respective legal systems.

Divergences of approach between RICO and COA speak to a legal and cultural gap (approaching a gulf) between Australia and the USA. A striking example is their vastly different attitude to laws about evidence.

For example, the Five Families trial in the 1980s featured testimony from law enforcement officers concerning an organised crime meeting in the 1950s. None of the accused were said to have been present at that meeting, which long pre-dated their involvement in the relevant enterprise (the Mafia Commission which coordinated the families).

Similarly, a defector from a Cleveland crime family testified on 'the lives and careers of legendary gangsters'.

In both instances, the recitation of this distant history (if not lore) was admitted as not unduly prejudicial and as relevant to the traditions, codes, structures and activities of the 1980s New York mafia.<sup>397</sup>

The Australian approach to such evidence is, of course, much more stringent.

RICO, as the COA Review also noted, is apt and willing to produce all-in-one mega-trials involving large numbers of individual defendants who are implicated in a sprawling enterprise. RICO indictments charging double-digit numbers of gang members simultaneously are common.<sup>398</sup>

The flexible and broad operation of the association-in-fact enterprise allows for such wide-ranging indictments.<sup>399</sup> Additionally, the inability to adduce secret evidence in America means that the revelation of informants and methods is inevitable.<sup>400</sup> Authorities therefore have an incentive to conduct long-term investigations and launch proceedings against the maximum possible number of defendants in one fell swoop.

COA and its Australian equivalents operate on the basis of 'stages' of significant hearings and culminate with orders which operate against a single organisation or individual each time.

The 2013 suite, despite its focus on 'criminal organisations', still descends to the particularity of individual 'participants' in its detail.

The possibilities under either for proceeding against multiple respondents for, say, a control order are, for reasons of relevance and fairness in the use of evidence, going to be significantly limited.

RICO is also a criminal statute which imposes huge criminal penalties. Maximum sentences for violations range from twenty years to life imprisonment.

The result in the American context is that sentences can take such imposing forms as '100 years' or 'three life sentences followed by 85 years'.<sup>401</sup> In contrast guilty pleas for broadly comparable offending however can result in imprisonment for less than twenty years.<sup>402</sup> Forfeiture provisions operate in addition upon any interest or property obtained directly or indirectly from racketeering activity.<sup>403</sup>

RICO also allows for civil remedies restraining the operation of the targeted enterprise.<sup>404</sup> Business 'fronts' or other ventures implicated in the operation of a RICO enterprise can simply be dissolved by court order. Persons injured in their business or property by reason of a RICO violation can sue for threefold damages plus costs.<sup>405</sup>

Whatever be the case, it is clear that a successful RICO prosecution can result in once-in-a-generation or even final dismantling of substantial criminal enterprises.

For similar or even greater labours in Australia, COA-style applications might result in the issue in a series of control orders.

Proceedings under the 2013 suite can result in the imposition of large sentences – but, to date, have not done so. Its primary purpose, to destroy OMCGs, is not dissimilar from RICO's goals vis-a-vis large racketeering organisations like the Mafia – but again, in terms of scale, pales beside the US laws.

As will be seen later in this Chapter the UK identified, some years ago, that its organised crime culture was different from the US and different responses were called for.

It is compelling that the same can be said about Queensland (and, generally, Australia).

While the Byrne Report identified the existence of well-organised crime groups in, for example, particular illicit drug market-places<sup>406</sup> nothing in that Report or in the information provided to the Taskforce by local law enforcement authorities suggests the presence, or the imminent rise, of Mafia-like organisations here.

There is much in RICO to be admired but neither the scale of OMCG crime nor organised crime generally in Queensland (as revealed in the Byrne Report) suggests there is either scope, or any present need, for anything on its grand scale here.

## CANADA

During the 1990s violent gang rivalry played out in Quebec between two OMCGs: the Hell's Angels and the Rock Machine.

### CANADA: FIRST ATTEMPT - ATTACKING CRIMINAL ORGANISATIONS

In 1997 the Quebecois Attorney-General asked the federal government to take action on the

issue.<sup>407</sup> As a result, the Canadian Parliament enacted Bill C-95.<sup>408</sup>

The centrepiece of this legislation was a new offence of *participation in a criminal organisation*.<sup>409</sup> 'Criminal organization' was originally defined to mean a group of five or more people, the primary activity of which is the commission of indictable offences punishable by at least five years in prison, and whose members have committed a series of such offences in the previous five years.<sup>410</sup>

The first convictions for this offence came in 2001, when four members of the Rock Machine were found guilty of operating a drug ring.<sup>411</sup> The judge in that case also found that the participation offence did not impose double punishment for the underlying offence of drug trafficking.<sup>412</sup>

### CANADA – CONTROLLING GANG MEMBERS BEFORE THEY OFFEND: 'PEACE BONDS'

Another measure introduced in Canada in 1997 was the 'peace bond', designed to prevent organised crime before it has happened.<sup>413</sup>

Under this scheme, with the consent of the Attorney-General, anyone can apply to a provincial court judge for a peace bond if they reasonably apprehend that a person will commit a 'criminal organisation offence'.<sup>414</sup>

If the judge is satisfied there are reasonable grounds for the fear, they may require the defendant to enter into a recognisance to keep the peace and be of good behaviour.<sup>415</sup>

Originally, the recognisance could only last for 12 months but following an amendment in 2009 the recognisance can now extend for two years if the defendant has previously been convicted of a criminal organisation offence.<sup>416</sup>

The peace bond can include conditions which prohibit the defendant from going to certain places or from associating with certain people.<sup>417</sup> If a person refuses to enter into the recognisance or breaches a condition, they can be imprisoned for up to 12 months.<sup>418</sup>

Apparently, peace bonds have been used with some success against lower-level gang members to break their links to organised crime.<sup>419</sup>

Despite its successful use in some cases the participation offence in its original form was criticised for its ‘complexity and limited application’.<sup>420</sup>

#### CANADA: SECOND ATTEMPT

Following a review in 2000 by the House of Commons Subcommittee on Organized Crime,<sup>421</sup> the Canadian Parliament introduced substantial changes in Bill C-24, enacted in 2001.<sup>422</sup>

#### CHANGING CENTRAL CONCEPTS

These changes broadened the meaning of criminal organisation by reducing the minimum number of members, and eliminating the need to show a pattern of activity in the last five years.

Now a criminal organisation is a group of three or more people, the main purpose or activity of which is the commission of serious offences which result in the organisation receiving a material benefit.<sup>423</sup>

#### NEW OFFENCES

Three new offences hinge off this definition. Under section 467.11, it is an offence to participate in or contribute to the activities of a criminal organisation in such a way as to enhance its ability to commit indictable offences.

Under section 467.12, it is an offence to commit an indictable offence for the benefit of, at the direction of, or in association with a criminal organisation.

Conversely, under section 467.13, it is an offence to instruct another person to commit an indictable offence for the benefit of, at the direction of, or in association with a criminal organisation.

These offences carry a maximum penalty of five years, 14 years and life imprisonment respectively. These terms of imprisonment are to be served cumulatively upon any sentence for the underlying offence by virtue of section 467.14.

#### A NEW RECRUITING OFFENCE

More recently, in 2014, Canada introduced another offence of recruiting, punishable by five years in prison, with a minimum period of six months if the recruit is a child.<sup>424</sup>

#### CANADIAN LEGISLATION TESTED IN ITS COURTS

The first case to test the 2001 laws was *Lindsay v The Queen* in 2005.<sup>425</sup> In that case, the Ontario Supreme Court found that the Hell’s Angels motorcycle gang was a criminal organisation, having as one its main purposes or activities the facilitation of drug trafficking.

Two of its members were then found guilty of trying to extort money ‘in association’ with the Hell’s Angels contrary to section 467.12. The offences have been found not to fall foul of the Canadian Charter of Rights and Freedoms<sup>426</sup> for being too vague or overbroad.<sup>427</sup>

In terms of effectiveness, there is no doubt that people have been prosecuted for participation offences, occasionally in large numbers.

For example, in 1998, 35 members of the Manitoba Warriors were charged with participating in a criminal organisation.

However, most pleaded guilty to other offences involving drugs after the participation charges were withdrawn as part of a plea bargaining deal.<sup>428</sup>

On another occasion in the early 2000s, 42 members of the Hell’s Angels were charged with participation offences. However, many of them pleaded guilty to charges of murder, conspiracy to murder and drug trafficking,

indicating that the ordinary criminal law had been sufficient.<sup>429</sup>

### EFFECTIVENESS OF CANADIAN LAWS: HAS CRIME DIMINISHED?

As one academic observed in 2008, '[d]espite the stated goals of the legislation, there has been no noticeable decline in organised crime activities in Canada since the introduction of these laws in 1997'.<sup>430</sup>

## NEW ZEALAND

### 1997 – AN ATTEMPT TO ADDRESS ORGANISED CRIME

Like Canada, New Zealand enacted an offence of participation in a criminal gang in 1997 through the introduction of section 98A of the *Crimes Act 1961* (NZ).

The definition of 'criminal gang' was originally a group of at least three people, at least two of whom had previously been convicted of serious offences committed on separate occasions.<sup>431</sup> Due to the difficulty of establishing a criminal organisation under this test, in the first five years a total of only 16 prosecutions were brought under section 98A.<sup>432</sup>

### LATER CHANGES TO NZ LEGISLATION

The definition was significantly amended in 2002. After that, an 'organised criminal group' was defined as a group of at least three people who have as one of their objectives committing serious offences of violence or for obtaining material benefits.<sup>433</sup>

The mental element of participation was also extended to recklessness and the penalty for the offence was increased from three to five years in prison.<sup>434</sup>

The rate of prosecutions under section 98A 'increased dramatically' to 76 in 2003.<sup>435</sup> In 2009, in order to 'better reflect the culpability of those involved in this insidious activity',<sup>436</sup>

the penalty was further increased to 10 years in prison.<sup>437</sup>

Another amendment in 2009 made participation in an organised criminal group an aggravating circumstance for the purposes of sentencing.<sup>438</sup> This might be seen as curious given that charges under section 98A are 'normally brought in conjunction with other charges'.<sup>439</sup> That is, in practice the participation offence already operates as a circumstance of aggravation upon the underlying offence.

### SOME DIFFICULTIES IN NZ

The trend of charging the participation offence with other offences calls into question its value as a separate offence.

For example in the recent case of *R v Dewar*,<sup>440</sup> the defendant was charged with conspiracy to supply cannabis, and theft. The addition of a charge of participation in an organised group added very little, if anything; involvement in any form of organised criminal association is already a circumstance of aggravation, and the extension of responsibility through the concept of a 'conspiracy' already captured the defendant's criminality.

As a result, the sentencing judge decided that 'a specific uplift for the aggravating factor of gang involvement [was not] justified' because it had already been taken into account as part of the milieu for the underlying offences.<sup>441</sup>

## UNITED KINGDOM

### BRITAIN DECIDES IT IS NOT LIKE THE USA

In the early 2000s the UK Home Office gave some consideration to adopting the American RICO model, or the Canadian offence of participating in a criminal organisation.<sup>442</sup>

The UK experience was, however, that serious crime tends to be committed by 'career criminals who network with each other' in fluid associations bearing no identifiable structure.<sup>443</sup> This accords with the findings of

the Byrne Report about the fluidity of 'organised crime' groups and the response of a senior police officer to that Commission that:

*'... notions of organised crime had progressed beyond highly structured, long standing, organised syndicates...'*<sup>444</sup>

#### 2005: THE SERIOUS ORGANISED CRIME AND POLICE ACT 2005 (UK)

Accordingly, rather than 'attempt to construct offences around organised crime' as in the US and Canada, the UK decided instead to focus on increasing police powers to investigate and prosecute serious crime.<sup>445</sup>

In March 2004, the UK government published a white paper to this effect,<sup>446</sup> and the following year, the British Parliament passed the *Serious Organised Crime and Police Act 2005* (UK) c 15.

#### A SINGLE AGENCY TO COORDINATE AND LEAD THE FIGHT AGAINST ORGANISED CRIME

The centrepiece of the Act was the creation of a single agency to lead the response to organised crime: originally, the Serious Organised Crime Agency, recently renamed the National Crime Agency (NCA).<sup>447</sup>

The NCA has general powers to investigate and prosecute serious organised crime.<sup>448</sup> In addition, it has information-gathering and sharing functions, with police officers having a general duty to pass information on to it.<sup>449</sup>

#### FINANCIAL REPORTING ORDERS: DISCOURAGING FRAUDSTERS

Consistent with the UK government's strategy of targeting the financial incentives of crime, another feature of the Act was the introduction of Financial Reporting Orders ('FROs') as a sentencing option.

Under Part 2, Chapter 3 of the Act when a court is sentencing 'or otherwise dealing with' a person for one of several offences involving

deception,<sup>450</sup> the court may impose a FRO if the risk of committing a similar offence is 'sufficiently high'.<sup>451</sup>

Such an order requires the person to provide detailed and regular information about their financial affairs for up to 20 years in the most serious cases.

Failure to comply with the order carries a maximum penalty of between six months and 12 months in jail, depending on the region of the UK.<sup>452</sup>

#### UK – 'INCENTIVISING' OFFENDERS TO COOPERATE

In addition, the Act strengthened the investigative powers of police and the Director of Public Prosecutions,<sup>453</sup> provided for immunity and reduction of sentence for offenders who assist police investigations,<sup>454</sup> and enhanced protections for witnesses.<sup>455</sup>

#### CRIMINALISING THOSE WHO ASSIST ORGANISED CRIME ACTIVITY

In 2007 the UK further consolidated its response to organised crime into one agency by giving the NCA responsibility for proceeds of crime.<sup>456</sup>

The UK also introduced a new offence of intentionally encouraging or assisting the commission of an offence.<sup>457</sup>

This means that anyone who encourages or assists a crime to be committed will be treated as though they themselves committed the offence. Victims of crime are not liable for the new offence, and a defence of acting reasonably is also available.<sup>458</sup>

The accompanying repeal of the common law offence of incitement suggests that 'encouraging' is to be treated as the modern equivalent of 'inciting'.<sup>459</sup> However, the concepts of 'aiding' and 'abetting' have survived.<sup>460</sup>

It would appear that the only difference between the new concept of 'assisting' and

the traditional concept of ‘aiding’ is that the former applies to attempted offences, whereas the latter does not.<sup>461</sup> Thus, the new law criminalises assisting another person to commit an offence, even though the offence does not eventuate.

#### 2007: THE UK INTRODUCES ‘SERIOUS CRIME PREVENTION ORDERS’

A far bigger change was the introduction of Serious Crime Prevention Orders (SCPOs).

Having for some years employed control orders to prevent terrorism, sexual offending and anti-social behaviour,<sup>462</sup> in 2007 the UK applied the same model for the first time to serious crime.

Under the *Serious Crimes Act 2007* (UK), a SCPO can be made in one of two scenarios. The first is when a person is convicted of a serious offence in the Crown Court (the approximate equivalent of Queensland’s District Court).<sup>463</sup> Second, even if a person has not been convicted of an offence, the Director of Public Prosecutions can bring an application for a SCPO in the High Court (the approximate equivalent to Queensland’s Supreme Court).<sup>464</sup>

The High Court must be satisfied on the balance of probabilities that the person has been involved in serious crime. In both cases, the Crown Court or the High Court must also be satisfied that there are reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting the person’s involvement in serious crime.

According to the Crown Prosecution Service, implicit in this test is proof of a ‘real risk’ that the person will reoffend.<sup>465</sup>

As the imposition of a SCPO in the Crown Court follows conviction, it is essentially a sentencing option in the form of a post-conviction order.

In the UK High Court past criminal conduct must still generally be shown, though ostensibly only on the balance of probabilities rather than beyond a reasonable doubt.<sup>466</sup> In

this sense, the lower threshold may be said to carry with it the risk that prosecuting authorities will opt to bring applications in the High Court as a substitute for a criminal trial. This was certainly envisaged when the model was first proposed.<sup>467</sup>

However, during her second reading speech, Baroness Scotland said that it was not the Government’s intention that SCPOs would be used as a ‘way for law enforcement agencies to get round troublesome prosecutions’.<sup>468</sup>

Moreover, the temptation to avoid a criminal trial may be tempered somewhat by the decision of *R (McCann) v Crown Court at Manchester*<sup>469</sup> in the context of control orders for anti-social behaviour. In that case the House of Lords held that the standard of proof of anti-social behaviour is tantamount to the criminal standard of beyond a reasonable doubt.<sup>470</sup>

By parity of reasoning, the same standard may be expected to apply to proof of criminal offences for SCPOs.<sup>471</sup>

#### THE UK SCPO – TAILORED CONSTRAINTS AND CONDITIONS

In making a SCPO the court may impose any prohibition, restriction or requirement it thinks necessary to protect the public through the prevention of serious crime.<sup>472</sup> This can include restrictions on associating or communicating with certain people, on the types of work a person is permitted to do, on the premises they may use and on where they can go, both within and outside of the UK.<sup>473</sup>

The order can go so far as to require the person to provide certain information, but not so as to require them to give evidence orally or violate legal professional privilege unless the order specifically requires it.<sup>474</sup>

According to the Crown Prosecuting Authority, *‘[w]hile the possible terms of an order could restrict the persons life [sic] in almost any respect, and to a very significant degree, ... any term will still have to be objectively justified as appropriate for the purpose of protecting the*

*public by preventing involvement in serious crime*'.<sup>475</sup> (emphasis added)

The broad power to impose conditions would also be read down in light of the requirement in the *Human Rights Act 1998* (UK) c 42 that any interference with human rights be necessary and proportionate to a legitimate purpose.<sup>476</sup> Thus, for example, '[a]n order could not include a requirement for house arrest, because such a measure would be incompatible with Article 5 of the *European Convention on Human Rights*'.<sup>477</sup>

The order can continue to apply for up to five years, though there is no limit on the number of subsequent orders that may be made.<sup>478</sup> A breach of the order is punishable by up to five years imprisonment or an unlimited fine.<sup>479</sup> In addition, any property used in connection with the offence may be forfeited to the Crown.<sup>480</sup>

#### THE UK SCPO -V- AUSTRALIAN CONTROL ORDERS

As the COA Review identified, aside from the potential to use SCPOs as post-conviction orders there are a number of other differences from control order regimes in Australia.

That discussion is relevant in light of the Taskforce's conclusion that control orders should form part of the proposed *Organised Crime Framework*, to replace the 2013 suite.

#### UK – NO NEED TO PROVE ORGANISED CRIME

One of the main differences is that whereas a control order under Queensland's COA requires proof of *organised crime*, a SCPO only requires proof of *serious crime*.

That is, the SCPO regime is not dependent on showing the existence of a criminal organisation, and focuses instead on individual conduct.

While the definition of 'serious offence' includes many offences typically associated with organised crime — such as trafficking,

child sex offences and money laundering — some are not.<sup>481</sup>

#### UK – SCPO CAN APPLY TO AN ORGANISATION

Another point of difference is that in addition to individuals SCPOs can apply to corporations, partnerships and unincorporated associations.<sup>482</sup>

Thus rather than establish the existence of a criminal organisation and then seek to place restrictions on its members the SCPO regime can be used to place restrictions on the organisation directly.

If the organisation is convicted for breaching the SCPO the Director of Public Prosecutions may apply to have it wound up.<sup>483</sup>

#### UK – CRIMINAL INTELLIGENCE MUST BE ADMISSIBLE, AND DISCLOSED

Lastly, in court proceedings for SCPOs criminal intelligence may only be used if it is admissible as evidence,<sup>484</sup> and if it is admitted as evidence, it *must* be disclosed to the respondent.<sup>485</sup>

Given the large number of SCPOs which have been granted it would appear that the full disclosure of criminal intelligence has not widely deterred prosecuting authorities from bringing applications.

Conversely, if criminal intelligence has not been relied upon because it is too sensitive or does not amount to evidence, that alone does not appear to have prevented courts from making a large number of SCPOs.

The SCPO regime came into force in early 2008.<sup>486</sup> The commencement dates of many of the initial orders were delayed to take into account time in prison.

#### UK SCPOS – HOW SUCCESSFUL?

The UK legislation introducing SCPOs is still quite recent and it is only of late that an accurate picture has emerged of their use.

As at 31 March 2014 the NCA (and its predecessor, the Serious Organised Crime Agency) had obtained 182 SCPOs. A further 136 were obtained by police forces or other agencies and notified to the NCA. Of these only one was sought in the High Court. The remainder were sought in the Crown Court.<sup>487</sup>

In the overwhelming majority of cases, SCPOs have been used as a post-conviction sentencing option rather than as a substitute for the criminal justice system.

Of the SCPOs currently on foot, the Lifetime Management Team within the NCA provides heightened supervision with respect to 47.<sup>488</sup> The NCA publishes a list of the names of the people subject to these orders, their dates of birth and the conditions of their orders.<sup>489</sup> This appears to be part of a broader shift in strategy in the UK to ‘publicise more widely the identity and photographs of people convicted of offences related to organised crime’.<sup>490</sup>

The intensity of monitoring required is no doubt costly. However, the SCPO regime was always intended to be used ‘in a targeted way’.<sup>491</sup>

There is high-level support for the SCPO model in Australia. It carries the approval of the Parliamentary Joint Committee on the Australian Crime Commission.

After reviewing various legislative approaches to combat organised crime, the Committee concluded in its 2009 report that:

*[o]f the approaches examined by the committee, the UK’s Serious and Organised Crime Prevention Orders (SPCOs [sic]) seem to be an effective way of managing the activities of known criminals. One of the key advantages of SCPOs is that they can be targeted to specific individuals, and do not attract many of the concerns about criminalising entire groups. However, the committee is also cognisant of the costs of monitoring such orders, and for that reason considers that the orders would really only be cost-effective for use against the most*

*high-risk criminals. The committee considers that such an approach may have significant benefits if applied in Australia and urges that further consideration be given to implementing SPCOs in Australia.*<sup>492</sup>

(emphasis added)

#### ANOTHER UK STRATEGY - INJUNCTIONS

In 2009 the UK introduced another civil order regime targeted at lower-level organised crime.

Under this new regime the police may apply for an injunction to prevent gang-related violence, either in the High Court or the County Court (the approximate equivalents of Queensland’s Supreme Court and District Court, respectively).<sup>493</sup>

To grant an injunction the court must be satisfied of two conditions. The first is that the respondent has more likely than not engaged in, encouraged or assisted, gang-related violence.<sup>494</sup> The second is that an injunction is necessary to prevent the respondent from engaging in further gang-related violence or that it would protect them from such violence.<sup>495</sup>

‘Gang-related’ means the activities of a group of at least three people who can be identified in some way as a group associated with a particular area.<sup>496</sup> Unlike control orders, where past criminal conduct must be proven beyond a reasonable doubt, for injunctions the Court of Appeal has confirmed that the past gang-related violence need only be proved on the balance of probabilities.<sup>497</sup>

In fashioning the injunction, the court can prohibit or require ‘anything’.<sup>498</sup> This can include requirements that the respondent not associate with certain people, go to certain places or wear ‘particular descriptions of articles of clothing’.<sup>499</sup>

It can even include regular reporting requirements and house arrest for up to eight hours each day.<sup>500</sup> Equally, it may include ‘supportive, positive requirements’ such as to

‘participate in rehabilitative activities’.<sup>501</sup> The injunction can last for up to two years, but after the first year the court must review the injunction and consider whether to vary or discharge it.<sup>502</sup> If a person breaches the injunction, they may be arrested and brought back before the court.<sup>503</sup>

## JUVENILE GANG INJUNCTIONS

In 2010, an amendment allowed gang injunctions to be sought against children between the ages of 14 and 17.<sup>504</sup>

The provisions authorising these injunctions only came into force in early 2011. The Home Office reviewed the operation of these injunctions in January 2014. Between 2011 and 2014, at least 88 injunctions had been granted, only two of which were against children.

The most common conditions prohibited the respondent from going to certain places or associating with certain people. The injunctions were seen to be a ‘valuable tool in tackling gang-related violence, and seemed to work most effectively in areas with strong multi-agency arrangements in place.’<sup>505</sup>

Police forces did report some difficulty in demonstrating association with a gang. Applications generally ‘took a substantial amount of time and effort to complete, with evidence-gathering proving particularly resource-intensive’.

Because of this, some police felt that ‘the outcomes of injunctions were sometimes not commensurate with the resources invested in them’.<sup>506</sup> Once an injunction had been obtained, monitoring for compliance was likewise felt to be ‘difficult and quite resource-intensive’.<sup>507</sup>

These difficulties appear to stem from the requirement to show the existence of a criminal organisation as well as the inutility of targeting relatively low-level criminality. SCPOs suffer neither of these drawbacks.

## 2015 – UK SCPO CHANGES

Any enthusiasm to adopt a SCPO model in Australia is now subject to a caveat, attached to amendments introduced earlier this year.

In October 2013, the UK Government released its *Serious and Organised Crime Strategy*.

As part of its key objective of ‘preventing’ serious crime, the strategy calls for increased use of SCPOs as a form of early intervention.<sup>508</sup>

Minor amendments were made to the SCPO regime in 2015, such as inclusion of computer-related offences in the definition of ‘serious crime’,<sup>509</sup> giving the Crown Court the power to replace a SCPO in the case of breach,<sup>510</sup> and allowing for SCPOs to extend beyond their terms in the case of reoffending or a breach of the conditions.<sup>511</sup>

Noticeably, these amendments are not directed to shifting the use of SCPOs from a post-conviction tool to a purely preventative one. Presumably, that change would be engineered by a change in prosecution policy, re-enlivening fears that SCPOs may become an alternative to the criminal justice system.

The 2015 amendments also broadened the reach of gang-related injunctions with minor amendments. Now drug-dealing is included alongside violence as a basis for granting an injunction.<sup>512</sup> The requirement that the gang be associated with a particular area was also removed, so that now there need only be at least three people who can be identified in some way as a group.<sup>513</sup>

As part of the objective of ‘pursuing’ serious crime, the UK government identified various ‘legislative gaps’ in need of filling.<sup>514</sup> One of these was the absence of a crime specifically prohibiting participation in organised crime. The Strategy proposed introducing a new offence based on ‘legislation that is already being used elsewhere in the world’.<sup>515</sup> In this connection, the Strategy refers to efforts by nations to implement Article 5 of the *United Nations Convention against Transnational Organized Crime* which requires the

criminalisation of participation in a criminal group.

Yet, as the UN Office on Drugs and Crime notes, in implementing Article 5, '[c]ommon law countries have [typically] used the offence of conspiracy, while civil law jurisdictions have [typically] used offences that proscribe an involvement in criminal organizations'.<sup>516</sup>

The UK has for a long time criminalised conspiring with others to commit offences, including offences outside of the UK.<sup>517</sup>

Nevertheless in 2015 the UK enacted an offence of participating in the activities of an organised crime group. Now, a person commits an offence if they take part in the activities of an organised crime group, reasonably suspecting that those activities constitute an offence punishable by seven years or more in prison.<sup>518</sup>

An organised crime group is defined to mean a group of at least three people who act, or agree to act, together for the purpose of committing offences punishable by at least seven years in prison.<sup>519</sup> The participation offence carries a penalty of imprisonment for up to five years.<sup>520</sup>

The new offence came into force in May 2015.<sup>521</sup> It remains to be seen whether 'participating' will capture activity that would not have been covered by the existing notions of conspiring, encouraging or assisting.

According to the Crown Prosecution Service, the participation offence is intended to be targeted at the bosses of criminal organisations who generally insulate themselves from criminal activity on the ground, as well as those on the periphery of criminal organisations who might turn a blind eye to the activities of the organisation.<sup>522</sup>

It remains to be seen whether the view originally taken by the UK in the early 2000s will be vindicated, or whether the participation offence will have a noticeable impact on organised crime.

## OVERVIEW: WHAT IS TO BE LEARNED FROM OTHER STATES, TERRITORIES AND COUNTRIES?

### A DISCERNIBLE PATTERN

There are some compelling, recurring features associated with the advent of anti-OMCG laws (and anti-organised crime laws) both in Australia and overseas.

First comes incidents, or a spate, of public violence involving bikies. This is quickly followed by political statements condemning that conduct and promising a swift and strong legislative response. Then, governments introduce 'tough' laws intended, variously, to curb these criminal activities and, at the highest, to drive OMCGs out of the jurisdiction.

The 2013 suite, it must be remarked, well and truly fit this mould.

### HAVE OTHER NATIONAL OR INTERNATIONAL APPROACHES WORKED?

The analysis undertaken in this Chapter suggests only limited and sporadic success for the range of stratagems tried elsewhere in Australia, or overseas.

It is also persuasive that none of those stratagems have proved particularly useful in the fight against OMCGs or criminal organisations in other Australian jurisdictions, with the possible exception of a variant of public safety orders in South Australia. Fortification removal orders are seldom sought or issued. Of the limited number of control orders made against organised criminals, only one has not been overturned following legal challenge.

This analysis also shows, however, that the post-conviction control order model holds promise. The UK's version of control orders — SCPOs — has found frequent, though targeted, use.

Otherwise, consorting offences in other Australian jurisdictions have tended to cast a wide net, mostly capturing associations between low-level criminals, rather than serious organised criminals. Their wide application is also a result of prohibiting association with *any* convicted person, regardless of their links to organised crime or the specific risk they present in drawing others into organised crime. The lesson to be learned is that their use must be carefully structured and tempered to ensure they are not used inappropriately.

Where ‘participation’ offences have been utilised, they tend to be charged in conjunction with a substantive criminal offence. Used in this way, they amount to no more than a circumstance of aggravation.

Accordingly, charges for participating in a criminal organisation have generally led to the same kinds of sentences that are currently available, not measures aimed at reducing the factors that lead to organised crime.

#### HAS THE 2013 SUITE DONE BETTER?

Views differ whether the 2013 suite has worked. It was not, as the analysis in this Chapter shows, novel but it had some features which set it apart from earlier forms of similar legislation.

Its noticeable distinguishing points were a process whereby organisations could be speedily declared to be criminal by a government minister; it’s very high mandatory sentences; and, the wide reach of its effects – eg, inhibiting OMCG members from a range of vocations, and attacking things like wearing their colours, their right to drive their motorcycles, go to licensed venues, or meet together at all.

Putting aside any of the large questions about the legitimacy (in various senses, including necessity) of the 2013 suite, has it worked?

Certainly, the only evidence approaching scientific precision – available statistics – shows that OMCG crime was always a very

small part of criminal activity in Queensland (although those connected with law enforcement contend the level of bkie crime was always higher than the figures reveal) so the scope for reducing it started from a low base.

The period since October 2013 is probably too short for a meaningful analysis, via statistics, of its effects. It is a common perception that bikies have become less ‘visible’ in Queensland in that time, although the figures around OMCG crime suggest they may, simply, have adapted to the new stringent milieu which flowed from the 2013 suite.

#### HOW THE PROPOSED RENEWED ORGANISED CRIME FRAMEWORK DRAWS UPON LESSONS LEARNED ELSEWHERE

The proposed renewed Organised Crime Framework developed by the Taskforce contains what has been gleaned from this analysis as the best and the brightest of the many legislative attempts it considered.

The Framework abandons the ‘participant in a criminal organisation’ approach – ie, one which focuses *primarily* upon organisations, and not individual offenders – which, despite many serious attempts and a great deal of legislative verbiage, cannot be described as successful anywhere.

Where it has not proved disproportionately expensive and time-consuming, it has inevitably involved some infringement upon rule of law principles and approached (or surpassed) the margins of constitutional validity.

Queensland’s 2013 suite, with its overtly unchecked executive power to criminalise groups and their members, and impose grossly disproportionate sentences, might be said to be the high-water mark of this approach.

The proposed Framework reverts to tried and proven methods of convicting criminals, by focusing primarily on their crimes and only

adjunctively, as a ‘circumstance of aggravation’, dealing with the fact they committed those crimes with others in an organised or entrepreneurial way.

That said, it addresses that circumstance of aggravation severely in terms of penalty, with a view both to reflecting society’s concerns about and condemnation of organised crime while also persisting with what law enforcement sees as an advantage in laws like VLAD – using the prospect of severe penalties as a way to ‘crack’ organised crime groups and secure the cooperation of members to that end.

Finally, it adopts what this analysis has shown to be a promising post-sentence method of reducing the risk that ‘organised’ criminals will maintain their efforts – control orders.

It also, of course, contains other stratagems which have been proven in this analysis (or, which have been identified in the COA Review) as adjuncts to its overarching, targeted approach – public safety, fortification, and anti-recruitment provisions.

## ENDNOTES

- <sup>1</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38
- <sup>2</sup> *South Australia v Totani* (2010) 242 CLR 1
- <sup>3</sup> *Wainohu v New South Wales* (2011) 243 CLR 181
- <sup>4</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 August 2006, 1142, 1145 (Tony Stewart).
- <sup>5</sup> Andreas Schloenhardt, 'Mafias and Motorbikes: New Organised Crime Offences in Australia' (2008) 19(3) *Current Issues in Criminal Justice* 259, 262.
- <sup>6</sup> *Crimes Act 1900* (NSW) s 93IK(1) (now s 93T(1)).
- <sup>7</sup> *Ibid* s 93IK(2), (3) (now s 93T(2), (3)).
- <sup>8</sup> *Ibid* s 93IK(4) (now s 93T(4)).
- <sup>9</sup> *Ibid* s 351A, introduced by *Crimes Legislation Amendment (Gangs) Act 2006* (NSW) sch 1[17].
- <sup>10</sup> Introduced by *Crimes Legislation Amendment (Gangs) Act 2006* (NSW) sch 2[5].
- <sup>11</sup> *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 210B(1).
- <sup>12</sup> *Ibid* s 210B(2)(b).
- <sup>13</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 2 April 2009 14440 (Premier Nathan Rees).
- <sup>14</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 5(3).
- <sup>15</sup> *Ibid* s 6(1).
- <sup>16</sup> *Ibid* ss 8(5), 28(3), taken from the provisions of the *Liquor Licensing Act 1997* (SA) upheld in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.
- <sup>17</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 25.
- <sup>18</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) ss 14(1), 19(2)(a).
- <sup>19</sup> Lorana Bartels, 'The status of laws on outlaw motorcycle gangs in Australia' (Research in Practice Report No 2, Australian Institute of Criminology, 2010, 2<sup>nd</sup> ed) 4-5.
- <sup>20</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s 26.
- <sup>21</sup> *Ibid* s 27.
- <sup>22</sup> *Ibid* s 13(2).
- <sup>23</sup> (2011) 243 CLR 181.
- <sup>24</sup> *Ibid* 219-220 [68]-[70] (French CJ and Kiefel J), 228 [104] (Gummow, Hayne, Crennan and Bell JJ).
- <sup>25</sup> *Ibid* 220 [71] (French CJ and Kiefel J), 231 [115]-[116] (Gummow, Hayne, Crennan and Bell JJ).
- <sup>26</sup> *Criminal Assets Recovery Act 1900* (NSW) s 28A(1), introduced by *Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010* (NSW) sch 1[14].
- <sup>27</sup> *Criminal Assets Recovery Act 1900* (NSW) s 28A(2).
- <sup>28</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 February 2012, 8130 (Greg Smith, Attorney-General).
- <sup>29</sup> Introduced by *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW) sch 1[9].
- <sup>30</sup> New South Wales, *Parliamentary Debates*, above n 28, 8131 (Greg Smith, Attorney-General).
- <sup>31</sup> (2014) 88 ALJR 860.
- <sup>32</sup> *Ibid* 877 [40] (French CJ), 882 [71] (Hayne J), 888 [108] (Crennan, Kiefel and Bell JJ), 895 [159] (Gageler J).
- <sup>33</sup> *Ibid* 883-885 [76]-[93] (Hayne J), 888-890 [112]-[125], 891 [133] (Crennan, Kiefel and Bell JJ).
- <sup>34</sup> New South Wales, *Parliamentary Debates*, above n 28.
- <sup>35</sup> *Crimes Act 1900* (NSW) s 93T(1A), introduced by the *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW) sch 1[4].
- <sup>36</sup> New South Wales, *Parliamentary Debates*, above n 28.
- <sup>37</sup> *Crimes Act 1900* (NSW) s 93T(4A), introduced by the *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW) sch 1[5].
- <sup>38</sup> *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 39A (as enacted).
- <sup>39</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 February 2012, 8279 (Greg Smith, Attorney-General).

- current version regarding appeal to the District Court, see *Firearms Act 1977* (SA) s 26C(5)(a) (current version).
- <sup>40</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 March 2013, 19116 (Greg Smith, Attorney-General).
- <sup>41</sup> *Criminal Organisation Act 2009* (NSW) s 10(1)(b).
- <sup>42</sup> *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 7(1)(b) (current version).
- <sup>43</sup> COA Review, p 145
- <sup>44</sup> Gabrielle Appleby and John Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of *Kable*' (2012) 40 *Federal Law Review* 1, 3.
- <sup>45</sup> *Summary Offences Act 1953* (SA) s 74BB, introduced by *Statutes Amendment (Anti-Fortification) Act 2003* (SA) s 8.
- <sup>46</sup> Andrew Dowdell, 'Descendants Motorcycle Club likely to consent to changes demanded by SAPOL to Adelaide clubrooms', *The Advertiser* (Online), 30 April 2015, <<http://www.adelaidenow.com.au/news/south-australia/descendants-motorcycle-club-likely-to-consent-to-changes-demanded-by-sapol-to-adelaide-clubrooms/story-fni6uo1m-1227328908810>>. For two other examples see: *Osenkowski v Magistrates Court of South Australia* (2006) 96 SASR 456, 458 [1] (Doyle CJ); Nigel Hunt, 'Police lodge court order to tear down fortification protecting Mongols bikie gang's Thebarton clubrooms', *The Advertiser* (Online), 30 October 2013 <<http://www.adelaidenow.com.au/news/south-australia/police-lodge-court-order-to-tear-down-fortification-protecting-mongols-bikie-gangs-thebarton-clubrooms/story-fni6uo1m-1226749966620>>.
- <sup>47</sup> Ministerial Council on the Administration of Justice, Australasian Police Ministers' Council, *Special Meeting on Firearms (Handguns): Consolidated Resolutions* (November 2002, Sydney) 4 [13].
- <sup>48</sup> *Firearms Act 1996* (NSW) ss 11(5A), 29(3A), introduced by *Firearms Amendment (Public Safety) Act 2002* (NSW) sch 1 [6], [9]. For the claim that these laws served as the national model, see: New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2002, 6418 (Michael Costa, Minister for Police).
- <sup>49</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 June 2002, 3891 (Reba Meagher).
- <sup>50</sup> South Australia, *Parliamentary Debates*, House of Assembly, 23 September 2003, 241 (KO Foley, Deputy Premier).
- <sup>51</sup> *Firearms Act 1977* (SA) ss 12(7a), 20(3a) introduced by *Firearms (COAG Agreement) Amendment Act 2003* (SA) ss 8(1), 13.
- <sup>52</sup> *Firearms Act 1977* (SA) s 21E(2), introduced by *Firearms (COAG Agreement) Amendment Act 2003* (SA) s 15. For
- <sup>53</sup> *Statutes Amendment (Liquor, Gambling and Security Industries) Act 2005* (SA). See also South Australia, *Parliamentary Debates*, House of Assembly, 9 December 2004, 1295 (MJ Atkinson, Attorney-General): 'These confidentiality of criminal intelligence provisions are modelled on provisions enacted in the Firearms Act by the *Firearms (COAG Agreement) Amendment Act 2003*.'
- <sup>54</sup> South Australia, *Parliamentary Debates*, above n 96, 1294 (MJ Atkinson, Attorney-General).
- <sup>55</sup> (2009) 237 CLR 501.
- <sup>56</sup> Introduced by *Statutes Amendment (Liquor, Gambling and Security Industries) Act 2005* (SA) s 27.
- <sup>57</sup> *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 531-532 [94]-[99] (French CJ), 542-543 [143]-[149] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 576-580 [257] (Kirby J).
- <sup>58</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 99 [154] (Hayne, Crennan, Kiefel and Bell JJ).
- <sup>59</sup> Gabrielle Appleby, 'Protecting procedural fairness and criminal intelligence: Is there a balance to be struck?' in Greg Martin, Rebecca Scott Bray and Miiko Kumar (eds), *Secrecy, Law and Society* (Taylor and Francis, 2015) 75, 77.
- <sup>60</sup> See for example, *Casino Act 1997* (SA) ss 45A(3), 66A, 69; *Summary Offences Act 1953* (SA) ss 21F(11), (13), 21H(5), 21J(3), (5), 66J, 74BGA; *Hydroponics Industry Control Act 2009* (SA) s 7; *Serious and Organised Crime (Control) Act 2008* (SA) ss 5A, 9(7); *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) s 6; *Child Sex Offenders Registration Act 2006* (SA) s 5A.
- <sup>61</sup> Mark Russell, 'Nightclub bikie shooting sparks fears of gang war', *The Age* (online), 3 June 2007 <<http://www.theage.com.au/articles/2007/06/02/1180205580355.html>>.
- <sup>62</sup> South Australia, *Parliamentary Debates*, House of Assembly, 21 November 2007, 1805 (MJ Atkinson, Attorney-General).
- <sup>63</sup> *Ibid* 1806 (MJ Atkinson, Attorney-General).
- <sup>64</sup> Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38 *Melbourne University Law Review* 362, 376.
- <sup>65</sup> *Criminal Code* (Cth) div 104, introduced by *Anti-Terrorism Act (No 2) 2005* (Cth) sch 4, pt 1, upheld in *Thomas v Mowbray* (2007) 233 CLR 307, 327-328 [15] (Gleeson CJ),

- 347-348 [78]-[79] (Gummow and Crennan JJ), 506-507 [591]-[596] (Callinan J).
- <sup>66</sup> ABC Radio National, 'South Australia's plans to obliterate outlaw bikie gangs', *Law Report*, 6 May 2008 (Mike Rann) <<http://www.abc.net.au/radionational/programs/lawreport/south-australias-plans-to-obliterate-outlaw-bikie/3254212>>.
- <sup>67</sup> M Rann, 'SA set for world's toughest anti-bikie laws' (Media Release, 8 May 2008), cited in Bartels, above n 39, 2.
- <sup>68</sup> *Serious and Organised Crime (Control) Act 2008* (SA) s 10(1).
- <sup>69</sup> *Ibid* s 10(3).
- <sup>70</sup> *Ibid* s 10(3)(f).
- <sup>71</sup> *Ibid* s 13.
- <sup>72</sup> *Ibid* s 41(2).
- <sup>73</sup> *Ibid* s 14(5)(a)(i), (b)(i).
- <sup>74</sup> *Ibid* s 22(1).
- <sup>75</sup> *Ibid* s 35(1)(b).
- <sup>76</sup> *Ibid* s 21(2).
- <sup>77</sup> MJ Atkinson, *Serious and Organised Crime (Control) Act 2008: Application for declaration regarding the Finks MC: Reasons of the Honourable MJ Atkinson MP, Attorney-General*, tabled in the South Australian House of Assembly 14 May 2008.
- <sup>78</sup> Alan Moss, *A review of the execution of the powers under the Serious and Organised Crime (Control) Act 2008 exercised during the period 1 July, 2008 to 30 June, 2009*, tabled in the South Australian House of Assembly 13 October 2009, 28 [68].
- <sup>79</sup> *Totani v South Australia* (2009) 105 SASR 244, 280-281 [155]-[157] (Bleby J), 305 [277] (Kelly J).
- <sup>80</sup> *South Australia v Totani* (2010) 242 CLR 1, 52 [82] (French CJ), 67 [149] (Gummow J), 92-93 [236] (Hayne J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J).
- <sup>81</sup> South Australian Police, Clarification of Evidence to Crime and Public Integrity Policy Committee, *Inquiry into Serious and Organised Crime Legislation*, 10.
- <sup>82</sup> *Ibid* 11.
- <sup>83</sup> *Serious and Organised Crime (Control) Act 2008* (SA) s 23(1).
- <sup>84</sup> *Ibid* s 23(3).
- <sup>85</sup> *Ibid* s 3 (definition of 'Court'), 25(1).
- <sup>86</sup> Moss, above n 78, 11-15 [13].
- <sup>87</sup> Evidence to Crime and Public Integrity Policy Committee, *Inquiry into Serious and Organised Crime*, Parliament of South Australia, Adelaide, 3 July 2015, 21 (Deputy Commissioner Stevens).
- <sup>88</sup> South Australian Police, above n 81, 12.
- <sup>89</sup> *Criminal Assets Confiscation Act 2005* (SA).
- <sup>90</sup> *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) s 9(2).
- <sup>91</sup> As explained in the second reading speech: South Australia, *Parliamentary Debates*, South Australia, House of Assembly, 16 July 2009, 3614 (MJ Atkinson, Attorney-General).
- <sup>92</sup> *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA) s 6(2).
- <sup>93</sup> Evidence to Crime and Public Integrity Policy Committee, *Inquiry into Serious and Organised Crime*, Parliament of South Australia, Adelaide, 25 September 2015, 69 (Alan Moss).
- <sup>94</sup> South Australia, *Parliamentary Debates*, House of Assembly, 15 February 2012, 80 (JR Rau, Deputy Premier, Attorney-General).
- <sup>95</sup> *Ibid* 79 (JR Rau, Deputy Premier, Attorney-General).
- <sup>96</sup> Introduced by *Statutes Amendment (Serious and Organised Crime) Act 2012* (SA) s 30.
- <sup>97</sup> *Criminal Law Consolidation Act 1935* (SA) s 83E(7).
- <sup>98</sup> *Ibid* s 83D(1) (definitions of 'criminal organisation', 'criminal group' and 'declared organisation').
- <sup>99</sup> *Ibid* s 83E(1)-(4).
- <sup>100</sup> *Ibid* s 83E(5).
- <sup>101</sup> South Australian Police, above n 81, 62.
- <sup>102</sup> The only reference in available cases to a charge under s 83E is: *R v Cekic [No 2]* [2014] SADC 143 (21 August 2014) [4] (Stretton DCJ).
- <sup>103</sup> Adam Kimber SC, Submission to Crime and Public Integrity Policy Committee, *Inquiry into Serious and Organised Crime Legislation*, 1 April 2015, 2. See also: Evidence to Crime and Public Integrity Policy Committee, *Inquiry into Serious and Organised Crime*, Parliament of South Australia, Adelaide, 11 September 2015, 49 (Mr Kimber).

- <sup>104</sup> *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(ga), introduced by *Statutes Amendment (Serious and Organised Crime) Act 2012* (SA) s 29.
- <sup>105</sup> *Serious and Organised Crime (Control) Act 2008* (SA) sch 1 cl 6, repealing *Summary Offences Act 1953* (SA) s 13.
- <sup>106</sup> This reading of *Totani* was set out in a proposal paper and repeated in the second reading speech: Government of South Australia, Attorney-General's Department, *Combatting Serious and Organised Crime* (August 2011) 6; South Australia, *Parliamentary Debates*, above n 141. The passage referred to is: *South Australia v Totani* (2010) 242 CLR 1, 31 [33] (French CJ).
- <sup>107</sup> Introduced by *Statutes Amendment (Serious and Organised Crime) Act 2012* (SA) s 46.
- <sup>108</sup> Introduced by *ibid* s 48.
- <sup>109</sup> *Summary Offences Act 1953* (SA) s 66A(1).
- <sup>110</sup> *Ibid* s 66(1) (definition of 'prescribed offence').
- <sup>111</sup> *Ibid* s 66A(1)(a)(i) (as enacted), amended by *Statutes Amendment (Serious and Organised Crime) Act 2015* (SA) s 11(1).
- <sup>112</sup> *Summary Offences Act 1953* (SA) s 66(2)(a).
- <sup>113</sup> *Ibid* s 66A(2)(a), (b)(i).
- <sup>114</sup> South Australia, *Parliamentary Debates*, above n 94, 81 (JR Rau, Deputy Premier, Attorney-General). Cf notices issued to controlled persons: *Summary Offences Act 1953* (SA) s 66A(3) (as enacted), repealed by *Statutes Amendment (Serious and Organised Crime) Act 2015* (SA) s 11(2).
- <sup>115</sup> *Summary Offences Act 1953* (SA) ss 66D, 66E.
- <sup>116</sup> *Ibid* s 66J.
- <sup>117</sup> South Australian Police, above n 81, 13.
- <sup>118</sup> South Australia, *Parliamentary Debates*, above n 94, 82 (JR Rau, Deputy Premier, Attorney-General).
- <sup>119</sup> Introduced by *Statutes Amendment (Serious and Organised Crime) Act 2012* (SA) s 49.
- <sup>120</sup> South Australia, *Parliamentary Debates*, above n 94, 82 (JR Rau, Deputy Premier, Attorney-General).
- <sup>121</sup> *Summary Procedure Act 1921* (SA) s 78(2).
- <sup>122</sup> *Ibid* s 78(3)(a).
- <sup>123</sup> *Ibid* s 83(1).
- <sup>124</sup> South Australia, *Parliamentary Debates*, above n 94, 82 (JR Rau, Deputy Premier, Attorney-General).
- <sup>125</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 19AA, introduced by *Statutes Amendment (Serious and Organised Crime) Act 2012* (SA) s 26.
- <sup>126</sup> South Australian Police, above n 128, 16.
- <sup>127</sup> South Australia, *Parliamentary Debates*, above n 94, 77 (JR Rau, Deputy Premier, Attorney-General); Government of South Australia, Attorney-General's Department, *Combatting Serious and Organised Crime* (August 2011) 8.
- <sup>128</sup> *Serious and Organised Crime (Control) Act 2008* (SA) s 11(1), introduced by *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA) s 6.
- <sup>129</sup> South Australia, *Parliamentary Debates*, above n 94, 98 (JR Rau, Deputy Premier, Attorney-General).
- <sup>130</sup> *Serious and Organised Crime (Control) Act 2008* (SA) s 16, introduced by *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA) s 6.
- <sup>131</sup> *Serious and Organised Crime (Control) Act 2008* (SA) s 3 (definition of 'Court'), introduced by *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA) ss 4(3).
- <sup>132</sup> *Serious and Organised Crime (Control) Act 2008* (SA) s 22, introduced by *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA) s 6.
- <sup>133</sup> *Statutes Amendment (Criminal Intelligence) Act 2012* (SA).
- <sup>134</sup> See, for example, *Casino Act 1997* (SA) s 66A; *Firearms Act 1977* (SA) s 26C(5); *Liquor Licensing Act 1997* (SA) s 28A(5a); *Summary Offences Act 1953* (SA) s 74BGA.
- <sup>135</sup> *Serious and Organised Crime (Control) (Declared Organisations) Amendment Act 2013* (SA) esp s 9, amending s 11 of the *Serious and Organised Crime (Control) Act 2008* (SA).
- <sup>136</sup> South Australia, *Parliamentary Debates*, House of Assembly, 4 July 2013, 6421 (JR Rau, Deputy Premier Attorney-General).
- <sup>137</sup> Alan Moss, Submission to Crime and Public Integrity Policy Committee, *Inquiry into Serious and Organised Crime Legislation*, 16 February 2015, 1-2.
- <sup>138</sup> South Australian Police, above n 81, 18.
- <sup>139</sup> *Statutes Amendment (Serious and Organised Crime) Act 2015* (SA) ss 8-9.

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- <sup>140</sup> South Australia, *Parliamentary Debates*, House of Assembly, 3 June 2015, 1476 (JR Rau, Deputy Premier, Attorney-General).
- <sup>141</sup> *Criminal Law Consolidation Act 1935 (SA)* s 83GC, mirroring *Criminal Code (Qld)* s 60A.
- <sup>142</sup> *Criminal Law Consolidation Act 1935 (SA)* s 83GD, mirroring *Criminal Code (Qld)* s 60B.
- <sup>143</sup> *Criminal Law Consolidation Act 1935 (SA)* s 83GE, mirroring *Criminal Code (Qld)* s 60C.
- <sup>144</sup> *Liquor Licensing Act 1997 (SA)* ss 117B(1) (definition of 'prohibited item'), 117E, mirroring *Liquor Act 1992 (Qld)* ss 173EA, 173EC.
- <sup>145</sup> *Criminal Law Consolidation (Criminal Organisations) Regulations 2015 (SA)*, *Liquor Licensing (Declared Criminal Organisations) Regulations 2015 (SA)*, introduced by *Statutes Amendment (Serious and Organised Crime) Act 2015 (SA)* schs 1-2.
- <sup>146</sup> South Australia, *Parliamentary Debates*, above n 140, 1481 (JR Rau, Deputy Premier, Attorney-General). Regarding the intention to exclude judicial review, see also: Evidence to Crime and Public Integrity Policy Committee, Inquiry into Serious and Organised Crime, Parliament of South Australia, Adelaide, 3 July 2015, 24 (Deputy Commissioner Stevens).
- <sup>147</sup> South Australia, *Parliamentary Debates*, above n 140, 1478 (JR Rau, Deputy Premier, Attorney-General).
- <sup>148</sup> *Summary Offences Act 1953 (SA)* s 13(1), as inserted by *Statutes Amendment (Serious and Organised Crime) Act 2015 (SA)* s 10. Cf *Summary Offences Act 1953 (SA)* s 13(3), as inserted by *Statutes Amendment (Serious and Organised Crime) Act 2012 (SA)* s 46.
- <sup>149</sup> *Summary Offences Act 1953 (SA)* s 13(2), as inserted by *Statutes Amendment (Serious and Organised Crime) Act 2015 (SA)* s 10.
- <sup>150</sup> *Summary Offences Act 1953 (SA)* s 13(3), as inserted by *Statutes Amendment (Serious and Organised Crime) Act 2015 (SA)* s 10, modelled on *Crimes Act 1900 (NSW)* s 93X.
- <sup>151</sup> Sheradyn Holderhead, 'South Australian bikies abandon their clubrooms as tough new anti-association laws take effect', *The Advertiser* (Online), 6 August 2015 <<http://www.adelaidenow.com.au/news/south-australia/south-australian-bikies-abandon-their-clubrooms-as-tough-new-anti-association-laws-take-effect/story-fni6uo1m-1227472748147?sv=2f5c4bf5914439fff786328a3622912b>>.
- <sup>152</sup> Nigel Hunt, 'Tougher laws: Clubrooms abandoned, bikies now meeting covertly to thwart police', *Sunday Mail (SA)* (Online), 1 November 2015 <<http://www.theaustralian.com.au/news/tougher-laws-clubrooms-abandoned-bikies-now-meeting-covertly-to-thwart-police/story-e6frg6n6-1227589579438>>.
- <sup>153</sup> South Australia, *Parliamentary Debates*, House of Assembly, 11 February 2015, 45, quoting Labor's 2010 serious crime election policy. For the other four attempts, see: South Australia, *Parliamentary Debates*, House of Assembly, 18 May 2011, 3744-3750 (A Koutsantonis, Minister for Correctional Services); South Australia, *Parliamentary Debates*, House of Assembly, 14 February 2012, 56-62 (JA Rau, Deputy Premier, Attorney-General); South Australia, *Parliamentary Debates*, House of Assembly, 16 October 2012, 3101-3104 (JA Rau, Deputy Premier, Attorney-General); South Australia, *Parliamentary Debates*, House of Assembly, 7 May 2014, 81-85 (JA Rau, Deputy Premier, Attorney-General).
- <sup>154</sup> Proposed s 6A(1) of the *Criminal Assets Confiscation Act 2005 (SA)*, proposed by Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Bill 2015 (SA) cl 6 (as at the first reading speech in the House of Assembly on 11 February 2015).
- <sup>155</sup> South Australia, *Parliamentary Debates*, House of Assembly, 11 February 2015, 45 (JR Rau, Deputy Premier, Attorney-General).
- <sup>156</sup> South Australia, *Parliamentary Debates*, House of Assembly, 26 February 2015, 448.
- <sup>157</sup> South Australia, *Parliamentary Debates*, Legislative Council, 10 September 2015, 1471.
- <sup>158</sup> Proposed s 209(1a) of the *Criminal Assets Confiscation Act 2005 (SA)*, proposed by Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Bill 2015 (SA) cl 21(2) (as at the third reading in the Legislative Council on 10 September 2015).
- <sup>159</sup> Proposed s 226(3a) of the *Criminal Assets Confiscation Act 2005 (SA)*, proposed by Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Bill 2015 (SA) cl 24 (as at the third reading in the Legislative Council on 10 September 2015).
- <sup>160</sup> The amended Bill has been returned to the lower house, but without a vote or further debate: South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2015, 2549-2550.
- <sup>161</sup> David Royds, 'The Murder of Don Hancock' (2013) 67(4) *Australian Police Journal* 158, 158.
- <sup>162</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 November 2001, 5038 (Dr Geoff Gallop, Premier).<sup>163</sup> *Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002 (WA)* pts 4, 5.
- <sup>164</sup> *Ibid* pt 7.

<sup>165</sup> *Ibid* ss 7, 9-11.

<sup>166</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 May 2003, 7862 (Jim McGinty, Attorney-General).

<sup>167</sup> *Corruption, Crime and Misconduct Act 2003* (WA) ss 60, 64.

<sup>168</sup> *Ibid* s 68(1).

<sup>169</sup> *Ibid* s 68(2).

<sup>170</sup> *Ibid* ss 69(2)(b), 70(1).

<sup>171</sup> *Ibid* s 72(2).

<sup>172</sup> *Ibid* ss 73(2)(a), 75(1), (3).

<sup>173</sup> *Ibid* s 76(1).

<sup>174</sup> *Ibid* s 76(2).

<sup>175</sup> (2008) 234 CLR 532.

<sup>176</sup> *Ibid* 551-552 [7] (Gleeson CJ), 558 [33], 559 [36], 561 [44] (Gummow, Hayne, Heydon and Kiefel JJ), 593-594 [170]-[174] (Crennan J). Cf 584 [125] (Kirby J). See also the subsequent ruling by Blaxwell J, accepting some claims of confidentiality and rejecting others: *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police [No 2]* [2008] WASC 166 (13 August 2008) [56], sch.

<sup>177</sup> Corruption and Crime Commission of Western Australia, *Annual Report 2003-2004* (2004) 22; Corruption and Crime Commission, *Annual Report: 2010-2011* (2011) 91 [227]; Corruption and Crime Commission, *Annual Report: 2013-2014* (2014) 73 [116].

<sup>178</sup> P Murray, 'Bikie gangs prosper as tough laws gather dust', *West Australian*, 31 March 2009, cited in Bartels, above n 39, 6.

<sup>179</sup> M Edwards, 'Hit bikies' hip pockets in gang crackdown: McGinty', *ABC News*, 1 April 2009, cited in Bartels, above n 39, 6.

<sup>180</sup> Rob Johnson and Christian Porter, 'Criminal's money will target organised crime' (Media Statement, 30 November 2008) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2008/11/Criminals'-money-will-target-organised-crime.aspx>>.

<sup>181</sup> Rob Johnson, 'Media response – bikie laws' (Media Statement, 19 February 2009) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2009/02/Media-response---bikie-laws.aspx>>.

<sup>182</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 23 November 2011, 9679 (Mr C Porter, Attorney-General).

<sup>183</sup> Christian Porter, 'Organised crime busting laws' (Media Statement, 13 November 2011) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2011/11/Organised-crime-busting-laws.aspx>>.

<sup>184</sup> Western Australia, *Parliamentary Debates*, above n 182.

<sup>185</sup> *Ibid*.

<sup>186</sup> Michael Mischin, 'Laws targeting criminal gangs pass Parliament' (Media Statement, 14 November 2012) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2012/11/Laws-targeting-criminal-gangs-pass-Parliament.aspx>>.

<sup>187</sup> *Criminal Organisations Control Act 2012* (WA) s 26(1).

<sup>188</sup> *Ibid* s 28.

<sup>189</sup> *Ibid* s 7(1).

<sup>190</sup> *Ibid* s 13(1).

<sup>191</sup> *Ibid* s 14(1).

<sup>192</sup> *Ibid* ss 16(2), 18, 21(1).

<sup>193</sup> *Ibid* ss 35(1), 52(1).

<sup>194</sup> *Ibid* ss 38(1)(b), 52(2).

<sup>195</sup> *Ibid* s 52(1)(b).

<sup>196</sup> *Ibid* ss 60(1)(g), 62(2).

<sup>197</sup> *Ibid* ss 58(1)(a), 77(2), 78(1), but see s 59(2)(a).

<sup>198</sup> *Ibid* ss 58(1)(b), (2), 79(1), 80.

<sup>199</sup> *Ibid* ss 99, 102(1), 103(2), 106(1).

<sup>200</sup> *Ibid* s 107(2), (3).

<sup>201</sup> *Ibid* ss 110 (2), 111(2).

<sup>202</sup> Western Australia, *Government Gazette*, No 196, 1 November 2013, 4891.

<sup>203</sup> Ombudsman Western Australia, *Report by the Parliamentary Commissioner for administrative investigations under section 158 of the Criminal Organisations Control Act 2012 for the monitoring period ended 1 November 2014* (21 January 2015) 2 [3], tabled in the Legislative Assembly, Parliament of Western Australia on 24 February 2015.

- (second reading speech for the Justice Legislation Amendment (Group Criminal Activities) Bill).
- <sup>204</sup> Introduced by *Criminal Organisations Control Act 2012* (WA) s 173.
- <sup>205</sup> *Criminal Code* (WA) s 221D(1).
- <sup>206</sup> *Sentencing Act 1995* (WA) s 9D, introduced by *Criminal Organisations Control Act 2012* (WA) s 181.
- <sup>207</sup> *Criminal Property Confiscation Act 2000* (WA) s 148(4C), introduced by *Criminal Organisations Control Act 2012* (WA) s 176.
- <sup>208</sup> Parliamentary Joint Committee on the Australian Crime Commission (PJACC), Parliament of Australia, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups* (August 2009) 46 [3.55].
- <sup>209</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 29 June 2000, 8611 (Dan Barron-Sullivan).
- <sup>210</sup> Generally the Supreme Court for real property and the District Court for other property up to the value of the jurisdictional limit: *Criminal Property Confiscation Act 2000* (WA) s 101.
- <sup>211</sup> *Criminal Property Confiscation Act 2000* (WA) s 11(1).
- <sup>212</sup> *Ibid* s 12(1).
- <sup>213</sup> *Ibid* s 14.
- <sup>214</sup> *Misuse of Drugs Act 1981* (WA) s 32A(1); *Criminal Property Confiscation Act 2000* (WA) s 8(1).
- <sup>215</sup> Northern Territory, *Parliamentary Debates*, Legislative Assembly, 16 May 2002 (Dr Toyne, Attorney-General) (second reading speech for the Criminal Property Forfeiture Bill).
- <sup>216</sup> PJACC, above n 208, 50 [3.78].
- <sup>217</sup> *Criminal Property Forfeiture Act* (NT) s 67(1).
- <sup>218</sup> *Ibid* s 71(1).
- <sup>219</sup> *Ibid* s 71(2).
- <sup>220</sup> *Ibid* s 72(1).
- <sup>221</sup> Under *Misuse of Drugs Act* (NT) s 36A.
- <sup>222</sup> Under *Criminal Property Forfeiture Act* (NT) s 44(1).
- <sup>223</sup> *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 430 [56] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
- <sup>224</sup> Northern Territory, *Parliamentary Debates*, Legislative Assembly, 24 August 2006 (Dr Toyne, Attorney-General)
- <sup>225</sup> *Justice Legislation (Group Criminal Activities) Act 2006* (NT) s 22.
- <sup>226</sup> *Summary Offences Act* (NT) s 47B(1).
- <sup>227</sup> *Ibid* s 47B(4).
- <sup>228</sup> Northern Territory, *Parliamentary Debates*, above n 224.
- <sup>229</sup> *Justice Legislation (Group Criminal Activities) Act 2006* (NT) s 20.
- <sup>230</sup> Northern Territory, *Parliamentary Debates*, above n 224.
- <sup>231</sup> *Justice Legislation (Group Criminal Activities) Act 2006* (NT) s 23.
- <sup>232</sup> *Summary Offences Act* (NT) s 55A(4), (10).
- <sup>233</sup> *Ibid* s 55A(1).
- <sup>234</sup> *Justice Legislation (Group Criminal Activities) Act 2006* (NT) s 7.
- <sup>235</sup> *Sentencing Act* (NT) s 97A(2)(a), (b), (3)(b).
- <sup>236</sup> *Ibid* s 97A(2).
- <sup>237</sup> *Ibid* s 97D(1).
- <sup>238</sup> Northern Territory, *Parliamentary Debates*, Legislative Assembly, 24 August 2006 (Ms Lawrie, Attorney-General) (second reading speech for the Serious Crime Control Bill).
- <sup>239</sup> *Sentencing Act* (NT) ss 5(2)(f), 6A, the latter introduced by *Justice Legislation (Group Criminal Activities) Act 2006* (NT) s 6.
- <sup>240</sup> *Sentencing Act* (NT) s 6A(h).
- <sup>241</sup> Northern Territory, *Parliamentary Debates*, Legislative Assembly, 11 June 2009 (Dr Toyne, Attorney-General) (second reading speech for the Justice Legislation Amendment (Group Criminal Activities) Bill).
- <sup>242</sup> *Serious Crime Control Act 2009* (NT) ss 14, 20.
- <sup>243</sup> *Serious Crime Control Act* (NT) s 15, introduced by *Serious Crime Control Amendment Act 2011* (NT) s 5.
- <sup>244</sup> Northern Territory, *Parliamentary Debates*, Legislative Assembly, 19 October 2011 (Ms Lawrie, Attorney-General) (second reading speech for the Serious Crime Control Amendment Bill).
- <sup>245</sup> *Serious Crime Control Act* (NT) s 83.

- <sup>246</sup> Ibid ss 6 (definitions of ‘serious criminal activity’ and ‘serious criminal offence’), 12.
- <sup>247</sup> Ibid ss 23(1)(a)-(c), 24(1).
- <sup>248</sup> Ibid s 23(1)(d).
- <sup>249</sup> Ibid ss 36(1), 37(2).
- <sup>250</sup> Ibid ss 6 (definition of ‘prescribed activity’), 27(3), 38(2), 41
- <sup>251</sup> Ibid ss 42(1), 43(2).
- <sup>252</sup> Ibid ss 58(1), 59(1).
- <sup>253</sup> Ibid s 73(2).
- <sup>254</sup> Northern Territory, *Government Gazette*, No S69, 1 December 2011.
- <sup>255</sup> Northern Territory Government, Department of the Attorney-General and Justice, *Final Report: Review of the Summary Offences Act* (August 2013) 65.
- <sup>256</sup> Northern Territory Police, *Northern Territory Police Response to the Questions on Notice: Ice Select Committee* (19 June 2015) Northern Territory Government <[http://www.nt.gov.au/lant/parliamentary-business/committees/ice/Answers\\_to\\_Questions\\_Taken\\_on\\_Notice\\_NT\\_Police\\_Service\\_Public\\_Hearing\\_19\\_June\\_2015.pdf#search=%22consorting%22](http://www.nt.gov.au/lant/parliamentary-business/committees/ice/Answers_to_Questions_Taken_on_Notice_NT_Police_Service_Public_Hearing_19_June_2015.pdf#search=%22consorting%22)>.
- <sup>257</sup> Appleby, above n 59, 75, 79. See also R Hulls, ‘Victoria’s tough laws best for dealing with bikie gangs’ (Media Release, 15 April 2009), cited in Bartels, above n 39, 7.
- <sup>258</sup> See, in particular, the additional investigative powers introduced in 2004: the *Crimes (Controlled Operations) Act 2004* (Vic); *Surveillance Devices (Amendment) Act 2004* (Vic); *Crimes (Assumed Identities) Act 2004* (Vic); *Evidence (Witness Identity Protection) Act 2004* (Vic); *Major Crimes (Investigative Powers) Act 2004* (Vic).
- <sup>259</sup> Victorian Liberal Nationals Coalition, ‘Vic Coalition to Outlaw Criminal Bike Gangs’ (Media Release, 18 March 2010), quoted in Merner et al, above n 29, 13.
- <sup>260</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 15 November 2012, 5070 (Robert Clark, Attorney-General).
- <sup>261</sup> Ibid 5071 (Robert Clark, Attorney-General).
- <sup>262</sup> *Criminal Organisations Control Act 2012* (Vic) s 19(1)(b), (3) (as enacted).
- <sup>263</sup> Ibid ss 19(2)(a), 21(1) (as enacted).
- <sup>264</sup> Ibid ss 19(3)(a), (b), 21(1) (as enacted).
- <sup>265</sup> Ibid ss 19(2)(b), (3)(c), 21(2) (as enacted).
- <sup>266</sup> Ibid s 43(1) (as enacted).
- <sup>267</sup> Introduced by the *Major Crime Legislation (Amendment) Act 2009* (Vic).
- <sup>268</sup> *Criminal Organisations Control Act 2012* (Vic) s 71(1).
- <sup>269</sup> Ibid s 71(3).
- <sup>270</sup> Ibid s 71(4)(b).
- <sup>271</sup> Ibid s 71(5)(a).
- <sup>272</sup> Ibid s 79(3).
- <sup>273</sup> Ibid ss 73(1), 81(1).
- <sup>274</sup> Victoria, *Parliamentary Debates*, above n 307, 5069 (Robert Clark, Attorney-General).
- <sup>275</sup> Appleby, above n 59, 80.
- <sup>276</sup> *A v United Kingdom* (2009) 49 EHRR 29, 720 [218], 720-721 [220]; *Home Secretary v AF [No 3]* [2010] 2 AC 269, 356 [65] (Lord Phillips of Worth Matravers, Lords Scott of Foscote, Rodger of Earlsferry, Walker of Gestingthorpe and Brown of Eaton-Under-Heywood, and Baroness Hale of Richmond agreeing).
- <sup>277</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 18 April 2013, 1316 (Mr Clark, Attorney-General).
- <sup>278</sup> *Fortification Removal Act 2013* (Vic) s 6.
- <sup>279</sup> Ibid s 11(2).
- <sup>280</sup> Ibid ss 16(1), 18(1), 22(1).
- <sup>281</sup> Ibid s 25.
- <sup>282</sup> Ibid ss 36, 37.
- <sup>283</sup> Ibid s 26.
- <sup>284</sup> Sarah Farnsworth, ‘Police evidence to be reworked in anti-fortification test case’, *ABC News* (online), 10 December 2013 <<http://www.abc.net.au/news/2013-12-10/police-evidence-to-be-reworked-in-anti-fortification-test-case/5147172>>.
- <sup>285</sup> Anthony Dowsley, ‘Bros outlaw motorcycle gang ordered to tear down Yarraville clubhouse fortifications’, *Herald Sun* (online), 29 May 2014 <<http://www.heraldsun.com.au/news/law-order/bros-outlaw-motorcycle-gang-ordered-to-tear-down-yarraville-clubhouse-fortifications/story-fni0fee2-1226935938425>>.

- <sup>286</sup> Jane Lee, 'Police neglect anti-bikie law due to high complexity', *The Canberra Times* (online), 12 October 2013 <<http://www.canberratimes.com.au/victoria/police-neglect-antibikie-law-due-to-high-complexity-20131011-2ve1m.html>>.
- <sup>287</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2385 (Robert Clark, Attorney-General).
- <sup>288</sup> *Criminal Organisations Control and Other Acts Amendment Act 2014* (Vic) s 60(a) amended the definition of 'applicable offence' in ss 3 and 4 of the *Criminal Organisations Control Act 2012* (Vic). 'Applicable offence' is an element of 'serious criminal activity' in s 3, which in turn is an element of a declaration under s 19.
- <sup>289</sup> *Criminal Organisations Control Act 2012* (Vic) s 19(3) (current version).
- <sup>290</sup> *Ibid* s 19(2), (2A) (current version).
- <sup>291</sup> *Ibid* s 43(1)(b), (2)(b) (as enacted).
- <sup>292</sup> *Ibid* s 43(1)(b), (2)(b)(iii) (2A)(b) (current version).
- <sup>293</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2385 (Robert Clark, Attorney-General).
- <sup>294</sup> *Ibid* 2384 (Robert Clark, Attorney-General).
- <sup>295</sup> *Ibid*.
- <sup>296</sup> *Sentencing Act 1991* (Vic) s 89DI.
- <sup>297</sup> *Confiscation Act 1997* (Vic) s 3(1) (definition of 'serious drug offence'); *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ss 71, 72, 79(1), 80(1), (3)(a), (b).
- <sup>298</sup> Victoria, *Parliamentary Debates*, above n 293, 2384 (Robert Clark, Attorney-General).
- <sup>299</sup> *Confiscation Act 1997* (Vic) s 24(2).
- <sup>300</sup> *Ibid* s 36GA.
- <sup>301</sup> Introduced by *Justice Legislation Amendment (Confiscation and Other Matters) Act 2014* (Vic) s 16.
- <sup>302</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 20 August 2014, 2831 (Robert Clark, Attorney-General).
- <sup>303</sup> *Confiscation Act 1997* (Vic) s 40F(1), (2).
- <sup>304</sup> Victoria, *Parliamentary Debates*, above n 302, 2832 (Robert Clark, Attorney-General).
- <sup>305</sup> *Confiscation Act 1997* (Vic) s 40I(1), (3).
- <sup>306</sup> *Ibid* s 40I(1)(a)(iv).

- <sup>307</sup> Victoria, *Parliamentary Debates*, above n 302, 2832 (Robert Clark, Attorney-General).
- <sup>308</sup> *Confiscation Act 1997* (Vic) s 40R(1).
- <sup>309</sup> *Ibid* s 40S(1), (2).
- <sup>310</sup> *Ibid* s 40X.
- <sup>311</sup> *Ibid* s 40ZA(1).
- <sup>312</sup> *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015* (Vic).
- <sup>313</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 2 September 2015, 3013 (Martin Pakula, Attorney-General).
- <sup>314</sup> *Ibid* 3014 (Martin Pakula, Attorney-General).
- <sup>315</sup> *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015* (Vic) s 5. Cf *Summary Offences Act 1966* (Vic) s 49F, repealed by *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015* (Vic) s 9.
- <sup>316</sup> *Criminal Organisations Control Act 2012* (Vic) s 3 (definition of 'applicable offence').
- <sup>317</sup> New s 124D(1).
- <sup>318</sup> New s 124D(1).
- <sup>319</sup> New s 124A(3), (4)(f).
- <sup>320</sup> New s 124M(1).
- <sup>321</sup> New s 124B.
- <sup>322</sup> Explanatory memorandum, *Criminal Organisations Control Amendment (Unlawful Associations) Bill 2015* (NSW) 4.
- <sup>323</sup> PJCACC, above n 208, 48 [3.68].
- <sup>324</sup> L Giddings, 'Government moves on organised crime' (Media Release, 16 April 2009), cited in Bartels, above n 39, 7.
- <sup>325</sup> *Police Powers (Assumed Identities) Act 2006* (Tas); *Police Powers (Controlled Operations) Act 2006* (Tas); *Police Powers (Surveillance Devices) Act 2006* (Tas); *Witness (Identity Protection) Bill 2006* (Tas).
- <sup>326</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 1 November 2006, Part 2, 32 (Mr Kons, Minister for Justice).
- <sup>327</sup> *Ibid* 29 (Mr Kons, Minister for Justice).

- <sup>328</sup> Introduced by *Police Offences Amendment Act 2007* (Tas) s 7.
- <sup>329</sup> *Police Offences Act 1935* (Tas) s 20B(1).
- <sup>330</sup> *Ibid* s 20B(2).
- <sup>331</sup> *Ibid* ss 20C(2)(b), 20D(1).
- <sup>332</sup> *Ibid* s 20F(1), (2).
- <sup>333</sup> *Ibid* ss 20G(1)(a), 20I(1), (3).
- <sup>334</sup> *Ibid* s 20J(1).
- <sup>335</sup> *Ibid* s 20J(2).
- <sup>336</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 21 August 2013, 28-29 (Mr Wightman, Minister for Justice).
- <sup>337</sup> *Ibid* 84 (Mr Wightman, Minister for Justice).
- <sup>338</sup> Introduced by *Crime (Confiscation of Profits) Amendment (Unexplained Wealth) Act 2013* (Tas) s 12.
- <sup>339</sup> *Crime (Confiscation of Profits) Act 1993* (Tas) s 141(1).
- <sup>340</sup> *Ibid* s 142(2).
- <sup>341</sup> *Ibid* s 85.
- <sup>342</sup> *Ibid* s 144(1).
- <sup>343</sup> Tasmanian Liberals, *Serious and Organised Crime Squad* <<https://www.tas.liberal.org.au/policy#SAOCS>>.
- <sup>344</sup> Tasmanian Government, Department of Police and Emergency Management, *Annual Report 2014-15* (2015) 16.
- <sup>345</sup> Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 7 April 2005, 1507 (Mr Stanhope, Chief Minister, Attorney-General).
- <sup>346</sup> *Crimes (Sentencing) Act 2005* (ACT) s 21.
- <sup>347</sup> *Ibid* s 23(1).
- <sup>348</sup> *Ibid* s 23(2).
- <sup>349</sup> Explanatory Statement, *Crimes (sentencing) Bill 2005* (ACT) 12.
- <sup>350</sup> *Crimes (Controlled Operations) Act 2008* (ACT); *Crimes (Assumed Identities) Act 2009* (ACT); *Crimes (Surveillance Devices) Act 2010* (ACT); *Crimes (Protection of Witness Identity) Act 2011* (ACT).
- <sup>351</sup> Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 3 July 2008, 2664 (Mr Corbell, Attorney-General); Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 20 August 2009, 3422 (Mr Corbell, Attorney-General); Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 25 February 2010, 705 (Mr Corbell, Attorney-General). See also Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 25 August 2011, 3851 (Mr Corbell, Attorney-General).
- <sup>352</sup> Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 31 March 2009, 1547, 1579 (Mr Corbell, Attorney-General).
- <sup>353</sup> Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 1 April 2009, 1717.
- <sup>354</sup> Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 24 June 2009, 2860 (Mr Corbell, Attorney-General).
- <sup>355</sup> ACT Government, above n 349, 17, 38, 46.
- <sup>356</sup> *Human Rights Act 2004* (ACT) ss 15(2), 21, 22(2)(g); ACT Government, above n 23, 25.
- <sup>357</sup> ACT Government, above n 349, 25.
- <sup>358</sup> Introduced by *Crimes (Serious Organised Crime) Amendment Act 2010* (ACT) ss 4, 6, 7, 9, 10.
- <sup>359</sup> *Crimes Act 1900* (ACT) s 35A.
- <sup>360</sup> *Criminal Code 2002* (ACT) ss 652-654.
- <sup>361</sup> *Ibid* s 655.
- <sup>362</sup> *Ibid* s 709A
- <sup>363</sup> *Ibid* s 45A(1).
- <sup>364</sup> *Ibid* s 45(1).
- <sup>365</sup> ACT Government, above n 349, 39-40.
- <sup>366</sup> ACT Government, *Australian Capital Territory Budget 2014-2015: Budget Statements* (2014) 1 <[http://apps.treasury.act.gov.au/\\_\\_data/assets/pdf\\_file/0015/601071/Justice-and-Community-Safety-Directorate-Budget-Statement.pdf](http://apps.treasury.act.gov.au/__data/assets/pdf_file/0015/601071/Justice-and-Community-Safety-Directorate-Budget-Statement.pdf)>: one of the goals of the Justice and Community Safety Directorate in 2014-2015 was 'progressing reforms to introduce an unexplained wealth law.'
- <sup>367</sup> Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 19 February 2015, 601 (Mr Corbell, Attorney-General).
- <sup>368</sup> Attorney-General's Department, Submission No 16 to Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to*

- outlaw serious and organised crime groups, August 2008, 4 [19].
- <sup>369</sup> Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 24 June 2009, 6965 (Mr McClelland, Attorney-General).
- <sup>370</sup> *Proceeds of Crime Act 2002* (Cth) s 179E(1)(b), inserted by *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) sch 1, pt 1 [13].
- <sup>371</sup> Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* (September 2009) 58 [6.8], 59 [6.11].
- <sup>372</sup> *Proceeds of Crime Act 2002* (Cth) s 179E(6) (now s 179E(6)(b)), originally inserted by *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) sch 1, pt 1 [13].
- <sup>373</sup> *Proceeds of Crime Act 2002* (Cth) s 179E(6)(a), inserted by *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act 2015* (Cth) sch 1 [20]. See also Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 5 March 2014, 1642 (Mr Keenan, Minister for Justice).
- <sup>374</sup> *Crimes Act 1914* (Cth) pts IAB (controlled operations), IAC (assumed identities), IACA (witness identity protection for operatives), introduced by *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) sch 3, pt 1 [10].
- <sup>375</sup> Commonwealth of Australia, *Parliamentary Debates*, above n 369, 6966 (Mr McClelland, Attorney-General).
- <sup>376</sup> *Criminal Code Act 1995* (Cth) s 11.2A, introduced by *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) sch 4, pt 1 [4].
- <sup>377</sup> *Criminal Code Act 1995* (Cth) ss 11.2, 11.3-11.5.
- <sup>378</sup> Commonwealth of Australia, *Parliamentary Debates*, above n 369, 6968 (Mr McClelland, Attorney-General).
- <sup>379</sup> *Ibid.*
- <sup>380</sup> The meaning of ‘serious offence’ was extended to include activity associated with criminal organisations: *Telecommunications (Interception and Access) Act 1979* (Cth) s 5D(9), inserted by *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) sch 4, pt 2 [17]. Warrants under the Act can only be issued for the purpose of investigating a ‘serious offence’: *Telecommunications (Interception and Access) Act 1979* (Cth) ss 46(1)(d), 46A(1)(d).
- <sup>381</sup> The meaning of ‘exempt proceeding’ was amended to include a proceeding under an ‘organised crime control law’: *Telecommunications (Interception and Access) Act 1979* (Cth) ss 5(1) (definition of ‘organised crime control law’), 5B(1)(ca), inserted by *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) sch 4, pt 2 [18A], [18D]. Intercepted information may then be given in evidence in exempt proceedings: *Telecommunications (Interception and Access) Act 1979* (Cth) ss 74(1).
- <sup>382</sup> Inserted by *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010* (Cth) sch 4 [1].
- <sup>383</sup> *Criminal Code Act 1995* (Cth) s 390.3(1)(a)-(c).
- <sup>384</sup> *Ibid* s 390.3(1)(d), (e).
- <sup>385</sup> *Ibid* s 390.4(1)(a), (b), (f).
- <sup>386</sup> *Ibid* s 390.5(1)(a)-(b), (f), (2)(a)-(b), (f).
- <sup>387</sup> *Ibid* s 390.6(1)(a)-(b), (f), (2)(a)-(b), (f).
- <sup>388</sup> *Ibid* ss 390.4(1)(d)-(e), 390.5(1)(d)-(e), (2)(d)-(e), 390.6(1)(d)-(e), (2)(d)-(e).
- <sup>389</sup> *Ibid* ss 390.1 (definitions of ‘constitutionally covered offence punishable by imprisonment for at least 12 months’ and ‘constitutionally covered offence punishable by imprisonment for at least 3 years’), 390.2.
- <sup>390</sup> *Ibid* ss 73.1, 271.2, 307.1-307.4, 361.2-361.3, 400.3-400.9.
- <sup>391</sup> See the Congressional Statement of Findings and Purpose in the *Organized Crime Control Act of 1970*, Pub L No 91-452, §1, 84 Stat 922.
- <sup>392</sup> 18 USC §1961(4).
- <sup>393</sup> US Department of Justice, *Criminal RICO: 18 U.S.C. §§ 1961-1968. A Manual for Federal Prosecutors* (5<sup>th</sup> ed, October 2009) 53-7.
- <sup>394</sup> *Ibid* 62.
- <sup>395</sup> For a schematic representation, see Andreas Schloenhardt, *Palermo in the Pacific: Organised Crime Offences in the Asia Pacific Region* (Martinus Nijhoff, 2010) 301.
- <sup>396</sup> With respect to RICO, see, for example, William R Geary, ‘The legislative recreation of RICO: Reinforcing the “myth” of organized crime’ (2002) 38 *Crime, Law and Social Change* 311.
- <sup>397</sup> Jacobs, Panarella and Worthington, above n 460, 83; *United States v Salerno*, 868 F 2d 524, 534-5 (2d Cir, 1989).
- <sup>398</sup> See, for recent examples: FBI San Antonio Division, ‘Sixty-One Latin Kings Gang Members and Associates Arrested and Charged in Connection with a Racketeering and Drug Distribution Scheme’ (Press Release, 15 October 2015)

- <<https://www.fbi.gov/sanantonio/press-releases/2015/sixty-one-latin-kings-gang-members-and-associates-arrested-and-charged-in-connection-with-a-racketeering-and-drug-distribution-scheme>>; FBI Charlotte Division, 'Thirty-Seven MS-13 Gang Members Indicted on Racketeering Conspiracy Charges; Some Also Charged with Murder, Attempted Murder, and Firearms Violations' (Press Release, 20 May 2015) <<https://www.fbi.gov/charlotte/press-releases/2015/thirty-seven-ms-13-gang-members-indicted-on-racketeering-conspiracy-charges-some-also-charged-with-murder-attempted-murder-and-firearms-violations>>. This can contribute to the complexity of RICO trials: see Schloenhardt, *Palermo in the Pacific*, above n 456, 322-3.
- <sup>399</sup> *United States v Cintolo*, 818 F 2d 980, 984-5 (1st Cir, 1987) contains a now famous piece of wiretap transcript in which a RICO suspect explains to colleagues: 'It might be me, you, him, him, and him, too. Nobody knows. Under RICO, no matter who ... we are, if we're together, they'll get every ... one of us.'
- <sup>400</sup> The confrontation clause grants accused persons a constitutional right 'to be informed of the nature and cause of the accusation' and 'to be confronted with the witnesses against [them]': *United States Constitution* amend VI. Through the Fourteenth Amendment, these protections have been applied at the state level as well: *In re Oliver*, 333 US 257 (1948) and *Pointer v Texas*, 380 US 400 (1965).
- <sup>401</sup> All but one of the defendants in the Five Families trial received 100 years: *United States v Salerno*, 868 F 2d 524, 528 (1989). The other example provided can be found among many others in US Department of Justice, 'Twenty-Two MS-13 members Sentenced for Violent Crimes,' *Justice News* (online), 31 July 2015 <<http://www.justice.gov/opa/pr/twenty-two-ms-13-members-sentenced-violent-crimes>>.
- <sup>402</sup> US Department of Justice, above n 393.
- <sup>403</sup> 18 USC §1963(a)-(c).
- <sup>404</sup> 18 USC §1964(a).
- <sup>405</sup> 18 USC §1964(c).
- <sup>406</sup> Queensland Organised Crime Commission of Inquiry Report 30 October 2015 Vol 1 p 4
- <sup>407</sup> Don Stuart, 'Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution' (2002) 28(1) *Manitoba Law Journal* 89, 92.
- <sup>408</sup> *An Act to Amend the Criminal Code (Criminal Organisations) and to Amend Other Acts in Consequence*, SC 1997, c 23.
- <sup>409</sup> Originally, *Criminal Code*, RSC 1985, c C-46, s 467.1, inserted by *An Act to Amend the Criminal Code (Criminal Organisations) and to Amend Other Acts in Consequence*, SC 1997, c 23, s 11.
- <sup>410</sup> Originally, *Criminal Code*, RSC 1985, c C-46, s 2, inserted by *An Act to Amend the Criminal Code (Criminal Organisations) and to Amend Other Acts in Consequence*, SC 1997, c 23, s 1.
- <sup>411</sup> Eileen Skinnider, *Defining Organised Crime in Canada – Meeting Our Obligations Under the UN Convention Against Transnational Organised Crime and Its Protocols Against Trafficking of Persons and Smuggling of Migrants?* (February 2006) International Centre for Criminal Law Reform and Criminal Justice Policy 12 <<http://www.icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/ES%20paper%20-%20TOC%20and%20canadian%20implementation.pdf>>.
- <sup>412</sup> *R v LeClerc*, 2001 CanLII 16729 (QC CQ), p 114 (Sansfaçon JQC); [2001] JQ no 426.
- <sup>413</sup> Inserted by *An Act to Amend the Criminal Code (Criminal Organisations) and to Amend Other Acts in Consequence*, SC 1997, c 23 ss 19, 26.
- <sup>414</sup> *Criminal Code*, RSC 1985, c C-46, s 810.01(1).
- <sup>415</sup> *Ibid* s 810.01(3).
- <sup>416</sup> *Ibid* s 810.01(3.1), inserted by *An Act to amend the Criminal Code (organized crime and protection of justice system participants)*, SC 2009 c 22, s 19.
- <sup>417</sup> *Criminal Code*, RSC 1985, c C-46, s 810.01(4.1).
- <sup>418</sup> *Ibid* s 810.01(4).
- <sup>419</sup> PJCACC, above n 208, 71 [4.82].
- <sup>420</sup> Dominique Valiquet, 'Bill C-14: An Act to Amend the Criminal Code (Organized Crime and Protection of Justice System Participants)' (Library Research Paper No LS-633E, Library of Parliament, Parliament of Canada, 2009) 2.
- <sup>421</sup> House of Commons, Subcommittee on Organized Crime of the Standing Committee on Justice and Human Rights, *Combatting Organized Crime* (October 2000) <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1031763&Language=E&Mode=1&Parl=36&Ses=2>>.
- <sup>422</sup> *An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts*, SC 2001, c 32.
- <sup>423</sup> *Criminal Code*, RSC 1985, c C-46, s 467.1(1).

- <sup>424</sup> Ibid s 467.111, inserted by *An Act to amend the Criminal Code and the National Defence Act (criminal organization recruitment)*, SC 2014, c 17, s 9.
- <sup>425</sup> *Lindsay v The Queen*, 2010 CanLII 10089 (SCC).
- <sup>426</sup> *Canada Act 1982* (UK) c 11, sch B pt I, esp s 7.
- <sup>427</sup> *R v Lindsay*, 2009 ONCA 532 (CanLII), [20]-[33] (MacPherson JJA); 97 OR (3d) 567; *R v Lindsay* (2004), 2004 CanLII 16094 (ON SC); 70 OR (3d) 131 (Fuerst J); *R v Terezakis*, 2007 BCCA 384 (CanLII), [43] (Mackenzie J), [78] (Chiasson J); 223 CCC (3d) 344. Leave to appeal to the Supreme Court was refused in both cases: *Terezakis v The Queen*, 2008 CanLII 3191 (SCC); *Lindsay v The Queen*, 2010 CanLII 10089 (SCC).
- <sup>428</sup> Stuart, above n 407, 97.
- <sup>429</sup> Andreas Schloenhardt, Submission No 1 to Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, 4 April 2008, 36.
- <sup>430</sup> Ibid.
- <sup>431</sup> *Crimes Act 1961* (NZ) s 98A, inserted by *Crimes Amendment (No 2) Act 1997* (NZ) s 2.
- <sup>432</sup> New Zealand, *Parliamentary Debates*, House of Representatives, 3 March 2004, vol 615, 11499 (Margaret Wilson, Acting Minister of Justice).
- <sup>433</sup> *Crimes Act 1961* (NZ) s 98A(2), as replaced by *Crimes Amendment Act 2002* (NZ) s 5.
- <sup>434</sup> *Crimes Act 1961* (NZ) s 98A(1), as replaced by *Crimes Amendment Act 2002* (NZ) s 5.
- <sup>435</sup> New Zealand, *Parliamentary Debates*, House of Representatives, 3 March 2004, vol 615, 11499 (Margaret Wilson, Acting Minister of Justice).
- <sup>436</sup> New Zealand, *Parliamentary Debates*, House of Representatives, 10 September 2009, vol 657, 6283 (Simon Power, Minister of Justice).
- <sup>437</sup> *Crimes Act 1961* (NZ) s 98A(1), as replaced by *Crimes Amendment Act 2009* (NZ) s 5.
- <sup>438</sup> *Sentencing Act 2002* (NZ) s 9(1)(hb), inserted by *Sentencing Amendment Act (No 3) 2009* (NZ) s 4.
- <sup>439</sup> New Zealand, *Parliamentary Debates*, above n 431, 11500 (Margaret Wilson, Acting Minister of Justice).
- <sup>440</sup> [2013] NZHC 2010 (9 August 2013).
- <sup>441</sup> Ibid [22] (Kos J).
- <sup>442</sup> Micheal Levi and Alaster Smith, *A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales*, Home Office Online Report 17/02 (2002).
- <sup>443</sup> Peter Stelfox, 'Policing lower levels of Organised Crime in England and Wales' (1998) 37(4) *The Howard Journal of Criminal Justice* 393, 401.
- <sup>444</sup> Report of the Queensland Crime Commission of Inquiry (30 October 2015) p 550
- <sup>445</sup> Attorney-General's Department, Submission No 16, above n 368, 13 [55].
- <sup>446</sup> Home Office, *One Step Ahead: A 21<sup>st</sup> Century Strategy to Defeat Organised Crime*, Cm 6167 (March 2004) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/251075/6167.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251075/6167.pdf)>.
- <sup>447</sup> *Serious Organised Crime and Police Act 2005* (UK) c 15, s 1.
- <sup>448</sup> Ibid s 2(1).
- <sup>449</sup> Ibid ss 3(1), 36, 37.
- <sup>450</sup> *Theft Act 1968* (UK) c 60, ss 15, 15A, 16, 20(2); *Theft Act 1978* (UK) c 31, ss 1, 2; *Proceeds of Crime Act 2002* (UK) c 29, sch 2.
- <sup>451</sup> *Serious Organised Crime and Police Act 2005* (UK) c 15, s 76(1), (2).
- <sup>452</sup> Ibid ss 76(6), (7), 79.
- <sup>453</sup> Ibid pt 2, ch 1, pt 3.
- <sup>454</sup> Ibid pt 2, ch 2.
- <sup>455</sup> Ibid pt 2, ch 4.
- <sup>456</sup> *Serious Crimes Act 2007* (UK) c 27, pt 3, ch 2.
- <sup>457</sup> Ibid ss 44-46.
- <sup>458</sup> Ibid ss 50-51.
- <sup>459</sup> Ibid s 59.
- <sup>460</sup> *Accessories and Abettors Act 1861* (UK) c 94, s 8.
- <sup>461</sup> The Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Report No 300, Cm 6878 (2006) 21 [3.2] <[http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc300\\_Inchoate\\_Liability\\_for\\_Assisting\\_and\\_Encouraging\\_Crime\\_report.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc300_Inchoate_Liability_for_Assisting_and_Encouraging_Crime_report.pdf)>; Home Office, *New Powers Against Organised and Financial Crime*, Cm 6875 (July 2006) 24

- <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/272311/6875.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272311/6875.pdf)>.
- <sup>462</sup> *Prevention of Terrorism Act 2005* (UK) c 2, s 1 (abolished by *Terrorism Prevention and Investigation Measures Act 2011* (UK) c 23, s 1); *Sexual Offences Act 2003* (UK) c 42, s 104; *Crime and Disorder Act 1998* (UK) c 37, s 1.
- <sup>463</sup> *Serious Crimes Act 2007* (UK) c 27, s 19(2).
- <sup>464</sup> *Serious Crimes Act 2007* (UK) c 27, s 1(1)(b).
- <sup>465</sup> Crown Prosecution Service, *Serious Crime Prevention Orders Serious Crime Act 2007 – Sections 1-41 and Schedules 1 and 2*, [2.3]  
<[http://www.cps.gov.uk/legal/s\\_to\\_u/serious\\_crime\\_prevention\\_orders\\_\(scpo\)\\_guidance/](http://www.cps.gov.uk/legal/s_to_u/serious_crime_prevention_orders_(scpo)_guidance/)>.
- <sup>466</sup> *Serious Crimes Act 2007* (UK) c 27, s 35(2).
- <sup>467</sup> Home Office, *New Powers Against Organised and Financial Crime*, Cm 6875 (July 2006) 31  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/272311/6875.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272311/6875.pdf)>.
- <sup>468</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 7 February 2007, vol 689, col 729 (Baroness Scotland of Asthal, Minister of State, Home Office).
- <sup>469</sup> [2003] 1 AC 787.
- <sup>470</sup> *Ibid* 812 [37] (Lord Steyn), 825-826 [81]-[83] (Lord Hope of Craighead), 835 [114] (Lord Hutton), 836 [116] (Lord Hobhouse of Woodborough), 836 [117] (Lord Scott of Foscote).
- <sup>471</sup> Indeed, this was the Government's intention: United Kingdom, *General Committee Debates*, House of Commons, Public Bill Committee, 26 June 2007, col 17 (Vernon Coaker, Parliamentary Under-Secretary of State for the Home Department).
- <sup>472</sup> *Serious Crimes Act 2007* (UK) c 27, ss 1(3), 19(5).
- <sup>473</sup> *Ibid* s 5(3). <sup>474</sup> *Ibid* ss 5(5), 11, 12, 13(2)-(4).
- <sup>475</sup> Crown Prosecution Service, above n 537, [3.3].
- <sup>476</sup> *Human Rights Act 1998* (UK) c 42, sch 1, arts 5 (liberty and security), 8 (private life), 10 (freedom of expression), 11 (freedom of assembly and association).
- <sup>477</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 25 April 2007, vol 691, col 675 (Baroness Scotland of Asthal, Minister of State, Home Office).
- <sup>478</sup> *Serious Crimes Act 2007* (UK) c 27, s 16(2), (5).
- <sup>479</sup> *Ibid* s 25(2)(b).
- <sup>480</sup> *Ibid* s 26(1).
- <sup>481</sup> *Ibid* ss 2(2) 3(2), sch 1, pts 1, 2.
- <sup>482</sup> *Serious Crimes Act 2007* (UK) c 27, ss 30-32.
- <sup>483</sup> *Ibid* ss 27(1), (4), (7), 28(1), (4), (7).
- <sup>484</sup> It should be noted that hearsay evidence is admissible in civil proceedings in the High Court with certain safeguards. For example, if the Director of Public Prosecutions adduces the hearsay evidence of a statement of a person and decides not to call them as a witness in support of an application for a SCPO, the respondent may do so for the purposes of cross-examination: *Civil Evidence Act 1995* (UK) c 38, ss 1(1), 3; *Civil Procedure Rules 1998* (UK) r 33.4. In the Crown Court, hearsay evidence is admissible in only very limited circumstances: *Criminal Justice Act 2003* (UK) c 44, s 114.
- <sup>485</sup> *Serious Crimes Act 2007* (UK) c 27, ss 35(1), 36(4); *Civil Procedure Rules 1998* (UK) pts 31 (disclosure), 32 (evidence), rr 33.1-33.4 (hearsay evidence); *Criminal Procedure Rules 2015* (UK) pts 15 (disclosure), 20 (hearsay evidence).
- <sup>486</sup> *Serious Crime Act (Commencement No.2 Transitional and Transitory Provisions and savings) Order 2008* (UK) SI 2008/755, O 15.
- <sup>487</sup> Home Office, *Fact sheet: Improvements to Serious Crime Prevention Orders* (March 2015) 1[5]  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/415969/Fact\\_sheet\\_-\\_SCPOs\\_-\\_Act.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/415969/Fact_sheet_-_SCPOs_-_Act.pdf)>.
- <sup>488</sup> National Crime Agency, *Lifetime Management*, <<http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/organised-crime-command/lifetime-management>>.
- <sup>489</sup> National Crime Agency, *Publication of Ancillary Orders* (August 2015)  
<<http://www.nationalcrimeagency.gov.uk/publications/621-ancillary-orders-aug-2015/file>>.
- <sup>490</sup> United Kingdom, *Serious and Organised Crime Strategy*, Cm 8715 (October 2013) 47 [5.19]  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/248645/Serious\\_and\\_Organised\\_Crime\\_Strategy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf)>.
- <sup>491</sup> United Kingdom, *Parliamentary Debates*, above n 540, col 728 (Baroness Scotland of Asthal, Minister of State, Home Office).
- <sup>492</sup> PJCACC, above n 208, 94 [4.188].
- <sup>493</sup> *Policing and Crime Act 2009* (UK) c 26, ss 37(1), 49(1) (definition of 'court').
- <sup>494</sup> *Ibid* s 34(2) (as enacted).

<sup>495</sup> *Ibid* s 34(3) (as enacted).

<sup>496</sup> *Ibid* s 34(5) (as enacted).

<sup>497</sup> *Birmingham City Council v James* [2014] 1 WLR 23, 30-31 [13] (Moore-Bick LJ), 32 [19] (Jackson LJ), 34 [32] (Maurice Kay LJ).

<sup>498</sup> *Policing and Crime Act 2009* (UK) c 26, s 34(4) (as enacted).

<sup>499</sup> *Ibid* s 35(2)(a), (b), (d).

<sup>500</sup> *Ibid* s 35(3)(b)-(c), (4).

<sup>501</sup> Home Office, *Review of the operation of injunctions to prevent gang-related violence* (January 2014) 3 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/278786/ReviewInjunctionsGangRelatedViolence.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/278786/ReviewInjunctionsGangRelatedViolence.pdf)>.

<sup>502</sup> *Policing and Crime Act 2009* (UK) c 26, s 36(2), (4), (5).

<sup>503</sup> *Ibid* ss 36(6), 43(4).

<sup>504</sup> *Crime and Security Act 2010* (UK) c 17, s 34. See also *Crime and Courts Act 2013* (UK) c 22, s 18 providing that these applications for injunctions be heard in the Youth Court.

<sup>505</sup> Home Office, above n 500, 5.

<sup>506</sup> *Ibid*.

<sup>507</sup> *Ibid* 6.

<sup>508</sup> United Kingdom, *Serious and Organised Crime Strategy*, above n 589, 11 [1.19], 51 [5.36]-[5.37].

<sup>509</sup> *Serious Crime Act 2007* (UK) c 27, sch 1, part 1 [11A], [27A], inserted by *Serious Crime Act 2015* (UK) c 9, s 47(4), (8).

<sup>510</sup> *Serious Crime Act 2007* (UK) c 27, s 21, as amended by *Serious Crime Act 2015* (UK) c 9, s 48.

<sup>511</sup> *Serious Crime Act 2007* (UK) c 27, s 22E, inserted by *Serious Crime Act 2015* (UK) c 9, s 49.

<sup>512</sup> *Policing and Crime Act 2009* (UK) c 26, 2 34(2)-(3), substituted by *Serious Crime Act 2015* (UK) c 9, s 51.

<sup>513</sup> *Policing and Crime Act 2009* (UK) c 26, 2 34(5), substituted by *Serious Crime Act 2015* (UK) c 9, s 51.

<sup>514</sup> United Kingdom, *Serious and Organised Crime Strategy*, above n 490, 37 [4.58].

<sup>515</sup> *Ibid* 37 [4.60].

<sup>516</sup> United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol thereto* (2004) 21 [49] <[http://www.unodc.org/pdf/crime/legislative\\_guides/Legislative%20guides\\_Full%20version.pdf](http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf)>.

<sup>517</sup> *Criminal Law Act 1977* (UK) c 45, ss 1, 1A (inserted by *Criminal Justice (Terrorism and Conspiracy) Act 1998* (UK) c 40, s 5).

<sup>518</sup> *Serious Crimes Act 2015* (UK) c 9, s 45(2)-(5).

<sup>519</sup> *Ibid* s 45(6).

<sup>520</sup> *Ibid* s 45(9).

<sup>521</sup> *Serious Crime Act 2015 (Commencement No 1) Regulations 2015* (UK) c 52, reg 2(e).

<sup>522</sup> Crown Prosecution Service, *Participating in Activities of an Organised Crime Group* <[http://www.cps.gov.uk/legal/l\\_to\\_o/organised\\_crime\\_groups/](http://www.cps.gov.uk/legal/l_to_o/organised_crime_groups/)>.

## PART 2

# CHAPTER FOUR

## BY THE NUMBERS: A STATISTICAL VIEW OF CRIME IN QUEENSLAND

*Statistics gathered from various reputable sources including Police and the Courts indicate that the role of OMCGs in criminal activity in Queensland is, objectively, very small. There is, however, a belief within law enforcement authorities that these figures do not reveal the full picture or true extent of OMCG involvement in crime.*

*The Taskforce was also concerned that some crime 'statistics' referred to publicly have been exaggerated, distorted or are unreliable.*

*The Taskforce concluded that there is a need, in Queensland, for an independent body which (like NSW) focuses on collecting reliable statistical information.*

Any understanding of the kinds of laws Queensland needs to combat crime sensibly begins with the best and most reliable information we have about the nature and extent of criminal activity within the State.

Crime figures about the frequency and prevalence of certain kinds of criminal activity, from which we can detect patterns and trends, are the only logical starting point.

Statistics enable us to measure the nature, and the extent, of the risks presented by particular kinds of crime (including, of course, organised crime).

As will be seen, however, the available crime figures reveal inconsistencies and differences, and scope for argument and disagreement.

The level of uncertainty engendered by doubts about the reliability of the available figures warrants a better and more focussed effort.

The *actual* level of criminal activity said to underlie the need for the 2013 suite is, itself, an illustration of that uncertainty.

The 2013 suite very quickly followed ugly public misconduct by OMCG members. They were referred to by a Government Minister as 'vicious, violent thugs' who were running rampant across Queensland.<sup>1</sup> They were described, in Parliament and the media, in terms suggesting wide-spread criminal activity necessitating a strong and rapid legislative response.

But the most recent and apparently reliable statistical evidence (the Byrne Report) shows that OMCGs are, in fact, responsible for considerably less than 1% of all reported crime across the state (and that this was also the case when the 2013 laws were introduced).

On a more general note the evidence is clear that, while the volume and rate of individual crime types has naturally fluctuated, overall crime in both Australia and Queensland has been consistently decreasing.<sup>2</sup>

It comes as a surprise, then, that incarceration rates are doing the opposite – in fact, in Queensland, the numbers of persons in prison are at their highest level since 2004.<sup>3</sup>

New South Wales has seen a similar trend. Respected crime statistician Don Weatherburn, Director of the NSW Bureau of Crime Statistics and Research, has criticised the ‘fear and loathing rhetoric’ that, he said, has been ‘driving public debate on law and order across Australia’ and the inappropriate emphasis placed on incarceration which does *not* reflect what we otherwise know about overall crime rates.<sup>4</sup> Dr Weatherburn says:<sup>5</sup>

*‘You’d think this dramatic fall in crime would bring with it a dramatic fall in imprisonment rates and a dramatic turnaround in public attitudes towards offenders, but you’d be wrong.’*

*‘Having pushed the law and order merry-go-round as hard as they could for more than 15 years, politicians found to their surprise that it was hard to get off. So the tougher laws kept coming.’*

## REPORTED CRIME RATES: THE AVAILABLE DATA

Available statistics about crime rates in Queensland are not as comprehensive nor as scientifically rigorous as they might be, and there is scope for improvement.

Current statistical information is, however, sufficiently trustworthy to provide a reliable indicator of the *actual* incidence of crime across Queensland, and the level of involvement of OMCGs (and organised crime groups) in that offending.

Given the clear focus on OMCGs in the 2013 suite, the statistics presented below (with the exception of the data provided by Queensland Courts) are isolated to reflect OMCG involvement in criminal activity across the state.

Much of the data is confined to the period after 17 October 2013 (when the 2013 suite

commenced) and is generally limited to charges not finalised (meaning charges that remain pending with the courts).

The ‘big picture’ of crime rates, within which these statistics fall to be considered, shows a steady, general improvement – ie, crime rates are falling.

The 2014/2015 QPS Annual Statistical Review reported a steady decline in criminal activity over the last 10 years, with a 30% reduction in recorded offences against the person and a 29% reduction in offences against property.<sup>6</sup>

## WHAT DO THE STATISTICS SHOW ABOUT OMCG CRIME IN QUEENSLAND BEFORE THE 2013 SUITE WAS INTRODUCED?

In the course of this review the Taskforce received submissions from Assistant Professor Terry Goldsworthy of Bond University, formerly a serving police officer. Some of his submissions contained an apparent statistical analysis of information relevant to OMCG criminal activity.

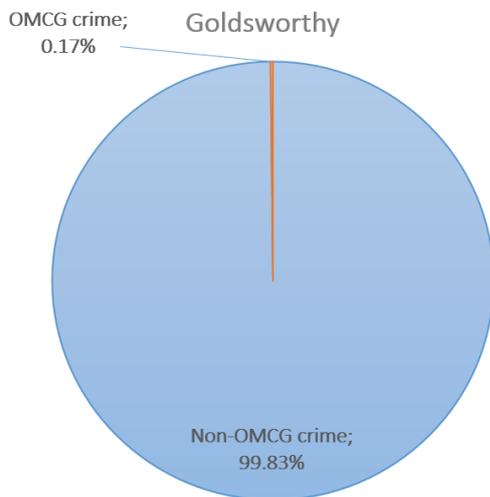
Prof Goldsworthy obtained numbers and figures under a Right to Information application and, using that data, came to a number of conclusions about the patterns of OMCG offending in Queensland between April 2008 and April 2014.

The weight to be attached to this material is limited by the fact that it is ‘raw’ data, from which Prof Goldsworthy has attempted to extrapolate statistical conclusions.

It is, however, the only available information of this type regarding OMCG, and OMCG member, involvement in crime before the introduction of the 2013 suite.

Prof Goldsworthy calculated that over the six-year period between 2008-14, 2,537,225 offences were reported to police across Queensland, but OMCG members were convicted of only 4,323 of those offences.

That data suggests, on its face, that OMCGs were found guilty of 0.17% of all reported offences in the state:



The most common conviction for OMCG members was for possessing dangerous drugs (523 offences), followed by public nuisance (285 offences), breach of bail conditions (258 offences) and assault or obstruct a police officer (218 offences) – those four offences accounted for 30% of all OMCG convictions.<sup>7</sup>

Both public nuisance and breach of bail conditions are what are called 'simple' offences, meaning that they can be summarily disposed of in the Magistrates Court.

Acknowledging the limitations which must attach to Prof Goldsworthy's analysis, his calculations constitute the only information we have about levels of OMCG offending in the period immediately preceding the introduction of the 2013 suite.

On any view they do not suggest that OMCG members were committing a large number, or a large proportion, of serious crimes in Queensland.

On the day of the introduction of the 2013 suite into Parliament, however, the government of the day said, however, that OMCG involvement 'in drugs, in prostitution, in extortion, in rape, in murder, [and] in

assaults' had left the streets of Queensland unsafe.<sup>8</sup>

The information that is available about the level of OMCG involvement in serious crime at the time, whatever the limitations attached to the figures, raises questions about these claims.

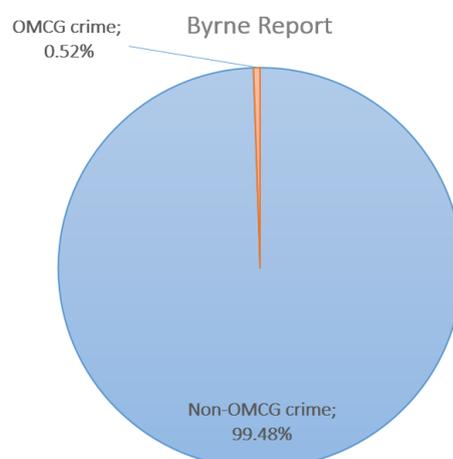
#### WHAT DID THE BYRNE REPORT FIND ABOUT OMCG OFFENDING IN LIGHT OF THE 2013 SUITE?

The Byrne Report, handed down in late 2015, provides the most recent, accurate and reliable evidence base from which conclusions can be drawn about OMCG offending in Queensland following the introduction of the 2013 suite.

Its conclusions are not, of course, beyond debate but they do reflect a thorough and comprehensive, and independent, attempt to measure and categorise OMCG crime (and organised crime) in our state.

Tasked with identifying crime trends, the Byrne Commission of Inquiry sought and heard evidence on the very issue of statistics from Queensland's law enforcement agencies, including QPS and the Crime and Corruption Commission.

The Byrne Report concluded that over a 21-month period, OMCG members accounted for 0.52% of all persons charged with offences across the state.



Between 1 October 2013 and 30 June 2015, 478 individual OMCG members were charged with 1,093 offences.

The types of offending represented in those 1,093 offences was broken down as follows:<sup>9</sup>

- 52% (572 offences) were simple offences attracting mandatory summary disposition in the Magistrates Court;
- 27% (298 offences) were drug-related;
- 19% (208 offences) were traffic or driving related; and
- 11% (122 offences) were offences of violence against the person (including extortion).

The Byrne Report properly raised a query whether these figures reflect, or were influenced, by the fact that over that same time period there was an intense and unrelenting law enforcement focus on OMCG members and their associates following the 2013 suite.

The Byrne Report statistics do not necessarily represent the actual figures for OMCG members who were charged with offences which attracted the VLAD Act or criminal organisation circumstance of aggravation.

For example, an OMCG member may have been charged with assault occasioning bodily harm (AOBH) but, if it was not alleged that the offence was committed in the course of the offenders' participation in the OMCG, then the OMCG member is not a 'vicious lawless associate' for the purpose of the AOBH.

The figures, instead, represent the *total* number of identified OMCG members who were charged with *any* offence throughout the 21-month period, related or unrelated to their participation in the OMCG.

This is an important distinction for any comparison of the statistics presented in the Byrne Report and those provided to the

Taskforce by the Courts or QPS (discussed below).

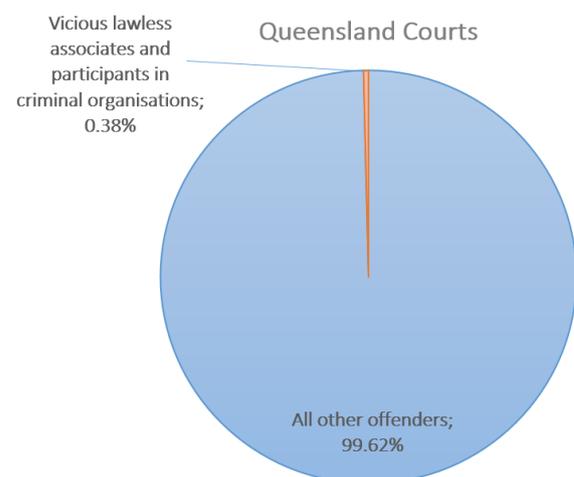
#### AN OVERVIEW OF THE DATA PROVIDED TO THE TASKFORCE BY QUEENSLAND COURTS

Statistical data was obtained from Queensland Courts to ascertain the number of defendants and charges officially lodged with the courts, specifically those under Schedule 1 of the VLAD Act.

That data indicates that, between 17 October 2013 and 31 January 2015:

- a total of 131,108 defendants were charged with 195,717 offences; and
- of those defendants, 521 were charged with 1,698 offences which attracted either the VLAD Act or the 'participant in the criminal organisation' circumstance of aggravation.

On these figures vicious lawless associates and criminal organisation-related offenders make up 0.38% of the total *alleged* offending population in that time frame.



This 0.38% of all defendants was responsible for 0.87% of the total number of offences, with drug-related charges being the most common.

The figures, while capturing organised crime offending and large drug syndicates (including those without any known links to OMCGs), also include offenders like drug addicts funding their personal addiction.

The data provided by Queensland Courts does not provide any identifying particulars regarding individual offenders or the circumstances of their alleged crimes, so it is not possible to isolate what proportion of the 0.38% were OMCG members.

### FINALISED CONVICTIONS

There have been only two finalised convictions under the VLAD Act since the commencement of the 2013 suite. Both of those convictions were for drug-related offending, but neither accused had any apparent OMCG connections.

**Joshua Robin Rohl** was convicted in the Brisbane Supreme Court on 3 June 2015 of various drug-related charges, including one count of trafficking in a dangerous drug as a vicious lawless associate. Rohl, it was accepted, was part of the Brisbane syndicate of a large wholesale cannabis distribution network operating between Victoria and Queensland. He pleaded guilty and cooperated significantly with authorities;<sup>10</sup> Rohl received a head sentence of five years imprisonment, suspended after serving 18 months.

**Brett William Young** was convicted in the Brisbane Supreme Court on 24 September 2015 of a number of drug offences including one count of trafficking in a dangerous drug as a vicious lawless associate, and three counts of possessing a dangerous drug as a vicious lawless associate. Young's role, it was accepted, was as a courier in a large methylamphetamine trafficking syndicate over a period of approximately two and a-half years. He pleaded guilty and his significant and 'genuine cooperation with the authorities in a material way' was recognised as a mitigating feature at his sentence.<sup>11</sup> Young received a head sentence of five years imprisonment which was wholly suspended.

It can be deduced from the penalty imposed on both defendants that they elected to cooperate under section 13A of the *Penalties and Sentences Act 1992* (Qld) which ameliorated the sentence they may otherwise have received under the VLAD Act (noting that the 'starting point' sentence is not publicly known in accordance with the process under section 13A).

While the facts in both cases indicate involvement in serious, large-scale organised crime drug trafficking networks, neither accused had any known links to OMCGs.

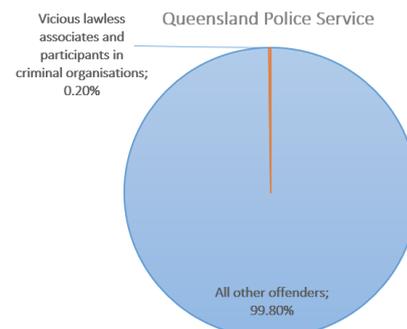
### A DETAILED BREAKDOWN OF CRIMINAL ORGANISATION OFFENDING PROVIDED BY THE QUEENSLAND POLICE SERVICE

The most recent figures supplied to the Taskforce by QPS provide a detailed breakdown of all offenders and offences charged from 17 October 2013 to 31 December 2015.

Those statistics reveal that 338 individuals have been charged with 1,287 offences where it has been alleged that the offender was a vicious lawless associate (202 persons), or a participant in a criminal organisation as a circumstance of aggravation (136 persons).

Across that same time frame, the total number of individuals charged with criminal offences across the state was 156,194.<sup>12</sup>

Using those figures it is possible to deduce that people who were charged as vicious lawless associates or participants in a criminal organisation accounted, on the QPS' own statistics, for 0.2% of the offending population.



Below is a discussion of those statistics by offence type. Attachment 4 sets out a complete breakdown of all VLAD Act and criminal organisation related offences, current as at 31 December 2015, provided to the Taskforce by the QPS.

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### DRUG-RELATED OFFENCES

The QPS data largely confirms what the Byrne Report concluded about the involvement of organised crime groups in the illicit drug market: drug-related offending constitutes a considerable portion of offending under the VLAD Act.

Over the past 26 months, 98 people have been charged with 121 offences of trafficking in dangerous drugs, 13 people have been charged with 879 offences of supplying a dangerous drug and 32 people have been charged with 44 offences of possessing a dangerous drug.

It is likely that many of the discrete supply offences have been charged in conjunction with a broader trafficking offence.

For example, a defendant may have been charged with one trafficking in dangerous drugs offence spanning a six-month period. Particularisation of that trafficking charge requires a number of discrete supplying a dangerous drug charges, and so the same defendant may also have been charged with 100 x supply charges which cover the same course of offending as the trafficking charge.

This may explain the seemingly high charge numbers for the offence of supplying a dangerous drug (when compared to other drug offences).

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### OFFENCES OF VIOLENCE (INCLUDING EXTORTION)

The QPS data shows that a relatively small proportion of violent crime across Queensland is committed by defendants as participants in criminal organisations.

Notably, since the introduction of the 2013 suite, 10 individuals have been charged with 10 robbery offences attracting the circumstance of aggravation, seven people have been charged with seven kidnapping offences attracting the circumstance of aggravation and five individuals have been charged with five assault occasioning bodily harm offences attracting the circumstance of aggravation. Two individuals have each been charged with the offence of extortion attracting the circumstance of aggravation.

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### CHILD SEX OFFENCES

The Byrne Report identified that there are a significant number of offenders (and networks of offenders) involved in online child sex offending operating in Queensland.

The QPS statistics only identify one person as being charged with a child sex offence (namely, distributing child exploitation material) as a vicious lawless associate.

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### FINANCIAL CRIME

The Taskforce noted, in response to the Byrne Report, that financial and fraudulent crimes did *not* form part of the schedule of offences to which the VLAD Act circumstance of aggravation applies.

That explains why QPS statistics are not able to reflect those crimes.

Given the Byrne Report's finding that organised crime is heavily entrenched in serious financial offending, the Taskforce acknowledges that the development of its proposed Organised Crime Framework (described in full in Chapter 7) should appropriately encompass those offences.

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### THE 2013 ORGANISED CRIME OFFENCES UNDER THE CRIMINAL CODE

The QPS reports the following statistics regarding the 'participation in a criminal organisation' offences under the Criminal Code:

- 36 individuals have been charged with 51 offences under section 60A (the *association* offence);
- 5 individuals have been charged with 6 offences under section 60B (the *clubhouse* offence); and
- 5 individuals have been charged with 6 offences under section 60C (the *recruiting* offence).

No offences under sections 60A, 60B or 60C have been finalised in the Courts. That is, since commencement in October 2013, no one person has actually been convicted. The Taskforce is aware of some matters which have been finalised by way of a reduction in charges to avoid being dealt with under these new provisions, or have been withdrawn when the prosecution offered no evidence to prove the charge.

Unfortunately the statistics are not able to record those variables.

Of those matters which remain before the courts, the Taskforce understands that the majority of prosecutions have been adjourned pending this Report.

#### THE EXTENT TO WHICH OMCG MEMBERS ARE RESPONSIBLE FOR THESE CRIMES

The QPS reports that, overall, 202 individual persons have been charged with criminal offences as a vicious lawless associate.

Of those 202 persons, 36 were identified as either members (21) or associates (15) of an OMCG.<sup>13</sup> That figure of 36 people, importantly, includes ex-members who disassociated from their OMCG throughout that period, and ex-associates. The remaining 166 individuals are not known to be members or associates of an OMCG.

Hence OMCG members make up no more than 17.8% of all offenders charged under the VLAD Act, and **only 0.02% of the total offending population** (when compared with the total

number of person charged with any criminal offence in the same time period).

The QPS (supported by the Queensland Police Union and the Commissioned Officers Union) submitted to the Taskforce that the available statistics do not necessarily reflect the true extent of OMCG involvement in serious and organised crime in Queensland, and the associated risk that OMCGs pose to community and Police Officer safety.

#### HAS THE 2013 SUITE LED TO A REDUCED NUMBER OF OMCG MEMBERS IN QUEENSLAND?

There has been widespread discussion about the impact of the 2013 suite on OMCG membership numbers in Queensland, including claims that there had been a significant drop as a direct result of the laws.

Figures drawn from QPS sources indicate that there has been some, but objectively small, reduction in OMCG membership numbers:

- **July 2013:** Prof Goldsworthy obtained a QPS Taskforce Hydra Report under a Right to Information application which identified approximately **920 OMCG members in Queensland** (including full members, probationary, prospect and nominee members);<sup>14</sup>
- **February 2015:** QPS advised APN News and Media that there were **789 members in Queensland**;<sup>15</sup> and
- **June 2015:** The QPS submission to the Taskforce identified **798 members in Queensland**.<sup>16</sup>

That data indicates that in the period of over two years since the introduction of the 2013 suite, OMCG members in Queensland have reduced by 124 members.

Some other statistics speak in terms of OMCG 'participants'. The danger in relying on any numbers which purport to represent the number of OMCG 'participants' at any one time is its very wide definition, which can

include members, associated persons, ex-members, disassociated members and unconfirmed members.

## UNREPORTED CRIME FIGURES

### WHAT ABOUT CRIMES WHICH ARE NOT REPORTED?

Crime statistics are, it is widely accepted, hampered by the fact that not all crime is reported.

There are many reasons why a crime might not be reported to law enforcement, including the reluctance of a victim to disclose family violence, or sexual assault; cases where the victim considers an incident too trivial to pursue; or, instances where victims are intimidated or threatened.

Whatever the reason, though, underreporting undoubtedly places some limitations on the use of statistical information, and its reliability.

The 2016 Report on Government Services offers this explanation:<sup>17</sup>

The full extent of crime is unlikely ever to be captured, because not all offences are reported to, or become known by, police. The victim's confidence in judicial process, the nature of the offence and the relationship between the victim and perpetrator are among the key factors that influence the propensity to report an offence.

The QPS referred the Taskforce to the concept of the 'dark figure' of unreported crime, in the context of unreported offending involving OMCG members.

The term itself carries an implicit acknowledgment that obtaining reliable figures about unreported crimes is fraught with difficulty and uncertainty.

Studies conducted in overseas jurisdictions which make reference to the phenomenon hypothesise, convincingly, that *'the vast pool of incidents which do not come to the*

*attention of the police does not conceal a large amount of serious crime with immediate social significance'*; rather, the pool consists mainly of offences where victims are 'much less likely to have been injured, their financial losses are small, and weapons are less likely to have been used by the offenders.'<sup>18</sup>

Criminologists recognise that victimisation surveys are the most useful tool to tap into this 'dark figure' of crime and the Australian Bureau of Statistics (ABS) appropriately conducts these surveys across the nation.<sup>19</sup>

That said, the very nature of victim surveys means there will almost always be a discrepancy between the data they collect and the data that is administratively recorded by law enforcement bodies.

More people will identify themselves as victims of crime than will be reflected in police recorded data. The ABS acknowledges that this occurs because victim surveys use a 'broad, behavioural definition for offences' whereas law enforcement bodies often use a legal or evidentiary definition.<sup>20</sup>

For example, a person may identify themselves as being the victim of an assault where they have been involved in a fight with another person, and both have (in effect, at law) consented to that course of conduct – the victim survey captures that person's subjective identification as a victim based only on how that person perceives a situation.

Law enforcement data, however, involves a more objective analysis of the facts of the assault (including an assessment about the element of consent) before it will be recorded as an offence.

## VICTIMISATION SURVEYS

The ABS, in an attempt to quantify the extent of unreported crime in Australia, conducts regular victim surveys.

The results present an estimate of the scale of 'victimisation' experienced by Australians aged 15 years and older for selected crimes

(personal physical assaults and household property crimes).<sup>21</sup>

While these surveys are useful in measuring a volume of unreported incidents, there are a number of variables which impact on the way they can be used to draw inferences about criminal activity in Queensland.

These variables range from differences in the recording practices used by police services, to the fact that the surveys are unable to capture any reliable information about 'victimless' crimes such as drug trafficking.

Any conclusions about the scale of unreported crime in Queensland must be viewed in light of those limitations.

The most recent ABS survey (2013-2014) provides a state-by-state breakdown of victim identified crimes. The survey reveals that over a 12-month period, only 55% of physical assaults and only 40% of face-to-face threatened assaults were reported to police in Queensland.<sup>22</sup>

While the percentage of unreported personal crime looks relatively large, the ABS usefully provides a guide to interpreting this information by reference to the QPS recording processes (which was independently confirmed by QPS to the Taskforce).

Unlike various other jurisdictions (New South Wales, South Australia, Western Australia, Northern Territory and Australian Capital Territory), when a person reports an assault to the QPS, the circumstances require the report to amount to an 'unlawful' offence before it is recorded on the Queensland Police Records and Information Management Exchange (QPRIME).<sup>23</sup>

To amount to an 'unlawful' offence the act or omission must not be authorised, justified or excused by law. The ABS categorises this an evidentiary assessment of a complaint, as opposed to simply accepting it on 'face value'.<sup>24</sup>

It follows, then, that while a person may consider they have been the victim of an assault for the purpose of the ABS victimisation survey, they are not considered the same by the QPS if the complaint is found to not actually amount to an offence (ie, where a victim claims to have been assaulted after actually assaulting the alleged offender first,<sup>25</sup> and in situations of self-defence or provocation).

Domestic violence situations are another variable which impacts on the interpretation of reported crime data in Queensland.

If a domestic violence incident which involves an assault is reported to QPS, the assault will only be recorded if the victim wishes to proceed with an assault complaint with a view to prosecution of the offender.<sup>26</sup>

If the victim chooses not to proceed with an assault charge, the complaint would be recorded on QPRIME as a domestic violence incident only and subsequently the assault would not be captured by QPS reported crime data.

That same victim may then identify himself or herself as having been the victim of an assault in a victimisation survey, meaning the results are inevitably skewed.

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#### WHAT PROPORTION OF OMCG-RELATED CRIME IS UNREPORTED?

A 1988 Parliamentary Report on witness protection recognised that organised criminal groups 'habitually resort to the violent intimidation of witnesses in order to avoid detection and punishment.'<sup>27</sup>

OMCGs are unlikely to be an exception, and it is widely accepted that members employ intimidation and standover tactics for a range of purposes (ie, to collect debts, threaten rival gangs, and frighten witnesses).

It follows from that assumption that fear of retribution would be a legitimate concern for a victim of an OMCG crime seeking assistance

from law enforcement and, as a result, some of those crimes may go unreported.

There is, however, no specific research to suggest that this fear is responsible for any greater proportion of unreported crime than any other reason.

The Queensland Police Service Annual Statistical Review (based on advice from the Office of the Government Statistician and the ABS) attributes the majority of unreported crime incidences to two primary explanations – that the victim considered the offence to be trivial, or that the victim doubted the police could or would take action.<sup>28</sup>

For a variety of reasons there is an undoubted gap between reported and unreported crime across Queensland. To quantify that gap, though, is virtually impossible and any attempt to do so would be heavily constrained by a number of variables.

The best that can be done is to acknowledge that a fear of retribution or intimidation does contribute to the pool of unreported crime (whether or not that fear is from an OMCG, or in some other context such as domestic or family violence); but, to accept that it does not appear on the available evidence to constitute a significant proportion of that pool.

## PERCEPTION

How a community *feels* and, in particular whether its members feel safe from crime, is something that does not necessarily correlate with actual crime rate statistics.

Rather, public perceptions about things like ‘community safety’ can be influenced by a number of sometimes nebulous factors: the daily lives of individual citizens, their own personal encounters with crime, and what they hear from politicians and media sources.

How Queenslanders perceive criminal activity across the state, and the degree to which they feel adequately protected from it, can (unsurprisingly) have an effect upon the way in

which governments and law enforcement agencies respond to various threats.

But perception is complex, and nuanced. Public attitudes are driven and informed by a myriad of different sources and are subject to an array of variables.

The suburb in which a person resides may cause them to have a greater concern about crime than someone living elsewhere.

Advancing age may make individuals feel more vulnerable and concerned for their safety.

A person who has been a victim (or knows a victim) of crime may be more fearful, and have stronger feelings about, the threat of crime.

The views of the community are an important part of any consideration of criminal activity across the state.

That said though, the views of eminent crime statisticians like Dr Weatherburn, mentioned earlier, illustrate how those views may be distorted or, in his strongly held opinion, exaggerated and made needlessly alarmist by those who choose to ignore available statistical information.

Public perceptions are a relevant unit of analysis, but only when they are informed and educated. *Uninformed* public opinion can do little but perpetuate the spread of misinformation and paint a false picture of the true landscape of crime in Queensland.

The utility and relevance of community perceptions about crime, and in particular organised crime and the role played by OMCGs, was a topic of lengthy discussion and debate among Taskforce members.

## WHAT INFLUENCES COMMUNITY PERCEPTIONS?

The community draws on a number of sources to construct views and opinions about crime and punishment.

Expert commentators have concluded that personal experiences, political representations and media portrayals are the most common influences on perception.<sup>29</sup>

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### PERSONAL EXPERIENCES

Public attitudes are driven by emotive concerns.<sup>30</sup> The personal experiences of citizens with criminal activity will inevitably impact on their perception of the size and nature of the problem.

A family who has suffered at the hands of drug addiction is likely to consider the drug problem in Queensland to be more serious than any other crime type; likewise, a business owner who has been robbed or whose legitimate operations have been exploited by an organised crime group, or who has been the victim of intimidation and standover tactics.

It is inevitable (and an aspect of ordinary human nature) that each individual citizen's personal experiences and encounters with crime will, more likely than not, influence their objective judgment.

There is no dispute that OMCG groups operate in the organised crime space in Queensland. While, on the statistics discussed above, they are by no means the biggest group so far as actual criminal offending is concerned, their sometimes brazen public presence means that they are the most identifiable.

OMCGs can be intimidating. Their mere existence – characterised by packs of men in leather vests sporting menacing tattoos and riding noisy motorcycles – can alarm some members of the Queensland community.

Add to that their tendency to play out violent feuds (within clubs, or between rival OMCGs) in very public spaces, such as restaurants and shopping centres (and airports), and the level of fear and intimidation increases.

So, using a similar analogy to the family and the business owner, a resident of Surfers Paradise who has shared a restaurant with patched OMCG members is probably more

likely to consider them a tangible, present threat to individual and public safety than a resident of, say, a Brisbane suburb in which bikies are rarely or never seen.

Personal experiences are diverse and, of course, highly individual. It is that subjective element which means that, while experiences can provide a sense of the *feeling* of public risk (or safety), they cannot be confidently said to provide a legitimate or reliable indicator of *actual* community safety.

The variables are just too unpredictable. It is, however, useful to understand how perceptions are formed.

Plainly, the personal experiences of individual citizens plays an important role in that development.

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### POLITICAL REPRESENTATIONS

Politicians need popular support. Without it they would never be elected. The notion of being tough on crime has fuelled political policy for decades. To be perceived as the opposite – *soft* on crime – is, as one eminent commentator has remarked, 'political anathema'.<sup>31</sup>

The 2013 suite was accompanied by a number of statements from politicians about the presence of OMCG groups in Queensland and the threat they presented to public safety. Their involvement in criminal activity was, it was said, so entrenched and so serious that it warranted extreme measures.<sup>32</sup>

It is inconceivable that those statements did not have an impact on the way the 'bikie threat' was perceived by members of the public.

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### MEDIA PORTRAYALS

Widespread research confirms the integral role that print and electronic news media play in shaping public opinion on crime and justice issues. Their accessibility, popularity and ubiquity means that media outlets are the

primary source of information for the large majority of citizens.

That research also shows that inaccuracies or misstatements in media reports and articles can create an *artificial* public perception of crime and the level of the threat it presents.<sup>33</sup>

The Victorian Sentencing Advisory Council has undertaken a detailed and considered analysis of community perceptions of criminal justice issues, with a particular focus on the role of the media and associated public views of sentencing processes and outcomes.

In a 2006 report produced for the Council by Senior Criminologist Dr Karen Gelb, the role of the media in crime reporting was discussed in these terms.<sup>34</sup>

‘Newspaper portrayals of crime stories do not provide a complete and accurate picture of the issue. Papers report selectively, choosing stories, and aspects of stories, with the aim of entertaining more than informing. They tend to focus on unusual, dramatic and violent crime stories, in the process painting a picture of crime for the community that overestimates the prevalence of crime in general and of violent crime in particular. **Thus public concerns about crime typically reflect crime as depicted in the media, rather than trends in the actual crime rate.**’

(emphasis added)

In June 1999 the QPS and the Queensland Crime Commission published an information paper titled *Project Krystal*, which was a strategic assessment of organised crime in Queensland.

Project Krystal discussed the way in which organised crime is defined, and noted a preoccupation with presuming OMCGs are the biggest organised crime players.

The report commented that media headlines and the emphasis placed on certain organised crime groups, in particular OMCGs, ‘*nurture[s] the perception of the domination of a crime market by particular groups*’ – a perception

which may not be wholly supported by reliable and accurate information.<sup>35</sup>

As Project Krystal also emphasised, it is incumbent upon law enforcement bodies to ‘*provide accurate information to their primary client – the public – about the true nature of organised criminal activity within the community*’.<sup>36</sup>

Those excerpts from Project Krystal and the report published by the Victorian Council are as topical now as they were when written.

The amplification of the role of OMCGs in criminal activity across Queensland has, in the face of the actual statistics, arguably distorted the public’s perception of the actual extent of the threat.

#### EVIDENCE PRESENTED TO THE TASKFORCE ON HOW THE QUEENSLAND COMMUNITY PERCEIVES THE CRIME THREAT IN RELATION TO OUTLAW MOTORCYCLE GANGS

Any attempt to analyse how the Queensland community perceives the threat of criminal activity, and in particular of OMCGs, must be undertaken in a way which acknowledges the discussion above about how those perceptions are formed.

QPS provided the Taskforce with surveys which, on their face, indicated that at least some members of the Queensland public viewed the threat of OMCGs as a serious one.

The surveys also indicated a beneficial impact as a result of the 2013 suite, and associated policing activity by QPS, on public perceptions about community safety.

The results of those surveys, as extracted by QPS, can be found at Attachment 5.<sup>37</sup>

Some caution must attach to them, for two reasons: the extraneous factors which can colour or even warp public opinion which were just discussed and, also, in regard to their intrinsic statistical reliability.

They have some obvious limitations arising from the size of the survey sample, and the nature of the questions asked of participants.

For example, the National Police Survey of Community Confidence in Policing reports that 85.7% of the community are no longer concerned about risks to their safety from criminal motorcycle gangs, but provides no data indicating how OMCGs tangibly impacted on their feelings of safety *prior* to the 2013 suite.

The Survey of Business Owners at the Gold Coast by the Department of the Premier and Cabinet has, with respect, similar apparent limitations. Plainly, it would be unscientific to rely upon a survey of 132 Gold Coast café and restaurant owners as conclusive, or even strongly persuasive, evidence of how Queenslanders, across the state, perceive the OMCG threat and the ‘crackdown’ on it.<sup>38</sup>

#### WHAT RELIANCE CAN (AND SHOULD) BE PLACED ON COMMUNITY PERCEPTION BY THE TASKFORCE?

Public perceptions about crime and safety are an important aspect of the discussion around policy approaches to criminal activity in Queensland.

But, again, statements and claims about community views can only be given weight and credence when they can be shown to reflect informed public engagement with an issue.

As one commentator has noted, surveys and polls are *‘ill-equipped to measure people’s complex, nuanced and shifting perceptions and opinions.’*<sup>39</sup>

As the research discussed above shows, community perception is influenced by media portrayals and political representations to a degree that carries the risk of distortion – at worst (as noted in Project Krystal) to the point that it ‘bears little resemblance’ to reality.<sup>40</sup>

At their highest, surveys can provide a ‘partial glimpse’ of public perceptions but, at their

lowest, may distort the true views of the community.<sup>41</sup>

Most Taskforce members accept that there is a commonly held view amongst Queenslanders that OMCGs play a significant and disproportionate role in criminal activity across the state. They are, as a result, perceived by some to be the biggest threat to community safety.

In the face of the statistical evidence, however, a number of Taskforce members have a strong concern that those views are exaggerated or disproportionate.

The Taskforce has striven to use these surveys, and other variable information it has gleaned about public perceptions, in a way which reflects their actual utility – that is, as interesting and useful information pursued in a reasonable effort to gauge public opinion but as something which, ultimately, cannot be held to represent a statistically sound or reliable picture of public attitudes and perceptions of OMCGs and the 2013 suite.

In summary, these surveys and their results can only, fairly, be placed beside and weighed with reliable statistical data about the actual level of OMCG criminal activity.

While there is no doubt that OMCGs play a role in the organised crime landscape of the state, the true extent of that role can only be fully appreciated in view of actual crime incidences and statistics including those provided, of course, by QPS itself.

#### “STATISTICS” IN THE MEDIA

All statistics carry limitations on their use and reliability. Despite those limits, it is not impossible to achieve an informed understanding of crime rates in Queensland based on the data available to the Taskforce.

The Byrne Report, which was specifically tasked with identifying and characterising crime risks in Queensland and drawing data from law enforcement bodies across the state,

provides a reliable and independent source from which those conclusions can be drawn.

On any view of all the statistics, OMCGs account for a very small proportion of the overall *reported* crime in Queensland – definitively, less than 1%.

The law enforcement and legislative approach to criminal organisation offending which underpins the 2013 suite has, it follows, placed considerable focus on an objectively small part of the criminal community with, in proportion, a relatively small number of charges and a very small number of convictions.

Statistics appearing in some media outlets from time to time have conveyed a dramatically different picture.<sup>42</sup> It has been widely reported, for example, that the ‘demonstrated results of the bikie crackdown’ was evident in ‘the arrest of 2,573 offenders’.<sup>43</sup>

On its face that figure is both impressive, and alarming. It implicitly (and strongly) connotes a very large number of individual arrests of bikies engaged in criminal activity on an apparently large scale.

QPS has clarified these figures in a way which significantly mutes their impact.

The number 2,573 was in fact the number of *arrests* made where the person *arrested* was identified as a *participant* in an OMCG, not the number of individual offenders who had been arrested – nor, necessarily, members of OMCGs.

The figure also contains inherent variables. It is not impossible, for example, that one person has been arrested on multiple separate occasions over the course of the 27-month period since the laws commenced, and they are being counted multiple times.<sup>44</sup> Conversely, if a person is been arrested on one occasion that led to multiple charges, they are only counted once.

Further, for the purpose of those 2,573 arrests the definition of ‘participant’ in an OMCG is, as

the QPS also confirms, very broad: it includes confirmed members, associates of members, disassociated members, ex-members, and even *unconfirmed* members and associates.<sup>45</sup>

Effectively, the partners or acquaintances of a person who was once an OMCG member but resigned from the club some years ago could still be counted in that number.

The figure also masks the fact that many of the charges were for minor, *simple* offences not regarded as signifying serious criminal, or organised, criminal activity. Statistics in the Byrne Report showed about half were simple.<sup>46</sup>

Almost three decades ago the Fitzgerald Inquiry discussed the effect on the public when crime figures are artificially inflated:<sup>47</sup>

*The community becomes ‘frustrated, confused and gravely under-informed.’*

(emphasis added)

Misunderstanding the true dimensions and nature of OMCG crime carries that risk.

It is unhelpful to the debate, and a disservice to the citizens of Queensland, to unquestioningly amplify the role of any particular organised crime group.

## HOW CAN WE GET A FIRM, INDEPENDENT PICTURE OF CRIME IN QUEENSLAND?

The problem with relying on a number of different sources in an attempt to ascertain a complete picture of crime across the state is that, while they all provide a piece of the puzzle, more often than not the pieces do not easily or neatly fit together, or correlate in a way which gives comfort that they are reliable.

Each source has its own intricacies and constraints which limit the use of what it produces.

Statistics must be factual and reliable indicators of actual crime rates and trends.

They should be as accurate and consistent as possible and should be reported on in a regular and timely fashion. The Queensland Audit Office is currently undertaking a review on the reporting of crime data. The investigation of how data is captured across various agencies (including law enforcement, courts, corrections, prosecuting bodies, Victims Assist Queensland and Legal Aid Queensland, etc.) and how that data is subsequently shared between those bodies is crucial to understand where the current gap lies in terms of criminal law statistics.

It was an election commitment of the Queensland Government that an independent crime statistical body would be established.

The work undertaken by the Taskforce in delivering its Terms of Reference reveals there is a strong need for such a body.

The collection, presentation and scrutiny of crime statistics is crucial in providing government, law enforcement, policy bodies and the public with a comprehensive picture of crime in our State.

The Taskforce endorses the recommendation of the Byrne Report that, once established, that body should prioritise the collection and analysis of data relevant to organised crime.<sup>48</sup>

### RECOMMENDATION 1 (Chapter Four)

The Queensland Government should establish an independent statistical research body to collect and publish regular analysis of Queensland crime data, and, once established, that body should prioritise the collection and analysis of data relevant to organised crime in Queensland. (unanimous recommendation)

## ENDNOTES

- <sup>1</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3156 (Jarrod Bleijie, Attorney-General and Minister for Justice).
- <sup>2</sup> Australian Institute of Criminology, 'Australian Crime: Facts & Figures' (Report, Australian Government, 2014) iii.
- <sup>3</sup> As at 30 June 2014, the number of adult prisoners in Queensland prisons was 7,049. This represents an increase of 16% (973 prisoners) from 2013. This is the highest number of prisoners since 2004. Australian Bureau of Statistics, *Prisoners in Australia 2014* (11 December 2014) [www.abs.gov.au](http://www.abs.gov.au).
- <sup>4</sup> Rachel Olding, 'Prison Crisis: Call for Lighter Sentencing', *Sydney Morning Herald*, 17 February 2016, 6.
- <sup>5</sup> Don Weatherburn, Director of the NSW Bureau of Crime Statistics and Research, 17 February 2016.
- <sup>6</sup> Queensland Police Service, *Annual Statistical Review 2014/2015* (15 October 2015), 6.
- <sup>7</sup> Terry Goldsworthy, Submission No 5.17 to the Taskforce on Organised Crime Legislation, 9 September 2015, 14.
- <sup>8</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3156 (Jarrod Bleijie, Attorney-General and Minister for Justice); 3210 (Campbell Newman, Premier).
- <sup>9</sup> Queensland, Commission of Inquiry into Organised Crime, *Final Report* (2015), 25 (the Byrne Report).
- <sup>10</sup> Joshua Robertson, 'Bikie Gang Laws: First Person Convicted under VLAD Act is Spared Longer Jail Term', *The Guardian* (online), 3 June 2015 <<http://www.theguardian.com/australia-news/2015/jun/03/bikie-gang-laws-first-person-convicted-under-vlad-act-is-spared-longer-jail-term>>.
- <sup>11</sup> Transcript of Proceedings, *The Queen v Brett William Young* (Brisbane Supreme Court. Justice Boddice, 24 September 2015).
- <sup>12</sup> Advice from Queensland Police Service to the Secretariat to the Taskforce on Organised Crime Legislation, 14 March 2016 (in confidence). The QPS advised that, in providing this number, they were unable to replicate the exact methodology used to determine the figure provided to the Queensland Commission of Inquiry into Organised Crime. The QPS have instead provided this number on the basis that it represents all criminal offences charged between 17 October 2013 and 31 December 2015, excluding offences under the *Transport Operation (Road Use Management) Act 1995* (Qld) and the *Regulatory Offences Act 1985* (Qld).
- <sup>13</sup> Advice from Queensland Police Service to the Secretariat to the Taskforce on Organised Crime Legislation, 15 February 2016 (in confidence).
- <sup>14</sup> Terry Goldsworthy, Submission No 5.17 to the Taskforce on Organised Crime Legislation, 9 September 2015, 17.
- <sup>15</sup> Terry Goldsworthy, Submission No 5.17 to the Taskforce on Organised Crime Legislation, 9 September 2015, 18.
- <sup>16</sup> Queensland Police Service, Submission No 1.10 (part 2) to the Taskforce on Organised Crime Legislation, undated, 17.
- <sup>17</sup> Steering Committee for the Review of Government Service Provision, *Report on Government Services 2016 Volume C: Justice*, Productivity Commission, Canberra, 6.26.
- <sup>18</sup> Wesley Skogan, 'Dimensions of the Dark Figure of Unreported Crime' (1977) 23 *Crime and Delinquency* 41, 49.
- <sup>19</sup> See generally, Wesley Skogan, 'Dimensions of the Dark Figure of Unreported Crime' (1977) 23 *Crime and Delinquency* 41 and Clive Coleman and Jenny Moynihan, *Understanding Crime Data: Haunted by the Dark Figure* (Open University Press, 1996).
- <sup>20</sup> Australian Bureau of Statistics, *Measuring Victims of Crime: A Guide to Using Administrative and Survey data* (16 June 2011) <[www.abs.gov.au](http://www.abs.gov.au)>.
- <sup>21</sup> Australian Bureau of Statistics, *Crime Victimization, Australia 2013-14* (17 February 2015) <[www.abs.gov.au](http://www.abs.gov.au)>.
- <sup>22</sup> Australian Bureau of Statistics, *Crime Victimization, Australia 2013-14* (17 February 2015) <[www.abs.gov.au](http://www.abs.gov.au)>.
- <sup>23</sup> Advice from Queensland Police Service to the Secretariat to the Taskforce on Organised Crime Legislation, 5 February 2016 (in confidence).
- <sup>24</sup> Australian Bureau of Statistics, *Measuring Victims of Crime: A Guide to Using Administrative and Survey data* (16 June 2011) <[www.abs.gov.au](http://www.abs.gov.au)>.
- <sup>25</sup> Advice from Queensland Police Service to the Secretariat to the Taskforce on Organised Crime Legislation, 5 February 2016 (in confidence).

- <sup>26</sup> Advice from Queensland Police Service to the Secretariat to the Taskforce on Organised Crime Legislation, 5 February 2016 (in confidence).
- <sup>27</sup> Parliamentary Joint Committee on the National Crime Authority, Parliament of the Commonwealth of Australia, *Witness Protection* (1988), viii.
- <sup>28</sup> Queensland Police Service, *Annual Statistical Review 2014/2015* (15 October 2015), 159.
- <sup>29</sup> Lynne Roberts and David Indermaur, 'Predicting Punitive Attitudes in Australia' (2007) 14(1) *Psychiatry, Psychology and Law* 56, 59.
- <sup>30</sup> Karen Gelb, 'More Myths and Misconceptions' (Sentencing Advisory Council, Victoria, September 2008), 13.
- <sup>31</sup> Arie Freiberg, 'Sentencing: Trends and Issues: (2005) 86 *Australian Law Reform Commission Reform Journal* 7, 8.
- <sup>32</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3157 (Jarrod Bleijie, Attorney-General and Minister for Justice).
- <sup>33</sup> Karen Gelb, 'Alternatives to Imprisonment: Community Views in Victoria' (Sentencing Advisory Council, Victoria, March 2011), 18.
- <sup>34</sup> Karen Gelb, 'Myths and Misconceptions: Public Opinion versus Public Judgement about Sentencing' (Sentencing Advisory Council, Victoria, July 2006), 27.
- <sup>35</sup> Queensland Crime Commission and Queensland Police Service, 'Project Krystal: A Strategic Assessment of Organised Crime in Queensland' (Public Information Paper, June 1999), 8.
- <sup>36</sup> Queensland Crime Commission and Queensland Police Service, 'Project Krystal: A Strategic Assessment of Organised Crime in Queensland' (Public Information Paper, June 1999), 8.
- <sup>37</sup> Queensland Police Service, Submission No 5.16 to the Taskforce on Organised Crime Legislation, undated, 10.
- <sup>38</sup> Queensland Police Service, Submission No 5.16 to the Taskforce on Organised Crime Legislation, undated, 10.
- <sup>39</sup> Karen Gelb, 'Myths and Misconceptions: Public Opinion versus Public Judgement about Sentencing' (Sentencing Advisory Council, Victoria, July 2006), 14.
- <sup>40</sup> Queensland Crime Commission and Queensland Police Service, 'Project Krystal: A Strategic Assessment of Organised Crime in Queensland' (Public Information Paper, June 1999), ix.
- <sup>41</sup> Karen Gelb, 'Myths and Misconceptions: Public Opinion versus Public Judgement about Sentencing' (Sentencing Advisory Council, Victoria, July 2006), 14.
- <sup>42</sup> It is worth an observation on this point that recent media reports have sought to discuss the lack of similar laws in other Australian jurisdictions. Those reports have hypothesised that OMCs in, for example, New South Wales are "allowed to roam the streets and engage in bloody stabbings and brawls with rival gangs." Both the New South Wales Government and Police Service strongly disputed that claim and highlighted that there has been a "huge recent decline in bikie numbers" with the "NSW Police Force making major inroads into outlaw motorcycle gangs" without the need for analogous laws. See Taylor Auerbach, 'NSW a Bikies' Paradise', *Gold Coast Bulletin* (Gold Coast, Queensland) 24 February 2016.
- <sup>43</sup> Editorial, 'Top Priority is to Keep Streets Safe from Thugs', *The Courier Mail* (Brisbane), 18 January 2016.
- <sup>44</sup> Advice from Queensland Police Service to the Secretariat to the Taskforce on Organised Crime Legislation, 3 February 2016 (in confidence).
- <sup>45</sup> Advice from Queensland Police Service to the Secretariat to the Taskforce on Organised Crime Legislation, 3 February 2016 (in confidence).
- <sup>46</sup> Queensland, Commission of Inquiry into Organised Crime, Final Report (2015), 25 (the Byrne Report).
- <sup>47</sup> Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Final Report* (1989) 148 (the Fitzgerald Inquiry).
- <sup>48</sup> Queensland, Commission of Inquiry into Organised Crime, *Final Report* (2015) 282 (the Byrne Report).

## PART 3

# CHAPTER FIVE

## THE 2013 SUITE

*A public brawl between bikies at Broadbeach in September 2013 led to the speedy introduction of an anti-OMCG legislative package.*

### THE BROADBEACH BRAWL

On the evening of Friday 27 September 2013 approximately 60 members of the Bandidos OMCG appeared in the Broadbeach Central Business District. Part of that group, about 15 or 20 in number, crossed the street and headed towards the Aura Tapas & Lounge Bar.

They entered the restaurant at about 8:30pm. It was busy with customers.

The group of Bandidos made their way to a rear table, where two members of a rival gang (the Finks) were dining. Threats were made. The group and the two Finks diners turned and began to walk out of the restaurant.

As they approached the entrance to the restaurant a violent incident occurred. It seemed to involve only a few of those Bandidos members who entered, and one or both of the Finks diners. It lasted only a short time – a number of police officers were nearby, and they were able to quickly subdue the altercation.

Two groups formed. The smaller was immediately outside the restaurant, with a larger group a short distance away. The two groups were separated by police officers – who were, it must be said, heavily outnumbered.

The larger group failed to move on, as instructed by the officers, for about 20 minutes.<sup>1</sup>

Eighteen arrests were made that evening (a number of other OMCG members were subsequently arrested following a police investigation).<sup>2</sup>

Whilst there is some uncertainty surrounding the event, television footage showed that later that same evening some persons who appeared to be OMCG members gathered outside the Southport Police Station, apparently demanding the release of those arrested.

This incident sparked a rapid government response and, within weeks, a legislative package targeting OMCGs was implemented.

The content, and the effects, of this legislative package (as well as its rapid introduction) gave rise to public discussion and debate.

Many supported it as a necessary response to a serious, ongoing threat to public safety. Others expressed disquiet about the need for it, its contents, and its consequences.

Debate and discussion, and different public responses, were inevitable. The legislation was, on any view, harsh in its effects – but, as the government unabashedly declared, that was perfectly deliberate.

## TIMELINE OF EVENTS

The speed of the Government's response is illustrated by the following timeline:

### 27 September 2013

- The Broadbeach brawl erupts between members of the Bandidos OMCG and Finks OMCG.

### 28 September 2013

- At the direction of the Queensland Government, the Commissioner of Police announces extra police and the creation of a specific taskforce assigned to the Gold Coast area following the Broadbeach incident.<sup>3</sup>
- The Attorney-General indicates that approaches taken in other jurisdictions to tackle organised crime, which complemented existing laws, were being considered.<sup>4</sup>

### 29 September 2013

- The Government announces new laws to tackle OMCGs and organised crime in Queensland.<sup>5</sup>

### 1 October 2013

- Work commenced within the Queensland Police Service to establish *Operation Resolute*, including *Taskforce Maxima*, with the primary objective to disrupt, dismantle and eliminate OMCGs from Queensland.<sup>6</sup>

### 2 October 2013

- A member of the Bandidos declares to the media that they 'run the Gold Coast'.<sup>7</sup>

### 3 October 2013

- The Attorney-General indicates that laws designed to break up OMCG gangs will be introduced to Parliament on 15 October 2013 and were unlikely to be sent to a Parliamentary Committee for examination prior to their passage.<sup>8</sup>

### 15-16 October 2013

- When Parliament commenced at about 9am on 15 October 2013, the Government signified its intention to introduce three Bills for urgent debate that day: the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld)*, the *Tattoo Parlours Act 2013 (Qld)*, and the *Vicious Lawless Association Disestablishment Act 2013 (Qld)*.
- The Bills were tabled at 2:30pm and at 2:45pm the Attorney-General moved to have them declared urgent so as to enable them to be passed through the remaining stages at that week's sittings.<sup>9</sup>
- During the urgency motion the Opposition Leader told Parliament that:<sup>10</sup>
  - The Bills had not proceeded through the Parliamentary Committee system. The

Opposition Leader suggested to Parliament that the Bills could be appropriately referred to, and examined by, the Parliamentary Crime and Misconduct Commission (PCMC) and the Legal Affairs and Community Safety Committee (LACSC), who could report back to the Legislative Assembly the following day, and still allow time for debate and passage in that week;

- The Opposition had not received briefings on the Bills. (The Attorney-General advised that the Opposition Leader's Office would be briefed at 3pm that day).
- The urgency motion was passed shortly after 3pm.<sup>11</sup>
- The Second Reading of the Bills commenced at 7:41pm;<sup>12</sup> debate continued until the early hours of 16 October 2013.
- The Opposition moved some minor amendments to the Bills (for example, excluding lawyers acting in their professional capacity from being captured by the legislation)<sup>13</sup> during the consideration-in-detail stage of the debate, at around 1:20am on 16 October 2013.
- The three Bills were read a third time and passed through Parliament (ie, bypassing the Parliamentary Committee process) at 2:47am on 16 October 2013.<sup>14</sup> The Opposition voted in favour of the laws.<sup>15</sup>

### 19-21 November 2013

- On 19 November 2013, the *Criminal Law (Criminal Organisations Disruption) and Other Legislation*

*Amendment Act 2013* (Qld) was presented to Parliament at 10:12pm and referred to the LACSC with a report back date of 21 November 2013.<sup>16</sup>

- On 21 November 2013, the Report of the LACSC was tabled in Parliament at 9:58am.<sup>17</sup>
- The Bill was read for a second time, starting at 12:26 pm on 21 November,<sup>18</sup> with several adjournments of debate throughout the day. Debate concluded at approximately 9pm, when the Bill was passed by Parliament.<sup>19</sup> The Opposition voted against many of the clauses of the Bill during its consideration-in-detail stage.

## SCRUTINY AND CONSULTATION

The reason advanced in the Explanatory Notes for this expedition, and dearth of consultation, was:<sup>20</sup>

*'Consultation has occurred within Government. Wider consultation has not been possible because of the need to respond urgently to the significant public threat criminal gangs pose in Queensland.'*

The remainder of this Chapter provides an overview of the 2013 suite.

## THE 2013 SUITE OF LEGISLATION

### THE VICIOUS LAWLESS ASSOCIATION DISESTABLISHMENT ACT 2013

The *Vicious Lawless Association Disestablishment Act 2013* (Qld) (the VLAD Act) was introduced into the Queensland Parliament on 15 October 2013 and commenced on 17 October 2013.

The VLAD Act creates a legislative scheme whereby a participant in a criminal association who commits certain offences is categorised as a 'vicious lawless associate' and, if

convicted, made subject to severe mandatory penalties – not less than 15 or, in some cases, 25 years imprisonment.

This mandatory sentencing scheme can only be mitigated if the person undertakes to cooperate with law enforcement agencies, and that offer of cooperation is accepted in writing by the Commissioner of Police.

The cooperation must meet the threshold that it will be of significant use in a proceeding about a declared offence. Decisions of the Commissioner in this regard are final and not judicially reviewable (except for jurisdictional error).

## CRIMINAL CODE AMENDMENTS

### AMENDMENT TO THE CRIMINAL CODE DEFINITION OF ‘CRIMINAL ORGANISATION’

Before 2013, section 1 of the Criminal Code had a definition of ‘criminal organisation’ with two limbs.

The 2013 suite changed the definition of ‘criminal organisation’ under section 1 of the Code. Limb one was broadened to provide that a group of three or more people need only have as *one of their purposes* (rather than *predominantly associate for the purpose of*) engaging in, organising, planning, facilitating, supporting or otherwise conspiring to engage in, serious criminal activity, to constitute a criminal organisation. Limb two of the definition remained unchanged.

A new limb was then inserted into the definition (limb three).

The new limb three provides that a criminal organisation also means an entity *declared under a regulation*.

To that end, new section 708A was inserted into the Criminal Code. It sets out the criteria by which the Minister may consider before recommending an entity to be a criminal organisation under the *Criminal Code (Criminal Organisations) Regulation 2013* (Qld) (a new

Regulation which also commenced as part of the 2013 suite).

How the term ‘criminal organisation’ is defined under section 1 of the Criminal Code has significant implications; that definition is not only used extensively within the Criminal Code itself, but it is also relied upon in other Queensland legislation.

For example, under the Criminal Code, the definition of criminal organisation applies:

- as an element of the new offences in sections 60A, 60B and 60C inserted under the 2013 suite;
- as an element of the new circumstances of aggravation inserted under the 2013 suite; and
- to the offences in section 86 (obtaining of or disclosure of secret information about the identity of an informant), section 359 (aggravated threats) and section 359E (unlawful stalking), unrelated to the 2013 suite.

The definition also applies under:

- the *Bail Act 1980* (Qld) – to determine when the reverse onus provisions apply with respect to participants in criminal organisations;
- the *Corrective Services Act 2006* (Qld) – as part of the ‘Criminal Organisation Segregation Order’ provisions;
- the *Liquor Act 1992* (Qld) – as an element of offences pertaining to participants in criminal organisations being present in licensed premises;
- the *Police Powers and Responsibilities Act 2000* (Qld) – as an element of new stop, search and detain powers; and
- the new and/or amended occupational and industry licensing regimes.

### CREATION OF CRIMINAL CODE OFFENCES (SECTIONS 60A, 60B AND 60C) AND CREATION OF NEW CIRCUMSTANCES OF AGGRAVATION

The *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* amended the Criminal Code to:

- Create a new offence (section 60A – the anti-association offence) for participants in criminal organisations who knowingly gather together in a group of three or more persons. It carries a maximum penalty of three years imprisonment, with a mandatory minimum penalty of six months imprisonment to be served wholly in a corrective services facility;
- Create a new offence (section 60B – the clubhouse offence) for a participant in a criminal organisation who enters or attempts to enter a prescribed place, or attends or attempts to attend a prescribed event. It carries a maximum penalty of three years imprisonment and a mandatory minimum penalty of six months imprisonment to be served wholly in a corrective services facility;
- Create a new offence (section 60C – the recruitment offence) for a participant in a criminal organisation who recruits another person to that organisation. It carries a maximum penalty of three years imprisonment and a mandatory minimum penalty of six months imprisonment to be served wholly in a corrective services facility;
- Amend section 72 (*affray*) to create a circumstance of aggravation where the offender is a participant in a criminal organisation, with the circumstance carrying a maximum penalty of seven years imprisonment, and a mandatory minimum penalty of six months imprisonment to be served wholly in a corrective services facility;
- Amend section 92A (*misconduct in relation to public office*) to create a circumstance of aggravation for a person who gained a benefit, directly or indirectly while a participant in a criminal organisation, with the circumstance carrying a maximum penalty of 14 years imprisonment;
- Amend section 320 (*grievous bodily harm*) to create a circumstance of aggravation where the offender is a participant in a criminal organisation, and harms a police officer acting in execution of their duty. The mandatory minimum penalty is one year imprisonment to be served wholly in a corrective services facility;
- Amend section 340 (*serious assault*) to create a circumstance of aggravation where an offender is a participant in a criminal organisation and assaults a police officer acting in the execution of their duty, in circumstances attracting the maximum penalty of 14 years imprisonment. The mandatory minimum penalty is one year imprisonment to be served wholly in a corrective services facility; and
- Amend section 408D(1) (*obtaining or dealing with identification information*) to create a new circumstance of aggravation when the offender supplied the information to a participant in a criminal organisation, with the circumstance carrying a maximum penalty of seven years imprisonment.

#### CRIMINAL CODE (CRIMINAL ORGANISATIONS) REGULATION 2013

The Regulation is a legislative adjunct to Limb 3 of the new definition of ‘criminal organisation’ introduced into the Criminal Code, and flows from new section 708A – the provision which allows a government minister to recommend to the Governor-in-Council that an organisation be declared to be criminal.

## PRESCRIBED ENTITIES

The Regulation prescribes 26 entities as being *criminal organisations*.<sup>21</sup> All 26 entities are OMCGs.

## PRESCRIBED PLACES

For the purpose of section 60B(4) of the Criminal Code, the Regulation also declares a number of premises as being a 'prescribed place' preventing participants in criminal organisations from attending those premises.<sup>22</sup>

## BAIL ACT 1980 AMENDMENTS

The Bail Act was amended to provide that, where the court or a police officer is satisfied that a defendant charged with any offence (regulatory, simple or indictable) where it is alleged that they are a *participant in a criminal organisation*, then:

- the defendant will be in a *show cause* position: that is, the court or police officer shall refuse to grant bail unless the defendant shows cause why their detention in custody is not justified; and
- the defendant must surrender their passport/s, and must be detained until that condition is complied with.

## CORRECTIVE SERVICES ACT 2006 AMENDMENTS

The Corrective Services Act was amended to enable Queensland Corrective Services (QCS) to implement a restricted management regime for participants in criminal organisations in Queensland prisons and who are subject to parole or community-based orders.

The amendments enable the QCS to:

- segregate a remand or sentenced prisoner and apply a restrictive management regime (including limiting that prisoner's entitlements), if informed by the Commissioner of

Police that the prisoner is a participant in a criminal organisation;

- ensure all prisoners who are subject to the restricted management regime receive a high or maximum security classification;
- ensure regular medical checks of prisoners who are subject to the restricted management regime;
- enable the exchange of information and intelligence between QPS and QCS; and
- apply electronic monitoring, movement restrictions and drug testing requirements to offenders under supervision in the community who are participants in a criminal organisation.

## CRIME AND CORRUPTION ACT 2001 AMENDMENTS

The 2013 suite significantly amended the *Crime and Corruption Act 2001* (Qld).

The amendments were contained in both the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* and *Criminal Law (Criminal Organisations Disruption) and Other Legislation Act 2013*.

The *Crime and Misconduct Act 2001* (Qld) was renamed the *Crime and Corruption Act 2001* by the *Crime and Misconduct and Other Legislation Amendment Act 2014* (Qld). (For ease of reference throughout this Report the legislation will be referred to by its current name, the *Crime and Corruption Act 2001* (CCA)).

The policy objectives of the 2013 amendments were aimed at enhancing the Crime and Corruption Commission's (CCC) ability to target clandestine criminal organisations.

Some of the amendments, however, had application beyond criminal organisations, with mandatory minimum sentences applying

to all persons convicted of contempt and enabling the use of compelled evidence from CCC investigations and hearings in later confiscation proceedings.

The amendments:

- define a ‘participant in a criminal organisation’ to include a person who was a ‘participant’ of the relevant organisation within the preceding two years;
- enable the CCC to intelligence function hearings with respect to criminal organisations, and their participants;
- provide the CCC with an immediate response function enabling it to undertake crime investigations, and conduct intelligence hearings, into incidents which have threatened or may threaten public safety;
- allow information from any CCC hearing (which would otherwise not be permitted into evidence because it tends to incriminate the person) to be used in confiscation proceedings;
- increase the statutory penalties for non-compliance by witnesses at CCC hearings. When the contempt involves a refusal to take an oath, answer a question or produce a stated document or thing at any CCC hearing, the penalties include the imposition of a new minimum mandatory term of imprisonment, namely:
  - a term to be decided by the court for the first contempt;
  - two and a half years imprisonment for the second contempt; and
  - five years imprisonment for the third and subsequent contempts;
- enable the CCC to issue a notice that may require the production of documents, information or statements for an approved intelligence operation;
- require the immediate attendance of a witness to a hearing about an incident which has threatened, or may threaten public safety, without prior approval from the Supreme Court;
- allow for the detention of a witness pending the CCC bringing an application to the Supreme Court for contempt;
- allow a Magistrate to issue a warrant for a person who has been given an attendance notice, but not attended;
- prohibit a defendant charged with a criminal offence from obtaining, to assist in their defence, any evidence obtained by the CCC at an intelligence hearing;
- remove, from a person who has been served with an attendance notice authorised pursuant to the CCC’s immediate response function, the ability to seek financial assistance from the Attorney-General to obtain legal representation; and
- allow the CCC to investigate (including requiring a person to answer questions) when that person has been charged with a criminal offence.

#### LIQUOR ACT 1992 AMENDMENTS

The 2013 suite amended the Liquor Act to create a series of discrete offences targeted at preventing patrons in licensed premises from wearing or displaying material, including items of clothing, that is associated with a declared criminal organisation.

**PENALTIES AND SENTENCES ACT 1992  
AMENDMENTS**

The *Penalties and Sentences Act 1992* (Qld) was amended to provide that, for certain offences committed by an offender who is a participant in a criminal organisation, the court must disqualify the offender from holding or obtaining a driver licence absolutely (or for a period of not less than three months) regardless whether the offence was committed in connection with, or arising out of, the driving of a motor vehicle.

**POLICE POWERS AND RESPONSIBILITIES  
ACT 2000 AMENDMENTS**

The Police Powers and Responsibilities Act was amended to:

- provide additional police powers to search, without a warrant, a person reasonably suspected of being a participant in a criminal organisation and/or a vehicle in that person's possession or use;
- require a person who is reasonably suspected of being a participant in a criminal organisation or a person found at a prescribed place or event to state their name and address to police;
- expand the power to impound vehicles so as to incorporate the new Criminal Code offences under sections 60A, 60B and 60C, the Criminal Code offence of affray with the new circumstance of aggravation, and the aggravated form of the evade police offence, so that a vehicle used in the commission of those offences may be impounded and forfeited to the State upon conviction;
- increase the mandatory minimum penalty for the offence of evade police to 50 penalty units, or 50 days imprisonment to be served wholly in a correctional services facility. For an

offender who is a *participant in a criminal organisation* the mandatory minimum penalty is 100 penalty units, or 100 days imprisonment to be served wholly in a correctional services facility.

**POLICE SERVICE ADMINISTRATION ACT  
1990 AMENDMENTS**

The *Police Service Administration Act 1990* (Qld) was amended to allow the Commissioner of Police to disclose the criminal history of a current or former participant in a criminal organisation to an entity where the Commissioner is satisfied the disclosure is in the public interest.

**TRANSPORT PLANNING AND  
CO-ORDINATION ACT 1994 AMENDMENTS**

The *Transport Planning and Co-ordination Act 1994* (Qld) was amended to allow the Chief Executive of the Department of Transport and Main Roads to provide an approved agency with all information held in databases maintained by DTMR.

The *Transport Planning and Coordination Regulation 2005* (Qld) was also amended to prescribe the Australian Security Intelligence Organisation as an 'approved agency'.

The amendments were made following advice from ASIO which had identified an intelligence gap during its preparations for Brisbane's G20 Summit held in 2014.

**AMENDMENTS FACILITATING THE  
USE OF AUDIO VISUAL LINKS IN THE  
CRIMINAL JUSTICE SYSTEM**

The 2013 suite amended the *Justices Act 1866* (Qld), *Bail Act*, *Penalties and Sentences Act*, the *Criminal Code*, the *Supreme Court of Queensland Act 1991* (Qld) and *District Court of Queensland Act 1967* (Qld), in order to maximise the use of audio visual facilities and assist in the administration of justice by providing an efficient avenue to conduct certain criminal proceedings.

The Taskforce thought these amendments were appropriate and useful.

## OCCUPATIONAL AND INDUSTRY LICENSING AMENDMENTS

### TATTOO PARLOURS ACT 2013

The new *Tattoo Parlours Act 2013* (Qld) received assent on 17 October 2013, and commenced on 1 July 2014.

Its stated aims to eliminate and prevent criminal infiltration of the tattoo industry through a strict occupational licensing regime, employing rigorous probity testing.

Applications for a licence are subject to inquiries and investigations by the Commissioner of Police, who has a determinative role in assessing whether an applicant is a fit and proper person to hold a licence and/or whether it is contrary to the public interest for a licence to be granted.

Licensing decisions are reviewable by the Queensland Civil and Administrative Tribunal (QCAT) or judicially reviewable by the Supreme Court (but only on the basis of jurisdictional error).

QCAT is required to protect any 'criminal intelligence report or other criminal information' to which the Commissioner of Police had regard to in making the adverse security determination.

### OTHER INDUSTRY AND OCCUPATIONAL LICENSING AMENDMENTS

In addition to the *Tattoo Parlours Act*, the 2013 suite made significant amendments to other legislation associated with trades and vocations.

The amendments were said to be aimed at preventing identified participants in criminal organisations (and criminal organisations themselves) from obtaining a licence, permit, or other authority to work in particular industries.

The following Acts were amended:

- *Electrical Safety Act 2002* (Qld);
- *Liquor Act*;
- *Queensland Building and Construction Commission Act 1991* (Qld) (previously the *Queensland Building Services Authority Act 1991*);
- *Racing Act 2002* (Qld);
- *Second-hand Dealers and Pawnbrokers Act 2003* (Qld);
- *Security Providers Act 1993* (Qld);
- *Tow Truck Act 1973* (Qld); and
- *Work Health and Safety Act 2011* (Qld).

(The commencement of the 2013 amendments to the *Work Health and Safety Act*, *Electrical Safety Act* and the *Queensland Building Services Authority Act* have been postponed and are scheduled to commence on 1 July 2016.)

While different language is adopted under the various licensing legislation, the amendments are directly aimed at preventing participants in a criminal organisation from obtaining or holding relevant licences and/or approvals.

The amendments:

- authorised the Commissioner of Police to disclose the names of participants in criminal organisations to the government departments or agencies administering the applicable regimes;
- maintain the confidentiality of criminal intelligence where the Commissioner of Police provides information to the Chief Executive of the administering department which contains or relies upon it;
- maintain the confidentiality of criminal

intelligence in review processes through QCAT; and

- provide that the *Judicial Review Act 1991* (Qld) does not apply to a refusal to grant or the decision to cancel a licence, permit or authority in relation to criminal organisations or identified participants, (except to the extent the decision is affected by jurisdictional error).

#### WEAPONS ACT 1990 AMENDMENTS

The *Weapons Act 1990* (Qld) was amended to include persons who are identified participants in criminal organisations and bodies that are identified criminal organisations (as defined by the Criminal Code) as an additional group of persons to be considered not 'fit and proper' to possess a weapons licence.

#### RECOMMENDATION 2 (Chapter Five)

The 2013 amendments which facilitate the use of audio visual links should be retained. (unanimous recommendation)

#### RECOMMENDATION 3 (Chapter Five)

The 2013 amendments to the *Transport Planning and Co-ordination Act 1994* (Qld) should be further considered by the Government to determine whether the current provision provides adequate transparency and oversight for the sharing of information between the Department of Transport and Main Roads and Australian Security Intelligence Organisation. (unanimous recommendation)

## ENDNOTES

- <sup>1</sup> See *Clarke-David v Commissioner of Police* [2014] QDC 61 (12 March 2014) (Farr SC DCJ).
- <sup>2</sup> The Office of Director of Public Prosecutions advised that 42 defendants were charged with 45 offences. 32 defendants were convicted with respect to a total of 40 charges. 10 defendants (each charged with one offence of riot) had their matters discontinued - Advice from Office of Director to Public Prosecutions to the Taskforce on Organised Crime Legislation, 24 and 25 February, 2016) (in confidence).
- <sup>3</sup> Kate McKenna, 'Police vow further crackdown on bikies and new task force following brawl at Broadbeach', *The Courier-Mail* (online), 28 September 2013 <<http://www.couriermail.com.au/news/three-arrested-after-bikie-brawl-at-broadbeach-involving-bandidos/story-fnihsrk2-1226728898927>>.
- <sup>4</sup> Kate McKenna, 'Police vow further crackdown on bikies and new task force following brawl at Broadbeach', *The Courier-Mail* (online), 28 September 2013 <<http://www.couriermail.com.au/news/three-arrested-after-bikie-brawl-at-broadbeach-involving-bandidos/story-fnihsrk2-1226728898927>>.
- <sup>5</sup> Queensland Government, 'Tough new laws to combat criminal gangs' (Media Release, 30 September 2013) <<http://statements.qld.gov.au/Statement/2013/9/30/tough-new-laws-to-combat-criminal-gangs>>.
- <sup>6</sup> Advice from Queensland Police Service to the Taskforce on Organised Crime Legislation, 26 February 2016 (in confidence).
- <sup>7</sup> Tanya Westthorp, 'Just a laugh for the gangs', *Gold Coast Bulletin* (Gold Coast), 2 October 2013, 5.
- <sup>8</sup> Greg Stolz, 'Attorney-General Jarrod Bleijie says new Queensland bikie laws to take effect within weeks, as Abbott Government also steps up attack', *The Courier-Mail* (online), 4 October 2013 <<http://www.couriermail.com.au/news/queensland/attorney-general-jarrod-bleijie-says-new-queensland-bikie-laws-to-take-effect-within-weeks-as-abbott-government-also-steps-up-attack/story-fnihsrf2-1226731830931>>.
- <sup>9</sup> Queensland, Parliamentary Debates, Legislative Assembly, 15 October 2013, 3158.
- <sup>10</sup> Queensland, Parliamentary Debates, Legislative Assembly, 15 October 2013, 3158-3159 (Annastacia Palaszczuk, Leader of the Opposition).
- <sup>11</sup> Queensland, Parliamentary Debates, Legislative Assembly, 15 October 2013, 3160.
- <sup>12</sup> Queensland, Parliamentary Debates, Legislative Assembly, 15 October 2013, 3198.
- <sup>13</sup> Queensland, Parliamentary Debates, Legislative Assembly, 15 October 2013, 3258.
- <sup>14</sup> Queensland, Parliamentary Debates, Legislative Assembly, 15 October 2013, 3269.
- <sup>15</sup> The Opposition put forward proposed amendments to a number of clauses during the consideration-in-detail stage of the Bills; those proposals were rejected.
- <sup>16</sup> Queensland, Parliamentary Debates, Legislative Assembly, 19 November 2013, 3987.
- <sup>17</sup> Queensland, Parliamentary Debates, Legislative Assembly, 21 November 2013, 4175.
- <sup>18</sup> Queensland, Parliamentary Debates, Legislative Assembly, 21 November 2013, 4199.
- <sup>19</sup> Queensland, Parliamentary Debates, Legislative Assembly, 21 November 2013, 4256-4262.
- <sup>20</sup> Explanatory Notes, Criminal Law (Criminal Organisations Disruption) Amendment Bill (2013) (Qld), 8; Explanatory Notes, Vicious Lawless Association Disestablishment Bill (2013) (Qld), 3.
- With respect to the introduction of the *Tattoo Parlours Act 2013* (Qld) no community consultation had been undertaken as the Act was 'part of an urgent package of reforms developed by the Queensland Government to deal with recent, unacceptable incidents of violent, anti-social and criminal behaviour of members of criminal motor cycle gangs.' Explanatory Notes, *Tattoo Parlours Bill* (2013) (Qld), 4.
- With respect to the introduction of the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013*, no community consultation had been undertaken apart from consultation with:
- members of the judiciary and legal stakeholders with respect to the requirement for parties to consent to the use of video and audio link facilities;
  - the Chief Magistrate with respect to the amendments to the Justices Act 1886 allowing audio link facilities to be used in criminal proceedings in the Magistrate; and the use of video link facilities and audio link facilities to be used across districts and divisions of the Magistrates Court; and amendments to the Bail Act 1980 to provide for the conduct of a bail proceeding by a Magistrates Court outside the district or division in which the bail proceeding would otherwise be required to be heard where a

practice direction is made by the Chief Magistrate permitting this;

- the Chief Justice with respect to the amendments to the *Crime and Corruption Act 2001* that provide for the confidentiality of proceedings under sections 195 and 199 of that Act;
- the Director of Public Prosecutions with respect to the amendments to the *Bail Act 1980* relating to section 16(3A); and
- the Crime and Corruption Commission with respect to the *Crime and Corruption Act 2001* and the *Criminal Proceeds Confiscation Act 2002*. Explanatory Notes, Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013 (Qld) 13-14.

<sup>21</sup> The *Criminal Code (Criminal Organisations) Regulation 2013* (Qld), section 2, prescribes the following motorcycle clubs as criminal organisations:

- the Bandidos;
- the Black Uhlans;
- the Coffin Cheaters;
- the Comancheros;
- the Finks;

- the Fourth Reich;
- the Gladiators;
- the Gypsy Jokers;
- the Hells Angels;
- the Highway 61;
- the Iron Horsemen;
- the Life and Death;
- as the Lone Wolf;
- the Mobshitters;
- the Mongols;
- the Muslim Brotherhood Movement;
- the Nomads;
- the Notorious;
- as the Odins Warriors;
- the Outcasts;
- the Outlaws;
- the Phoenix;
- the Rebels;
- the Red Devils;
- the Renegades; and
- the Scorpions.

<sup>22</sup> The *Criminal Code (Criminal Organisations) Regulation*, section 3, declares 37 addresses in Queensland as 'prescribed places'.

## PART 3

# CHAPTER SIX

## DECISIONS OF THE HIGH COURT OF AUSTRALIA

*Elements of the 2013 suite survived a High Court challenge in Kuczborski v Queensland, but the Judges identified unresolved concerns about the laws including:*

- *serious drafting issues;*
- *the potential for harsh and excessive outcomes; and*
- *possible vulnerability on constitutional grounds.*

### WHY DID THE TASKFORCE EXAMINE THE HIGH COURT DECISIONS IN KUCZBORSKI AND POMPANO?

Under clause 9 of its Terms of Reference the Taskforce was required to have regard to two High Court decisions: *Assistant Commissioner Condon v Pompano Pty Ltd*<sup>1</sup> and *Kuczborski v Queensland*.<sup>2</sup>

### THE DECISION IN POMPANO

The decision in *Pompano* is concerned with the constitutional validity of certain sections of earlier anti-OMCG/organised crime legislation in Queensland, the *Criminal Organisation Act 2009* (Qld) (COA).

In a review of that legislation undertaken by the Taskforce chair in December 2015 (the COA Review<sup>3</sup>), a detailed analysis of the High Court's judgment in *Pompano* was provided.

The Taskforce had regard, generally, to the COA Review (as required by clause 10 of its Terms of Reference).

No Taskforce member took issue with the *Pompano* analysis in that Review, and no further detailed analysis or discussion of *Pompano* is required for this Report.

### THE SIGNIFICANCE OF THE DECISION IN KUCZBORSKI

The decision of the High Court of Australia in *Kuczborski* is not a definitive statement on the constitutional validity of any provision in the 2013 suite.

In *Kuczborski* the court found that sections 60A-60C of the Criminal Code and sections 173EB-173ED of the *Liquor Act 1992* (Qld) did not breach a constitutional tenet called 'the *Kable*<sup>4</sup> principle' (discussed below) and the provisions were not invalid *on that ground*.

The High Court's analysis of the 2013 suite in *Kuczborski* assisted the Taskforce to identify important drafting and interpretation issues. Those issues will also be discussed here.

In various parts of this Report the Taskforce identifies areas of the 2013 suite which remain vulnerable to challenge on constitutional grounds. Those vulnerabilities had previously been identified at Chapter 7 of the COA Review.

The High Court's analysis also provided the Taskforce with insight into how the court might consider a constitutional challenge made on grounds other than the *Kable* principle. They are mentioned here, but discussed in more detail in Chapter 11

## THE DECISION IN *KUCZBORSKI*

### THE FACTUAL BACKGROUND

Stefan Kuczborski was a member of the Hells Angels Motorcycle Club. The Hells Angels was declared to be a 'criminal organisation' under the *Criminal Code (Criminal Organisations) Regulation 2013* (Qld).

Mr Kuczborski was not charged with any offence under the criminal laws of Queensland, nor was there any contention that he intended to commit a criminal offence.

Mr Kuczborski argued that the following provisions in the 2013 suite were constitutionally invalid because they breached the *Kable* principle:

- sections 6 and 16(3A)(a) of the *Bail Act 1980* (Qld);
- sections 60A, 60B, 60C, 72(2), 92A(4A), 320(2) and 340(1A) of the *Criminal Code* (Qld);
- sections 173EB, 173EC and 173ED of the *Liquor Act 1992* (Qld); and
- the *Vicious Lawless Association Disestablishment Act 2013* (Qld) (the VLAD Act).

The High Court decided that Mr Kuczborski *only* had standing to be heard with respect to:

- sections 60A, 60B and 60C of the *Criminal Code* ('the new Code offences'); and
- sections 173EB, 173EC and 173ED of the *Liquor Act* ('the Liquor offences').

### WHAT IS THE *KABLE* PRINCIPLE?

The *Kable* principle is named after a decision in which the High Court found that, because Chapter III of the Australian Constitution provides for the judicial power of the Commonwealth to be vested in state and territory courts, the Constitution effectively creates an integrated system for the exercise of the judicial power of the Commonwealth.

State Parliaments cannot, then, pass laws conferring powers on state courts which are repugnant to or inconsistent with the exercise of the judicial power of the Commonwealth.

The decision in *Kable*, which sits at what might be called a high and aerated point in the landscape of our legal system, has generated a considerable amount of litigation in Australia.

A submission to the Taskforce from a legal academic and commentator, Dr Rebecca Ananian-Welsh, noted that the *Kable* principle is '*presently one of the most litigated aspects of the Commonwealth Constitution, however its content and application remain fraught with uncertainty.*'<sup>5</sup>

Undeterred, the Taskforce set out to grapple with its constitutional niceties.

### WHAT TYPES OF LAWS WILL INFRINGE THE *KABLE* PRINCIPLE?

Laws which violate a court's institutional integrity or its essential features will infringe the *Kable* principle.

The High Court has said that it is impossible to exhaustively define what type of law will infringe these principles, but has identified some essential characteristics of a court. Critical ones are: the reality and appearance of independence and impartiality; procedural

fairness; observation of the open court principle; and, the giving of reasons for decisions.<sup>6</sup>

In *Kuczborski* the Chief Justice gave three examples where the High Court has found that state legislation has infringed the *Kable* principle:

- laws which effect an impermissible executive intrusion into the processes or decisions of a court;
- laws which authorise the Executive to enlist a court to implement decisions of the Executive in a manner incompatible with that court's institutional integrity; and
- laws which confer upon a court a function (judicial or otherwise) incompatible with the role of that court as a repository of federal jurisdiction.<sup>7</sup>

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#### WHAT IS THE 'STANDING' THAT MR KUCZBORSKI LACKED?

A party seeking a declaration that a law is invalid must have a sufficient interest in having their legal position clarified. This is called the 'standing' rule.

The standing rules have been developed to prevent the courts being opened up to 'busybodies' who might overwhelm the resources of the justice system with constant interruptions.<sup>8</sup> A classic example is asking the court to answer legal questions, or address legal issues, which are not actually in dispute in a particular case, and do not need to be answered in the court's final judgment in that case.

The plurality of the High Court judges in *Kuczborski* observed:

*'The established requirements as to standing ensure that the work of the court remains focused upon the determination of rights, duties, liabilities and obligations as the most concrete and specific expression of*

*the law in its practical operation, rather than the writing of essays of essentially academic interest'.<sup>9</sup>*

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#### WHY DID MR KUCZBORSKI HAVE STANDING TO CHALLENGE SOME PROVISIONS IN THE 2013 SUITE, BUT NOT OTHERS?

The State of Queensland did not dispute that Mr Kuczborski had the standing to seek a declaration about the new Criminal Code offences, and the Liquor Act offences.

This is because these offences actually operated to impede Mr Kuczborski in the lawful exercise of his membership of the Hells Angels – for example, they prohibited him from meeting with two or more members in public, attending the Hells Angels clubhouse, recruiting new members to the club, and wearing club colours in licensed premises.

The impact on Mr Kuczborski in respect of those matters was not merely hypothetical, and provided him with sufficient interest to challenge the validity of those laws.

In contrast, the court found that Mr Kuczborski would have to have been, at least, charged with a criminal offence in order to have been impacted by the provisions of the Bail Act, the circumstances of aggravation to existing offences in the Criminal Code, and the VLAD Act.

But he was not charged with any offence and, therefore, the court found that he did not have the standing to challenge those provisions.<sup>10</sup>

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#### COULD THE HIGH COURT HAVE CONSIDERED GROUNDS OTHER THAN KABLE ON THIS OCCASION?

No. The court could only consider the constitutional grounds of challenge which were particularised by Mr Kuczborski in his special case application to the High Court.

He challenged the provisions in the 2013 suite on one ground only – the *Kable* principle.

It is not unknown for the High Court to raise, for consideration by the parties in a case before it, the question of whether *other* issues over and above those the parties have chosen to address should also be considered; and, if that invitation is accepted, to give them some attention in its reasons for judgment.

The fact that this did not occur in *Kuczborski* does not signify that other arguments might not be raised in another case about elements of the 2013 suite which were not addressed in the judgment. It was Mr Kuczborski's inability to establish the necessary level of personal interest – standing – in those issues which explains why they remain unresolved.

#### THE MAJORITY OF HIGH COURT JUDGES FOUND THAT THE NEW CODE OFFENCES AND THE LIQUOR OFFENCES DID NOT INFRINGE THE *KABLE* PRINCIPLE

Mr Kuczborski argued that the *Kable* principle had been infringed because:

- the new Code offences and the Liquor Act offences required a departure from 'equal justice' because they provided for punishments based on *association*, rather than *personal and individual guilt*,<sup>11</sup> and
- the declaration by a regulation of the Hells Angels as a 'criminal organisation' amounted to the executive arm of the State of Queensland enlisting or directing the court to implement its decision, in a manner that was incompatible with the court's institutional integrity; that is, that the State of Queensland was trying to cloak what was effectively the government's own decision with the authority of the court.<sup>12</sup>

#### CHIEF JUSTICE FRENCH

French CJ concluded that the *Kable* principle was not infringed. He found that the executive government's declaration of the Hells Angels

as a criminal organisation merely '*creates a factum in relation to an entity, which has consequences provided by law*'.<sup>13</sup>

The Chief Justice determined that there was no impermissible intrusion into the court's decision-making process because many issues were still left to the court to resolve – such as, whether a person is a participant in a criminal organisation, whether the particular circumstances of the offence are made out and (if the defence is raised) whether the organisation has as one of its purposes the purpose of engaging in or conspiring to engage in criminal activity.<sup>14</sup>

#### JUSTICE BELL

Bell J noted that it is not uncommon for legislatures to declare a certain state of affairs to be an element of an offence, and gave the example of legislation declaring certain drugs to be illegal.<sup>15</sup>

She found that, because all of the ordinary functions of the court would still be necessary features of the criminal trial a person in Mr Kuczborski's position would face, there was no compromise to the institutional integrity of the court.<sup>16</sup>

#### JUSTICES CRENNAN, KIEFEL, GAGELER AND KEANE (THE PLURALITY)

In a joint judgment the plurality found that the legislature asking the court to enforce laws informed by the government's policy position is not incompatible with the court's institutional integrity.<sup>17</sup>

The plurality said that the new Criminal Code offences do not direct or require the court to lay down any new norm of conduct; they merely require the court to find facts, and impose punishment, as a result of a contravention of a norm which the legislature has prescribed.<sup>18</sup>

The plurality disagreed with Mr Kuczborski's argument that the laws were 'cloaking' the work of the Executive because it was 'abundantly clear' that any harshness or

encroachment on civil liberties which resulted from these laws was entirely the responsibility of the ‘political branches of the government’.<sup>19</sup>

#### JUSTICE HAYNE (DISSENTING JUDGEMENT)

Hayne J disagreed with the other six judges who sat on the case on one issue – he found that the new Criminal Code offences *did* infringe the *Kable* principle.

He did not agree with Mr Kuczborski’s first submission that the departure from ‘equal justice’ amounted to a repugnancy which was incompatible with the institutional integrity of the court.<sup>20</sup>

Rather, he concluded that the new Criminal Code offences infringed the *Kable* principle because of the executive declaration of ‘criminal organisation’ – but, for different reasons than those argued by Mr Kuczborski.<sup>21</sup>

Hayne J noted that the Criminal Code provided three pathways by which an organisation might be caught by the definition of ‘criminal organisation’:

- (1) declaration under the *Criminal Organisation Act 2009* (**determined by a court**); or
- (2) meeting factual criteria set out in the definition in section one of the Criminal Code (**determined by a court**); or
- (3) executive declaration (**determined by the political branch of the government**).<sup>22</sup>

In his view the attempt by the legislature to elevate ‘*an untested and effectively untestable judgment made by the political branches of government*’ to the same level as a judicial decision, made on the basis of admissible evidence in open court, was repugnant to and incompatible with the institutional integrity of the court.<sup>23</sup>

As the Liquor Act offences do not permit or require the court to make any judgment about

what is or is not a criminal organisation, Hayne J agreed with the six other judges that they did not infringe the *Kable* principle.<sup>24</sup>

#### OBITER DICTUM IN KUCZBORSKI WHICH HAS ASSISTED THE TASKFORCE IN ITS ANALYSIS OF THE 2013 SUITE

##### WHAT IS OBITER DICTUM?

*Obiter dictum* is a Latin phrase which means ‘*a remark in passing*’. The phrase is used in law to describe a judicial observation that is not an essential part of the court’s reasoning for reaching its final decision.

*Obiter dictum* is not binding on other courts, but Australian courts cannot readily ignore considered *obiter dicta* from the majority of the High Court.<sup>25</sup>

*Obiter dictum* by the High Court Justices in *Kuczborski* helped the Taskforce to identify significant drafting and interpretation issues, as well as other constitutional vulnerabilities, in the 2013 suite.

##### VAGUE, IMPRECISE AND POTENTIALLY MISLEADING DRAFTING

#### THE VLAD ACT

French CJ said that the title of the VLAD Act:

*‘... is a piece of rhetoric which is at best meaningless and at worst misleads as to the scope and substance of the law’.*<sup>26</sup>

(emphasis added)

The Chief Justice noted that neither the terms ‘vicious’ nor ‘lawless’ are defined in the VLAD Act, and that persons who committed some of the ‘declared offences’ under the VLAD Act could not be described as either ‘vicious’ or ‘lawless’.<sup>27</sup>

And, French CJ noted, only a ‘tiny minority’ of the associations which might be covered by

the VLAD Act could conceivably be described as either ‘vicious’, or ‘lawless’.<sup>28</sup>

Hayne J shared the Chief Justice’s concern about the undefined and irrelevant use of the terms ‘vicious’ and ‘lawless’. He felt that the terms could not only be misleading, but that they could also potentially prejudice a jury. He said:<sup>29</sup>

*‘The adoption of this method of drafting is antithetical to the proper statement and administration of the criminal law’.*

Hayne J also pointed out that there is a confusion of grammatical tenses between the requirements of section 5<sup>30</sup> (which defines ‘vicious lawless associate’) and section 4<sup>31</sup> (which defines ‘participant in the affairs of an association’).

The definition of ‘participant’ refers to *past* acts, for example, *having attended* more than one meeting, whereas the definition of ‘vicious lawless associate’ requires a person to be a participant *at the time of the offence*.<sup>32</sup>

Hayne J did not seek to resolve the obvious tension between these requirements.<sup>33</sup>

#### **INCONSISTENT DEFINITIONS OF ‘PARTICIPANT’, ‘CRIMINAL ORGANISATION’ AND ‘ASSOCIATION’**

Hayne J expressed concern that, although the 2013 suite was introduced as a ‘package’ of laws, there were no consistent definitions of ‘criminal organisation’, ‘participant’ or ‘association’ across the multiple pieces of legislation amended by the 2013 suite.

Commenting on this inconsistency, he observed:<sup>34</sup>

*‘That this has not been done can only create unnecessary difficulty and complexity in the administration of the criminal law’.*

#### **THE POTENTIAL FOR INJUSTICE**

##### **OPAQUE NATURE AND OPERATION OF A POSSIBLY UNREVIEWABLE EXECUTIVE DECLARATION POWER**

The plurality in *Kuczborski* were of the view that the power of the executive to ‘declare’ an organisation to be criminal could be construed narrowly, taking into account its placement in the Criminal Code and the criteria set out in the section 1 definition of ‘criminal organisation’.

The four judges who made up the plurality suggested that the Executive may be limited to *only* declaring organisations which met the same criteria that would need to be established if the court was called on declare an organisation.<sup>35</sup>

Hayne J was of the view that the executive declaration was effectively unreviewable.<sup>36</sup> He noted that that section 708A of the Criminal Code (which provides the power to make the regulatory executive declaration) contains criteria which the Minister is *not*, however, compelled to follow, and allows the Minister to take into account ‘*any other matter the Minister considers relevant*’.<sup>37</sup>

Hayne J spelt out the consequence of this interpretation: that is, that organisations could be declared to be criminal organisations for reasons that need never be made known publicly.<sup>38</sup>

In her submission to the Taskforce Dr Ananian-Welsh suggested that, ‘*it may take an application for judicial review of an exercise of the declaration power to resolve its scope*’.<sup>39</sup>

##### **THE DEFINITION OF ‘PARTICIPANT’ IS VERY BROAD**

The plurality suggested that, based on the current definition of ‘participant’ in 60A(3) of the Criminal Code, it was arguable that a person who had attended more than one meeting of a declared organisation would be

'*marked for life*' as a participant in a criminal organisation.<sup>40</sup>

### THE APPLICATION OF THE LAWS MAY BE UNDULY HARSH

The plurality said with respect to section 60A of the Criminal Code:<sup>41</sup>

*'... there can be no doubt that these provisions are capable of having a wide operation which might be thought to be unduly harsh'.*

(emphasis added)

### SCOPE FOR DISPROPORTIONATE SENTENCES OF IMPRISONMENT

French CJ noted that the range of 'declared offences' under the VLAD Act was wide 'in subject matter and gravity', and that it covered offences with maximum penalties as low as one years imprisonment, all the way up to life imprisonment.<sup>42</sup>

The Chief Justice said:<sup>43</sup>

*Under the VLAD Act it is quite possible that a person who would not receive a custodial sentence for a declared offence in the lower range of seriousness would nevertheless, if an officer of a relevant association, be sentenced to a mandatory 25 years imprisonment.'*

### THE PRESUMPTION IN FAVOUR OF BAIL IS REVERSED REGARDLESS OF ANY CURRENT CONNECTION TO A CRIMINAL ORGANISATION OR ORGANISED CRIMINAL OFFENDING

French CJ noted that, prior to the amendments in the 2013 suite, the presumption in favour of bail was only reversed where there was some unacceptable risk that a defendant would not appear at a subsequent hearing, commit an offence, endanger the safety of others, interfere with a witness or otherwise obstruct the course of justice.<sup>44</sup>

The Chief Justice observed that the 2013 suite of laws effectively require that defendants who had *at any time* been a participant must have their application for bail refused unless *the defendant* could show that their incarceration was not justified.

This requirement applies regardless whether:

- the alleged offence was indictable, simple, or regulatory;
- the defendant was a participant in a criminal organisation when the alleged offence was committed; or
- there was no link at all between the defendant's alleged participation in a criminal organisation, and the alleged offence.

### POTENTIAL PREJUDICE OF JURIES

As noted earlier, Hayne J expressed concern that if someone is charged with committing an offence as a '*vicious lawless associate*' a jury might be prejudiced against them (and the jury's attention may be diverted away from the factual matters it has to decide).

### THE POSSIBILITY THAT THE CRIMINAL CODE OFFENCES ARE VULNERABLE TO A CONSTITUTIONAL CHALLENGE ON THE BASIS THAT THEY INFRINGE THE IMPLIED CONSTITUTIONAL RIGHT TO FREEDOM OF POLITICAL COMMUNICATION AND ASSOCIATION

Mr Kuczborski did not challenge the new Criminal Code offences on the basis that they infringed his implied constitutional rights to freedom of association for the purpose of political communication.

However, six of the seven High Court Justices gave indications in their obiter dictum that such a challenge could, at least, be brought.

Some made statements indicating a real concern about the question. French CJ said:<sup>45</sup>

*'... the offence-creating provisions of the Criminal Code directly affect, inter-alia, his [Mr Kuczborski's] freedom of movement and association.'*

The plurality expressly noted that Mr Kuczborski did not make a challenge on the basis of the freedom of communication on governmental and political matters.<sup>46</sup>

In considering whether, under the 'open ended' nature of the executive declaration-making power, a hypothetical government minister who disapproved (for example) of Catholicism could declare the St Vincent de Paul Society to be a criminal organisation, the plurality said:<sup>47</sup>

*'...in the hypothetical scenario under consideration, it is inconceivable that an issue would not be raised by the defence as to the invalidity of the declaration based on the limitation on executive and legislative power implied by the freedom of communication and association on matters of political interest. As noted above, this issue was not agitated in this case'.*

Bell J said that, *'the Plaintiff's submissions as to the possibility that the Beefsteak and Burgundy Club, the Australian Bar Association and the Australian Medical Association might be declared to be criminal organisations may be left to a case in which the issue is presented.'*<sup>48</sup>

Later, Bell J noted that the State of Queensland had accepted that, if Mr Kuczborski had attended the hearing of his matter before the High Court knowing that two other members of the Hells Angels would also attend, he might have been liable to conviction of an offence under section 60A of the Criminal Code.

Bell J went on to say: *'The acknowledgment of the singular reach of the provision does not engage the limitation on the legislative power of the Parliament of Queensland that arises under the Kable principle. And, as the joint reasons note, the plaintiff does not assert any other basis of constitutional infirmity.'*<sup>49</sup>

A detailed analysis of the potential vulnerability of the new Criminal Code offences to constitutional challenge on the grounds of their possibly impermissible infringement upon implied freedoms of communication and association is contained in Chapter 11 of this Report.

## ENDNOTES

- <sup>1</sup> (2013) 252 CLR 38 (*Pompano*’).
- <sup>2</sup> (2014) 89 ALJR 59 (*Kuczborski*’).
- <sup>3</sup> Criminal Organisation Act 2009 (Qld), Queensland, Statutory Review of the Criminal Organisation Act 2009, Final Report (2015).
- <sup>4</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577.
- <sup>5</sup> Dr Rebecca Ananian-Welsh Submission 1.7 to the Taskforce on Organised Crime Legislation, 1 July 2015, 19.
- <sup>6</sup> *Pompano* (2013) 252 CLR 38, [67]-[68].
- <sup>7</sup> *Kuczborski* (2014) 89 ALJR 59, [38].
- <sup>8</sup> Denis Galligan, Mark Robinson, Brenda Jo Tronson, *‘Standing rules are used as a screening device to determine who is entitled to bring a particular action and thereby gain a remedy’*, The Laws of Australia – [www.westlaw.com.au](http://www.westlaw.com.au), TLA [2.6.190].
- <sup>9</sup> *Kuczborski* (2014) 89 ALJR 59, [184].
- <sup>10</sup> *Kuczborski* (2014) 89 ALJR 59, [16], [30], [34], [100], [175]-[188] [280]-[285].
- <sup>11</sup> *Kuczborski* (2014) 89 ALJR 59, [107].
- <sup>12</sup> *Kuczborski* (2014) 89 ALJR 59, [107].
- <sup>13</sup> *Kuczborski* (2014) 89 ALJR 59, [40].
- <sup>14</sup> *Kuczborski* (2014) 89 ALJR 59, [41].
- <sup>15</sup> *Kuczborski* (2014) 89 ALJR 59, [303].
- <sup>16</sup> *Kuczborski* (2014) 89 ALJR 59, [303].
- <sup>17</sup> *Kuczborski* (2014) 89 ALJR 59, [220].
- <sup>18</sup> *Kuczborski* (2014) 89 ALJR 59 [225].
- <sup>19</sup> *Kuczborski* (2014) 89 ALJR 59, [229].
- <sup>20</sup> *Kuczborski* (2014) 89 ALJR 59, [109].
- <sup>21</sup> *Kuczborski* (2014) 89 ALJR 59, [110]-[112].
- <sup>22</sup> *Kuczborski* (2014) 89 ALJR 59, [113]-[114].
- <sup>23</sup> *Kuczborski* (2014) 89 ALJR 59, [116].
- <sup>24</sup> *Kuczborski* (2014) 89 ALJR 59, [129 -131].
- <sup>25</sup> *Farrah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [134] [158].
- <sup>26</sup> *Kuczborski* (2014) 89 ALJR 59, [14].
- <sup>27</sup> *Kuczborski* (2014) 89 ALJR 59, [13].
- <sup>28</sup> *Kuczborski* (2014) 89 ALJR 59, [14].
- <sup>29</sup> *Kuczborski* (2014) 89 ALJR 59, [67].
- <sup>30</sup> *Kuczborski* (2014) 89 ALJR 59, [70].
- <sup>31</sup> *Kuczborski* (2014) 89 ALJR 59, [71].
- <sup>32</sup> *Kuczborski* (2014) 89 ALJR 59, [72].
- <sup>33</sup> *Kuczborski* (2014) 89 ALJR 59, [72].
- <sup>34</sup> *Kuczborski* (2014) 89 ALJR 59, [66].
- <sup>35</sup> *Kuczborski* (2014) 89 ALJR 59, [210]-[214].
- <sup>36</sup> *Kuczborski* (2014) 89 ALJR 59, [84].
- <sup>37</sup> Criminal Code (Qld), section 708A(1)(e).
- <sup>38</sup> *Kuczborski* (2014) 89 ALJR 59, [84].
- <sup>39</sup> Dr Rebecca Ananian-Welsh, Submission 1.7 to the Taskforce on Organised Crime Legislation, 1 July 2015, 23.
- <sup>40</sup> *Kuczborski* (2014) 89 ALJR 59, [209].
- <sup>41</sup> *Kuczborski* (2014) 89 ALJR 59, [208].
- <sup>42</sup> *Kuczborski* (2014) 89 ALJR 59, [12].
- <sup>43</sup> *Kuczborski* (2014) 89 ALJR 59, [12].
- <sup>44</sup> *Kuczborski* (2014) 89 ALJR 59, [31].
- <sup>45</sup> *Kuczborski* (2014) 89 ALJR 59, [36].
- <sup>46</sup> *Kuczborski* (2014) 89 ALJR 59, [144].
- <sup>47</sup> *Kuczborski* (2014) 89 ALJR 59, [210].
- <sup>48</sup> *Kuczborski* (2014) 89 ALJR 59, [294].
- <sup>49</sup> *Kuczborski* (2014) 89 ALJR 59, [304].

## PART 4

# CHAPTER SEVEN

## A RENEWED LEGISLATIVE FRAMEWORK TO CONFRONT QUEENSLAND'S ORGANISED CRIME THREAT

*The Taskforce concluded that the legislative approach used by the 2013 suite (and earlier legislation in 2009) had drawbacks which diminished its utility and militated against its continued use.*

*The Taskforce developed its proposal for a renewed ORGANISED CRIME FRAMEWORK to replace the 2013 suite which:*

- *targets all forms of organised crime;*
- *takes heed of findings from the Byrne Report; and*
- *retains the objective strengths of the suite.*

Collectively, the recommendations of the Taskforce present a *renewed Organised Crime Framework* which is underscored by traditional criminal law approaches; well-proven methods of crime detection and prosecution; and a focus on groups of *individual* criminals.<sup>1</sup>

This is in contrast to the prevailing approach under the *Criminal Organisation Act 2009* (COA) and the 2013 suite, which is accentuated by a focus on the organisation itself.

The approach under COA is a tactic which has been actively implemented, tried and tested across most Australian jurisdictions but which has now been shown to be unsuccessful as a strategy for combating the threat of organised crime.<sup>2</sup>

Part 5.1 of this Report comprehensively sets out the Taskforce recommendations (including the views of each of its members) on reshaping the Criminal Code amendments and the *Vicious Lawless Association Disestablishment Act 2013* (the bedrock provisions of the 2013 suite) to achieve a legally and operationally superior approach to criminalising serious organised crime.

To truly and effectively stem the threat posed by organised crime any initiatives must offer efficiencies not only at the investigation, charge and preliminary stages of the criminal justice process (as, arguably, aspects of the 2013 suite do achieve),<sup>3</sup> but must also be capable of withstanding the trial stage – the critical step for securing a conviction.

A criminal law regime which does not meet the challenges of *all* stages of the criminal justice system is not a successful approach to *actually* confronting the organised crime threat.

The renewed Organised Crime Framework provides this all-inclusive platform.

What follows is a cohesive and workable model which provides a strong yet proportionate response, and meets the criticisms of the 2013 suite.<sup>4</sup>

The Taskforce has deliberately focused on *serious* organised crime, and its proposals necessarily encompass OMCGs; but, unlike the 2013 suite, they are not patently focused upon them – the focus is on *all forms of* serious organised crime.

## THE RENEWED ORGANISED CRIME FRAMEWORK

### AN OVERVIEW

The recommendations of the Taskforce were developed through compromise and consensus, and incorporate elements of the views of all members. Unsurprisingly in view of the composition of the Taskforce these views were, at times, diverse and competing.

In developing its recommendations the Taskforce was influenced by the operational views and concerns expressed by Queensland's law enforcement agencies about the genuine threat of organised crime to the community and to law enforcement officers tasked with enforcing the law and upholding public order.

This Chapter contains an overview of key aspects of the Taskforce proposal.

A comprehensive analysis of each topic, and more details of individual elements of the Framework and the specific views of each member, are set out in following Chapters.

### ENHANCED DEFINITIONS FOR THE TERMS 'PARTICIPANT' IN A 'CRIMINAL ORGANISATION'

The Taskforce was unanimous that, as a fundamental requirement for effectively combatting organised crime, what is required is a single, uniform approach to defining the concept of being a *participant in a criminal organisation*; and, that this new definition should be applied consistently across the statute books.

Enhanced definitions of *criminal organisation* under section 1; and of *participant* under

section 60A(3) of the Criminal Code are required, with a necessary focus upon individuals who are actively involved in the affairs of the criminal group, or who identify themselves as belonging to or who promote their association with it.

The Taskforce has suggested a definition that is sufficiently broad to capture the traditional, hierarchically structured crime groups<sup>5</sup> and, also, those that are informally arranged and more flexible and adaptable in their structures.<sup>6</sup>

The definition does not contemplate ministers recommending entities be declared as criminal organisations under a regulation. The majority of Taskforce members have concluded that no level of safeguards can overcome concerns which attach to that approach, which are considered in detail in Chapter 8.

Accordingly, 'whether a group falls within the new definition will be a question of fact, to be determined on a case by case basis (ie, in the context of the charges against an individual, and through admissible evidence tested before jury, or a judge in a judge-alone trial).'<sup>7</sup>

## CHANGING THE 2013 CRIMINAL CODE AMENDMENTS

### SECTION 60A – THE ANTI-ASSOCIATION OFFENCE

How the Taskforce has dealt with section 60A reflects the view that a person's criminality should be determined by their conduct rather than the mere fact of their association with others.

A cornerstone of the renewed Organised Crime Framework is the establishment of a post-conviction Control Order regime (discussed later). As with any new post-conviction initiative, a window of time is needed for it to properly take effect, and for its benefits to materialise.

In this regard the Taskforce is cognisant of the operational concerns expressed by the

Queensland Police Service – that the immediate repeal of the anti-association offence in section 60A, without replacement, could lead to public disorder and safety risks from a sudden re-emergence of activity by organised crime groups including, in particular, criminal elements of some OMCGs.

To ensure this risk does not eventuate, the Taskforce considered how best to, in effect, fill any gap that could emerge between the time section 60A is repealed and the new regime of post-conviction control orders comes into its own.

In working through the different ideas in this regard, the following, short-term possibilities were considered (these in effect represent the different and in some regards competing views of the Taskforce members):

- retain section 60A of the Criminal Code but convert the offence to an indictable offence; and, include a sunset clause for the provision;
- retain section 60A but convert the offence to an indictable offence and include a sunset clause for the provision; and, aim to immunise the provision against possible constitutional challenge through an express statement to limit its application or by prescribing a defence to the charge, which protects associations who communicate or associate for genuine political purposes;<sup>8</sup>
- repeal section 60A immediately and replace it with a *consorting offence*, adapted from similar schemes around Australia (noting that properly framed consorting offences have been found to be constitutionally valid by the High Court);<sup>9</sup> and/or
- an alternative proposed by the QPS – the retention of section 60A in the short term, but subject to a sunset clause with an independent statutory review to be undertaken prior to that

date, and accompanied by the introduction of a *consorting offence* based on the New South Wales model (section 93X of the *Crimes Act 1900* (NSW)).

A *consorting offence* makes it a criminal offence for a person to associate with two other people who have previous convictions; but, is preceded by a warning to the person that those with whom they are associating have convictions, and that any continued association would be considered a criminal offence.

It would also be framed to include safeguards, a requirement for a statutory review of its effectiveness, and a sunset clause.

These ideas to perhaps deal with the challenges confronting section 60A of the Criminal Code are traversed in Chapter 11.

#### SECTION 60B – THE CLUBHOUSE OFFENCE

The majority of the Taskforce recommends the repeal and replacement of section 60B of the Criminal Code.

The replacement scheme is modelled on the *reputed criminal declaration* under the *Restricted Premises Act 1943* (NSW).

In essence where the court makes a reputed criminal declaration, anchored to a particular premises (eg, a known OMCG clubhouse) because ‘reputed criminals’ or associates of reputed criminals are known to go to the premises, it is an offence for the owner of the premises (while the declaration is in force) to have such a person at the premises, or to take part or assist in the control or management of the premises.

The owner is not guilty of an offence if they prove that they have taken all reasonable steps to stop this from occurring.

In terms of the prohibition, under section 60B, against attending prescribed events, Chapter 11 sets out a proposal to replace that aspect of the offence with *public safety orders*.

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**SECTION 60C – THE RECRUITMENT OFFENCE**

The Taskforce recommends the repeal and replacement of section 60C of the Criminal Code.

Existing section 100 (Recruiting persons to become member of criminal organisation) of COA should be transposed into Queensland's Criminal Code. (The COA offence is an indictable offence, with a maximum penalty of 5 years imprisonment.)

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**OTHER MATTERS**

The existing offence of money laundering under section 250 of the *Criminal Proceeds Confiscation Act 2002* (Qld), which was not part of the 2013 suite, should also be transferred into the Criminal Code and, in doing so, the requirement for the Attorney-General's consent to a proceeding for money laundering, should be omitted.<sup>10</sup>

The circumstances of aggravation<sup>11</sup> created under the 2013 suite<sup>12</sup> should be repealed. In making this recommendation, the Taskforce is comforted in the knowledge that the new Serious Organised Crime circumstance of aggravation (summarised below), to be punishable by a targeted sentencing regime, will operate to fill any void created by the repeal of the 2013 provisions.

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**A NEW SERIOUS ORGANISED CRIME CIRCUMSTANCE OF AGGRAVATION, PUNISHABLE BY A TARGETED SENTENCING REGIME**

Another cornerstone of the renewed Organised Crime Framework is the establishment of a new Serious Organised Crime circumstance of aggravation to be inserted into Queensland's Criminal Code; and to replace the VLAD Act in its entirety.

The intention is to create a new circumstance of aggravation to attach to a list of specific offences; in particular, offences which are

objectively serious in nature, and often connected with organised criminal activity.

The focus is on drug offending, sexual offending and child sex offending, fraud and money laundering, serious violence, and attacks on the administration of justice.<sup>13</sup>

To indict with the circumstance of aggravation will require the written consent of the Director of Public Prosecutions.

A person convicted of a prescribed offence with the new Serious Organised Crime circumstance of aggravation must be sentenced to a term of imprisonment, and will be punished by a *targeted sentencing regime* which includes the imposition of the new Control Order regime.

Like the VLAD Act (although with necessary modifications) the new targeted sentencing regime can only be avoided in circumstances where the person provides significant cooperation with law enforcement.

However, a fundamental point of distinction between the new scheme and the approach under the VLAD Act is that the new scheme relies upon the sentencing judge (not the Commissioner of Police) to assess the calibre of the cooperation from the convicted person, to be used in an investigation or a proceeding about a serious criminal offence (with assistance from submissions by the Crown, and defence legal representatives).

It is also recommended that a new sentencing principle be inserted into the *Penalties and Sentences Act 1992* (Qld) which requires the court, in structuring the appropriate sentence, to have express regard to whether the offence was committed as part of a criminal organisation.

The Terms of Reference<sup>14</sup> require the Taskforce to have regard to the Queensland Government's election commitments, which include a commitment to develop a new offence of 'serious organised crime'.

The Taskforce was mindful of this throughout its examination of the 2013 suite, and considers that this new Serious Organised Crime circumstance of aggravation accords with the commitment, albeit in an alternative format.

### A NEW SENTENCING OPTION FOR QUEENSLAND: CONTROL ORDERS

As foreshadowed, the Taskforce recommends the creation of a new kind of sentencing penalty for Queensland – one which will sit alongside existing sanctions under the Penalties and Sentences Act (such as imprisonment, community based orders, fines).

That is, a post-conviction Control Order regime, modelled on the United Kingdom’s Serious Crime Prevention Orders.<sup>15</sup>

These orders place conditions on a person in the community in order to control their behaviour post-imprisonment, with the aim of preventing or disrupting that person from engaging in further criminal activity.<sup>16</sup>

This additional sanction will enable the sentencing court to place a variety of conditions upon a person, relevant to their particular criminal behaviour including, for example, prohibitions on associating with named persons, using the internet, and being in possession of certain items which could be used to facilitate crime. The proposal has the benefit of anchoring the regime to *convicted* persons,<sup>17</sup> so any anti-association provision that may be included as part of the control order is less susceptible to constitutional challenge on the basis that it infringes a person’s constitutional rights to freedom of political communication and association, because it has the legitimate purpose of preventing criminal activity.<sup>18</sup>

(The High Court has accepted that an abrogation of the implied freedom of political communication could be justified where the infringement is for the purpose of disrupting or restricting the activities of criminal organisations and their members.<sup>19</sup>)

### TRANSITIONAL ARRANGEMENTS

The renewed Organised Crime Framework proposes the repeal and, at times, replacement of aspects of the 2013 suite. For example, change is recommended in the context of the offence under section 60A of the Criminal Code and with regards to the VLAD Act.

Depending upon the approach taken by the Government to the recommendations in this Report, there may be an impact on those who have been charged with offences under the 2013 suite but whose matters are not yet finalised to conviction (or acquittal); or, who have already been charged, convicted and sentenced under the 2013 suite.

In terms of the transitional arrangements, it is anticipated that the ordinary approach to legal interpretation and statutory construction regarding changes in the law will prevail. Generally, a change in the law does not affect the criminal liability of a person under a provision which has since been repealed or amended provided that the offence was committed and the person charged prior to commencement of the amending legislation. The transitional arrangements for any changes to the 2013 suite will be governed by reference to section 11 of the Criminal Code; section 20 of the *Acts Interpretation Act 1954* (Qld) and section 180 of the Penalties and Sentences Act.

Assuming that the ordinary approach to transition is ultimately adopted, in practical terms it is anticipated that the prosecuting authorities (no doubt in consultation with law enforcement agencies) will consider whether or not the pending criminal charges should continue (possibly having regard not only to the circumstances of each case but also Parliament’s intention in making the changes to the law in this regard). Where the charges are to proceed, it is possible that the charges may be the subject of legal argument before the court as to whether the proceedings should be allowed to continue.

In framing the transitional arrangements for the VLAD Act, in addition to the provisions referred to above consideration could be given to the approach taken under the *Drugs Misuse Act Amendment Act 1990* (Qld) when the mandatory life sentence for drug trafficking was repealed and replaced with a statutory maximum penalty regime. This may be particularly so having regard to the discussion in Chapter 13 as to the objectively disproportionate and *crushing* nature of the VLAD Act regime. To date, only two men have been sentenced under the VLAD Act.

#### RECOMMENDATION 4 (Chapter Seven)

A new sentencing guideline should be added to section 9 of the *Penalties and Sentences Act 1992* (Qld) to provide that a court is required when structuring the appropriate sentence to have express regard to whether the offence was committed as part of a criminal organisation. (unanimous recommendation)

#### RECOMMENDATION 5 (Chapter Seven)

The offence of money laundering currently located at section 250 of the *Criminal Proceeds Confiscation Act 2002* (Qld) should be transferred into the Criminal Code and, in doing so, the requirement for the Attorney-General's consent to a proceeding for money laundering should be omitted. (unanimous recommendation)

## ENDNOTES

- <sup>1</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015) 231.
- <sup>2</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015) taken as a whole and at 231.
- <sup>3</sup> Queensland Police Service, Submission 5.16 to the Taskforce on Organised Crime Legislation (undated).
- <sup>4</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), 226 – 229.
- <sup>5</sup> Australian Crime Commission, *Organised Crime in Australia 2015* (May 2015), 6-7.
- <sup>6</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), Chapter 2.
- <sup>7</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), 232.
- <sup>8</sup> *Tajjour v New South Wales* (2014) 313 ALR 221.
- <sup>9</sup> *Tajjour v New South Wales* (2014) 313 ALR 221.
- <sup>10</sup> *Criminal Proceeds Confiscation Act 2002*, section 251; Queensland, Commission of Inquiry into Organised Crime, *Final Report* (2015), 493 – 529 (Recommendation 6.1).
- <sup>11</sup> A circumstance of aggravation means: *any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance* (Criminal Code, section 1).
- <sup>12</sup> Chapter 2 provides an overview of the offences captured by the 2013 suite and the circumstance of aggravation inserted for each.
- <sup>13</sup> Queensland, Commission of Inquiry into Organised Crime, *Final Report* (2015) (the Byrne Report); Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), 229 – 230.
- <sup>14</sup> Attachment 1.
- <sup>15</sup> *Serious Crime Act 2007* (UK).
- <sup>16</sup> *Serious Crime Act 2007* (UK).
- <sup>17</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015) 213 – 217 (a conviction based regime over a civil/pre-conviction regime).
- <sup>18</sup> *Tajjour v New South Wales* (2014) 313 ALR 221.
- <sup>19</sup> *Tajjour v New South Wales* (2014) 313 ALR 221.

## PART 5.1

# CHAPTER EIGHT

## WHAT IT MEANS TO BE A PARTICIPANT IN A CRIMINAL ORGANISATION

*It is the ever-changing and fluid nature of organised crime which makes the task of defining what it means to be **participant in a criminal organisation** such a challenge.*

*An added problem in Queensland is the use of different definitions; and, concerns about the legal mechanisms under which it is decided how, and when, an organisation is categorised as ‘criminal’.*

Exactly what it is to be a *participant in a criminal organisation* is central to understanding the workings of the 2013 suite.

It was also central, then, to the job facing the Taskforce in its examination of those laws.

To establish at law that someone is a participant in a criminal organisation carries significant ramifications for any individual swept up by the 2013 suite. Once established, it is at the core of the suite’s substantial punishment regimes, the occupational and industry licencing changes, the expanded police powers and the alterations to bail and stringent corrective service management techniques.

But settling upon an appropriate and reasonable definition of this key concept is a difficult task. The Taskforce devoted considerable time and effort to discussing and robustly deliberating the merits of, and the possibilities for, reform.

(That said, the challenges faced by the Taskforce in this regard were by no means new or unique. Mr Tony Fitzgerald AC QC observed nearly 30 years ago that ‘organised crime’ is a term frequently used, but rarely defined. At that time, in fact, he considered an exhaustive definition to be both impossible and unnecessary.<sup>1</sup>)

As recently as late 2015 the Byrne Report observed that there is no common definition of organised crime and that definitions of it vary, both internationally and within Australia.<sup>2</sup>

As observed in Chapter 2 it is, nowadays, the ever-changing and fluid nature of organised crime which makes the task of defining what it means to be participant in a criminal organisation particularly challenging.<sup>3</sup>

Any definition must in that context have both sufficient precision and an appropriate measure of fluidity; be comprehensive but, also, workable; and be flexible, but not too broad or sweeping. A successful definition has a lot of work to do.

What the Taskforce found is that the concept, while used throughout the Queensland statutes, is not always defined in the same way; and, that the definitions in the 2013 suite raise a number of issues and concerns from a law enforcement and prosecutorial perspective.

Those circumstances led the Taskforce to the unanimous view that, notwithstanding the difficulties inherent in the exercise, the current definitions of *participant* and *criminal organisation* require amendment; and that the amended definitions should apply uniformly across the statute books so as to provide consistency and equality in our laws.

Not unexpectedly, this complex but pivotal task brought out some divergence of views among Taskforce members as to how best to frame these terms.

What follows, then, is an analytical examination of the issues and competing considerations regarding what it means to be a participant in a criminal organisation; and, a roadmap to facilitate enhanced definitions which can underpin the renewed Organised Crime Framework developed by the Taskforce.

#### HOW ARE THE TERMS 'PARTICIPANT' AND 'CRIMINAL ORGANISATION' CURRENTLY DEFINED UNDER QUEENSLAND LAWS?

The concept of *participating in a criminal organisation* is found within several pieces of Queensland legislation but the language chosen to define those terms differs across the Acts. This is despite the fact that the underlying concept remains broadly consistent throughout. There is, then, no apparent or compelling need for different definitions of what is for all intents and purposes the same thing under Queensland legislation.

The practical consequence of Parliament adopting different definitions for what is, in essence, the one concept is that it can too easily create uncertainty, difficulty and complexity in the administration of the criminal law.<sup>4</sup>

The principal examples of legislation in which the concept of *participation in a criminal organisation* is relied upon are:

- Queensland's Criminal Code;
- *Criminal Organisation Act 2009* (Qld) (COA);
- *Crime and Corruption Act 2001* (Qld) (CCA); and
- *Vicious Lawless Association Disestablishment Act 2013* (Qld) (VLAD Act).

Each is discussed in detail below.

#### CRIMINAL CODE

The Criminal Code uses the terms 'criminal organisation' and 'participant'.

#### DEFINITION OF CRIMINAL ORGANISATION

Section 1 of the Criminal Code (which is the provision that lists all of the important definitions under the Criminal Code) provides:

***criminal organisation*** means—

- (a) an organisation of 3 or more persons—
  - (i) who have as their purpose, or one of their purposes, engaging in, organising, planning, facilitating, supporting, or otherwise conspiring to engage in, serious criminal activity as defined under the *Criminal Organisation Act 2009* (Qld); and
  - (ii) who, by their association, represent an unacceptable risk to

the safety, welfare or order of the community [**Limb 1**]; or

(b) a criminal organisation under the *Criminal Organisation Act 2009* (Qld) [**Limb 2**]; or

(c) an entity declared under a regulation to be a criminal organisation [**Limb 3**].

(The phrases in bold type – eg, ‘**Limb 1**’ – are a shorthand method for referring to the three different ways in which an organisation may find itself declared to be ‘criminal’.)

This is an important definition under Queensland’s criminal law. It not only applies to various Criminal Code offences – it has extra work to do, as the definition relied upon under other legislation amended as part of the 2013 suite.

For example the section 1 definition of ‘criminal organisation’ applies to the following Criminal Code offences:

- as an element of the new offences in section 60A (the anti-association offence), section 60B (the clubhouse offence) and section 60C (the recruitment offence);
- as an element of the new circumstances of aggravation inserted under the 2013 suite; and
- to the existing offences in section 86 (obtaining of or disclosure of secret information about the identity of an informant), section 359 (aggravated threats) and section 359E (unlawful stalking), unrelated to the 2013 suite.

The section 1 definition of ‘criminal organisation’ also applies under the:

- *Bail Act 1980* (Qld) – to determine when the reverse onus provisions apply with respect to participants in criminal organisations;

- *Corrective Services Act 2006* (Qld) – as part of the Criminal Organisation Segregation Order provisions;
- *Liquor Act 1992* (Qld) – as an element of offences about participants in criminal organisations being visibly present on licensed premises;
- *Police Powers and Responsibilities Act 2000* (Qld); and
- the new and/or amended occupational and industry licensing regimes.

The *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* significantly broadened the ambit of the definition.

Before it was changed in 2013, the definition of criminal organisation had two limbs, not three, and proof of either limb would satisfy the definition.

The 2013 suite amended Limb 1, and added Limb 3 (Limb 2 was not changed).

Under Limb 1, the definition hinged upon a group of three or more people who *predominantly associate for the purpose of* engaging in, organising, planning, facilitating, supporting, or otherwise conspiring to engage in, serious criminal activity.

The 2013 suite broadened Limb 1 to provide that the group need only have *as one of their purposes* engaging in (etc.) serious criminal activity, to constitute a criminal organisation.

Limb 1 and Limb 2 require findings of fact by a court, either in a criminal trial context or in an earlier proceeding under COA.<sup>5</sup>

Arguably the most controversial change to the definition was the insertion of new Limb 3, which heralded an approach to defining this term that had not previously existed under Queensland law.

To accompany the new Limb 3, section 708A was inserted into the Criminal Code. It sets out the matters that the minister *may* (not

*must*) have regard to in deciding whether to recommend to the Governor-in-Council that an entity be declared by regulation to be a criminal organisation, namely:

- (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; or
- (e) ***any other matter the Minister considers relevant.***

(emphasis added)

These matters are analogous to the factors which the Supreme Court *must* have regard to in declaring an entity to be a criminal organisation under COA (ie, Limb 2 of the section 1 definition).<sup>6</sup>

The important distinction is, of course, that unlike the Supreme Court the minister is *not* compelled to take all, or even any, of these matters into account.

Limb 3 does not actually declare membership of any particular organisation to be a criminal offence. Instead what it does is to make membership of a designated group one ingredient of an offence.<sup>7</sup>

Whether a person is a member of a criminal organisation and whether a person committed the offence must still be proven in the ordinary way; ie, in the normal case, at a criminal trial – and so, too, must the ‘no criminal purpose defence’ if raised (this defence is discussed later).

There are 26 entities declared to be criminal organisations by virtue of Limb 3.<sup>8</sup> All 26 are OMCs. There have been no amendments to the list of entities since the enactment of the Regulation.

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#### DEFINITION OF PARTICIPANT

Curiously, ‘participant’ is not defined under section 1 of the Criminal Code (the definition provision) but, rather, under section 60A (the anti-association offence) created under the 2013 suite.

Like the term criminal organisation, the definition of participant is fundamental to the 2013 amendments made to the Criminal Code; and, also, to the Bail Act, Corrective Services Act, Liquor Act, the Police Powers and Responsibilities Act and occupational and industry licensing schemes. These Acts cross-reference the definition under section 60A(3).

The definition is cast in wide terms and states that a **participant** in a criminal organisation means one of five things:

- (a) if the [criminal] organisation is a body corporate – a director or officer of the body corporate; or
- (b) a person who (whether by words, conduct or in any other way) asserts, declares or advertises their membership of, or association with, the [criminal] organisation; or

- (c) a person who (whether by words, conduct or in any other way) seeks to be a member of, or to be associated with, the [criminal] organisation; or
- (d) a person who attends more than one meeting or gathering of persons who participate in the affairs of the [criminal] organisation in any way; or
- (e) a person who takes part in the affairs of the [criminal] organisation in any other way.

The definition specifically excludes a lawyer acting in a professional capacity.

The term ‘member’ includes an associate member or prospective member, however described.

The definition of participant under section 708A (which sets the discretionary criteria for recommending an entity be declared by regulation) replicates (b) to (e) above.

#### CRIME AND CORRUPTION ACT 2001

The CCA also relies on the concept of *participant in a criminal organisation*.

One of the purposes of the CCA is to combat and reduce the incidence of major crime.

This is achieved primarily through the establishment of a permanent commission called the Crime and Corruption Commission which, inter alia, has investigative powers, not ordinarily available to police, that enable it to effectively investigate major crime and criminal organisations and their participants.<sup>9</sup>

#### DEFINITION OF CRIMINAL ORGANISATION

Schedule 2 of the CCA provides the dictionary to the Act and includes the definition of ‘criminal organisation’.

The definition is exactly the same as the definition of criminal organisation under section 1 of the Criminal Code.

#### DEFINITION OF PARTICIPANT

Schedule 2 also includes the definition of ‘participant’ in a criminal organisation.

The definition is the same as the definition under section 60A(3) of the Criminal Code, but with one addition: it also means someone who *has been* a person mentioned in paragraph (a), (b), (c), (d) or (e) [see previous reference to section 60A(3) of the Criminal Code] *at any time within the preceding 2 years*.

The definition, again, specifically excludes a lawyer acting in a professional capacity.

#### CRIMINAL ORGANISATION ACT 2009

The purpose of COA is to disrupt and restrict the activities of organisations, including their members and associates, involved in serious criminal activity.<sup>10</sup>

#### DEFINITION OF CRIMINAL ORGANISATION

Schedule 2 contains the dictionary to the Act and includes the definition of ‘criminal organisation’. It is a reference to an organisation declared by the Supreme Court, (under Part 2 of COA) to be a criminal organisation.

Section 10 further provides that the Supreme Court may declare an organisation to be a criminal organisation if satisfied that:

- (a) the respondent is an organisation [namely, any incorporated body or unincorporated group of 3 or more persons, however structured whether the body or group is based inside or outside Queensland; or whether the body or group consists of persons who are ordinarily resident inside or outside Queensland]; and
- (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.

While consistent with Limb 1 of the Criminal Code definition, this definition is not as wide in its scope: it requires members of the organisation to associate *for the purpose of* engaging in serious criminal activity etc., as distinct from this being but *one of its purposes*.

A declaration by the Supreme Court that an organisation is a criminal organisation satisfies Limb 2 of the Criminal Code.

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### DEFINITION OF MEMBER

COA relies on the term ‘member’ rather than ‘participant’ in a criminal organisation. The definition of member (under Schedule 2) differs somewhat to that of participant under the Criminal Code, namely:

- member**, of an organisation or criminal organisation includes, any of the following—
- (a) if the organisation is a body corporate—a director or officer of the body corporate;
  - (b) a member, associate member or prospective member, however described, of the organisation;
  - (c) a person who identifies himself or herself, in some way, as belonging to the organisation;
  - (d) a person who is treated by the organisation as if he or she belongs to the organisation; or
  - (e) a person who associates with a member of the organisation for the purpose of engaging in, or conspiring to engage in, serious criminal activity.

### VICIOUS LAWLESS ASSOCIATION DISESTABLISHMENT ACT 2013

The VLAD Act uses the phrase ‘participant in the affairs of an association’ as distinct from a ‘participant in a criminal organisation’.

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### DEFINITION OF ASSOCIATION

Section 3 of the VLAD Act provides a very wide definition of association, namely:

**association** means any of the following—

- (a) a corporation;
- (b) an unincorporated association;
- (c) a club or league; or
- (d) any other group of 3 or more persons by whatever name called, whether associated formally or informally and whether the group is legal or illegal.

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### DEFINITION OF PARTICIPANT

Section 4 of the VLAD Act sets out what it means to be a ‘participant’ in the affairs of an association. While it has parallels with the definition under the Criminal Code, it is not in exactly the same terms.

A person is a **participant** in the affairs of an association if the person—

- (a) (whether by words or conduct, or in any other way) asserts, declares or advertises his or her membership of, or association with, the association; or
- (b) (whether by words or conduct, or in any other way) seeks to be a member of, or to be associated with, the association; or
- (c) has attended more than 1 meeting or gathering of persons who participate in the affairs of the association in any way; or

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

The term ‘affairs of the association’ is not defined.

#### A SINGLE DEFINITION OF CRIMINAL ORGANISATION AND PARTICIPANT ACROSS QUEENSLAND LEGISLATION

This traverse has brought into sharp focus the absence of a single definition applying uniformly across the laws despite the fact that this same concept (individuals forming groups to engage in serious criminal activity) underpins a number of Queensland legislative schemes.

The Taskforce considers that Queensland would benefit from having a consistent approach to characterising what it means to be a participant in a criminal organisation, with one definition to apply across the statutes.

This simpler approach has the practical advantage of lessening the risk of confusion and reducing the complexity of interpreting and applying the laws, while ensuring greater equality across like provisions.

There is, the Taskforce believes, no detriment in this course. Rather, the compelling benefits of having a single definition were cogently signalled by Justice Hayne in *Kuczborski v Queensland* when he noted that:<sup>11</sup>

*‘But if the VLAD Act, the Disruption Act and Tattoo Parlours Act were to constitute a ‘package’ of laws, it might reasonably have been expected that the most basic elements of the laws (identifying the individuals and groups to which they were directed) would be defined identically. That this has not been done can only create unnecessary difficulty and complexity in the administration of the criminal laws. It entails, at least, that those administering and enforcing the relevant provisions must pay the closest attention to the applicable provisions and recognise that a conclusion reached about the engagement of one set of provisions very*

*often cannot be applied when considering the application of other provisions.’*

(emphasis added)

#### HOW ARE THE TERMS PARTICIPANT AND CRIMINAL ORGANISATION DEFINED ELSEWHERE IN AUSTRALIA?

##### PARTICIPANT

Queensland and South Australia have the widest definitions. A person needs only to attend more than one meeting or gathering of persons who participate in the affairs of the criminal organisation to fall within the definition.

All other jurisdictions require some sort of positive act by an individual which shows that they identify with the criminal organisation or actively participate in its activities.<sup>12</sup>

Attachment 6 outlines the definitions of participant used throughout Australia.

##### CRIMINAL ORGANISATION

With the exception of Tasmania and the Australian Capital Territory, all Australian jurisdictions define the term ‘criminal organisation’. An inter-jurisdictional comparison of the definitions is also in Attachment 6.

(Tasmania and the ACT do not specifically criminalise organised crime.)

Other jurisdictions mostly define the term in a way which captures concepts consistent with the Limb 1 definition under section 1 of Queensland’s Criminal Code. South Australia actually replicates the Queensland definition.<sup>13</sup>

New South Wales is alone in providing a definition which is anchored to the concept of ‘obtaining material benefits from conduct that constitutes a serious indictable offence’;<sup>14</sup> – compare this with the Queensland approach, which is anchored to the purpose of the

criminal organisation and its unacceptable risk to the community.

In terms of Limb 2 of the Queensland definition all Australian jurisdictions (with the exception of Tasmania and the ACT) have enacted legislation like Queensland's COA, which involves a judicial declaration.<sup>15</sup>

In terms of Limb 3 of the Queensland definition, South Australia is the only other jurisdiction to allow the Executive to declare a criminal organisation, using a regulation.<sup>16</sup>

But in South Australia (unlike Queensland) the minister can only make a recommendation for a declaration *if* the minister has received a report from the Parliamentary Committee with special organised crime oversight functions, or if the minister has referred a *proposal* for such a declaration to that specialist Committee.

South Australia also requires the regulation to relate only to a single entity, single event or single place (again, this is not the case in Queensland).<sup>17</sup>

Attachment 7 provides a comparative analysis of the Queensland and South Australian schemes. The most obvious and telling difference is the provision for parliamentary oversight of the Executive.

### THE RISK OF NOT MODIFYING THE EXISTING DEFINITIONS

Through its methodical examination of the 2013 suite the Taskforce has exposed a number of issues and challenges concerning the current definitions, both from legal and operational perspectives.

These matters are of such importance that the Taskforce considers the current definitions require amendment. The issues and challenges are outlined below.

### AMENDING THE TERM 'CRIMINAL ORGANISATION' AS DEFINED UNDER THE CRIMINAL CODE

### LIMB ONE: A FINDING OF FACT TO BE PROVEN BEYOND REASONABLE DOUBT

The complexion of organised crime has changed over time, and that trend is expected to continue into the future.

The Australian Crime Commission reports that:

'Organised crime will continue to adapt their criminal business model, to expand their use of flexible networked structures, to enhance their resilience and enable adaptive operations across international and domestic jurisdictions.'<sup>18</sup>

This assessment is consistent with the information provided to the Taskforce by Queensland's law enforcement agencies.

It is also consistent with the analysis of '*What is Organised Crime?*' appearing in the COA Review, recently finalised as a separate exercise by the Taskforce chair.<sup>19</sup>

While OMCGs have traditionally favoured hierarchical and highly visible models of organisation (with ranks of seniority, chains of command, membership rituals, insignia and uniforms), the same cannot be said for all forms of organised crime.<sup>20</sup>

Organised crime groups are now frequently informally arranged, flexible and adaptable in structure, and have a membership composition which shifts over time depending upon the availability, reliability and specialist capabilities of individuals recruited.<sup>21</sup>

To develop a definition of criminal organisation which captures both the traditional structure *and* these modern shape-shifting, flexibly arranged crime groups is complicated; the two are not synonymous.

The risk in framing a definition sufficiently broad to capture both types of crime groups is that it may ultimately lack the specificity needed to insure against injustice – for example, by inadvertently capturing groups of individuals beyond the policy scope of the serious organised crime laws.

The Taskforce considers that Limb 1, as currently framed, arguably captures the traditional hierarchical groups but it is not likely to be sufficient over time to cover more informal and flexibly arranged groups.

The Limb 1 definition requires amendment to ensure it covers existing, and future, organised crime groups. A model for change is set out later in this Chapter.

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## LIMB TWO: SUPREME COURT DECLARATION

Limb 2 rests entirely on the continuation of COA.

The Report of the COA Review was delivered to the Attorney-General on 15 December 2015. The Report must be tabled by the Attorney-General in Parliament by May 2016.

At the time of printing, the COA Report had not yet been published by the Queensland Government. However, the Attorney-General approved the earlier, confidential release of the Report to the Taskforce so that its work under its Terms of Reference was not delayed.<sup>22</sup>

COA includes a sunset clause and will expire (and no longer be current law) on 15 April 2017 unless the Queensland Government introduces legislation to allow the Act to continue.

The future of COA (and consequentially, Limb 2 of the definition) depends upon the Queensland Government's response to the COA Review.

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## LIMB THREE: EXECUTIVE DECLARATION

Limb 3 is quite distinct from Limbs 1 and 2 of the definition under section 1 of the Criminal Code.

It involves a ministerial determination that an organisation is a criminal one and is, hence, wholly a decision of Executive Government – and absent any judicial involvement in the process.

Limb 3 caused the Taskforce varying degrees of concern and unease. Overall that unease could be categorised as considerable, with the exception of the Police Unions and the QPS who, from an operational perspective, recognised its advantage of speed and simplicity. It was extensively scrutinised, and debated.

What follows is an overview of key themes discussed concerning Limb 3. It gives insight into the varied and competing considerations with which the Taskforce grappled.

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## IS THE EXECUTIVE DECLARATION MODEL CONSTITUTIONALLY VALID?

The constitutional validity of Limb 3 was one of the matters considered in *Kuczborski*. The foundation of the challenge rested on the principles stemming from *Kable v Director of Public Prosecutions (NSW)*<sup>23</sup> (*Kuczborski* and the *Kable* principle are discussed in an earlier chapter).

It was argued for the applicant in *Kuczborski* that, because the question of whether an organisation is a criminal organisation can be predetermined by declaration in a regulation, that exercise impermissibly entangles judicial functions with those of the Executive Government.

The High Court, by majority, rejected the challenge to Limb 3 on the basis of the *Kable* principle and upheld its constitutional validity on that discrete basis.

But, as noted in Chapter 6 (and by the Bar Association of Queensland in its submission to the Taskforce<sup>24</sup>), the High Court was not asked to consider *other* constitutional arguments: in particular, the High Court did not need to resolve whether Limb 3 (read in conjunction with section 708A) might be invalid because it impermissibly infringes upon implied constitutional freedoms of communication and association about matters of political and governmental interest.<sup>25</sup>

Relevantly, section 708A does *not* include a caveat to signal that the power is not in any way intended to diminish the freedom to participate in advocacy, protest, dissent or industrial action.

The risk presented by Limb 3 is its open-ended language, which allows the minister to have regard to ‘*any other matter the minister considers relevant*’<sup>26</sup> in reaching a decision whether or not to recommend that an organisation be declared by regulation to be a criminal one.

The concerns engendered by this executive power are self-evident. Principally they hinge on these facts and circumstances:

- that it vests decision-making power, not in Parliament or the Judiciary (and is not immediately subject to their oversight or scrutiny) but solely in a minister of the Government;
- that the discretionary criteria attached to the exercise of the decision-making power by this sole Minister are extraordinarily wide; and
- the danger of misuse – that the power could, in the wrong hands, be exploited so as, for example, to have a wide range of entities declared to be ‘criminal organisations’, including associations whose purpose includes, (as one of many possible examples) the active pursuit of political objectives antithetical to those in power.<sup>27</sup>

In *Kuczborski* the Solicitor-General of Queensland submitted that the minister, in exercising the Limb 3 power, would be limited to consideration of matters relevant to whether the organisation has, as one of its purposes, the commission of *serious criminal offences* and the effect of such purposes on public order.<sup>28</sup>

This narrower construction of the regulation-making power was also discussed by the plurality of judges who sat on the case.<sup>29</sup> If so

constrained, then the constitutional validity of the regulation-making power under Limb 3 and section 708A is on much surer footing.

The problem is that, although there was discussion in *Kuczborski* about the possible construction of the provision, the High Court was *not* required to decide the limits of section 708A, and did not do so.

It is not known how the High Court will ultimately rule in this regard. The Taskforce chair expressed, in the COA Review, concern that a challenge was inevitable and that if challenged the legislation was, more likely than not, in jeopardy. The matter is complex and is not one to which any certain outcome can be ascribed, and different views are open.

The Taskforce accepts that it is probable that a further constitutional challenge will be made to aspects of the 2013 suite, and that the challenge will necessarily include further examination of the validity of the executive declaration limb of the definition of criminal organisation.

Further, as an adjunct to its acceptance that such a risk exists, the Taskforce then takes into account that a measure of doubt lingers over the constitutional validity of Limb 3 when viewed in the context of section 708A. (Within the Taskforce, views differed about the outcome of any challenge to the constitutional validity of Limb 3.)

#### MIGHT THE EXECUTIVE DECLARATION MODEL BE SUBJECT TO JUDICIAL REVIEW?

How the executive power to declare criminal organisations will be interpreted also has implications for the question whether a decision by the minister under section 708A of the Criminal Code might be the subject of judicial review. Again, this was not a question the High Court had to answer.

(*Judicial review* is the process whereby an administrative decision is reviewed by a court to determine whether the correct legal process was followed in making that decision. Faults in decision-making may include a failure

to afford natural justice, a failure to take into account a relevant consideration – or, conversely, that an irrelevant consideration was taken into account.)

In a helpful and carefully argued submission to the Taskforce,<sup>30</sup> Dr Rebecca Ananian-Welsh, Law lecturer at the University of Queensland, analysed *Kuczborski* and its impact on the scope of the *Kable* principle. She also discussed how the regulation-making power might be interpreted, and the potential limits that may be placed on its construction (as discussed above).

The Taskforce was interested in her interpretation of the comments of the plurality in *Kuczborski* regarding the potentially narrow interpretation which might be given to the power under section 708A, and her suggestion that the decision of the minister is open to judicial review (or, at least, that the plurality of judges in the High Court ‘seem to be opening a doorway to judicial review of administrative action’).

In her submission Ms Ananian-Welsh highlighted that the plurality:<sup>31</sup>

*...favoured a highly contextual reading of the declaration power, taking into account its placement in the Criminal Code and criteria by which an organisation could be declared by a court. Looking to these factors, their Honours suggested that, despite its broad framing, the declaration power may in fact be limited to the declaration of organisations engaged in serious criminal activity (so, presumably neither the Australian Bar Association, the Australian Medical Association, nor the Beefsteak and Burgundy Club)...It may take an application for judicial review of an exercise of the declaration power to resolve its scope.*

The Taskforce was also respectful, of course, of Hayne J’s view in *Kuczborski* that the declaration of the first 26 entities is unreviewable (presumably, on the basis that the Minister’s decision was of a legislative

nature given the Regulation was enacted as part of the 2013 amending Act).

Hayne J was also of the view that *for all practical purposes* future declarations would also be unreviewable. The matters taken into account by the minister and the criteria applied would most likely, he thought, be unknown (in contrast to the plurality view, Hayne J focused upon a wide interpretation of the criteria under section 708A).<sup>32</sup>

The implications of the minister’s decision being exposed to judicial review prompted much discussion within the Taskforce, with a particular focus on the relief open to an aggrieved person who is successful in having the decision judicially reviewed. The Supreme Court under that process, can:<sup>33</sup>

- nullify or set aside a decision;
- refer the matter back to the decision-maker;
- declare the rights of the parties in relation to the decision;
- direct parties to do or refrain from doing anything the court considers necessary to do justice between the parties.

Judicial review has the potential to significantly impact upon and limit the breadth of the regulation-making power under section 708A; a provision which is otherwise, on its face, very wide-reaching.

### IS THERE ANOTHER PROBLEM WITH LIMB 3?

#### DOES THE EXECUTIVE DECLARATION MODEL SIMPLY DELAY ANY CHALLENGES TO A LATER POINT IN THE PROCEEDINGS?

The Taskforce acknowledges that Limb 3 enables organisations to be declared ‘criminal organisations’ quickly and simply, and provides significant operational efficiencies at the investigation, charge and preliminary hearing stages of the criminal justice process.

In turn, this arguably provides initial and immediate protection to the community from the serious threat alleged to be posed by a particular crime group.

The Queensland Police Service advised the Taskforce that, operationally, it relies primarily on the declaration of entities under the *Criminal Code (Criminal Organisations) Regulation 2013* (Qld) to establish whether a person is a participant in a criminal organisation at the investigation and charge stages.

The QPS not infrequently reiterated that, operationally for law enforcement agencies, the process under Limb 3 is considered to be an efficient and flexible way to swiftly respond to the threat posed by particular groups by enabling them to be added to and omitted from the list of criminal organisations under the regulation.

The problem is that while Limb 3 clearly has the perceived advantage of saving time and resources at the preliminary stages of the criminal justice process it does not, in reality, provide any tangible efficiencies once the matter moves forward to the trial stage – the critical step to securing a conviction.

The risk, the Taskforce came to understand, is that Limb 3 does no more than delay the evidentiary challenges which would otherwise be faced at the investigation and charge stages of a criminal matter, to a later stage in the process.

#### THE ‘NO CRIMINAL PURPOSE’ DEFENCE

This challenge happens by virtue of the ‘no criminal purpose defence’ under the 2013 suite. The defence is discussed later in the context of the Criminal Code offences, but some comment is required about it, in the context of the definition provisions.

In effect the defence leaves it open to an accused person to attempt to prove, on the balance of probabilities, that the ‘criminal organisation’ (including those declared under Limb 3), of which they are alleged to be a

participant, is *not* one that has (as one of its purposes) the purpose of engaging in, or conspiring to engage in, criminal activity.

(It is appropriate to note, in passing, that the Taskforce accepts that the retention of the no criminal purpose defence may be important in the face of any challenge to the constitutional validity of the 2013 suite [to which the defence applies] on the basis of the *Kable* principle.)

The strong likelihood of the defence being raised at trial means that, in practice, the prosecution will need in every case to have *admissible* evidence to negative the defence. This evidence needs to be obtained, in admissible form, pretty much from the outset of the proceedings; it will be too late if the prosecution and law enforcement agencies delay acting until the defence is raised, for example, early in or part-way through the trial.

What will be required goes beyond mere proof of the existence of an executive declaration under the regulation (or declaration by the Supreme Court under Limb 2); that evidence does no more than establish the fact the declaration was made and that the particular entity is legally characterised as a criminal organisation.

Rather, once the defence is raised and the accused tries to prove it the balance of probabilities, the prosecution will need to establish that the ‘criminal organisation’ does *in fact* have, as one of its purposes, the purpose of engaging in criminal activity.<sup>34</sup> Failure to counter this defence will be fatal to the case.

The secretive nature of criminal organisations and their internal processes makes it at least likely, and indeed probable, that the prosecution may strike difficulties in securing admissible evidence of the organisation’s criminal purpose.

And, to establish ‘purpose’ the prosecution will likely need to lead evidence beyond the criminal convictions of individual members (given that, without something more, it is

impossible to determine from a criminal history whether accused persons were operating opportunistically, or for the furtherance of the alleged 'criminal' organisation on those previous occasions).

Although law enforcement agencies may have criminal intelligence about the activities of an organisation, it is often not in admissible form and, hence, may not be able to be relied upon by the prosecution as part of its case at trial.

The practical utility of Limb 3 was confirmed in *Kuczborski* but, as Chief Justice French and the plurality observed, the declaration under regulation *does not amount to a finding of guilt*; and it *does not conclusively* establish the nature of that organisation.<sup>35</sup>

This deferment of the problem, inherent in Limb 3, is something which the Taskforce believes militates against its *actual* utility and significantly reduces the advantages it offers in terms of a speedy, uncomplicated declaration process.

#### WHAT DOES IT MATTER IF THE EXECUTIVE DECLARATION MODEL LACKS SAFEGUARDS?

A criticism levelled at Limb 3, read in conjunction with section 708A, is that it provides no protection for ordinary citizens against the potential for arbitrary and unjust misuse of the power by the minister<sup>36</sup> who (adopting a wide and unrestrained interpretation of the provisions) is allowed to make a recommendation to the Governor-in-Council on the basis of any matter he/she considers relevant.<sup>37</sup>

Just how the High Court will ultimately interpret the scope of the provisions is unknown. While the plurality, as noted, at least contemplated a narrow construction anchored to considerations of serious criminal activity, the fact the provision is framed in non-mandatory terms lends support to the assertion that it is open to wide interpretation.

The apparent deliberate drafting decision to cast the consideration of factors, ultimately, in discretionary terms raises the risk (or, at least,

the possibility) that the minister's decision may be based on reasons entirely unrelated to the listed factors.

This leaves open the concern that a government could recommend that an entity be declared a criminal organisation on the basis, for example, of religious beliefs or for political advantage.

On the one hand, this can sound unnecessarily alarmist and provocative; on the other, it reflects a sound reason why our system of parliamentary democracy implicitly limits the risk that any one arm – Parliament, the executive, or the judiciary – misuses a power by avoiding just this kind of legislation.

The Queensland Council for Civil Liberties, in its submission to the Taskforce, advocates for the repeal of Limb 3 and views it as 'simply a form of proscription'; noting that 'Australian history is replete with examples of the arbitrary misuse of proscription powers'.<sup>38</sup>

In its submission the BAQ described the regulation-making power as a '*substantially retrograde step from the pre-existing (and nonetheless unsatisfactory regime [under COA])*'.<sup>39</sup>

On its face Limb 3 (with section 708A) affords no natural justice to the entity declared to be a criminal organisation. The Taskforce, under its Terms of Reference, is required when considering the 2013 suite to have regard to the *fundamental legislative principles* under section 4 of the *Legislative Standards Act 1992* (Qld).

Queensland laws are meant to have regard to the rights and liberties of individuals, which includes the principles of natural justice.

Two important characteristics of natural justice are that: a party has an opportunity to have their case heard, and that the decision maker be neutral or free from bias.<sup>40</sup>

Section 708A does not allow an entity any opportunity to be heard before the decision is

made by the minister to recommend the declaration.

Indeed, it is highly likely that an entity will not even know it has been 'declared' a criminal organisation until the regulation is made – as occurred with the 26 entities currently declared to be criminal organisations.

On 17 October 2013 these entities took on the legal characterisation of criminal organisations.<sup>41</sup> The day before, they were not. There was no warning of this prior to 15 October 2013 (with the exception of the Finks OMCG (Gold Coast Chapter) which was at that time the subject of an application that it be declared a criminal organisation under COA.)<sup>42</sup>

The neutrality of the decision-maker is, plainly, a critical question. The minister is a member of the Executive branch, comprised of members of the governing party.

No ground, and no evidence, was presented to the Taskforce which would warrant an immediate concern that any Attorney-General (past, present or future) would in fact act inappropriately.

But it would be facile for the Taskforce not to acknowledge, as it must, that the terms of the legislation increase the risk that the ultimate decision-maker is put in a position where pressures and constraints (which are not apparent, or exposed in the decision-making process) might bear upon him/her.

As Hayne J observed in *Kuczborski*, for all practical purposes the decision is unable to be attacked because the matters taken into account and the criteria applied will almost always remain unknown.<sup>43</sup> There is no obligation for transparency in the decision-making process under section 708A.

Hayne J referred to the declaration under Limb 3 in these terms (in the context of setting out what he considered to be the vice of the provisions):<sup>44</sup>

*The necessarily opaque, forensically untested and effectively untestable*

*conclusion expressed in the legislative or regulatory identification of an organisation as a criminal organisation.*

What that means for Queenslanders is that the only safeguards under Limb 3 are:

- The possibility that the Governor-in-Council might reject an apparently unjust recommendation for a declaration by regulation. The likelihood of this occurring is remote. The Governor acts on the advice of the Executive Council (which is comprised of the Governor and Cabinet Ministers from the government of the day).<sup>45</sup> The Governor-in-Council gives legal effect to the decisions of the Government; or
- The process whereby, after a regulation has been made, it must be tabled in Parliament where it is examined by a portfolio Parliamentary Committee<sup>46</sup> and can be the subject of a disallowance motion.<sup>47</sup> Again, given that the Government of which the decision-maker is a member would ordinarily hold a majority of seats in Parliament, it is highly unlikely that the motion would be successful.

Thereafter, the only real recourse for citizens is to exercise their democratic right to vote against the Government at the next State Election.

The challenge in leaving this as the main protection against the potential for an abuse of power is that State Elections are held once every three years<sup>48</sup> (possibly extending to four yearly<sup>49</sup>) which means that there is, effectively, no interim protection (or remedy) for a group which believes it has been unjustly declared.

The Taskforce recognises that, in contrast, some may view the regulation-making power under Limb 3 as in fact reflecting a fundamental principle of representative democracy – that is, the regulation-making power represents a democratically elected Government directly exercising the popular will of its citizens to be protected from what

the majority of citizens perceive is a grave and urgent threat.

It is not the work of the Taskforce to resolve these politico-philosophical questions; rather, as the discussion above shows, its highest and best purpose is to consider *all* the facets, elements and ramifications of the 2013 suite.

#### DOES THE USE OF CRIMINAL INTELLIGENCE UNDER THE EXECUTIVE DECLARATION MODEL RAISE ANY CONCERNS?

Section 708A of the Criminal Code clearly contemplates the minister having regard to secret *criminal intelligence* to aid in the decision-making process.

This can be seen in the phrase, ‘any information suggesting...’ and otherwise, the ambit of ‘any other matter the minister considers relevant’ would capture information of this type.

The BAQ, in its submission to the Taskforce,<sup>50</sup> expressed its concern that the minister is not strictly required to act on *evidence*, as distinct from something so nebulous as *any information*, in making a decision with such significant implications for an individual’s rights and liberties.

The use of criminal intelligence in judicial processes was exhaustively analysed in the COA Review<sup>51</sup> and the Taskforce has relied on conclusions reached in the Review to inform its decisions in this regard.

The COA Review did *not* draw a conclusion about the use of criminal intelligence in administrative decision-making processes; to do so was beyond the scope of its Terms of Reference. For the Taskforce, however, this was very much a live issue which generated a deal of discussion over a number of its meetings.

Chapter 10 provides a comprehensive analysis of the use of criminal intelligence in administrative decision-making processes, and the conclusions reached by the Taskforce in this regard in the context of the 2013 suite.

#### AMENDING THE TERM ‘PARTICIPANT’ AS DEFINED UNDER THE CRIMINAL CODE

The breadth of the definition of *participant in a criminal organisation* was a matter which the Taskforce comprehensively examined from both a legal and operational perspective.

The definition is unarguably wide, with the potential to extend beyond persons who are members and associates of an organisation or who are involved in its affairs.

The definition of ‘participant’ arguably extends to individuals who merely *meet* with other people who are members or associates of the organisation, irrespective of the nature of those meetings or gatherings.

For example, a person who maintains a friendship with a person from high school (a person who happens to become be a member of an OMCG) might be caught by the extended definition of ‘participant’ if they were to attend a handful of social functions with that person, such as their wedding, birthday celebrations and Christening ceremony of their child – despite the gatherings being, say, entirely unrelated to the affairs of the criminal organisation.

The plurality in *Kuczborski* briefly commented on this interpretation of the definition but did not draw final conclusions (given it was unnecessary for the purpose of that case).

It was considered ‘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.’<sup>52</sup>

In any event, the plurality went on to indicate that:<sup>53</sup>

However that may be, there can be no doubt that these provisions are **capable of having a wide operation which might be**

**thought to be unduly harsh.** Thus, it is arguable that a person who has attended more than one such meeting is “*marked for life*” as a participant, even though the person ceased to be a member long before the acts which lead to a charge.

(emphasis added)

The possibility of the definition being construed in these ways caused unease within Taskforce members.

The breadth of the definition has, the Taskforce recognised, the potential to operate harshly and to lead to unfairness and injustice.

### PROPOSAL FOR CHANGE

The Taskforce concluded that the definition of participant in a criminal organisation under section 1 (read in conjunction with section 60(3) and section 708A) requires amendment; once amended, that definition should apply consistently across the Queensland statutes.

Ultimately, the Taskforce was united in its recommendation to enhance the definition provisions.

The challenge for the Taskforce was how best to achieve that. Indeed, what it means to be a *participant in a criminal organisation* was a constant theme throughout its analysis of the entire 2013 suite.

Limb 3 and its preservation, deletion or amendment featured heavily in that debate. Several ideas were comprehensively analysed and discounted.

Through this process, the majority of the Taskforce, including the chair, came to the conclusion that the challenges confronting Limb 3 are simply insurmountable, and that no appropriate level of safeguards can be incorporated into the provision to overcome its deficits.

This view was reinforced by the COA Review’s exhaustive analysis of the limitations of the use of criminal intelligence and the

effectiveness of the ‘safeguards’ surrounding its use; and, the Review’s concerns about the constitutional limits of section 60A (the anti-association offence).

Limb 3 can be repealed, the Taskforce concluded, if it (and other troubling elements of the 2013 suite) can be effectively replaced with legislation which contains a just, comprehensive and effective roadmap to combating *all* forms of organised crime.

The Taskforce recommendations which follow collectively represent a renewed Organised Crime Framework, based on traditional criminal law approaches; well-proven methods of crime detection and prosecution; and a focus on groups of *individual* criminals instead of attempts to combat the threat they pose by going after the *organisation* itself.<sup>54</sup>

The repeal of Limb 3 eliminates any perception or risk of the (conscious, or unconscious) politicisation of the declaration process. This is because Limb 1, which it is proposed should be retained with some amendments, relies upon the jury to be the ultimate decision-maker about this critical issue – ie, to make a finding of fact based on admissible evidence that the group is a criminal organisation.

What follows is a précis of the proposal for change in terms of the definition provisions.

### LIMB ONE – RETAIN WITH MODIFICATION

The Taskforce is concerned that the current definition of *criminal organisation* under section 1 of the Criminal Code may not be sufficient to cover modern, more informal and flexibly arranged crime groups.

It is recommended that Limb 1 be modified to make it sufficiently broad to capture both types (ie, traditional, hierarchically structured and the shape-shifting entities) but also with sufficient detail to ensure against inadvertently capturing groups beyond what is intended.

To achieve this diversity within the definition the following features are considered necessary:

- use of the term ‘*group*’ rather than an ‘*organisation*’;
- making it clear that the group can be formally or informally organised;
- not focusing solely on the ‘purpose’ of the group but, also, the concept of a group which comes together ‘to engage in’ criminal activity – so as to capture opportunistic groups who have no connection to each other beyond committing the criminal activity; and
- focusing the definition of criminal organisation upon objectively more serious examples of organised crime through the use of concepts such as: ‘*serious criminal activity*’ (ie, an offence punishable by at least 7 years imprisonment<sup>55</sup>) and ‘obtaining a material benefit’.

For example, if these modifications were incorporated into the current language of Limb 1, the definition provision might look something along the following lines<sup>56</sup>:

criminal organisation means –

- (a) a **group** of 3 or more persons (**whether formally or informally organised**) –
- (i) **who engage in** or who have as their purpose (or 1 of their purposes) to engage in, serious criminal activity; and
- (ii) who represent an unacceptable risk to the safety, welfare or order of the community; or

‘**engage in**’ includes organising, planning, facilitating, supporting, conspiring to engage in or **obtaining a material benefit from serious criminal activity**.

In terms of the definition of ‘participant’ in a criminal organisation, the Taskforce recommends the repeal of the different and varying definitions within the 2013 suite and the adoption of a single definition, which is contained within section 1 of the Criminal Code (the definition provision), and which would be used uniformly across Queensland legislation.<sup>57</sup>

The definition should no longer be located in section 60A of the Criminal Code (the anti-association offence).

The Taskforce favours a modified definition that is focused on individuals who are actively involved in the affairs of the criminal group or who identify themselves as belonging to, or who promote their association with, the criminal group. The BAQ emphasised that the focus should be on actual participation.

What is proposed is a refined definition modelled on the Victorian approach under the *Criminal Organisations Control Act 2012 (Vic)* – for example:

- an individual who is a current participant of the group because the individual has paid a fee or levy to participate in the activities of the group, or has been accepted as a participant in the group through another process set by the group; or
- an honorary participant of the group; or
- a prospective member of the group; or
- an individual who identifies themselves as belonging to the group, including an individual who wears or displays the patches or insignia (if any) of the group,<sup>58</sup> or
- an individual whose conduct in relation to the group would reasonably lead another person to consider the individual to be a participant in the group; or
- an office holder of the group.

The principal advantage of these changes is that Limb 1 ought to then cover both existing (and future) hierarchically structured crime groups; and, also, those which are shape-shifting and flexibly arranged.

This modified definition of *participant* is sufficiently restrictive so as to not unfairly capture people who have never truly participated (or held themselves out as truly having participated) in the affairs of the criminal group.

#### LIMB TWO – BEYOND THE SCOPE OF THE TERMS OF REFERENCE

The continuation of Limb 2 depends upon the Queensland Government's response to the COA Review. For the Taskforce to proffer a view on the fate of COA is beyond the scope of its Terms of Reference.

#### LIMB THREE – REPEAL

As noted earlier, from the outset there was division within the Taskforce as to the continuance or repeal of Limb 3. The Queensland Law Society (QLS), the BAQ, the Public Interest Monitor (PIM), and chair of the Taskforce each took the view that it should be repealed.

The Queensland Police Union and Commissioned Officers' Union supported the retention of Limb 3, while conceding the need for safeguards to be incorporated into the provisions.

The QPS position was that, operationally, what it required is a definition that is effective in combating organised crime groups and offers operational flexibility and timeliness. Limb 3 compares favourably in this respect to the costly, time consuming and resource intensive declaration process under Limb 2 – but, again, does not unnecessarily and unduly impede individual rights and liberties.

In the course of this debate those in favour of repeal acknowledged that Limb 3 afforded serving police officers a potentially speedy method of dealing with groups which, in the

opinion of the police, were criminal in nature and warranted a Limb 3 declaration to that effect; and, QPS and the police members and officers unions recognised the force of concerns about the risk of the improper use of executive power, and that Limb 3 only postponed and did not circumvent the need, ultimately, to prove the necessary elements to a jury.

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#### MODELS FOR CHANGE WHICH WERE CONSIDERED BUT REJECTED BY THE MAJORITY OF MEMBERS

The Taskforce, in furtherance of its consideration of these issues, examined ways to overcome the challenges confronting the regulation-making power through the possible inclusion of safeguards designed to bring rigour to the declaration process, and to enhance the transparency and scrutiny of decision making under it.

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#### PARLIAMENTARY COMMITTEE SCRUTINY

This idea, modelled on the South Australian approach,<sup>59</sup> involved the modification of section 708A of the Criminal Code to *require* that:

- the minister may only consider a *proposal* to recommend that a group be declared a criminal organisation if a written request is received by the minister from a law enforcement agency;
- the minister *must* refer a proposal to declare a criminal organisation to the Parliamentary Crime and Misconduct Committee (PCMC);
- the Commissioner of Police and the Chairman [*sic*]<sup>60</sup> of the Crime and Corruption Commission (CCC) *must* provide the PCMC with their opinion on the proposal;
- the opinion of the Commissioner of Police and the Chairman of the CCC can contain criminal intelligence which *must*

be kept confidential by the PCMC but *must* also be provided, on a confidential basis, to a PIM;

- the PCMC may invite the group that is the subject of the proposal to make a submission to the PCMC and the PCMC can invite a representative of the group to appear before them. The PIM must also be invited and can ask questions at the hearing;
- the Commissioner of Police and the Chairman of the CCC *must* appear before the PCMC to answer questions from the Committee Members and the PIM; and
- the minister *can only* make a recommendation to the Governor-in-Council that a group be declared a criminal organisation if a *majority of members* of the PCMC support the proposal to declare the group.

While this model builds some safeguards into the regulation-making power, including offering a degree of procedural fairness by allowing the group to be heard on the proposal (albeit, but without access to the criminal intelligence presented in support of it, or any means by which the veracity of that secret evidence could be meaningfully tested), the majority of the Taskforce considered that this was insufficient to overcome the fundamental challenges inherent in a process under which a minister can recommend that entities be declared as criminal – and, that in the unusual circumstances of Queensland’s parliamentary structure, the South Australian model did not readily carry across.

That is, unique to Australia, Queensland has a *unicameral* parliament with just one ‘house’, not the traditional two (our upper house was demolished almost a century ago).

Traditionally, upper houses in our Westminster system play a reviewing role, applying checks and balances by reviewing legislation generated in the lower house. Queensland lacks that.

In the result our system relies more heavily upon Parliamentary Committees to consider, review, and report to Parliament on proposed legislation, and the actions of the Executive Government.

In Queensland, the committee system has not always been able, or been seen, to effectively perform that role. Historically, there are not always sufficient numbers of non-government members to ensure that Parliamentary Committees are truly bi-partisan; and, as has been seen from time to time the majority government can use its numbers on the floor of our one house of Parliament, the Legislative Assembly, to dissolve Parliamentary Committees when it chooses.<sup>61</sup>

Intending, of course, no disrespect to Parliament, those circumstances diminish (indeed, seriously undermine) the certainty of any protections which might be incorporated into Limb 3 that are based on our parliamentary process.

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#### MINISTER TO UTILISE A PUBLIC INTEREST MONITOR

This idea involved the modification of section 708A to include a mandatory requirement that the minister seek and receive an opinion from the PIM on the quality of the criminal intelligence to be relied upon by the minister in making their recommendation that an entity be declared as criminal.

This model is not favoured by the Taskforce as it would not provide the same degree of transparency and scrutiny as the Parliamentary Committee model.

Indeed, in discussing this model, the PIM himself provided significant insight as to the practical challenges that he anticipates would be confronted by a PIM in this type of role; challenges consistent with the conclusions reached under the COA Review as to the practical effectiveness of the analogous Criminal Organisation Public Interest Monitor (COPIM) role under the COA scheme.<sup>62</sup>

Under COA the purpose of the COPIM is twofold; it tempers the breach of procedural fairness in conducting proceedings in the absence of a respondent and it provides the court with some assistance to forensically test information in an adversarial setting that has lost the advocate for the alternative argument.

The COPIM is able to be present at all hearings (including those that take place in the absence of the respondent), is required to be provided with information (which necessarily includes criminal intelligence) put before the Court and can test and make submissions about the appropriateness and validity of each monitored application.

However, the COPIM is not able to receive any information that would disclose the identity of an informant who supplied criminal intelligence and COA expressly prohibits informants being called to give evidence.

Further, whilst there is no express prohibition on the COPIM communicating with a respondent, the COPIM cannot communicate with any other person in the discharge of their duties at criminal intelligence hearings.

The COA Review examined the effectiveness of the COPIM role and concluded that, because the COPIM is prevented from engaging with the credit of informants and the substance of their information (or able to discuss the secret evidence with a respondent) it was impossible for the COPIM to meaningfully test that information.

The Taskforce considers, based on the observations and conclusions under the COA Review, that for the PIM to play a meaningful and effective role as a safeguard for Limb 3, at a minimum they would have to:

- be appointed independently of the Government;
- have full access to all criminal intelligence including the identity and full criminal history of informants;
- have the ability to cross-examine any informant or person whose information or evidence was relevant to the decision to declare an organisation; and
- be empowered to put specific allegations to, and take instructions from, the organisation that was to be subject to the declaration.

The reality is that these requirements are simply not practicable. Given the secrecy of criminal intelligence information and the safety concerns that link to this type of informant information, it is never going to be possible for a government to concede these requirements.

Yet to modify Limb 3 using this model, but without provision for these requirements (set out above), would make a mockery of the fundamental policy objective to ensure safeguards; and, in practical terms, would be tantamount to having no meaningful protections (as is the case currently with Limb 3).

### RECOMMENDATION 6 (Chapter Eight)

A single, uniform definition of the terms criminal organisation and participant is required and should be applied consistently across the statute books when dealing with organised crime. (unanimous recommendation)

### RECOMMENDATION 7 (Chapter Eight)

The definition of criminal organisation under section 1, and of participant under section 60A(3), of the Criminal Code require substantial amendment. (unanimous recommendation)

### RECOMMENDATION 8 (Chapter Eight)

**Limb 1** of the section 1 Criminal Code definition of criminal organisation should be retained but with modification as set out in the discussion in Chapter 8 of this Report. (unanimous recommendation)

### RECOMMENDATION 9 (Chapter Eight)

**Limb 2** of the section 1 Criminal Code definition of criminal organisation is beyond the scope of the Terms of Reference. (unanimous recommendation)

### RECOMMENDATION 10 (Chapter Eight)

**Limb 3** of the section 1 Criminal Code definition of criminal organisation (and consequentially, section 708A) should be repealed; the inclusion of safeguards cannot overcome the inherent flaws of the provisions. (not preferred by the Commissioned Officers' Union or the Queensland Police Union)

### RECOMMENDATION 11 (Chapter Eight)

The definition of participant under section 60A(3) of the Criminal Code should be amended as set out in the discussion in Chapter 8 of this Report; and should be relocated to section 1 of the Criminal Code. (unanimous recommendation)

## ENDNOTES

- <sup>1</sup> Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Final Report* (1989), 161-162 (the Fitzgerald Inquiry).
- <sup>2</sup> Queensland, Commission of Inquiry into Organised Crime, *Final Report* (2015), 17 (the Byrne Report).
- <sup>3</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009*, *Final Report* (2015), 21-26 (the Byrne Report).
- <sup>4</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [65]-[66] (Hayne J).
- <sup>5</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [21] (French CJ).
- <sup>6</sup> *Criminal Organisation Act 2009*, (Qld), section 10.
- <sup>7</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [40] (French CJ); [154]-[155] (Crennan J, Kiefel J, Gageler J, Keane J).
- <sup>8</sup> *Criminal Code (Criminal Organisations) Regulation 2013* (Qld), section 2.
- <sup>9</sup> *Crime and Corruption Act 2001* (Qld), sections 4 and 5.
- <sup>10</sup> *Criminal Organisation Act 2009* (Qld), section 3.
- <sup>11</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [65]-[66] (Hayne J).
- <sup>12</sup> Attachment 6.
- <sup>13</sup> *Criminal Law Consolidated Act 1935* (SA), section 83GA (which applies to Part 3B, Division 2: Public places, prescribed places and prescribed events). Additionally, South Australia has another definition of criminal organisation (section 83D), under the same legislation, which applies to the participation in a criminal organisation offence under Part 3B, Division 1: Participation in criminal organisation.
- <sup>14</sup> *Crimes Act 1900* (NSW), section 93S.
- <sup>15</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009*, *Final Report* (2015), Chapter 8.
- <sup>16</sup> *Criminal Law Consolidated Act 1935* (SA), section 83GA.
- <sup>17</sup> *Criminal Law Consolidated Act 1935* (SA), section 83GA.
- <sup>18</sup> Australian Crime Commission, *Organised Crime in Australia 2015* (May 2015), 83.
- <sup>19</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009*, *Final Report* (2015), 21-26.
- <sup>20</sup> Australian Crime Commission, *Organised Crime in Australia 2015* (May 2015), 6-7.
- <sup>21</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009*, *Final Report* (2015), Chapter 2.
- <sup>22</sup> Terms of Reference, Attachment 1, cl 10: *to 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*.
- <sup>23</sup> (1996) 189 CLR 51.
- <sup>24</sup> Bar Association of Queensland, Submission 5.1 to the Taskforce on Organised Crime Legislation, 5 August 2015.
- <sup>25</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [216] (Crennan J, Kiefel J, Gageler J, Keane J).
- <sup>26</sup> Criminal Code, section 708A.
- <sup>27</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [210] (Crennan J, Kiefel J, Gageler J, Keane J).
- <sup>28</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [41] and [24] (French CJ).
- <sup>29</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [211]-[216] (Crennan J, Kiefel J, Gageler J, Keane J).
- <sup>30</sup> Dr Rebecca Ananian-Welsh, Submission 5.14 to the Taskforce on Organised Crime Legislation.
- <sup>31</sup> Dr Rebecca Ananian-Welsh, Submission 5.14 to the Taskforce on Organised Crime Legislation, 23.
- <sup>32</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [84] (Hayne J).
- <sup>33</sup> *Judicial Review Act 1991* (Qld), section 29 and 30.
- <sup>34</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [41] and [44] (French CJ).
- <sup>35</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [40] (French CJ); [232]-[238] (Crennan J, Kiefel J, Gageler J, Keane J).
- <sup>36</sup> Bar Association of Queensland, Submission 5.1 to the Taskforce on Organised Crime Legislation, 5 August 2015, 3; Queensland Council for Civil Liberties, Submission 5.15 to the Taskforce on Organised Crime Legislation, 3.
- <sup>37</sup> Criminal Code, section 708A(1)(e).

- <sup>38</sup> Queensland Council for Civil Liberties, Submission 5.15 to the Taskforce on Organised Crime Legislation, 3.
- <sup>39</sup> Bar Association of Queensland, Submission 5.1 to the Taskforce on Organised Crime Legislation, 5 August 2015, 4.
- <sup>40</sup> The State of Queensland, Department of the Premier and Cabinet, *The Queensland Legislation Handbook* (at January 2014), [7.2.2].
- <sup>41</sup> *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld); assent date 17 October 2013.
- <sup>42</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), Chapter 5.
- <sup>43</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [84] (Hayne J).
- <sup>44</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [115] (Hayne J).
- <sup>45</sup> Queensland Parliament, *Everyone's Parliament – Fact Sheet 2.2: The Governor of Queensland* (July 2015).
- <sup>46</sup> *Parliament of Queensland Act 2001* (Qld), section 93.
- <sup>47</sup> *Parliament of Queensland Act 2001* (Qld), section 50.
- <sup>48</sup> *Constitution Act Amendment Act 1890* (Qld), section 2.
- <sup>49</sup> *Constitution (Fixed Term Parliament) Referendum Act 2015*; Governor of Queensland, *Writ for Referendum on a Bill*, Register of Patents No. 50, 89, (8 February 2016). Polling day: 19 March 2016; Return of the Writ: 18 April 2016.
- <sup>50</sup> Bar Association of Queensland, Submission 5.1 to the Taskforce on Organised Crime Legislation, 5 August 2015.
- <sup>51</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), Chapter 4.
- <sup>52</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [208]-[209] (Crennan J, Kiefel J, Gageler J, Keane J).
- <sup>53</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [208]-[209] (Crennan J, Kiefel J, Gageler J, Keane J).
- <sup>54</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), 231.
- <sup>55</sup> *Criminal Organisation Act 2009* (Qld), sections 6 and 7. In contrast, the Bar Association of Queensland advocates a maximum penalty of at least 10 years imprisonment; preferably 14 or 15 years imprisonment.
- <sup>56</sup> The Taskforce notes the role of the Office of the Queensland Parliamentary Counsel and that the drafting of the amendments would be subject to the practices and conventions of that Office.
- <sup>57</sup> Subject to any exceptions identified during the drafting process regarding provisions unrelated to the 2013 suite.
- <sup>58</sup> BAQ does not support this 'limb' of the definition or the one following it, as it is considered too far removed and likely to catch 'wannabe' individuals.
- <sup>59</sup> *Criminal Law Consolidation Act 1935* (SA), section 83GA.
- <sup>60</sup> In 2014 the Crime and Misconduct and Other Legislation Amendment Bill contained a number of amendments which changed the title of 'CMC Chairperson' to 'CCC Chairman' throughout the CCA and other associated legislation. No justification for the policy change was provided in the Explanatory Notes to the Bill. A number of submissions to the Legal Affairs and Community Safety Committee raised issue with this change, noting that for the preceding 20 years the gender-neutral term 'Chairperson' has been preferred and that the revert to Chairman was a 'needless, anachronistic step' that achieves nothing more than to aggravate a significant proportion of the community. See Legal Affairs and Community Safety Committee, Queensland Parliament, *Report No.62*, April 2014, 87.
- <sup>61</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 21 November 2013, 4263 (Stevens, Leader of the House); 4263 (Palaszczuk, Leader of Opposition); 4265 (Cunningham, Gladstone – Independent); 4265 (Trad); 4267 (Miller); 4270 (JW Seeney, Deputy Premier and Minister for State Development, Infrastructure and Planning); 4272 (Dr Douglas).
- <sup>62</sup> *Criminal Organisation Act 2009* (Qld), Part 7; Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015).

## PART 5.1

# CHAPTER NINE

## CHANGES TO QUEENSLAND'S BAIL LAWS

*The 2013 suite changed Queensland's bail laws to impose a presumption against bail for an accused person who is **alleged** to be a participant in a criminal organisation.*

*The Taskforce unanimously concluded that the amendments were excessive and unnecessary.*

In his Explanatory Speech for the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld), which amended the *Bail Act 1980* (Qld) the Attorney-General said:

*'The Bill amends the Bail Act 1980 so that there is a **presumption against bail for criminal motorcycle gang members** and they will be forced to surrender their passport if bail is granted. Let us make it clear: **this Government believes members or associates of criminal motorcycle gangs should be in jail and not get bail.**'*

(emphasis added)

### A DETAILED ANALYSIS OF BAIL IN QUEENSLAND

#### THE STARTING POINT

There is no common law right, for a person who has been arrested and charged with a serious crime, to be at liberty on bail pending the resolution of their criminal trial.<sup>1</sup>

However, article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) provides:<sup>2</sup>

...

- (2) *Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*
- (3) *Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial*

*proceedings, and, should occasion arise, for execution of the judgement.*

- (4) *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*

...

Australia ratified the ICCPR on 13 August 1980.<sup>3</sup> Although the Commonwealth Government has signed the treaty, there is no legal obligation upon a state parliament to enact legislation which conforms to it.<sup>4</sup>

All Australian jurisdictions have legislation regulating the granting and conditions of bail.<sup>5</sup>

#### PRESUMPTION OF ENTITLEMENT TO BAIL

Consistent with the presumption of innocence in our criminal justice system, section 9 of the Bail Act provides that there is a presumed entitlement to bail for a person who is charged with a criminal offence, but not yet convicted of that offence.<sup>6</sup>

While it is acknowledged that no grant of bail is risk free, the granting of bail is an important process in civilised societies which reject any general right of the executive to imprison a citizen on the basis of as yet unproven allegations, and without trial.<sup>7</sup>

Bail is an important matter, for many reasons. A defendant who is granted bail has the advantage of being able to continue to meet work and family responsibilities, which in turn may assist them to fund their own defence.

Defendants who are granted bail also enjoy free access to their legal representatives and can prepare for their criminal trial with the close emotional support of their family and community.<sup>8</sup>

#### A REBUTTAL TO THE PRESUMPTION – AN ‘UNACCEPTABLE RISK’

Section 16(1) of the Bail Act provides, however, that the presumption in favour of bail is rebutted if the court is satisfied that there is an *unacceptable risk* that the defendant, if released on bail:

- (a) would fail to appear and surrender into custody; or
- (b) would, while released on bail, commit an offence; or
- (c) endanger the safety or welfare of a person who is claiming to be the victim of an offence; or
- (d) interfere with witnesses or otherwise obstruct the course of justice.<sup>9</sup>

#### FACTORS RELEVANT TO AN ‘UNACCEPTABLE RISK’

Section 16(2) specifies that, when a court or police officer is assessing whether there is an unacceptable risk with respect to any of the events prescribed in section 16(1), regard shall be had to the following relevant matters (although the discretion is not limited to them):

- (a) the nature and seriousness of the offence;
- (b) the character, antecedents, associations, home environment, employment and background of the defendant;
- (c) the history of any previous grants of bail to the defendant;
- (d) the strength of the evidence against the defendant; and
- (e) if the defendant is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the

defendant's community, including, for example, about—

- (i) the defendant's relationship to the defendant's community; or
- (ii) any cultural considerations; or
- (iii) any considerations relating to programs and services in which the community justice group participates.

The burden of establishing that there is an unacceptable risk ordinarily falls upon the prosecution.

#### REVERSAL OF THE PRESUMPTION UNDER THE BAIL ACT

Section 16(3) of the Bail Act reverses the statutory presumption where the defendant is charged with a serious offence – eg, involving violence or breaches of earlier bail conditions.

Under the provision a defendant is placed in a show cause position and the court will refuse to grant bail unless the defendant shows cause why their detention in custody is not justified.

A defendant is automatically in a show cause position if charged with:

- (a) 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
- (b) an offence to which section 13 applies (eg, murder);<sup>10</sup> or
- (c) 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; or
- (d) an offence against the Bail Act; or
- (e) an offence against the *Criminal Organisation Act 2009* (Qld), sections 24 or 38; or
- (f) an offence against the Criminal Code, section 359 (stalking) with a circumstance of aggravation mentioned in section 359(2).

#### THE 2013 AMENDMENTS

Sections 16(3A), (3B), 3(C) and (3D) were inserted into the Bail Act under the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013*, which commenced on 17 October 2013.

Section 16(3A) provides that:

- where it is alleged that the defendant is a participant in a criminal organisation (that is, all that is required is that the charge itself allege this; the prosecution does not need to produce evidence to establish participation at this point in the process – subject to section 16(3D)) the court or police officer must refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified;<sup>11</sup> and
- it is a mandatory requirement that if a person who was identified as a participant in a criminal organisation is granted bail, they must surrender their passport.<sup>12</sup>

Section 16(3B) requires that, if granted bail, a participant in a criminal organisation will be detained in custody until they surrender their passport.

Section 16(3C) provides that section 16(3A) applies whether the offence with which the defendant is charged is an indictable offence, a simple offence or a regulatory offence.

Section 16(3D) provides that section 16(3A) does not apply if the defendant proves that the criminal organisation did not have (as one of its purposes) the purpose of engaging in, or conspiring to engage in, criminal activity.

## JUDICIAL INTERPRETATION OF THE 2013 BAIL ACT AMENDMENTS IMMEDIATELY FOLLOWING THE CHANGES

### DA SILVA V DIRECTOR OF PUBLIC PROSECUTIONS

In *Da Silva v Director of Public Prosecutions*<sup>13</sup> the Supreme Court of Queensland held that section 16(3A) only applied where a person was, *at the time of the bail application*, a current participant in a criminal organisation.

It did not apply, the court held, in circumstances where there was evidence that the person had resigned their membership of the organisation.

### A JUDICIAL PRACTICE DIRECTION WAS ISSUED

On 4 November 2013, the then Chief Magistrate directed (by Practice Direction No 21 of 2013) that all contested applications for bail to which section 16(3A) of the Bail Act applies are to be heard in the Brisbane Magistrates Court. Contrary to the ordinary practice, the geographical location of the alleged offending or the presence of a nearby Magistrates Court is irrelevant.

In practical terms, what this means is that bail applications involving alleged participants in criminal organisations *must* be determined by the Chief Magistrate sitting in Brisbane.

### VAN TONGEREN V OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS

On 14 November 2013, the Chief Magistrate (acting under the Practice Direction) presided over a bail application in *Van Tongeren v Office of Director of Public Prosecutions*.<sup>14</sup>

The sitting was in Brisbane even though the actual charges would be tried in the Toowoomba Magistrates Court.

The applicant was a 46 year old male who had no prior criminal convictions. He was an alleged member of the Bandidos OMCG. He

had been charged with disorderly behaviour on hotel premises and affray, having allegedly assaulted a hotel patron (in company with another man) in an unprovoked attack.

The prosecution alleged that the applicant was a member of a criminal organisation, and consequently, was in a show cause position under section 16(3A).

By virtue of the applicant being an alleged member of a criminal organisation, upon conviction of the affray offence he was exposed to a mandatory minimum 6 months imprisonment.

The Chief Magistrate, in refusing bail, cited *Da Silva v Director of Public Prosecutions*<sup>15</sup> with approval but said he was not satisfied that, at the date of the bail application, the applicant was not a member of a prescribed OMCG.

### A SUBSEQUENT AMENDMENT

In response to the matters raised in *Da Silva* Parliament significantly amended sections 16(3A) and 16(3B) under the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (CODALA).

In the Second Reading speech of the Bill the Attorney-General said:<sup>16</sup>

*‘The Bill amends the Bail Act because different definitions are being used by different levels of the judiciary. The magistrates have taken a particular interpretation of the legislation and the Supreme Court has taken a different interpretation to the Chief Magistrate.*

*This clarifies that the intention of the legislature in the original legislation is to ensure that criminal motorcycle gang members cannot simply throw in the towel by throwing in their colours and to say to Queenslanders that they are no longer a criminal participating in the activity because their lawyers have, in safe custody, their leather jackets which have their patches on them’.*

Section 16(3A) was amended so that where a defendant is charged with an offence and it is alleged (in the charge itself) that the defendant is, *or has at any time been*, a participant in a criminal organisation then they are placed in a show cause position with regards to a grant of bail.

The amendment means that the show cause provision has retrospective application: a person who *may* have been a participant in a criminal organisation *prior* to the 2013 Bail Act amendments will be caught by it, and placed in a show cause position.

Section 16(3C)<sup>17</sup> was amended to provide that Section 16(3A) applies to offences *whether or not the defendant was a participant in a criminal organisation* when the offence was committed; and, *whether or not there was any link between the offence and the defendant's alleged participation in the criminal organisation*.

A transitional provision was also inserted into the Bail Act deeming it irrelevant whether the offence which was the subject of the bail application occurred before or after 17 October 2013, when section 16(3A) was originally inserted.<sup>18</sup>

A number of other minor amendments were made to the Bail Act,<sup>19</sup> which, in conjunction with amendments to the *Justices Act 1886*, assisted in conducting hearings by video and audio link.

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#### VENUE OF CONTESTED SECTION 16(3A) BAIL HEARINGS

CODALA also gave legislative effect to Chief Magistrate's instruction in Magistrates Practice Direction No 21, by the insertion of section 15A in the Bail Act.

The Legal Affairs and Community Safety Committee (LACSC) was told by the Government at its public hearing that 'these amendments will assist greatly in the speedy resolution of cases and the management of the court's workload, particularly Magistrates

Court proceedings in relation to criminal organisations'.<sup>20</sup>

The Department of Justice and Attorney-General advised the LACSC that consultation had occurred with the Chief Magistrate in relation to this provision, which the Chief Magistrate had requested.<sup>21</sup>

CODALA commenced on 27 November 2013 following the LACSC recommendation that it be passed.

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#### THE TIME GIVEN TO THE PARLIAMENTARY COMMITTEE TO SCRUTINISE THE BILL

As noted, CODALA was introduced to Parliament and referred to the LACSC in the evening sitting session on 19 November 2013.

By resolution of the Legislative Assembly, the LACSC was required to report back by 10am on 21 November 2013.

The LACSC met on the morning of 20 November 2013 and invited stakeholders and subscribers to lodge written submissions on the Bill by 5pm that day.

A number of stakeholders were critical of this remarkably short time for submissions, including the Queensland Law Society, the Bar Association of Queensland, the Queensland Council for Civil Liberties, and the Law and Justice Institute (Qld). Nevertheless, some managed it.

In its submission, BAQ observed that the amendments had:<sup>22</sup>

*'... the effect of reversing the onus of proof for bail applicants for any person who has, at any time, been a member of a criminal organisation. Previously s 16 of the Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013 was confined to a defendant who "is a participant in a criminal organisation." This constitutes a widening of the provision. On one view the measure is contrary to one of the primary aims of the recent legislative measures,*

*that is, to cause members of criminal organisations to disassociate’.*

### A BREACH OF THE FUNDAMENTAL LEGISLATIVE PRINCIPLES ENSHRINED IN QUEENSLAND LAW

Section 4(2) of the *Legislative Standards Act 1992* (Qld) (LSA) provides that legislation must have sufficient regard to the rights and liberties of individuals.

The amendments contravened the fundamental legislative principles in two key respects, namely:

#### THE REVERSAL OF THE ONUS OF PROOF

The insertion of section 16(3A) into the Bail Act reversed the onus of proof by creating a statutory presumption against bail for alleged participants in a criminal organisation notwithstanding whether there was any connection between the alleged offence and the person’s alleged participation in the criminal organisation.

#### THE RETROSPECTIVE APPLICATION

The further amendments that were made to section 16(3A) by CODALA meant that the provision also had retrospective application (in that there was a presumption against bail for a defendant who was alleged to have been a participant organisation *at any time* including any time prior to the commencement of the provision).

Similarly, section 42(4) which was inserted into the Bail Act by CODALA, applied retrospectively by deeming it irrelevant whether the offence which was subject of the bail application happened before or after 17 October 2013 when section 16(3A) was originally inserted.

### JUSTIFICATION PROVIDED FOR BREACHING THE FUNDAMENTAL LEGISLATIVE PRINCIPLES

The justification provided for the breach of FLPs was that the amendments applied ‘*only to participants in criminal organisations and thereby target only those individuals who offend while enjoying the support and encouragement of the criminal group*’<sup>23</sup> and that ‘*if an individual chooses to be part of a criminal organisation then it is reasonable for the legislature to deem the individual an on-going risk to the community in lieu of evidence to the contrary*’.<sup>24</sup>

In its assessment of the Bail Act amendments the LACSC noted that the Explanatory Notes had not addressed the issue of retrospectivity. The LACSC recommended in its report that the Attorney-General address this.<sup>25</sup>

In his Second Reading Speech the Attorney-General said:<sup>26</sup>

*‘It is correct that these provisions will apply retrospectively in the sense that they will capture proceedings commenced before these amendments are passed and irrespective of when the relevant offence occurred. However, this is consistent with the common law on the application of procedural laws. In the absence of an express provision to the contrary, procedural laws are construed so as to operate retrospectively and apply to events that have occurred in the past that are presently before the court. The general rule is that the procedural law applying in a court proceeding is the procedural law in place on the day of the proceeding, and the amendments are consistent with that.’*

In analysing the breach of the FLPs, including with regard to the explanation provided, the Taskforce was unanimous in its view that the contraventions were not justifiable.

## PRACTICAL APPLICATION OF THE BAIL ACT CHANGES

The Taskforce was required, under its Terms of Reference, to note the results of bail applications since the 2013 suite and the reasons given for bail determinations, where reasons were available.<sup>27</sup>

Following the introduction of the 2013 show cause Bail Act amendments a number of bail applications concerning alleged participants in criminal organisations were determined by the judiciary, some of which were published.

Advice to the Taskforce from the QPS and the Office of Director of Public Prosecutions was, however, that records were *not* maintained with respect to the outcomes of bail hearings concerning alleged participants of criminal organisations following the 2013 amendments.

Whilst it was not possible, then, for the Taskforce to record all bail application outcomes concerning the 2013 amendments, the Taskforce had regard to the publicly available decisions. A summary of those published decisions accompanies this Report and is marked Attachment 8.

## CONSTITUTIONAL CHALLENGE

As discussed in Chapter 6, the Bail Act amendments were one part of the challenge to the 2013 suite in *Kuczborski*<sup>28</sup> where it was argued that they infringed the *Kable*<sup>29</sup> principle.

The plaintiff argued that the amendments were directed towards keeping a particular class of person in custody by reason of their associations, rather than by reason of the risks that might attach to their release. He submitted, in short, that requiring courts to act in this way undermined their institutional integrity.<sup>30</sup>

The High Court ruled that the applicant did not have standing to challenge the Bail Act provisions because he had not actually been

charged with an offence. Accordingly, the issue remains a live one.

Nevertheless, Chief Justice French remarked on the effects of the 2013 amendments. He noted that, prior to the amendments, the presumption in favour of bail was only reversed where there was some unacceptable risk that a defendant would not appear at a subsequent hearing, commit an offence, endanger the safety of others, interfere with a witness, or otherwise obstruct the course of justice.<sup>31</sup>

French CJ observed that the 2013 suite effectively required that defendants who had *at any time* been a participant in a criminal organisation must have their application for bail refused unless *the defendant* could show that their incarceration was not justified.

This requirement applies regardless of whether:

- the alleged offence was indictable, simple, or regulatory;
- the defendant was a participant in a criminal organisation at the actual time when the alleged offence was committed; or
- there was no link at all between the defendant's alleged participation in a criminal organisation, and the alleged offence.<sup>32</sup>

## APPROACH IN OTHER AUSTRALIAN JURISDICTIONS

Presently, Queensland and South Australia<sup>33</sup> are the only Australian jurisdictions which legislate for a presumption against bail if the person is charged with an offence associated with organised crime.

In South Australia, section 10 of the *Bail Act 1985 (SA)* provides a presumption in favour of bail. The presumption means that bail should be granted unless there are good reasons for refusing it.

Section 10A removes the presumption in favour of bail in certain cases, and requires the person applying for bail to convince the bail authority that there are special circumstances justifying bail before a grant may be made.

The section also provides that, if an individual is suspected of 'serious and organised crime offence',<sup>34</sup> the suspect will *not* be taken to have established that special circumstances exist *unless* they also establish, by evidence verified on oath or by affirmation, that they have not previously been convicted of a serious crime offence (or an offence that would have been a serious and organised crime offence had it been committed in South Australia).

#### DISTINCTIONS BETWEEN SOUTH AUSTRALIA AND QUEENSLAND

An accused person is not placed in a show cause position in South Australia if the prosecution fails to establish a connection between the alleged offence and the activities of a criminal organisation.

In Queensland no such evidentiary burden lies on the prosecution.

And, in Queensland, a former member of a criminal organisation is automatically placed in a show cause position notwithstanding the absence of any temporal nexus between the offence and the person's previous membership of the criminal organisation.

Further, in Queensland, a person who is an alleged participant in a criminal organisation is in a show cause position regardless of whether the alleged offence(s) are indictable, regulatory or simple.

By comparison, in South Australia, an alleged participant in a criminal organisation is only in a show cause position when the alleged offence is defined as a *serious and organised crime offence*.

#### TASKFORCE DISCUSSION

The Taskforce undertook a comprehensive analysis of the operation of the Bail Act, including the principles behind the show cause provisions which applied before 2013.

The Taskforce was assisted by submissions from a number of legal stakeholders.

The submission from Australian Lawyers for Human Rights exemplifies the views of those who oppose the maintenance of the amendments. It said that the 2013 show cause provisions were '*unreasonable and disproportionate to the risk posed to the community by participants in criminal organisations*', and recommended repeal in their entirety.<sup>35</sup>

The BAQ repeated the concerns it had expressed when the amendments were first introduced:<sup>36</sup>

*'The presumption against bail, even where there is no alleged link between the offence charged and the defendant's alleged participation in the criminal organisation, raises the real concern that those amendments are designed to target particular groups rather than address the actual risks posed by a defendant afforded bail. Such an approach is contrary, in our view, to established legal principles relating to bail. It appears to seek to use the occasion of bail to punish persons for being perceived to be members of a group as opposed to having been proven to have committed an offence. The latter is the only proper basis for imposing punishment under the rule of law.'*

During Taskforce discussions BAQ, the Queensland Law Society and the Public Interest Monitor advised their primary position was for the repeal of the 2013 bail amendments, while acknowledging that the South Australian provisions were less objectionable.

The QPS position was that the pre-existing provisions adequately dealt with the risks

associated with the granting of bail to alleged participants in criminal organisations – ie, in effect, that the 2013 amendments were unnecessary and superfluous.

The Taskforce was satisfied that the provisions of the Bail Act, before the 2013 amendments, adequately addressed whatever actual risks might be associated with a grant of bail to a person charged with an offence and, also, alleged to have done so in a way connected with organised crime.

While that circumstance features as an important element in the Organised Crime Framework put forward by the Taskforce, no member felt that, by itself, it was so inherently serious as to warrant the harsh anti-bail provisions inserted in 2013.

The Taskforce concluded that:

- placing an alleged participant in a criminal organisation in a show cause position because of the alleged commission of *any* offence, irrespective whether there was a link between that alleged offence and the criminal organisation, was unnecessary, unreasonable and disproportionate;
- likewise, for a defendant who is simply alleged to have been in a criminal organisation when the offence was committed;
- while a person’s participation in a criminal organisation was a relevant feature in considering the risks associated with granting bail, these risks were adequately addressed by the application of established *refusal of bail* principles already set out in sections 16(1), (2) and (3) of the Bail Act;
- while the South Australian model (which placed a defendant in a show cause position if the offence was linked to the criminal organisations) gained some traction with the Taskforce, there was already an established criterion under section 16(2) of the Bail Act which enabled the court to consider the defendant’s associations (which would include participation in criminal organisations) in determining whether a person presented an unacceptable risk with respect to the matters already prescribed in section 16(1) of the Bail Act;
- the section 16(3B) passport requirements was unnecessary and administratively cumbersome; the Bail Act already allows for bail to be granted on the proviso that an existing passport be surrendered to the court;<sup>37</sup>
- the legislative enshrining of the Practice Direction issued by the Chief Magistrate on 4 November 2015 into section 15A of the Bail Act was unnecessary, and operationally redundant; and
- changes in the 2013 amendments which advanced the use of technology were beneficial, and should be preserved.

## RECOMMENDATION 12 (Chapter Nine)

The 2013 suite amendments to the *Bail Act 1980* (Qld) (with the exception of amendments which assist in the use of audio-visual technology as they related to bail hearings) should be repealed. (unanimous recommendation)

## ENDNOTES

- <sup>1</sup> *Chau v Director of Public Prosecution* (1995) 37 NSWLR 639 (Gleeson CJ).
- <sup>2</sup> International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 2200A (XXI) (entered into force 23 March 1976) art 9.
- <sup>3</sup> Australian Human Rights Commission (AHRC), *Chart of Australian Treaty Ratifications* AHRC <<https://www.humanrights.gov.au/chart-australian-treaty-ratifications-may-2012-human-rights-your-fingertips-human-rights-your>>.
- <sup>4</sup> *Tajjour v State of New South Wales* (2014) 254 CLR 508.
- <sup>5</sup> *Bail Act 1980* (Qld), *Bail Act 1982* (WA), *Bail Act 1994* (Tas), *Bail Act 2013* (NSW), *Bail Act 1977* (Vic), *Bail Act 1985* (SA), *Bail Act 1992* (ACT), *Bail Act* (NT).
- <sup>6</sup> *Bail Act 1980* (Qld), section 9.
- <sup>7</sup> *Williamson v DPP* [2001] 1 Qd R 99 (Thomas J).
- <sup>8</sup> Heather Douglas et al, *Criminal Process in Queensland and Western Australia* (Thompson Reuters, 2010) 101.
- <sup>9</sup> *Bail Act 1980* (Qld), section 16(1).
- <sup>10</sup> The offence attracts a mandatory term of life imprisonment, which cannot be mitigated or varied under law (s.13(a)) or; an indefinite sentence under the *Penalties and Sentences Act 1992* (Qld), part 10 (section 13(b)).
- <sup>11</sup> *Bail Act 1980* (Qld), section 16(3A).
- <sup>12</sup> *Bail Act 1980* (Qld), section 16(3A)(i).
- <sup>13</sup> [2013] QSC 316, 8 November 2013 (Wilson J).
- <sup>14</sup> [2013] QMC 016 (Chief Magistrate Carmody).
- <sup>15</sup> [2013] QSC 316 8 November 2013.
- <sup>16</sup> Queensland, Parliamentary Debates, Legislative Assembly, 21 November 2013, 4201 (Jarrod Bleijie, Attorney-General).
- <sup>17</sup> *Bail Act 1980* (Qld), section 16(3C).
- <sup>18</sup> *Bail Act 1980* (Qld), section 42(4).
- <sup>19</sup> The definition of Section 6 of the *Bail Act* was amended to insert a reference to a justice conducting a bail proceeding using video or audio link facilities under the *Justices Act 1886* (Qld). Section 8 of the *Bail Act* was amended to insert a note under subsection 8 (1) referring the reader to part 6A of the *Justices Act* which enables proceedings, including bail proceedings, to be conducted using video or audio link facilities.
- <sup>20</sup> Transcript of Proceedings, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, 3.
- <sup>21</sup> Transcript of Proceedings, Public Briefing, Legal Affairs and Community Safety Committee, 20 November 2013, 8.
- <sup>22</sup> Bar Association of Queensland, Submission No.12 to Legal Affairs and Community Safety Committee, Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013, 20 November 2013, 1.
- <sup>23</sup> Explanatory Notes, Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013, 5.
- <sup>24</sup> Explanatory Notes, Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013, 11.
- <sup>25</sup> Legal Affairs and Community Safety Committee, *Report No. 46*, (2013), 29.
- <sup>26</sup> Queensland, Parliamentary Debates, Legislative Assembly, 21 November 2013, 4255 (Jarrod Bleijie, Attorney-General).
- <sup>27</sup> Terms of Reference, Taskforce on Organised Crime Legislation, cl 2.
- <sup>28</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59.
- <sup>29</sup> *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.
- <sup>30</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [31].
- <sup>31</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [31] (French CJ).
- <sup>32</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [32] (French CJ).
- <sup>33</sup> *Bail Act 1985* (SA), sections 3A and 10A.
- <sup>34</sup> Defined in the *Criminal Law Consolidation Act 1935* (SA) as:
- (a) an offence against Part 3B; or
- (b) an offence that—
- (i) is punishable by life imprisonment; or

(ii) is an aggravated offence against a provision of this, or any other, Act,

if it is alleged that the offence was committed in the circumstances where—

(iii) the offender committed the offence for the benefit of a criminal organisation, or 2 or more members of a criminal organisation, or at the direction of, or in association with, a criminal organisation; or

(iv) in the course of, or in connection with, the offence the offender identified himself or herself in some way as belonging to, or otherwise being associated with, a criminal organisation (whether

or not the offender did in fact belong to, or was in fact associated with, the organisation).

<sup>35</sup> Australian Lawyers for Human Rights, Submission 4.1 to the Taskforce on Organised Crime Legislation, 24 July 2015, 1.

<sup>36</sup> Bar Association of Queensland, Submission 1.8 to the Taskforce on Organised Crime Legislation, 31 July 2015, 26-27, [7].

<sup>37</sup> *Bail Act 1980* (Qld), sections 11(2) and 11AA.

## PART 5.1

# CHAPTER TEN

## THE USE OF CRIMINAL INTELLIGENCE

*The majority of the Taskforce recommends that criminal intelligence should be defined consistently across Queensland's legislation.*

*Further, the use of criminal intelligence should be properly recorded and independently reviewed on an annual basis.*

### WHAT IS 'CRIMINAL INTELLIGENCE'?

*Criminal intelligence* is a term which, in the legal context, has developed a special meaning.

It is used to describe a legal stratagem, created by legislative bodies, allowing secret evidence to be used in legal proceedings whilst excluding or substantially impairing the operation of traditional, long-established common law rules of procedural fairness – rules which, otherwise, would ordinarily severely inhibit or prevent its use.

It is in effect a new kind of 'evidence' in legal proceedings but one not bound by the traditional rules of admissibility, relevance and cogency – or (in what is almost a revolutionary feature) any requirement that it be disclosed to the person who is its subject.

The definition most often used by Australian legislatures is reiterated in section 59 of the *Criminal Organisation Act 2009* (Qld) (COA), which defines *criminal intelligence* as information that might:

- prejudice a criminal investigation; or
- enable the discovery of the existence or identify of a confidential source of information relevant to law enforcement; or
- endanger a person's life or physical safety.

If information accords with one arm of this definition it may qualify as criminal intelligence and be permitted for use in stipulated proceedings, even if the outcome has serious consequences for the person against whom it is presented – for example, an application to withhold rights or privileges from them, or make a particular order against their interests, without the information ever needing to be disclosed to them.

For those raised in our kind of democracy with our kind of legal system the notion that a person might suffer an adverse outcome in

legal proceedings from ‘evidence’ they do not (and cannot) see and attempt to rebut is, at first blush, quite a startling one.

Until fairly recently in our legal history this departure from the ordinary processes of procedural fairness and adversarial justice was considered so extraordinary that it was only used in the context of anti-terrorism legislation.<sup>1</sup>

However in recent years the use of criminal intelligence has also found its way into Australian legislation to combat organised crime.<sup>2</sup>

The 2013 suite certainly envisages and encompasses its use but its legislative components either do not define ‘criminal intelligence’ at all, or define it merely as information gathered by the Commissioner of Police and provided to a Chief Executive decision-maker.

This means that in order for information claimed to be ‘criminal intelligence’ to be lawfully withheld from a person about whom an adverse decision might be made, that information no longer needs to necessarily possess any special qualities to justify the withdrawal of the person’s common law rights to know the nature of the allegations made against them, and to challenge those allegations.

#### AN IMPORTANT DISTINCTION: CRIMINAL INTELLIGENCE IS NOT EVIDENCE

The Taskforce has been assisted by the in-depth analysis of criminal intelligence, its nature and uses, in the COA Review.

These excerpts from the COA Review describe the essential differences between *criminal intelligence* and *evidence*:

*Intelligence, and the information and material of which it is comprised, is not (usually) evidence as the word is traditionally used in the judicial sphere. It can at the highest be said to lead to evidence or to facilitate the collection of it.*

*Intelligence is, by definition, ‘patchy’ – fragmentary or highly circumstantial – information bearing on possibly remote risks. Suspicion is its animating criterion. It is predictive in nature, for its primary aim is the prevention of hypothesised harm.*

*Evidence on the other hand is explanatory. It seeks to identify truth (guilt) for the purposes of apprehension, adjudication and retribution. It is wholly reactive – by definition, it only exists after a crime has been committed.*

*...Ultimately, evidence and intelligence might be seen as diametrically opposed in that the former operates in a culture in which the desideratum is to avoid a ‘false positive’ (wrongful conviction) as manifested in Blackstone’s famous maxim that ‘the law holds that it is better that ten guilty persons escape, than that one innocent suffer’.*

*In contrast, the predictive or preventative focus of intelligence makes it more tolerant of false positives. The false negative, rather – the risk that goes unanticipated, the ‘dots’ that go unconnected – is more to be avoided.<sup>3</sup>*

#### IF CRIMINAL INTELLIGENCE IS NOT EVIDENCE, WHAT KIND OF INFORMATION IS IT?

Members of the Taskforce representing the legal professional bodies were particularly concerned about the use of criminal intelligence in the 2013 suite.

The professional experiences of members representing the legal professions lay behind their assertion that the quality and reliability of information that could be classified as ‘criminal intelligence’ could vary widely.

The COA Review provided the following description of the system widely used by law enforcement agencies in Australia to ‘classify’ criminal intelligence and a practical example of its use by law enforcement in South Australia:

A six level system of alphanumeric grading is widely used to classify criminal intelligence. Sources are rated from A ('completely reliable') to E ('unreliable') and F ('reliability cannot be judged'), while the information they provide is rated 1 ('report confirmed') to 5 ('improbable report') and 6 ('accuracy cannot be judged').

Whatever system is used, any self-assessment will from an evidentiary perspective be of impaired significance to begin with.

Public documents from South Australia, where the above system is used, indicate that criminal intelligence was proffered in support of an application there when it is rated C-3 or higher.

The 'C' indicates a 'fairly reliable' source (one step above 'not usually reliable') while the '3' indicates information that is 'possibly true' (one step above a 'doubtful report').<sup>4</sup>

#### IS THERE ANY QUESTION THAT THE USE OF CRIMINAL INTELLIGENCE MIGHT BE UNCONSTITUTIONAL?

No. The High Court has not invalidated any legislative attempt to utilise criminal intelligence on the ground that to do so would offend the Australian Constitution.

The question has been asked, and the High Court has rejected challenges to the use of criminal intelligence grounded in the *Kable*<sup>5</sup> principle in the context of licensing legislation<sup>6</sup> and most recently, with respect to Queensland's COA.<sup>7</sup>

#### HOW IS CRIMINAL INTELLIGENCE USED IN THE 2013 SUITE?

##### OCCUPATIONAL AND INDUSTRY LICENSING

The 2013 suite made amendments providing for the use of criminal intelligence in licensing decisions under the following Queensland Acts: *Tattoo Parlours Act 2013*; *Liquor Act*

*1992*; *Motor Dealers and Chattel Auctioneers Act 2014*; *Queensland Building and Construction Commission Act 1991*; *Racing Act 2002*; *Second-hand Dealers and Pawnbrokers Act 2003*; *Security Providers Act 1993*; *Electrical Safety Act 2002*; *Tow Truck Act 1973*; *Work Health and Safety Act 2001*; and the *Weapons Act 1990*.

This legislation was created/amended to require the Commissioner of Police to provide an assessment whether a licence holder/applicant is a participant in a criminal organisation and/or a suitable person to hold a licence.<sup>8</sup>

As part of that assessment the Commissioner of Police can use criminal intelligence.

In all pieces of legislation other than the *Tattoo Parlours Act*, criminal intelligence is defined merely to be the assessment and information required to be gathered by the Police Commissioner, and provided to the Chief Executive.<sup>9</sup>

The *Tattoo Parlours Act* (an Act which came into existence and effect under the first tranche of 2013 laws, and substantially copied the legislation in NSW) does not define criminal intelligence at all.

The applicant is not provided with the criminal intelligence and, therefore, cannot directly respond to the Commissioner's assessment of them as an unsuitable person, or a participant in a criminal organisation.

The Commissioner of Police and the CEO are not required to give reasons why an adverse finding was made against a person, on the basis of criminal intelligence.

A finding by the Commissioner of Police that a person is a participant in a criminal organisation or an unsuitable person will *compel* the CEO to refuse or cancel an occupational or industry licence.

The Queensland Civil and Administrative Tribunal (QCAT) or the Supreme Court can review whether the Commissioner of Police

made the ‘correct and preferable’ decision about the adverse security determination.

In reviewing the merits of the decision, QCAT (or the Supreme Court) may take steps to maintain the confidentiality of the intelligence information, including taking and receiving evidence in the absence of the applicant.

What those steps might include has been considered by QCAT. The Tribunal found that it would not extend to allowing disclosure of criminal intelligence to an applicant’s legal representatives, but would extend to the appointment of an independent monitor or *amicus curiae* to review the criminal intelligence.<sup>10</sup>

If QCAT or the Supreme Court determines, however, that information has been incorrectly categorised as ‘criminal intelligence’ the Commissioner of Police must be given an opportunity to withdraw the information.

The Supreme Court’s review jurisdiction for all errors on the part of a CEO (and by QCAT) is legislatively excluded except for what is called *jurisdictional error* (which is discussed in more detail later).

In-depth analysis of this process as it applies to each discrete Act is contained at Chapter 21 of this Report.

## CORRECTIVE SERVICES

The criminal intelligence provisions in the *Corrective Services Act 2006* (Qld) allow the CEO to request, and in turn compel, the Commissioner of Police to provide information about an offender’s participation in a criminal organisation.

Where the Commissioner of Police advises the CEO that a prisoner is an identified participant in a criminal organisation, the CEO can use that intelligence either to:

- implement a restricted management regime for a prisoner who is on remand (known as a COSO);

- decide whether to give a section 267A direction (which relates to monitoring the parolee) subject to a parole or other community based order; or
- require the offender to give a test sample under section 41 of the Corrective Services Act.

The Commissioner of Police is required to provide the CEO with updated information about a prisoner’s participation in a criminal organisation every six months following the initial advice.

If the CEO reasonably believes a prisoner is no longer a participant in a criminal organisation, they must seek and receive information about that status from the Commissioner of Police as soon as practicable after forming that belief.

Where criminal intelligence is used to implement a COSO or make an order under section 267A(3) (which relates to monitoring the parolee), there is a review mechanism in the Supreme Court.

The court may review the identification by the Commissioner of Police that a prisoner is a participant in a criminal organisation, and the categorisation of information by the Commissioner of Police as being criminal intelligence.

The court cannot, however, review the decision of the CEO to make a COSO or section 267A(3) order. That decision is, absent any jurisdictional error, final and conclusive – judicial review is specifically excluded.<sup>11</sup>

In-depth analysis of this process as it applies to each discrete Act is contained at Chapter 15 of this Report.

## HOW DO OTHER JURISDICTIONS USE CRIMINAL INTELLIGENCE IN THESE CONTEXTS?

### OCCUPATIONAL LICENSING

#### NEW SOUTH WALES

NSW allows<sup>12</sup> the use of criminal intelligence in licensing decisions relating to liquor, tow-trucks, second-hand dealers and commercial agents but it must first be declared to be criminal intelligence under the *Crimes (Criminal Organisations Control) Act 2012* which uses the same definition as section 59 of COA.

However, NSW takes a similar approach to Queensland with regulation of the Tattoo Industry<sup>13</sup> and does not define criminal intelligence in that legislation.

NSW also uses criminal intelligence to regulate the combat sport industry<sup>14</sup>, the security industry<sup>15</sup> and weapons licensing<sup>16</sup> and, again, does not define criminal intelligence within that legislation.

#### SOUTH AUSTRALIA

In 2012, South Australia standardised the use of criminal intelligence across its statute books.

The *Statutes Amendment (Criminal Intelligence) Act 2012 (SA)* provided for criminal intelligence to be used in licensing applications concerning firearms, liquor, gaming and security.

The definition of criminal intelligence used in those licensing statutes is the same as section 59 of COA.

Section 74A of the *Police Act 1998 (SA)* requires the Police Commissioner to keep detailed records of all criminal intelligence used in these applications and requires those records to be reviewed annually by a retired

judicial officer, with the powers of a commission of inquiry.

The review by the retired judicial officer must be provided to the Attorney-General and tabled within 12 sitting days in each South Australian House of Parliament.

#### THE AUSTRALIAN CAPITAL TERRITORY

The ACT allows criminal intelligence to be used in a decisions about licensing in the security<sup>17</sup> and liquor<sup>18</sup> industries. The definition of criminal intelligence used is the same as section 59 of the COA.

#### TASMANIA

Tasmania allows criminal intelligence to be used in the licensing of security<sup>19</sup> and investigation agents, and for firearms.<sup>20</sup>

Tasmania does not define criminal intelligence for the purposes of its legislation.

#### NORTHERN TERRITORY

The Northern Territory allows criminal intelligence to be used in licensing decisions under its *Firearms Act* but does not specifically define the term. The Northern Territory does not appear to utilise criminal intelligence in other licensing legislation

#### WESTERN AUSTRALIA AND VICTORIA

Western Australia and Victoria do not appear to provide for the use of criminal intelligence in licensing decisions.

#### CORRECTIVE SERVICES

No other Australian jurisdiction provides for the use of criminal intelligence in corrective services legislation.

## THE COA REVIEW CONCLUSIONS ABOUT CRIMINAL INTELLIGENCE

The COA Review considered the use of criminal intelligence in *substantive court proceedings*.

Part 6 of COA allows information that is or contains criminal intelligence to be admitted as evidence in applications under the Act itself. The criminal intelligence cannot be revealed to a respondent to the COA application.

The process for the reception of criminal intelligence under COA was found to be constitutional by the High Court of Australia.<sup>21</sup>

Nevertheless the COA Review concluded that:

- certain safeguards are required in order to admit criminal intelligence into an evidence-only context, and those safeguards result in cumbersome and counterproductive outcomes;
- when criminal intelligence is admitted, it will generally be granted little evidentiary weight; and
- criminal intelligence ‘possesses an inherently self-defeating quality in the sense that, the more important it is in any particular case, the more likely that case is to be stayed or invalidated because of procedural unfairness’.<sup>22</sup>

The COA Review undertook an exhaustive examination of the conceptual, evidentiary, judicial, procedural and practical issues arising from the use criminal intelligence and **concluded that criminal intelligence was unsuitable for use in judicial processes.**<sup>23</sup>

It is to be noted, of course, that processes for the utilisation of criminal intelligence in the 2013 suite are *administrative* in nature.

## JUDICIAL REVIEW ANALYSIS

The Taskforce recommends, elsewhere in this Report, that the Supreme Court should be

given its full powers of review under the *Judicial Review Act 1991* (Qld) regarding the administrative decision-making processes enacted/amended under the 2013 laws (see Chapters 15 and 21).

Based on the findings of the COA Review it is anticipated (and, therefore, a matter of concern) that criminal intelligence is not likely to be given much weight when it is subjected to judicial review.

The conclusion of the COA Review that criminal intelligence ‘*possesses an inherently self-defeating quality in the sense that, the more important it is in any particular case, the more likely that case is to be stayed or invalidated because of procedural unfairness*’,<sup>24</sup> reflects a view expressed by the High Court and will necessarily impact upon the work of any court or tribunal called upon to adjudicate in a matter where criminal intelligence is relied upon.

In the High Court’s decision in *K-Generation*, five judges noted that criminal intelligence would rarely be decisive in a judicial review hearing due to its reduced weight. They said:<sup>25</sup>

*The potential that the s 28A(5) procedure has for injurious effects is reduced by the fact that a decision by the Police Commissioner to make a s 28A(5)(a) application itself may greatly reduce the chance of the ‘criminal intelligence’ being decisive, because, in at least some cases, the Licensing Court may feel disinclined to place weight on material which the Police Commissioner’s application has prevented the applicant for a licence being able to test, or even see.*

## WHAT IF THE EXCLUSION OF JUDICIAL REVIEW POWERS UNDER THE 2013 SUITE WAS RETAINED?

Even if the Government excluded powers of review under the Judicial Review Act, in the way the 2013 suite does, it remains arguable that difficulties around the use of criminal intelligence would remain.

This is because the state is unable to oust the Supreme Court's power to grant relief on account of jurisdictional error; its supervisory jurisdiction is constitutionally entrenched.<sup>26</sup>

Constitutional entrenchment is the reason why the 2013 suite provided that the power to review decisions for jurisdictional error remained.

*Jurisdictional error* includes, at least, the following mistakes: identifying a wrong issue; asking a wrong question; ignoring relevant material, or relying on irrelevant material; and, in some circumstances, coming to the wrong conclusion.<sup>27</sup>

The High Court recently found that jurisdictional error can include a process of fact-finding which is tainted by an antecedent error.<sup>28</sup> Thus, if the ultimate decision-maker under the 2013 laws makes a decision based on an error by the Commissioner of Police (that is, an antecedent error), arguably the ultimate decision may also be tainted by jurisdictional error.

Jurisdictional error may also include a denial of procedural fairness.<sup>29</sup>

The state can lawfully remove elements of procedural fairness by clear words, but the scope of procedural fairness which remains must be adhered to by the decision-maker.

If the decision-maker does not accord this residual procedural fairness then, arguably, they will fall into jurisdictional error – which, again, can never be shielded from judicial review.

#### THE USE OF CRIMINAL INTELLIGENCE LEADS TO SLOW, COMPLEX AND EXPENSIVE LITIGATION

The COA Review found that the use of criminal intelligence under that regime resulted in complex and expensive litigation.

This problem may also arise if criminal intelligence is permitted to be used in administrative decision-making processes.

Administrative decision-makers are still required to provide procedural fairness.<sup>30</sup>

Procedural fairness will ordinarily require that a person subject to a decision has an opportunity to challenge any evidence received against them, and put their case before a decision-maker.

Using secret evidence as a basis for a decision obviously inhibits and impairs the ability and opportunity for the decision-maker (or a reviewing tribunal or court) to afford procedural fairness to the effected person.

Parliament can, certainly, lawfully authorise a departure from the rules of procedural fairness and natural justice by preventing access to information in the way that the 2013 laws have done.

But recently the NSW Court of Appeal, when considering similar provisions in the *Security Industry Act 1997* (NSW), found that this does not reduce procedural fairness to nothing, and that there is still scope for the operation of the rules of 'natural justice'.<sup>31</sup>

In that case, the Court of Appeal suggested that a tribunal hearing a merits review matter could:

- request the Police Commissioner to disclose criminal intelligence, and that request would 'carry particular weight';<sup>32</sup> and
- appoint an *amicus curiae* to assist the tribunal to assess the criminal intelligence.<sup>33</sup>

The COA Review suggested (as the NSW Court of Appeal decision reaffirms) that this residual, lingering requirement for tribunals and courts to continue to provide a semblance of procedural fairness to applicants carries a serious risk that proceedings will become complicated, and expensive.

## CASE EXAMPLES: QCAT

The concern can be illustrated in practice. There is already an example of the kind of resources which can be required to maintain the use of criminal intelligence in administrative decision-making processes.

QCAT has published two decisions in an application to review a decision to refuse a licence which was brought by *DT* under the Tattoo Parlours Act.

The *first* decision<sup>34</sup> determined that an *amicus curiae* should be appointed; and the *second*<sup>35</sup> that information *had* been correctly identified as ‘criminal intelligence’.

In the *second* decision the Tribunal nevertheless foreshadowed the need for further hearings – and, for a *third* decision to determine the merits of the adverse security determination itself.<sup>36</sup>

Nine months elapsed between the date of the first hearing and the second decision (the decisions do not reveal the date of the original decision of the CEO, or the date that the application for review was filed).

The time and expense necessarily involved in a succession of hearings is a heavy burden on the state and also, arguably, an unfair financial burden upon any applicant seeking a review – particularly, of course, those applicants who may be unable to continue their business or occupation, or a person who is labouring under intensive correctional services controls until the review is resolved.

## THE USE OF CRIMINAL INTELLIGENCE IS INCONSISTENT WITH THE RULE OF LAW

The Rt Hon Lord Bingham<sup>37</sup> in his critically acclaimed book *The Rule of Law* identified eight principles of the rule of law.

One of these principles is that:

*Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which powers were conferred, without exceeding the limits of such powers and not unreasonably.*<sup>38</sup>

In discussion of this principle Lord Bingham says:<sup>39</sup>

A power must also be exercised in a way that in all the circumstances, is fair, since it is assumed (in the absence of a clearly expressed contrary intention) that the state does not intend to treat the citizen unfairly.

It may of course be a vexed question what, in the particular circumstances, fairness requires.

But the so called rules of natural justice have traditionally been held to demand, first, that the mind of the decision maker should not be tainted by bias or personal interest (he must not be a judge in his own cause) and, secondly, that anyone who is liable to have an adverse decision made against him should have a right to be heard (a rule the venerability of which is vouched by its Latin version: *audi alteram parterem*, hear the other party).

The use of criminal intelligence precludes a respondent from being ‘heard’ on the allegation against them that is contained within the intelligence – because, to state the obvious, *they do not know what it is*.

## THE USE OF CRIMINAL INTELLIGENCE IS A BREACH OF THE FUNDAMENTAL LEGISLATIVE PRINCIPLES ENSHRINED IN QUEENSLAND LAW

Paragraph 11 of the Taskforce Terms of Reference requires it to have regard to whether any breaches of the *fundamental legislative principles* (FLPs) contained the

*Legislative Standards Act 1992* (Qld) (LSA) in the 2013 suite can be justified.

Section 4(3)(b) of the LSA provides that it is an FLP that legislation should be consistent with the principles of natural justice.

The Office of the Queensland Parliamentary Counsel's FLP Notebook sets out the three principles of natural justice developed by the common law:

- (1) a person's legitimate rights, interests and expectations should not be withdrawn without the person being given an adequate opportunity to present the person's case to the decision-maker;
- (2) the decision-maker must be unbiased; and
- (3) the rules of procedural fairness must apply.<sup>40</sup>

The rules of procedural fairness are, unarguably, substantially impaired by allowing decisions to be made on the basis of criminal intelligence and by not allowing persons who are adversely affected by those decisions to have access to that information.

There is no attempt to justify the breach with respect to criminal intelligence in the Explanatory Notes which accompanied the introduction of the *Tattoo Parlours Act*.<sup>41</sup>

The breach of the FLP is, however, appropriately identified in the Explanatory Notes to the Bill that introduced the occupational licensing amendments.<sup>42</sup>

(Oddly, the same legislation contained the amendments to the *Corrective Services Act* but the breach of the FLP with regard to criminal intelligence was *not* identified with respect to the amendments to that Act.)

The justification given with respect to occupational licensing in the Explanatory Notes is that it is '*procedurally necessary*' to ensure that an applicant for review does not

obtain confidential intelligence, and that some natural justice is afforded by enabling a merits review to be conducted by QCAT.<sup>43</sup>

The Parliamentary Committee<sup>44</sup> which scrutinised the Bill that introduced occupational and industry licensing amendment and the amendments to the *Corrective Services Act*:

- noted the breach of the FLP;
- noted the justification provided in the Explanatory Notes; and
- brought the breach to the attention of the Legislative Assembly.<sup>45</sup>

#### CAN THE BREACH OF THE FLP BE JUSTIFIED?

##### THERE IS NO ADEQUATE DEFINITION OF 'CRIMINAL INTELLIGENCE'

As the discussion at the beginning of this Chapter indicated, if the 'criminal intelligence' contemplated by the legislation amounted to information the disclosure of which could jeopardise another person's safety or a criminal investigation, then there is a stronger justification for keeping that information confidential.

But, again, there is no definition within the legislation which provides that information needs to have any particular quality. This, plainly weakens the justification.

##### THERE ARE NO SAFEGUARDS

The COA Review observed, uncontentiously, that the common law rules of natural justice and procedural fairness were designed to protect citizens from anonymous accusers and secret testimony.<sup>46</sup>

The 2013 suite lacks appropriate safeguards to protect innocent persons from the risk that law enforcement agencies may receive (and rely upon) information that is, say, mischievous, malicious or otherwise incorrect; or that they may inadvertently misconstrue

information they receive about a person for which there is, in fact, an innocent explanation.

The Taskforce had no reason of course to question or doubt the conscientiousness and care of law enforcement authorities collating and presenting criminal intelligence for these statutory purposes.

But, even if only the most reliable criminal intelligence is actually being provided by the Commissioner of Police to CEOs (that is, intelligence categorised as ‘A1’ on the scale discussed previously), the legislation itself still lacks any appropriate mechanism for comfort and reassurance that it is not, even inadvertently, producing injustice for some of those affected by its provisions.

In other words, the best efforts of those using the legislation can never extinguish the concerns it (by its very nature) necessarily engenders.

A range of safeguards could be employed, similar to those used in South Australia, in order to mitigate the risks of injustice raised by the FLP breach and to ensure that public confidence in the process is not undermined.

#### THE QUEENSLAND POLICE SERVICE SUBMITS IT SHOULD RETAIN THE ABILITY TO PROVIDE CRIMINAL INTELLIGENCE TO CHIEF EXECUTIVE OFFICERS, IN LIMITED CIRCUMSTANCES

The QPS advised the Taskforce that there was little operational benefit to be gained from the 2013 suite’s requirements that the Commissioner of Police examine the background of every applicant for an occupational license.

But QPS also advised that, from time to time, information which meets the definition of criminal intelligence used at section 59 of COA may come to its attention which might suggest that participants in criminal organisations are seeking to infiltrate certain industries.

In those circumstances QPS sees benefit in retaining the flexibility to provide that information to CEOs, with a view to preventing organised crime infiltrating key industries – confident, necessarily, that the information would not be disclosed to the applicant.

#### MAJORITY RECOMMENDATION OF THE TASKFORCE

The Taskforce considered whether, taking into account significant breaches of the FLPs, and principles of procedural fairness, and incompatibility with the rule of law, it was worthwhile providing for criminal intelligence to be used in occupational licensing or corrective services legislation at all.

The Bar Association of Queensland believes that the use of criminal intelligence is open to severe abuse and saw no place for the use of criminal intelligence in occupational licensing or corrective services legislation.

The BAQ was particularly concerned that a person who had spent considerable resources obtaining qualifications could be deprived of their right to work on the basis of information which is often of very doubtful reliability.

All Taskforce members except for the BAQ concluded on the basis of information from the QPS that there remains some *limited circumstances* where it would be beneficial for the QPS to be able to provide sensitive intelligence information to CEOs, with a view to preventing a criminal organisation from utilising legitimate industries to facilitate serious criminal activity.

In considering an appropriate model for the transmission of criminal intelligence in these circumstances the majority of Taskforce members have decided to recommend that ‘criminal intelligence’ must be properly defined, and that strict safeguards should apply to its use.

The use of criminal intelligence should also, the Taskforce believes, be subject to rigorous independent review, the results of which

should be required to be made public (in line with the South Australian model).

The BAQ were of the view that the use of criminal intelligence could only ever be justified where it could be shown there was a specific public safety risk with respect to a particular industry. In those circumstances BAQ would only support the use of criminal intelligence with close controls and a strict review process.

The whole Taskforce reiterates, as a matter for consideration by the Government, that even if criminal intelligence is able to be used in these limited circumstances and an administrative decision is made in reliance upon it, in any judicial review of that decision there is a palpable risk that a court will give very little weight to the information; and, that the litigation involved in the review of a decision will be long, complex and expensive.

Government departments which administer the relevant legislation ought, in the view of the Taskforce, proceed on the basis that criminal intelligence should be utilised by decision-makers only as a last resort and only when the criminal intelligence can be corroborated by actual evidence.

### RECOMMENDATION 13 (Chapter Ten)

The Commissioner of Police should retain an ability to provide criminal intelligence to Chief Executive Officers and the prohibition on criminal intelligence being disclosed to an applicant should be maintained. (not preferred by the Bar Association of Queensland)

### RECOMMENDATION 14 (Chapter Ten)

The term 'criminal intelligence' should be defined to include the elements from section 59 of the *Criminal Organisation Act 2009* (Qld) and that definition should be applied consistently across the statutes. (not preferred by the Bar Association of Queensland)

### RECOMMENDATION 15 (Chapter Ten)

The requirements that the Chief Executive Officers refuse or cancel licence applications solely on the basis of criminal intelligence information should be repealed. (not preferred by the Bar Association of Queensland)

### RECOMMENDATION 16 (Chapter Ten)

A requirement modelled on section 74A of the *Police Act 1998* (SA) should be introduced, providing that the Commissioner of Police must keep detailed records of all criminal intelligence provided to Chief Executive Officer and that those records are to be annually reviewed by the President or Deputy President of the Queensland Civil and Administrative Tribunal. (not preferred by the Bar Association of Queensland)

### RECOMMENDATION 17 (Chapter Ten)

The Attorney-General should be required to table the annual reviews in Parliament within 14 sitting days. (not preferred by the Bar Association of Queensland)

## ENDNOTES

- <sup>1</sup> Greg Martin, Outlaw Motorcycle Gangs and Secret Evidence: Reflections on the Use of Criminal Intelligence in the Control of Serious Organised Crime in Australia, *Sydney Law Review* (2014) Vol 36, 501, [504].
- <sup>2</sup> Rebecca Ananian-Welsh and George Williams, The New Terrorists: The Normalisation and Spread of Anti-Terror laws in Australia [2014] *Melbourne University Law Review*, 362, [378].
- <sup>3</sup> *Criminal Organisation Act 2009* (Qld), Part 4.2.1; Queensland, Statutory Review of the *Criminal Organisation Act 2009*, Final Report (2015).
- <sup>4</sup> *Criminal Organisation Act 2009* (Qld), Part 4.2.2; Queensland, Statutory Review of the *Criminal Organisation Act 2009*, Final Report (2015).
- <sup>5</sup> *Kable v Director of Public Prosecutions* (NSW) (1996) 138 ALR 577.
- <sup>6</sup> *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532 and *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.
- <sup>7</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38.
- <sup>8</sup> These amendments are examined in greater detail at Chapter 21 of this Report.
- <sup>9</sup> *MKN v Chief Executive of the Queensland Department of Justice and Attorney-General* [2015] QCAT 358.
- <sup>10</sup> *DT & Anor v Department of Justice & Attorney-General, Industry Licensing Unit & Anor* [2014] QCAT 694.
- <sup>11</sup> Section 350B(2)(b) of the *Corrective Services Act 2006* (Qld).
- <sup>12</sup> Section 4 of the *Liquor Act 2007* (NSW); Section 3 of the *Tow Truck Industry Act 1998* (NSW); Section 3 of the *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW); and Section 4 of the *Commercial Agents and Private Inquiry Agents Act 2004* (NSW).
- <sup>13</sup> *Tattoo Parlours Act 2012* (NSW).
- <sup>14</sup> *Combat Sports Act 2013* (NSW).
- <sup>15</sup> *Security Industry Act 1997* (NSW).
- <sup>16</sup> *Weapons Prohibition Act 1998* (NSW).
- <sup>17</sup> *Security Industry Act 2003* (ACT).
- <sup>18</sup> *Liquor Act 2010* (ACT).
- <sup>19</sup> *Security and Investigations Agents Act 2002* (Tas).
- <sup>20</sup> *Firearms Act 1996* (Tas).
- <sup>21</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38.
- <sup>22</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009*, Final Report (2015) 4.2.3.
- <sup>23</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009*, Final Report (2015) 4.2.
- <sup>24</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009*, Final Report (2015) 4.2.3.
- <sup>25</sup> *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 543 [148].
- <sup>26</sup> *Kirk v Industrial Relations Commission* (2010) 239 CLR 531.
- <sup>27</sup> *Craig v South Australia* (1995) 184 CLR 163, 179. See also *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* [2013] 2 Qd R 75, 98-99 [95]-[97].
- <sup>28</sup> *Wei v Minister for Immigration and Border Protection* [2015] HCA 51, 9 [23]-[35].
- <sup>29</sup> *Re Refugee Review Tribunal; Ex parte Aala* (2000) HCA 57, 16 [41].
- <sup>30</sup> *Kioa v West* (1985) 159 CLR 550, 629.
- <sup>31</sup> *Commissioner of Police v Sleiman* (2011) 78 NSWLR 340.
- <sup>32</sup> *Commissioner of Police v Sleiman* (2011) 78 NSWLR 340, 380 [181].
- <sup>33</sup> *Commissioner of Police v Sleiman* (2011) 78 NSWLR 340, 380 [183].
- <sup>34</sup> *DT & Anor v Department of Justice & Attorney-General, Industry Licensing Unit & Anor* [2014] QCAT 694.
- <sup>35</sup> *DT & Anor v Department of Justice and Attorney-General – Industry Licensing Unit & Anor* [2015] QCAT 228.
- <sup>36</sup> *DT & Anor v Department of Justice and Attorney-General – Industry Licensing Unit & Anor* [2015] QCAT 228 [11].
- <sup>37</sup> Rt Hon Lord Bingham of Cornhill KG (Lord Bingham) was a Master of the Rolls, Lord Chief Justice of England and Wales and Senior Law Lord of the United Kingdom.
- <sup>38</sup> Tom Bingham, *The Rule of Law* (Penguin Books, 2011), 60.

<sup>39</sup> Tom Bingham, *The Rule of Law* (Penguin Books, 2011), 62.

<sup>40</sup> Queensland Government – Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, 24-25.

<sup>41</sup> Explanatory Notes, Tattoo Parlours Bill 2013.

<sup>42</sup> Explanatory Notes, Criminal Law (Criminal Organisations Disruption) and Other Legislation Bill 2013.

<sup>43</sup> Explanatory Notes, Criminal Law (Criminal Organisations Disruption) and Other Legislation Bill 2013, 8.

<sup>44</sup> Legal Affairs and Community Safety Committee.

<sup>45</sup> Legal Affairs and Community Safety Committee, Queensland Parliament, *Report No.46*, November 2013, 25.

<sup>46</sup> *Criminal Organisation Act 2009* (Qld), Part 4.2.2; Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015).

## PART 5.1

# CHAPTER ELEVEN

## THE CRIMINAL CODE OFFENCES

*New offences under the Criminal Code, introduced in the 2013 suite, represent a significant breach of Queensland's fundamental legislative principles, and compromise civil liberties and democratic rights.*

*In their current form the offences will be difficult to prosecute successfully, and may be constitutionally invalid.*

*Nevertheless law enforcement agencies are concerned that there may be a resurgence in public disorder if the offences are repealed.*

### A DELICATE BALANCING ACT – PUBLIC SAFETY, THE AUSTRALIAN CONSTITUTION AND THE PROTECTION OF FUNDAMENTAL CIVIL LIBERTIES

Is criminalising innocuous conduct on the basis of association an effective means of disrupting the activities of OMCGs, or an affront to our most fundamental freedoms and values? If the answer to both of these questions is 'yes', what should a government do?

The Taskforce has been told by law enforcement agencies that if the offences introduced into our Criminal Code by the 2013 suite are repealed without replacement, public safety may be compromised. The Taskforce cannot recommend to the Government that it ignore public safety concerns raised by Queensland's two most important law enforcement bodies – the Queensland Police Service, and the Crime and Corruption Commission.

At the same time, the Taskforce cannot recommend that the Government ignore the possibility that these offences, in their current form, may be found to be constitutionally invalid – and, in practice, will be very difficult to prosecute successfully.

The amendments to the Criminal Code in the 2013 suite also represent substantial breaches of Queensland's fundamental legislative principles, and the *International Covenant on Civil and Political Rights*.

An additional factor, necessarily falling within the ambit of Taskforce deliberations, is the proposition that a law which criminalises a person on the basis of their *associations*, rather than their individual acts, is fundamentally anti-democratic and (history confirms) has the ready potential to create injustice.

The Government must carefully consider whether the nature of the threat presented to public safety by OMCGs is so grave as to justify

the compromise of some basic, hard-won rights and freedoms.

The Taskforce has wrestled with how best to balance these competing concerns in order to provide the Government with workable recommendations.

### WHAT OFFENCES DID THE 2013 SUITE PUT INTO THE CRIMINAL CODE?

The 2013 suite created three new stand-alone offences in Chapter 9 of the Criminal Code and added five new circumstances of aggravation to existing offences in the Criminal Code.

The particulars of the circumstances of aggravation are discussed in greater detail at Chapter 12 of this Report.

This Chapter will focus on the three new offences which criminalised participants in criminal organisations meeting in groups of three or more in public,<sup>1</sup> attending a prescribed clubhouse or event<sup>2</sup> and recruiting new members to a criminal organisation.<sup>3</sup>

All of the new offences commenced operation on 17 October 2013.<sup>4</sup>

South Australia introduced offences modelled on Queensland's new Criminal Code offences in 2015.<sup>5</sup>

### THE QUEENSLAND CRIMINAL CODE

Queensland is a 'Code jurisdiction' which means that Queensland has *codified* (in simple terms, written down) its laws about criminal liability. The Commonwealth, Western Australia, Tasmania and the Northern Territory are also Code jurisdictions.

With the exception of the offence of contempt<sup>6</sup> all criminal offences in Queensland must be located either in the Criminal Code or in another piece of legislation.<sup>7</sup>

The Criminal Code provides for two types of offences: criminal offences and regulatory offences.<sup>8</sup>

Criminal offences can either be indictable offences or simple offences. Indictable offences are objectively more serious and must be dealt with on indictment before the District of Supreme Court (unless there is express provision allowing the particular offence to be dealt with summarily by the Magistrates Court).

An indictable offence is designated as either a crime or misdemeanour; the significance of this categorisation relates to whether the person can be arrested with or without a warrant.

The other type of criminal offence is a simple offence. If an offence provision does not stipulate that the offence is a crime or a misdemeanour then it is automatically designated as a simple offence.<sup>9</sup>

Simple and regulatory offences must be dealt with summarily in the Magistrates Court.

As a general proposition, the Criminal Code only contains indictable offences rather than simple offences. Further, it provides for the most serious indictable criminal offences in Queensland (as opposed to being located in other pieces of legislation).<sup>10</sup>

New South Wales, South Australia and Victoria are 'common law jurisdictions'. These jurisdictions still have statute based criminal offences and penalties but they draw predominantly from the common law for their legal principles of criminal liability.

An important distinction between the common law jurisdictions and Queensland's Criminal Code is the absence of the requirement of *mens rea*. This common law principle provides that a person must have a 'guilty mind' or have intended a specific result in order to be held criminally responsible for the action that caused the result.<sup>11</sup> The *mens rea* requirement normally excludes acts of inadvertent negligence from criminal liability.<sup>12</sup>

In contrast, Queensland's Criminal Code provides that it does not matter whether an accused person intends to cause a particular result, unless intent is expressly declared to be an element of a criminal offence.<sup>13</sup>

Queensland's Criminal Code also contains the defences and excuses which are of general application meaning that they will apply to all indictable and simple criminal offences in Queensland (whether those offence provisions are contained in the Criminal Code or in another statute) unless the offence provision itself specifically, or impliedly, excludes them.

Hence in addition to the specific defence provided for in the offences and circumstances of aggravation introduced by the 2013 suite (discussed later), the pre-existing and long-standing defences and excuses under the Criminal Code<sup>14</sup> are also available in appropriate circumstances.

Where there is ambiguity on the face of an offence provision either in a Code jurisdiction or in a common law jurisdiction, the principle of strict construction will apply – namely, the ambiguity must be resolved in favour of the accused person.<sup>15</sup>

## SECTION 60A (THE ANTI-ASSOCIATION OFFENCE)

The anti-association offence introduced into the Criminal Code by section 60A is a *simple offence* providing that participants in criminal organisations are prohibited from *knowingly* meeting together in public in groups of three or more.

It carries a *mandatory minimum* penalty of six months imprisonment to be *served wholly in a corrective services facility* and a maximum penalty of three years imprisonment.

The deliberate use of the word '*knowingly*' in the offence provision indicates the Legislature's intention that the prosecution must prove the mental element of the accused's intent beyond reasonable doubt in order to successfully prosecute this offence.

This requirement for knowledge on the part of the accused relates not only to them knowingly being in the presence of the other persons, but also to the accused knowing that they are currently participants in a criminal organisation.

The definition of 'criminal organisation' is contained at section 1 of the Criminal Code.

An organisation can either be determined to be criminal by the court using the specified factual criteria (limb one of the definition), declared under the *Criminal Organisation Act 2009* (limb two) or declared under a regulation (limb three).

Section 60A(3) contains the definition of 'participant' which also applies to all of the other new offences and the new circumstances of aggravation introduced into the Criminal Code by the 2013 suite.<sup>16</sup>

It is the breadth of the definition of 'participant' which gives this offence (and the other offences and circumstances of aggravation that utilise this definition) an extremely wide scope of application.

Paragraph (d) of the definition of 'participant' provides that a participant is '*a person who attends more than 1 meeting or gathering of persons who participate in the affairs of the organisation in any way*'.

Commenting on the connection between the definition of 'participant' and the practical operation of the anti-association offence, the majority of the High Court Justices in *Kuczborski v Queensland*<sup>17</sup> said:

'...it is arguable that a person who has attended more than one such meeting is "**marked for life**" as a participant, even though the person ceased to be a member long before committing the acts which lead to a charge. And to the extent that three or more members of the HAMC [Hells Angels Motorcycle Club] may have been present in court for the hearing of the arguments in this case, it might be argued that they have contravened s 60A(1), if they were unable

to make out the defence in s 60A(2). **That may well be thought to be an odd and undesirable outcome.**<sup>18</sup>

(emphasis added)

There is a specific defence to the anti-association offence set out at section 60A(2). It is a complete defence to the charge if the accused can show that the criminal organisation does not have, as one of its purposes, the purpose of engaging in, or conspiring to engage in criminal activity ('the *no criminal purpose defence*').

The no criminal purpose defence applies to all of the new Criminal Code offences and circumstances of aggravation created by the 2013 suite.

#### HOW HAS THE ANTI-ASSOCIATION OFFENCE BEEN USED?

##### STATISTICAL INFORMATION

Queensland Courts advised the Taskforce that between 17 October 2013 and 31 January 2016, 42 persons were charged with the anti-association offence.<sup>19</sup>

No new anti-association charges have been laid since July 2015.

No person has been successfully prosecuted under the anti-association offence.

The statistics available do not record whether charges have been subsequently withdrawn by the prosecution (the Taskforce is aware such cases exist). It should be noted that after the general State election on 31 January 2015 prosecutions have been adjourned pending this Report.

##### CASE EXAMPLES

###### THE PALAZZO VERSACE BIKIES

On 13 November 2013, James Cleave, Leslie Markham and Bradley Baker became the first

persons to be charged with the anti-association offence.<sup>20</sup>

The three men reportedly spent the night at the Palazzo Versace hotel on the Gold Coast and were arrested on the basis that they stood together in a common area of the hotel to pay their bill.<sup>21</sup>

On 14 October 2015 the prosecution offered no evidence on the charges and they were withdrawn. Their solicitor Mr Michael Gatenby told the Australian Broadcasting Corporation (ABC) that the anti-association offence '*appeared difficult to prosecute*'. Commenting more generally on the anti-association offence Mr Gatenby told the ABC:<sup>22</sup>

*'What's perhaps of the most concern is that the charges that have been brought to date have been for relatively trivial things, eating ice creams, paying a bill at an upmarket hotel and ordering a pizza at the pub. None of the charges have related to conduct where people have been carrying on unlawful activity.'*

###### THE ICE CREAM BIKIES

On 4 January 2014, Daniel Lovett, Bane Ajajbegovic, Dario Halolovic, Kresimir Basic and Darren Hayley were charged with the anti-association offence.

The five men were childhood friends on holiday from Victoria and staying at the Hilton Hotel on the Gold Coast.<sup>23</sup> They were reported to be on the way to the Cold Rock ice creamery in Elkhorn Avenue, Surfers Paradise when they came to the attention of the Queensland Police.<sup>24</sup>

On 28 September 2015, on the morning of their trial at the Southport Magistrates Court, the prosecution dropped all charges against the five men due to lack of evidence.<sup>25</sup>

Their solicitor Mr Bill Potts told the media that the men had spent three weeks in custody, some of it in solitary confinement for 23 hours a day<sup>26</sup> and that Queensland taxpayers had paid \$500,000 for the case to be pursued.<sup>27</sup>

Mr Potts told the ABC:

*‘Their only sin, their only crime, was to buy an ice-cream in a public place – the great controversy here was whether it was going to be choc top or vanilla’.*<sup>28</sup>

#### THE YANDINA SEVEN

On 10 December 2013, Joshua Carew, Paul Landsdowne, Steven Smith, Scott Conly and Dan Whale were charged with the anti-association offence.

It was alleged that they committed the offence when they met for pizza and a drink at the Yandina Hotel in the Sunshine Coast Hinterland on 1 November 2013.<sup>29</sup> They became known as the ‘Yandina Five’.

Three of the men were originally denied bail in the Magistrates Court and held in solitary confinement but have since been granted bail by the Supreme Court.<sup>30</sup>

Subsequently two other men, Patrick Maloney and Eric Fehlhaber, were also charged with committing the anti-association offence and the ‘Yandina Five’ became the ‘Yandina Seven’.

The Taskforce is advised that this matter has been listed for mention at the Maroochydore Magistrates Court on Friday, 15 April 2016.

#### THE DAYBORO THREE

On 19 December 2013, Phillip ‘Crow’ Palmer, Ronald Germain and Sally Kuether rode two motorcycles to the Dayboro Hotel north of Brisbane.

CCTV camera footage from the hotel reportedly showed that the trio stopped at the hotel for two light beers and then left without incident.<sup>31</sup>

The two men were wearing vests inside the hotel with the patch of the ‘Life and Death’ motorcycle club. That is an organisation declared to be a criminal organisation by the *Criminal Code (Criminal Organisations) Regulation 2013* (the Regulation). Sally

Kuether was wearing a vest inside the hotel with the words ‘Life and Death’ and ‘Property of Crow’ written on it.

On 24 January 2014, Palmer, Germain and Kuether were charged with committing the anti-association offence at the Dayboro Hotel on 19 December 2013.

Ms Kuether, a 40 year old multiple sclerosis sufferer, library assistant and mother of three with no criminal record was the first woman to be charged with the anti-association offence.

Ms Kuether spent six days in the Pine Rivers Police watch house after her arrest.<sup>32</sup>

On 8 April 2015 at the Brisbane Magistrates Court the prosecution offered no evidence on the anti-association charge and it was withdrawn.<sup>33</sup> Difficulties encountered by the Queensland Police Service in prosecuting this matter are detailed later.

Mr Palmer, Mr Germain and Ms Kuether did pleaded guilty to the offence of wearing prohibited items (that is, the ‘Life and Death’ vests) on licensed premises<sup>34</sup> and were fined \$500, \$300 and \$150 respectively for an offence under the *Liquor Act 1992* (Qld).<sup>35</sup>

#### SECTION 60B (THE CLUBHOUSE OFFENCE)

The clubhouse offence is a *simple offence* providing that any participant in a criminal organisation who enters or attempts to enter a prescribed place or event commits an offence.

This offence carries a *mandatory minimum* penalty of six months imprisonment to be *served wholly in a corrective services facility* and a maximum penalty of three years imprisonment.

Unlike the anti-association offence the legislature has *not* used the word ‘*knowingly*’ in the clubhouse offence provision.

The prosecution does not, then, have to prove that the accused person knew that a place or

event was prescribed in order to successfully prosecute this offence.

However, the general Criminal Code defences and excuses may provide an accused person with a defence if, for example, the place or event is not prescribed by regulation in accordance with the provisions of the *Statutory Instruments Act 1992 (Qld)*<sup>36</sup> or if the accused person has an honest and reasonable but mistaken belief about the nature of the prescribed place, or event.<sup>37</sup>

The clubhouse offence utilises the same definitions of criminal organisation and participant as the anti-association offence (see above).

The specific *no criminal purpose defence* is also available for persons charged with the clubhouse offence.

#### USE OF THE CLUBHOUSE OFFENCE

#### STATISTICAL INFORMATION

Queensland Courts advised the Taskforce that between 17 October 2013 and 31 January 2016 five people were charged with the clubhouse offence. No new clubhouse offence charges have been laid since July 2015.

No person has been successfully prosecuted under the clubhouse offence.

The available statistics do not record whether charges have been subsequently withdrawn by the prosecution (the Taskforce is aware such cases exist). Since the State election on 31 January 2015 prosecutions have been adjourned awaiting this Taskforce's Report.

#### CASE EXAMPLE: GLEN PITT – 29 MATHESON STREET, VIRGINIA

Glen Pitt's solicitor, Mr Chris Main, told *The Guardian* that on 5 July 2014 Mr Pitt had just returned to Brisbane after working a stint in the mines when he noticed that a shed was being dismantled by a group of persons at 29 Matheson Street, Virginia.<sup>38</sup>

Mr Main reportedly told *The Guardian* that Mr Pitt was unsure whether the property was being robbed, and that he entered the property to see what was happening.<sup>39</sup>

What happened next was the subject of intense cross-examination by Mr Pitt's counsel, Mr Ken Fleming QC, at a pre-trial hearing on 9 February 2016 at the Brisbane Magistrates Court.

A police traffic unit had noticed a number of people at 29 Matheson Street (a prescribed place under the Regulation) and officers from Taskforce Maxima were subsequently called to attend.<sup>40</sup>

The original police allegation was that Mr Pitt made a verbal admission to an officer of Taskforce Maxima about his participation in the Rebels Motorcycle Club (a declared organisation under the Regulation).<sup>41</sup>

The allegation of the verbal admission was contained in a statement of a police officer filed in support of the clubhouse offence charge. Under cross-examination it transpired, however, that the alleged verbal admission was not recorded in a police notebook; neither was it recorded on a police body worn recording device, notwithstanding the presence of several officers at the scene wearing such devices.<sup>42</sup>

After questioning Mr Pitt at 29 Matheson Street, police officers conducted a search of his residential property. During the search a 'Rebels' scarf<sup>43</sup> was allegedly discovered which the prosecution could, perhaps, have used to support an allegation that Mr Pitt was a *participant* in the Rebels Motorcycle Club.

Another issue arose, however. The prosecution case was that Mr Pitt had consented to the search of his property but, in cross-examination it was strongly put to the police officers that the search had *not* been consensual.

(The cross-examination on this issue is long and convoluted. In essence, recordings from body worn devices revealed that Mr Pitt had

been told that he was ‘detained’<sup>44</sup> and that, if he was to stand a realistic chance of attending his daughter’s 21<sup>st</sup> birthday party that evening, he had to ‘consent’ to the search of his home.<sup>45</sup>)

At 2:50pm on 9 February 2016 at the Brisbane Magistrates Court the police prosecutor advised Magistrate Cosgrove:

*‘Your Honour, following the way the evidence has been received today the prosecution intends to discontinue the charge...  
...I offer no evidence in relation to the single count of participant entering a prescribed place. I understand there will be an application in relation to costs by my learned friend and that is by consent as to quantum’.*<sup>46</sup>

All charges were dismissed against Mr Pitt and he was awarded \$30,000 in costs to be paid within two months.<sup>47</sup>

## SECTION 60C (THE RECRUITMENT OFFENCE)

This is also a *simple offence*, under which it is an offence for participants in criminal organisations to recruit or attempt to recruit another person to become a participant in a criminal organisation.

The offence carries a *mandatory minimum* penalty of six months imprisonment to be *served wholly in a corrective services facility* and a maximum penalty of three years imprisonment.

Unlike the anti-association offence (but like the clubhouse offence) the legislature has *not* used the word ‘*knowingly*’ in the recruitment offence provision. The prosecution does not have to prove that the accused person *knew* that an organisation was a criminal organisation in order to successfully prosecute this offence. (As noted above with respect to the clubhouse offence, however, there may be other defences and excuses in the Criminal Code which may be available to a person accused of this offence.)

The recruitment offence utilises the same definitions of criminal organisation and participant as the anti-association offence and the clubhouse offence (see above).

The specific no criminal purpose defence is also provided for in the recruitment offence.

### HOW HAS THE RECRUITMENT OFFENCE BEEN USED?

Queensland Courts advised the Taskforce that between 17 October 2013 and 31 January 2016 five people were charged with the recruitment offence. No new recruitment offence charges have been laid since July 2015.

No person has been successfully prosecuted under the recruitment offence.

The statistics available do not record whether charges have been subsequently withdrawn by the prosecution (the Taskforce is aware such cases exist). Again, after the State election on 31 January 2015 prosecutions have been adjourned awaiting this Taskforce Report.

Unlike the anti-association offence and the clubhouse offence there is no information currently in the public domain about the nature of charges laid under the recruitment offence. For this reason the Taskforce has elected not to provide a case example for the recruitment offence – all these matters are currently before the courts, and the Taskforce does not wish to risk prejudicing any future prosecution by discussing them publicly for the first time in this Report.

### WHY DOES IT MATTER THAT THE NEW CRIMINAL CODE OFFENCES ARE ‘SIMPLE’ OFFENCES?

Indictable offences usually proceed by way of indictment before one of Queensland’s superior courts: that is, the District Court or the Supreme Court.

The Criminal Code provides that indictments are usually<sup>48</sup> presented to the court by a

Crown Law Officer (the Attorney-General or the Director of Public Prosecutions) or a Crown Prosecutor (that is, a prosecuting lawyer who works within the independent Office of the Director of Public Prosecutions).<sup>49</sup>

If a person pleads not guilty to a charge of an indictable offence and the matter proceeds by way of indictment in front of a superior court the accused person will ordinarily have a trial in front of a judge and a jury of their peers.<sup>50</sup>

In contrast, prosecutions for simple offences are usually conducted by police prosecutors in the Magistrates Court. If an accused person pleads not guilty to a simple offence and the matter proceeds to trial the Magistrate tries all questions of fact and law without a jury.<sup>51</sup>

It is unusual that the new Criminal Code offences were introduced into the Criminal Code as simple offences because the Criminal Code generally otherwise contains indictable offences, in recognition of their objective seriousness.

Serious offences with serious consequences for the accused generally attract all of the protections afforded by a trial in a superior court – and, with the prosecution being conducted by an independent prosecutor.

The following attributes of the new Criminal Code offences would normally indicate that they are serious offences, which should properly be classified as *indictable*:

- the offences are alleged to involve participants in organised crime;
- they are complex in terms of the nature of the evidence required to obtain a successful prosecution; and
- they carry mandatory minimum sentences of six months imprisonment, to be served wholly in a correctional services facility.

The fact that it is extraordinary that the new Criminal Code offences which carry such serious consequences are classified as simple

offences is vividly corroborated by the apparent confusion of the investigating police officers within the specialised organised crime unit – Taskforce Maxima – whose evidence featured in the Pitt matter.

A police officer, in a record of his exchange with Mr Glen Pitt during an investigation of an alleged clubhouse offence (which carries a mandatory minimum sentence of six months imprisonment), advised Mr Pitt that because the offence was a simple offence not an indictable offence the only penalty he was likely to be facing was a fine.<sup>52</sup>

Officers investigating Mr Pitt’s matter were also apparently confused by the surprising fact that simple offences had been located within the Criminal Code; those police officers also incorrectly advised Mr Pitt that the clubhouse offence was located in the *Police Powers and Responsibilities Act 2000* (Qld).<sup>53</sup>

The Explanatory Notes to the 2013 suite and the introductory Explanatory Speech give no indication why the unusual decision was made to designate offences with such serious consequences to be simple, rather than indictable and, nevertheless, to place them within the Criminal Code.

**THE MAJORITY OF TASKFORCE MEMBERS BELIEVE THAT THE CRIMINAL CODE OFFENCES SHOULD NOT HAVE BEEN DESIGNATED AS SIMPLE OFFENCES**

All Taskforce members except the Queensland Police Union (QPU) agree that the Criminal Code offences created by the 2013 suite should not have been designated as simple offences.

The QPU is ambivalent whether the offences should be designated as simple or indictable offences.

Therefore, if the Government decides to retain the Criminal Code offences for any period of time, in any form, all Taskforce members except the QPU recommend that these offences should be redesignated as indictable

offences which can only be tried summarily upon the accused's election.

### THE 'NO CRIMINAL PURPOSE' DEFENCE

The no criminal purpose defence introduced by the 2013 suite is what is called a 'reverse onus defence'.

A 'reverse onus defence' moves the burden of proving a matter in a criminal trial (whereby very long historical tradition it is placed, almost entirely in most cases, on the prosecution) and shifts it to the accused person.

The plurality of the High Court in *Kuczborski* made it clear that a reversal of the onus of proof is not, itself, a breach of any constitutional right of an accused person unless it entails some sort of 'moral impossibility' – for example, if an accused could not hope to establish the defence.<sup>54</sup>

Reversals of the onus of proof will not be implied by the court; hence, if the legislature wishes to reverse the onus of proof, it must do so very deliberately, with clear and unequivocal language.<sup>55</sup> The no criminal purpose defence does this by using the phraseology 'it is a defence to a charge...to prove'.<sup>56</sup>

When the prosecution bears the onus of proof it must prove the elements *beyond reasonable doubt*; but, when the onus is instead placed on the accused, the standard of proof changes to the *balance of probabilities* (which is a lesser threshold).<sup>57</sup>

Therefore to use the defence effectively an accused person must be able to prove that on the balance of probabilities the criminal organisation in which they are alleged to have participated does not have criminal activity as its purpose, or one of its purposes.

(Of course, if the criminal organisation has been 'declared' under the Regulation, the prosecution is entitled to rely at the outset on that declaration and does not have to lead any

evidence about an organisation's engagement in criminal activity; that is, until the no criminal purpose defence is raised.)

But the plurality of the judges in *Kuczborski* remarked, in effect, on the relatively light burden the defence imposed upon an accused who was in a position to raise and rely upon it. They made the following observations about how the defence might be used in circumstances where, for example, the prosecution relied solely on the declaration:

*'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." 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'.<sup>58</sup>*

The Bar Association of Queensland drew no comfort from the suggested approach of the plurality in *Kuczborski* noted above. In its view no thought had been given by the legislature as to what must be proved because the defence is not drawn in terms of the defendant's knowledge or belief, but in terms of whether, as a fact, the organisation has as one of its purposes, engaging in criminal activity. In the view of the BAQ it is a defence which has been designed to fail.

The 'no criminal purpose' defence does not use the words 'serious criminal activity,' just 'criminal activity'. 'Criminal activity' is not further defined and it would appear, then, that even objectively low level criminal activity on

the part of an organisation could potentially eliminate the availability or utility of the defence.

A matter which concerned the Taskforce is that the defence may not be available to accused persons who are participants in, for example, activist organisations (which are arguably vulnerable to executive declaration by the Regulation<sup>59</sup>) and engage in low level criminal behaviour as part of their protest or activist activities.

By way of further example, animal rights organisations have been known to trespass on private property<sup>60</sup> to gather evidence of cruelty to animals.

**THE SNAPPING OF THE GOLDEN THREAD:  
WHY THE ONUS OF PROOF SHOULD NOT BE  
REVERSED WITHOUT ADEQUATE  
JUSTIFICATION**

**A BREACH OF HUMAN RIGHTS**

That a person is presumed innocent until proven guilty is, perhaps, the most vital element of a criminal justice system in a civilised society. The Taskforce accepted that this precept is fundamental to the historically-evolved, sophisticated system we have inherited and strive to sustain.

The importance of the presumption of innocence is recognised at Article 14(2) of the *International Covenant on Civil and Political Rights* (ICCPR) which states that ‘Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to the law’.<sup>61</sup>

Placing the primary onus upon the prosecution to prove a criminal case against a citizen who is accused of a crime is inextricably linked to the presumption of innocence. The prosecutorial burden of proof is viewed as so important that it has been referred to as the ‘golden thread’<sup>62</sup> of the criminal justice system which Australia inherited from England.

**A BREACH OF THE FUNDAMENTAL  
LEGISLATIVE PRINCIPLES ENSHRINED IN  
QUEENSLAND LAW**

In Queensland, a reversal of the onus of proof is a key consideration in assessing whether legislation is consistent with the *fundamental legislative principle* (FLP) that legislation should have sufficient regard to every Queenslanders’ rights and liberties.

Section 4(3)(d) of the *Legislative Standards Act 1992* (Qld) (LSA) expressly provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, among other things, the legislation reverses the onus of proof in criminal proceedings without adequate justification.

Paragraph 11 of the Taskforce’s Terms of Reference require it to have regard to the FLPs contained in the LSA in its review of the 2013 suite.

The Office of the Queensland Parliamentary Counsel’s *Principles of Good Legislation: OQPC Guide to FLPs* says that:

*‘The procedural rules relating to the conduct of criminal trials are concerned with the protection of innocent persons. For this reason, the prosecution is generally required to prove the guilt of an accused person beyond reasonable doubt. Legislation that requires an accused person to prove innocence by, for example, disproving a fact the prosecution would normally be obliged to prove, or that otherwise affects the onus of proof, may adversely affect the rights and liberties of individuals and should be justified’.*<sup>63</sup>

There was no attempt to either identify or justify the breach of the FLP inherent in the reversal of the onus of proof in the no criminal purpose defence, either in the introductory Bill’s Explanatory Notes or the introductory Explanatory Speech to the Legislative Assembly.<sup>64</sup>

The failure to clearly alert members of the Queensland Legislative Assembly to the breach of this FLP is significant given that:

- members of Parliament had only five hours to review three separate complex Bills (comprising 218 pages<sup>65</sup> of written material) after their introduction into the Legislative Assembly before the second reading and cognate debate began; and
- the normal legislative process was truncated because the Bill was declared urgent and was not, then, scrutinised by the relevant Parliamentary Committee.

If the Bill had gone through the Parliamentary Committee process, the OQPC's *Principles of Good Legislation: OQPC Guide to FLPs* states:<sup>66</sup>

'Parliamentary Committees closely scrutinise any proposed provision that affects the onus of proof in criminal proceedings'.

Again, if normal procedures had been followed the Parliamentary Committee would have then reported on the breach of this FLP, in a report which would have been tabled in the Legislative Assembly for the consideration of all members in advance of the debate on the proposed legislation.<sup>67</sup>

#### WHEN CAN THE REVERSAL OF THE ONUS OF PROOF BE JUSTIFIED?

In some circumstances reversals of the onus of proof can be justified. For example, it has always been the position at common law that the sanity of an accused person is presumed at law and, therefore, an accused person bears the onus of proving the defence of insanity (the common law presumption of sanity is reflected in Queensland's Criminal Code<sup>68</sup>).

This reversal is plainly justified because, if the prosecution had to prove the sanity of every accused person who comes before the courts on a criminal charge, the justice system would be entirely overburdened and grind to a halt.

The Australian Law Reform Commission (ALRC) recently released its final report on traditional rights and freedoms, and encroachments by Commonwealth laws on those freedoms.<sup>69</sup>

In the ALRC's examination of the onus of proof it identified that proportionality is the accepted test for justifying a reversal of proof. It identified three significant considerations in any evaluation whether a reversal of the burden of proof is reasonable, necessary and proportionate in pursuit of a legitimate objective:<sup>70</sup>

- (1) Does the reversal of proof relate to an essential element of the offence?<sup>71</sup>
- (2) How serious is the crime and the consequences of a conviction for the crime?<sup>72</sup> and
- (3) Does the reversal of proof relate to an element of the offence which would be particularly difficult for the prosecution to prove?<sup>73</sup>

#### IS THE REVERSAL OF THE ONUS OF PROOF IN THE NO CRIMINAL PURPOSE DEFENCE JUSTIFIED?

##### ESSENTIAL ELEMENT

Reversing the onus of proof with respect to an element of an offence that is *essential* to a person's culpability is difficult to justify.<sup>74</sup>

As observed by Hayne J in *Kuczborski*,<sup>75</sup> where there is no declaration of the *organisation* by the Regulation or under the *Criminal Organisation Act 2009* (Qld), the prosecution will have to prove that an organisation engages in criminal activity as an element of the offence and therefore the no criminal purpose test will become redundant.

However, where the organisation has been 'declared' to be a criminal organisation the prosecution can rely on the Regulation exclusively.

In these circumstances, the accused is left to disprove the inherent criminality of an organisation.

That a person is a participant in a *criminal organisation* goes to the heart of all the Criminal Code offences, and the circumstances of aggravation created by the 2013 suite, and must be said to be an essential element.

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### SERIOUSNESS

Where the penalty upon conviction is not serious (for example, a fine rather than a term of imprisonment), shifts in the burden of proof can be more readily justified.<sup>76</sup>

The penalties upon conviction for the Criminal Code offences and circumstances of aggravation are very serious, and in many instances provide for mandatory terms of imprisonment so this ground could not be said to provide justification for the reversal.

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### DIFFICULTY FOR THE PROSECUTION

The Office of Queensland Parliamentary Counsel's Notebook on FLPs provides that:

*Generally for a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidentiary means and the defendant would be particularly well positioned to disprove guilt.<sup>77</sup>*

Arguably, when the State has 'declared' an organisation to be a criminal organisation, it should have evidence that the organisation has engaged in criminal activity in its possession; and, therefore, the State would be well placed to prove this element.

If the State does *not* have evidence that an organisation is engaged in criminal activity, it is not in the public interest to prosecute a person on the basis of their participation in that organisation.

There is arguably no strong case for justification on this basis.

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### REASONABLE, NECESSARY AND PROPORTIONATE IN PURSUIT OF A LEGITIMATE OBJECTIVE?

On the basis of the assessment just undertaken, Taskforce members representing the legal professional bodies and the Public Interest Monitor concluded that the reversal of onus of proof could not be justified.

These same Taskforce members also support a recommendation to repeal all provisions allowing the Executive to declare criminal organisations by the Regulation (see Chapter 8.)

The Commissioned Officers' Union and the QPU support the retention of the no criminal purpose defence.

If the Government accepts the recommendation to repeal the provisions allowing the Executive to declare criminal organisations by the Regulation, all Taskforce members agree that the no criminal purpose test should also be repealed because it will become effectively redundant (it is not needed in the context of Limb 1 and Limb 2 of the definition of criminal organisation under section 1 of the Criminal Code).

### IS PROVISION OF THE NO CRIMINAL PURPOSE DEFENCE A CONSTITUTIONAL IMPERATIVE?

If provision for executive declaration of criminal organisations by the Regulation remains in the Criminal Code the answer is, probably, yes.

The provision of the defence means that the new Criminal Code offences are less susceptible to constitutional challenge based on the *Kable* principle, because the defence provides support for the proposition that the court is not being impermissibly directed in its decision making by the Executive's declaration of a key element of the offence.

The plurality of judges in *Kuczborski* found that the inclusion of the no criminal purpose test in the Criminal Code meant that the declaration

could not be 'equated with a presumptive finding' of fact which would impermissibly direct the court as to the outcome of a prosecution.<sup>78</sup>

All Taskforce members agree that if the Government decides to reject the recommendation that the executive declaration powers in section 708A should be repealed, this defence would have to be retained in order to protect the provisions from a further constitutional challenge grounded in the *Kable* principle.

## MANDATORY SENTENCING

The Taskforce observed that mandatory minimum sentences of imprisonment are a key feature of the Criminal Code offences and circumstances of aggravation created by the 2013 suite.

There was significant division within the Taskforce on the issue of mandatory sentencing.

### THE MAJORITY VIEW

Members of the Taskforce representing the legal professions and the PIM are fundamentally opposed to mandatory minimum sentences, on the grounds that mandatory sentencing will inevitably lead to unjust outcomes because there is no flexibility to take into account individual circumstances, and there is no evidence base to support the proposition that mandatory sentences deter criminal offending.

These Taskforce members and the stakeholders they represent do not support the retention of the Criminal Code offences in any form.

However, if the Government elects to retain these offences for any period of time, the preference of these stakeholders is that mandatory minimum sentences should be repealed and replaced with statutory maximum penalties.

### THE MINORITY VIEW

The Commissioned Officers' Union and the QPU support mandatory minimum terms of imprisonment for the Criminal Code offences, based upon the feedback provided to them by their members that the mandatory minimum sentences have been a factor in deterring public acts of violence by OMCGs since the introduction of the 2013 suite.

The differing views of Taskforce members on mandatory sentencing generally are set out in greater detail at Chapter 13.

### DIFFICULTIES IN PROVING THE NEW CRIMINAL CODE OFFENCES

The anti-association offence requires the prosecution to prove a number of key factors beyond reasonable doubt:

- that the person is (meaning *at the actual time of the commission of the offence*);
- a *participant* in a *criminal organisation*; and
- that the person is *knowingly* present in a *public place* with *2 or more other persons* who are *participants* in a *criminal organisation*.

### PROVING BEYOND REASONABLE DOUBT THAT THE PERSON IS A PARTICIPANT AT THE TIME OF THE OFFENCE

For the prosecution to establish beyond reasonable doubt that the defendant is a participant in a criminal organisation, based on admissible evidence (and not, say, criminal intelligence which is not in admissible form) will be extremely difficult.

Without a confessional statement from the defendant, or reliable and credible evidence from a witness with first-hand knowledge that the defendant is a participant (at the particular time of the commission of the offence), it is

difficult to see how the prosecution could establish this element of the offence.

It has been suggested that, for future prosecutions, the Queensland Police Service may develop ‘expert police witnesses’<sup>79</sup> to attest to the involvement of persons in criminal organisations.

The rules of evidence regarding the admissibility of expert evidence are, however, careful and quite strict and it is far from certain that this category of evidence would be accepted by the court as sufficient to constitute acceptable ‘expert’ evidence (as opposed to an opinion, albeit an informed one).

Certainly the Supreme Court of South Australia has held<sup>80</sup> that evidence about the general culture and operations of motorcycle gangs is admissible where it is based on a witness’ personal knowledge, obtained through long observation and study (for example, covert surveillance or undercover operatives); but evidence regarding specific instances, events or acts of (say) violence concerning a gang is not ordinarily admissible unless the witness was a direct observer of those incidents.

Evidence of the general culture and operation of the association is unlikely, then, to be sufficient to establish that the accused was in fact a participant ‘at the time of the offence’ beyond reasonable doubt.

Similar challenges apply to establishing the clubhouse offence and the recruitment offence (beyond reasonable doubt), and the new circumstances of aggravation in terms of proving that the defendant *is a participant* in a *criminal organisation* (noting, again, that police intelligence information is not likely to satisfy the high threshold standards of admissibility in a criminal trial).

**PROVING BEYOND REASONABLE DOUBT THAT A PERSON IS KNOWINGLY PRESENT IN A PUBLIC PLACE WITH TWO OR MORE OTHER PERSONS WHO ARE PARTICIPANTS IN A CRIMINAL ORGANISATION**

To establish knowledge on the part of the defendant that the other people *are* participants in a criminal organisation (at the time of the commission of the offence) will be extremely difficult for the prosecution, in the absence of a confessional statement, admissible covert evidence or witness accounts of words said or conduct by the defendant at the time of the gathering.

#### **RESPONDING WHEN THE NO CRIMINAL PURPOSE DEFENCE IS RAISED**

This became a problem for the QPS in its prosecution against the ‘Dayboro Three’.

Police Prosecutors intended to rely solely on the declaration that the Life and Death Motorcycle club was a criminal organisation under the Regulation.<sup>81</sup>

When the defence advised that they intended to raise the no criminal purpose defence, the prosecution found itself in exactly the situation foreshadowed by the plurality in *Kuczborski*<sup>82</sup> – that is, the prosecution did not have sufficient available evidence about the Life and Death Motorcycle club to rebut any contention raised by the accused that the club had no criminal purpose.<sup>83</sup>

Again, the QPS has advised its intention that future briefs of evidence for court proceedings will include information from ‘expert police witnesses’;<sup>84</sup> but, for the reasons explored earlier, the QPS or any other prosecuting authority is likely to encounter problems getting this expert witness material admitted under the current rules of evidence.

#### **BREACH OF RIGHTS TO FREEDOM OF ASSOCIATION IS A HUMAN RIGHTS ISSUE, AND A FUNDAMENTAL LEGISLATIVE PRINCIPLES ISSUE**

##### **UNIVERSAL HUMAN RIGHTS**

Several submissions referred the Taskforce to Article 22 of the ICCPR.<sup>85</sup>

Article 22 confirms the right to freedom of association (but, also, the right of the State to limit those freedoms to protect public safety).

Article 22 states:

‘Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.’

In an explanation of this international human right the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association states that a right of association is a prerequisite for a democracy and a just society.<sup>86</sup>

In explaining the universal nature of this human right the Rapporteur says:

*‘The freedoms of peaceful assembly and association are not cultural or specific to a particular place and time. They are born from our common human heritage. It is human nature – and human necessity – that people come together to collectively pursue their interests’.*<sup>87</sup>

Whether Article 22 is in fact breached by the new Criminal Code offences depends on whether they could be said to be necessary in the interests of ‘public safety’ or ‘public order’.

If the answer is yes, the question then becomes whether the offences are both a necessary and proportionate response to that public safety and order threat<sup>88</sup>

In this Report the Taskforce has provided the Government with:

- statistics which show that the intended target of these laws, that is OMCGs, account for only a small percentage of crime in Queensland but make up a disproportionately high percentage of the offending population, and that rates of serious crime in Queensland have not changed significantly since the introduction of these offences; but, also
- the views of law enforcement agencies which believe, on the basis of operational experience and community perception surveys, that these offences have been beneficial to public safety and order.

Members of the Taskforce have differing views about whether the evidence in this Report indicates the measures contained in the new Criminal Code offences are ‘necessary’ or ‘proportionate’ to the threat posed by OMCGs to public safety and order.

These views are reflected in the recommendations each member has chosen to support with respect to those offences.

The Taskforce noted that in *Tajjour v New South Wales*<sup>89</sup> the High Court of Australia unanimously concluded that the provisions of the ICCPR impose no constraint upon the power of a state parliament to enact legislation that is contrary to the ICCPR provisions.

Therefore, while all members of the Taskforce agreed that it would be a significant symbolic policy decision for any government in a modern civilised democracy to knowingly choose to breach Article 22, as a matter of Australian law such a breach would not render the Criminal Code offences invalid.

## FUNDAMENTAL LEGISLATIVE PRINCIPLES ENSHRINED IN QUEENSLAND LAW

As noted earlier, the Taskforce is required to have regard to the FLPs contained in the LSA. Those principles require Queensland's legislation to have sufficient regard to the rights and liberties of individuals.

Section 4(3) of the LSA contains the issues which need to be considered in deciding whether Queensland's legislation has sufficient regard to the rights and liberties of individuals.

Some of those rights and liberties are set out specifically in the section: for example, that the onus of proof in criminal proceedings should not be reversed without adequate justification.

However, as noted in the Office of the Queensland Parliamentary Counsel's FLP Notebook, the list of examples provided in section 4(3) of the LSA is not exhaustive and the rights and liberties to which legislation must have regard extend to protective common law rights.<sup>90</sup>

Therefore, to comply with the FLPs, legislation should not abrogate common law rights without sufficient justification.<sup>91</sup>

The OQPC FLP Notebook recognises the importance of the common law right to freedom of movement and association which is impacted by the new Criminal Code offences. The OQPC Notebook says:

'Common law rights to freedom of movement are associated with rights to liberty and security of the person, to freedom of peaceful assembly and process and to a democratic society respecting the rule of law'<sup>92</sup>

The impact of the new Criminal Code offences on freedom of movement and association was appropriately identified as a potential breach of the FLPs in the Explanatory Notes which accompanied the Bill introducing the offences.<sup>93</sup>

The breach was justified in the following terms:

'...they apply only to participants in criminal organisations and thereby target only those individuals who offend while enjoying the support and encouragement of the criminal group.'<sup>94</sup>

There was no reference to the potential FLP breach in the Explanatory Speech which accompanied the Bill introducing the Criminal Code offences.<sup>95</sup>

Again, members of the Taskforce have differing views about whether the breach of this FLP could be justified, and these views are reflected in the recommendations that each member has chosen to support with respect to the future of those offences.

## RIGHTS TO FREEDOM OF ASSOCIATION AND THE CONSTITUTION

### WHAT ARE AN AUSTRALIAN CITIZEN'S IMPLIED CONSTITUTIONAL RIGHTS TO FREEDOM OF ASSOCIATION?

The broad freedom of individuals to discuss opinions about political matters is one which is fundamental for any democratic society. In Australia, it is clearly contemplated by sections 7 and 24 of the *Australian Constitution* as being a necessary feature of representative government.<sup>96</sup>

The High Court first confirmed the implied freedom of political communication in the early 1990s<sup>97</sup> and later described it as '*indispensable to the systems of Government*'.<sup>98</sup>

Laws should not, as a general rule, be constructed to abrogate or diminish the freedom of individuals to participate in advocacy, protest, dissent or industrial action.

Political communication can be non-verbal and is not confined only to election periods.<sup>99</sup>

It is a view widely held by senior legal commentators that, embedded in the implied freedom of political communication, is a concurrent implied right to freedom of association.<sup>100</sup>

The High Court has certainly conceded, on a number of occasions, that the two concepts are cognate (although it is important to note that the comments by the High Court on this issue were made in *obiter* only, and in cases which were decided upon another basis – and, without it being necessary for the Court to definitively decide the precise question of the implied freedom of association).<sup>101</sup>

#### DO THE CRIMINAL CODE PROVISIONS INFRINGE THE IMPLIED RIGHT TO FREEDOM OF ASSOCIATION?

The High Court has, over time, developed a test to establish whether a law is constitutionally invalid on this ground.

Most recently, the majority of justices on the High Court embraced a three-limb process in *McCloy v New South Wales*,<sup>102</sup> derived predominantly from the earlier High Court decision in the case of *Lange v Australian Broadcasting Corporation*.<sup>103</sup>

The Taskforce undertook an examination of this three-limb process, as it applied to the Criminal Code offences and in particular the anti-association offence at section 60A; below is an overview of that examination.

#### DOES THE LAW EFFECTIVELY BURDEN THE FREEDOM OF COMMUNICATION ABOUT GOVERNMENT OR POLITICAL MATTERS, EITHER IN ITS TERMS, OPERATION OR EFFECT?

If the answer to this question is ‘no’ then the law does not breach the implied freedom of association and it is not necessary to examine other limbs.

However, as noted in Chapter 6, the Chief Justice in *Kuczborski*<sup>104</sup> explicitly stated that freedom of association was burdened by the new Criminal Code offences and *obiter dictum*

from other judges of the High Court indicated that they did not disagree.

The answer to the question is, then, ‘yes’.

#### IS THE PURPOSE OF THE LAW AND THE MEANS ADOPTED TO ACHIEVE THAT PURPOSE LEGITIMATE IN THE SENSE THAT THEY ARE COMPATIBLE WITH THE CONSTITUTIONALLY PRESCRIBED SYSTEM OF REPRESENTATIVE GOVERNMENT? (COMPATIBILITY TESTING)

If the answer to this question is ‘no’ then the law infringes the implied right, and is invalid.

The purpose of the Criminal Code offences is not problematic. Laws which have as their object the prevention or disruption of criminal conduct have been found to be compatible with the system of representative Government established by the Australian Constitution.<sup>105</sup>

The means used to by the Criminal Code offences to achieve their purpose is a more problematic issue.

In examining the NSW consorting offence at section 93X of the *Crimes Act 1900* (NSW) in *Tajjour*, two High Court judges<sup>106</sup> (the Chief Justice<sup>107</sup> and Justice Gageler<sup>108</sup>) found that the offence was *not* compatible with the system of representative government provided by the Constitution.

However, the NSW consorting offence was found to be valid on this ground by the majority of the High Court in *Tajjour*. That said, the NSW consorting offence presents a much lighter burden upon the implied freedom of political communication than Queensland’s Criminal Code offences, and it employs means that make it appear to be much more consistent with the system of representative government provided for in the Constitution.

For example, the NSW offence is restricted in its application to associations involving convicted offenders; it does not rely on an executive declaration by the political branch of government as its foundation; it relates to

habitual ongoing associations, rather than one-off interactions; and, it allows associations in a range of civic situations (for example, lawful employment).

Interestingly, in *Tajjour*, Gageler J went on to find that that the consorting offence was valid because it could be read down, so that it would not apply in circumstances where the freedom was infringed.

But a finding like that by a majority in the High Court would still cause practical problems for the operation of the anti-association offence (see the discussion below about the possibility of providing a ‘political communication’ defence).

There is a possibility that any of the new Criminal Code offences, and particularly the anti-association offence, could be found invalid at this juncture of the High Court’s assessment process.

If the Criminal Code offences were not found invalid at this juncture, they would still have to survive ‘proportionality’ testing under the next limb of the test.

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#### IS THE LAW REASONABLY APPROPRIATE AND ADAPTED TO ACHIEVE THAT LEGITIMATE OBJECT? (PROPORTIONALITY TESTING)

This part of the test involves a consideration of the extent to which the law burdens the implied freedom. In order to do this the court must ascertain whether the law is:

- (a) suitable;
- (b) necessary; and
- (c) adequate in its balance.

In order to be constitutionally valid, each of those questions must be answered sequentially in the affirmative before proceeding to the next stage.<sup>109</sup>

Academic commentary has noted that there is some necessary overlap between the analysis that must be undertaken in assessing compatibility and proportionality, and the

Taskforce accepts that what follows is a simplified explanation of a complex legal test.<sup>110</sup>

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#### IS THE LAW SUITABLE?

This part of the test requires an assessment of the question whether there is some rational connection between the law, and its purpose.<sup>111</sup>

Importantly, no value judgments are made at this point of the test about whether there would be more appropriate ways to achieve the legitimate end.<sup>112</sup> All this part of the test requires is a pure logical connection.<sup>113</sup>

The Criminal Code offences which aim to disrupt association between participants in criminal organisations have a clear logical connection with the purpose of the legislation – that is, to prevent organised crime.

There is a strong argument that this limb of the proportionality test would be answered in the affirmative.

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#### IS THE LAW NECESSARY?

If there are legal measures available to meet a legitimate purpose which are equally effective and less burdensome on the freedom, then a more burdensome law cannot be justified.<sup>114</sup>

The plurality in *McCloy* noted that this does not mean the legislature cannot choose its favoured means of achieving a legitimate end.

What it does mean is that it is the court’s role to ensure that the freedom is not burdened when it does not need to be.<sup>115</sup>

The constitutional restriction on the legislature is such that it must make its choice of preferred means from ‘*within the domain of selections*’ that are least burdensome on the freedom.<sup>116</sup>

This part of the test may be problematic for the Criminal Code offences.

Elements of the NSW consorting offence provide some obvious alternatives to the approach of the anti-association offence, as it is presently drafted, which could make it less burdensome on the freedom while still achieving its purpose. These include:

- eliminating the ability of the political branch of the government to prescribe criminal organisations;
- restricting the application of the offences to persons who have criminal convictions;
- providing warnings before offences are committed or that offence applied to ongoing, rather than one-off associations; and
- providing means for legitimate public associations to take place.

However, the plurality in *Tajjour* said that a true alternative had to be a ‘*reasonably practicable alternative*’.<sup>117</sup>

If the Criminal Code offences were constitutionally challenged on this ground, the arguments would foreseeably focus on whether a consorting offence (or, perhaps, some of the elements of a consorting offence) added to the association offence would equate to, and provide, a reasonably practicable alternative.

It might be argued in response for the State of Queensland that, for example, elements of the consorting offence would impact on the speed and efficiency of disruption enabled by the anti-association offence which would make those alternatives ‘*not reasonably practicable*’.

#### IS THE LAW ADEQUATE IN ITS BALANCE?

In the third and final stage of the proportionality test the importance of the law’s purpose will be weighed against the restriction on the freedom.<sup>118</sup>

The plurality in *McCloy* said:<sup>119</sup>

*‘Logically, the greater the restriction on the freedom, the more important the public interest purpose of the legislation must be for the law to be proportionate’.*

It follows that the court will examine the public interest in the legislation, in the context of the question whether the restriction on the freedom can be justified.<sup>120</sup>

Hence, the question at this juncture is: Is the weight placed on the freedom of association and communication by the Criminal Code offences balanced by the public interest benefits the offences seek to achieve?<sup>121</sup>

The principal argument that the State of Queensland would inevitably advance at this juncture is that the public interest purpose of the offences is an extremely important one: that is, combating serious and organised crime which presents a public safety threat.

The State would argue that the benefit to the public of subduing a threat to their safety far outweighs the restriction on the freedom presented by offences.

The counter-argument is that the terms of section 708A of the Criminal Code do not necessarily support the argument that the anti-association offence has a particularly strong attachment to the public interest in preventing serious organised crime.

Section 708A does not *require* the Minister to have regard to an organisation’s criminality before recommending that it be declared it under the Regulation. The Minister ‘may’ take into consideration the issues listed at section 708A (1) and, in fact, the provision expressly allows the Minister to consider ‘any other matter’<sup>122</sup> that the Minister considers is relevant.

The High Court judges in the plurality in *Kuczborski* have already identified the ‘open ended’ nature of section 708A as a potential source of a constitutional challenge on this ground.<sup>123</sup>

Section 32CA of the *Acts Interpretation Act 1954* (Qld) provides that when the word ‘may’ is used in a statute it indicates that a power may be ‘exercised or not exercised, at discretion’.<sup>124</sup> If a statute uses the word ‘must’ in relation to a power that indicates that the power is *required* to be exercised.<sup>125</sup>

It is highly likely that an individual challenging these laws on this ground would argue that the legislature deliberately used the word ‘may’ and provided the Minister with the ability to consider ‘any other matter’ to enable the Minister to recommend the declaration of *any* organisation to be a criminal organisation regardless of that organisation’s involvement in serious organised crime. On that basis the individual challenging the laws would argue that there is not a strong enough nexus with the public interest to justify the weight of the burden on the freedom.

The State may argue that despite the ‘open ended’ language of section 708A there is a general proposition that, when a legislature confers a discretionary power in a statute, that discretion is confined by the subject matter, scope and purpose of the statute within which it is contained and therefore, the placement of section 708A in the Criminal Code confines the exercise of the Minister’s discretion to the extent necessary to establish a sufficient nexus with the public interest.<sup>126</sup>

It is possible that much would then turn on the question whether the Minister’s decision to recommend the declaration of an organisation under section 708A was able to be reviewed in any way so that the public interest purpose of the provision (ie, preventing serious criminal activity) could be given any practical application.

At Chapters 6 and 8 of this Report the differing views of the High Court Justices in *Kuczborski*<sup>127</sup> on the reviewability and interpretation of section 708A are set out in greater detail.

#### COULD A DEFENCE PRESERVING RIGHTS OF POLITICAL COMMUNICATION SAVE SECTION 60A FROM INVALIDITY?

The Taskforce considered whether it might be possible to ‘immunise’ the anti-association offence against a constitutional challenge on this ground by either including an express statement to limit its application, or by prescribing a defence to the charge, both of which effectively have the same outcome of protecting associations where they are primarily for genuine political purposes.

This approach has been taken by a number of jurisdictions around Australia. The Commonwealth offence of *associating in support of serious organised criminal activity* specifically prescribes that it ‘does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication’.<sup>128</sup>

Similarly, the South Australian<sup>129</sup> and Victorian<sup>130</sup> anti-consorting laws prescribe that, if a consorting prohibition notice is issued to a person (or persons), the notice does not prohibit association occurring between persons where it is ‘for genuine political purposes’.

South Australian, Victorian and also Tasmanian<sup>131</sup> anti-consorting provisions, while not expressly providing an exception for political communication, allow for a ‘good and sufficient reasons’ defence which arguably leaves open an argument that the association was for a political purpose.

The notion of limiting the application of a provision where political communication is concerned is not novel in Queensland. Under Part 7 of the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA), the QPS has certain powers with respect of out-of-control events including the power to stop (or prevent) the event and disperse the persons involved.<sup>132</sup>

Section 53BB(2)(c) of the PPRA specifically prescribes that ‘an event that is primarily for the purpose of political advocacy, protest or

industrial action' is *not* an out-of-control event.

This option would inevitably require an assessment by police whether an alleged association under section 60A was primarily for a genuine political purpose. That task is similar to the judgment that is exercised when utilising the powers under Part 7 of the PPRA.

However, when the High Court considered NSW's anti-consorting offence in *Tajjour* concern was expressed about the practical reality of a defence of this kind (called a 'carved-out' defence). In *obiter* observations Crennan, Kiefel and Bell JJ commented:<sup>133</sup>

'Putting aside difficulties in drafting a defence of that kind, **such a defence would be easily claimed but difficult to investigate, test or challenge, both factually and legally.** This would be especially so if the prosecution were required to negative the claim once raised. In reality, the defence would create a gap which is readily capable of exploitation.'

(emphasis added)

This concern highlights a potential new pitfall if the anti-association offence was to be amended in this manner, and gives rise to legitimate concerns about the practical effectiveness of the provision.

There is a real possibility that person/s charged with the anti-association offence could readily manufacture an excuse for their association in line with a political communication defence (but which also sits hand-in-hand with criminal activity), thereby manipulating the true purpose of the provision.<sup>134</sup>

Further, as the plurality in *Tajjour* observed, the Crown would have real difficulties in disproving a claim that an association was for a political purpose, absent any direct evidence of the actual nature of the impugned interaction.

For these reasons the Taskforce concluded that any attempt to immunise the section 60A anti-association offence from constitutional challenge would render the offence, in practical terms, useless.

#### TASKFORCE DEBATE ABOUT CONSTITUTIONAL VALIDITY ON FREEDOM OF COMMUNICATION AND ASSOCIATION GROUNDS

The members of the Taskforce representing the BAQ, the PIM and the Queensland Law Society took the view that the new Criminal Code Offences and, in particular, the anti-association offence appear to be particularly vulnerable to constitutional challenge on the grounds of the implied constitutional right to freedom political communication and association.

On the basis of that vulnerability alone these members would not support a recommendation to the Government to retain these offences.

Members of the Taskforce representing the Commissioned Officers' Union and the QPU were ambivalent about the possibility that the section 60A offence would be found to be unconstitutional. They contend, fairly, that there is no way of definitively predicting how the High Court might treat an application brought on these grounds. (While acknowledging, of course, the force of the analysis of the legal issues set out earlier and the indications it provides about the way the High Court would determine these issues.)

In the view of members representing the Commissioned Officers' Union and the QPU, the 'operational' utility of the offences reported to them by their members (that is to say, the perceived benefits of the 2013 suite to crime prevention) is such that it is worth risking a finding that the offence is unconstitutional.

## LAW ENFORCEMENT VIEWS ABOUT THE OPERATIONAL IMPACT OF THE NEW CRIMINAL CODE OFFENCES

### QUEENSLAND POLICE SERVICE

The QPS has pointed out to the Taskforce that since October 2013, when these offences were introduced, there have been no acts of public violence by OMCGs.<sup>135</sup>

The QPS advised the Taskforce that in its view the new offences and circumstances of aggravation introduced into the Criminal Code have been a key contributor to OMCGs refraining from public acts of violence.<sup>136</sup>

### FEAR OF A RESURGENCE IN PUBLIC VIOLENCE IF THE CRIMINAL CODE OFFENCES ARE REPEALED WITHOUT ADEQUATE REPLACEMENT

The QPS has advised the Taskforce of its concern that, if the legislation is repealed without an appropriate replacement, then OMCGs will be able to move freely and conduct their criminal activities including violence in a public manner; and this will be facilitated through the use of fortified clubhouses.<sup>137</sup>

This QPS view is largely supported by the Commissioned Officers' Union, the QPU, Gold Coast Mayor Tom Tate<sup>138</sup> and Gold Coast City Councillors Dawn Crichlow<sup>139</sup>, Jan Crew<sup>140</sup> and Paul Taylor<sup>141</sup> who all made submissions to the Taskforce.

### VIEWS OF THE CRIME AND CORRUPTION COMMISSION

In confidential briefings<sup>142</sup> to the Taskforce the Crime and Corruption Commission (CCC) has advised that, on the basis of intelligence the CCC has received:

- criminal activity and recruitment activities by OMCGs have continued since the introduction of the 2013 suite but with a reduced public profile;

- new OMCG chapters were being established again in the latter half of 2014;
- incidents of intra-gang violence have continued since the introduction of the 2013 suite but there have been fewer overt public conflicts;
- recruitment activities have increased in the last year; and
- OMCGs have been focusing on quantity rather than quality in their most recent recruitment drive, with new members tending to be younger than in the past, with little understanding of club history and culture and often with no interest in, or ability to ride motorcycles.

The CCC told the Taskforce that it has received no reliable information from the new members of the clubs which would provide a reason for the recent resurgence in recruitment.

Despite this lack of specific information the CCC did advise the Taskforce that in its view it could be 'inferred' that OMCGs perceive that, in the wake of this Report, the Government may soften its stance towards OMCGs and, on that basis, are preparing for some kind of resurgence.

In the CCC's opinion, this inference is consistent with earlier intelligence gathered from senior OMCG members that, in the wake of the introduction of the 2013 suite, many club members took a 'wait and see' approach.

The CCC advised the Taskforce that the information it provided comes predominantly from intelligence hearings. This means that whilst information is obtained under oath or affirmation, it may have also been obtained using powers of compulsion, with the threat of mandatory terms of imprisonment for non-compliance. It must therefore, with respect, be treated with a proper level of caution. It must be remembered that intelligence that is gathered in this way is intended to be used

merely to inform and assist law enforcement agencies in their investigations and searches for verifiable and admissible evidence. In a court of law information obtained by means of compulsion would be given little or no weight – in the event it could actually be admitted as evidence.

### TASKFORCE DELIBERATIONS ON ADVICE FROM LAW ENFORCEMENT AGENCIES

All Taskforce members accept that the 2013 suite appears to have been effective in limiting intimidating public displays by OMCGs, and enhancing a perception or feeling of increased safety amongst members of the public (particularly those who live on the Gold Coast).

Whether the public's increased feelings of safety are grounded in reality, or whether they are the product of a misapprehension about the true level of OMCG involvement in crime, was a matter of debate amongst the Taskforce members (just as it has been in public forums).

The Taskforce notes that information provided to the Taskforce from both the QPS and CCC also indicates that the criminal activities of OMCGs and other criminal enterprises continued after the 2013 suite was introduced, with new chapters starting to be established within 12 months of the legislation's introduction – well before the possibility of this Taskforce review was in the public domain.

The ability of OMCGs to re-form and adapt their operational activities to avoid law enforcement is consistent with the findings of the COA Review – that legislative responses which target organisations rather than individuals carry a high risk of ultimate failure because of the fluid, adaptable nature of organised crime; and, of course, because human enterprise (whether criminally motivated, or not) reflects that we are adept at adjusting to changing circumstances.<sup>143</sup>

Taskforce members other than the Commissioned Officers' Union and the QPU

representatives believe that this information, along with statistical data gathered by the Taskforce and the data presented by the Byrne Report,<sup>144</sup> indicates that **in terms of preventing criminal activity by OMCGs or criminal activity generally the 2013 suite has not had a significant impact.**

The Commissioned Officers' Union and the QPU disagree that the impact on serious criminal activity has not been significant on the basis, again, of direct feedback from their members. The Commissioned Officers' Union and the QPU also advised the Taskforce that their membership reported enhanced feelings of officer safety since the introduction of the 2013 suite.

### CONNECTION BETWEEN THE CONCLUSIONS OF THE TASKFORCE ON THE CONSTITUTIONAL VIABILITY OF THE NEW OFFENCES AND THE PUBLIC SAFETY RISK IDENTIFIED BY LAW ENFORCEMENT

If the fears of police officers and CCC intelligence is correct (in that OMCGs are recruiting with a view to beginning a new wave of public disorder and violence), the Taskforce consideration of the constitutional validity of the section 60A offences is brought into sharp focus.

If section 60A of the Criminal Code (which are the 2013 suite's main tool in preventing *public* association between participants in OMCGs) is found to be unconstitutional then, on the basis of information provided by QPS and CCC, a public safety risk will emerge with no effective legal response available.

### TASKFORCE DISCUSSION

#### THE MAJORITY VIEW

Taskforce members representing the BAQ, the PIM and the QLS believe that because of the inherent unfairness of the offences, imprecise drafting, difficulties experienced in prosecution, breaches of the FLPs and

questions of constitutional vulnerability, maintenance of the new Criminal Code offences cannot be recommended and they should be repealed.

These Taskforce members wish to make it clear to the Government and the public that their strongest and first preference is that all the new Criminal Code offences and circumstances of aggravation should be repealed, without replacement.

These members believe that the breaches of the FLPs and human rights represented in these offences could not be justified in October 2013, and cannot be justified now on the basis of the evidence that the Taskforce has seen.

However, these Taskforce members also accept that the Government cannot properly ignore Queensland's two major law enforcement bodies and their concerns that a public safety risk may emerge if the new offences in the Criminal Code are repealed, without adequate replacement.

In the interests of providing the Government with a workable, realistic solution these Taskforce members have (with significant reservations) agreed to support a compromise recommendation that alternative measures (with much greater safeguards than the 2013 suite) should be introduced to replace the new Criminal Code offences.

These members continue to believe that serious questions remain about the information relied on by law enforcement agencies to support the ongoing need for these types of measures, and their support for compromise recommendations is conditional upon these alternative solutions being introduced as short term measures only, and subject to rigorous independent review and ongoing public scrutiny and debate.

#### THE MINORITY VIEW

The Commissioned Officers' Union and the QPU representatives on the Taskforce accept the public safety risk raised by the QPS and the

CCC at face value on the basis that they accord with and reinforce the views of the majority of their membership.

The Commissioned Officers' Union and the QPU believe that the new Criminal Code offences have supported their members' wellbeing and safety while performing their duties, and the feedback that they receive regularly from their membership is that the new Criminal Code offences enjoy member support – and, also, public support particularly in the Gold Coast region.

The Commissioned Officers' Union accepts that there are some problematic elements in the new Criminal Code offences (for example, the designation of the offences as simple offences) and they have agreed to support recommendations for minor changes.

The Commissioned Officers' Union and the QPU support the retention of the new Criminal Code offences substantially in their current form.

The Commissioned Officers' Union and the QPU would accept the introduction of the whole model recommended by the BAQ, PIM and QLS, but not as a replacement for the new Criminal Code offences and, rather, as an addition to them.

Both unions support regular independent reviews of the use of the new Criminal Code offences (and the new model recommended by the BAQ, PIM and QLS, if adopted).

The Commissioned Officers' Union will also support a recommendation for sunset clauses to be placed into the new model and the existing Criminal Code offences so that, after reviews take place, there can be a better informed debate about the ongoing necessity of these types of laws.

#### THE QPS VIEW

The QPS proposed that consideration could be given to retaining section 60A in the short term, but subject to a 'sunset clause' with an independent statutory review undertaken

prior to that date and accompanied by the introduction of a consorting offence based on the NSW model (section 93X of the *Crimes Act 1900* (NSW)) which has less safeguards than the consensus model proposed below.

Whilst the Taskforce noted this suggestion, ultimately it was not favoured by any of the other Taskforce members.

### A SUMMARY OF THE DIFFERING VIEWS OF TASKFORCE MEMBERS

The Taskforce discussions on the most appropriate recommendation to the Government on this issue were thoughtful and wide ranging. All Taskforce members were prepared to make some compromises in their fundamental positions in coming to the final positions they were willing to support.

The fundamental position of members representing the BAQ, QLS and the PIM is that sections 60A, 60B and 60C of the Criminal Code should be repealed without replacement. However, in order to provide the Government with a workable solution in light of the public safety issues raised by the QPS and the CCC they are prepared to support a short term compromise model that will prove more effective and not have an impact on fundamental rights and liberties that is as severe as the 2013 suite.

The Commissioned Officers' Union and the QPU robustly support the retention of sections 60A, 60B and 60C of the Criminal Code. The Commissioned Officers' Union is particularly passionate about the retention of these provisions and has made it very clear to the chair that it is their opinion that the repeal of the provisions would encourage an OMCG resurgence and likely have a significant detrimental effect on police officer and community safety.

The Commissioned Officers' Union is prepared to support the inclusion of a sunset clause and independent reviews of the operation of sections 60A, 60B and 60C. The QPU is willing to agree to the provision for independent

reviews but not the addition of any sunset clause.

Both the Commissioned Officers' Union and the QPU are willing to agree to support the consensus model supported by the BAQ, QLS and the PIM, but in addition to sections 60A, 60B and 60C being retained.

### THE RECOMMENDATION THAT IS FAVOURED BY THE CHAIR

The chair takes the view that the provisions are so beset with problems around the calibre of their drafting, the difficulties which will attach to their successful prosecution, and serious breaches of FLPs that, even if no concern arose about their ability to survive a constitutional challenge, their repeal would have to be seriously considered.

When, to those concerns, there is added what in his view is a compelling argument that (as the High Court has already flagged in *Kuczborski*) section 708A is exposed to challenge – and, in light of the analysis set out earlier under the *McCloy* test, any challenge would be both pertinent and cogent – the reasons to abandon the provisions are highly persuasive.

In those circumstances the chair concludes that the development of an alternative model is plainly critical and supports what is proposed, on that line, below.

### THE CONSENSUS MODEL SUPPORTED BY THE BAQ, PIM, QLS AND THE CHAIR

#### REPLACE SECTION 60A WITH A CONSORTING OFFENCE WITH A SUNSET CLAUSE

#### WHAT IS A CONSORTING OFFENCE?

A consorting offence effectively makes it a criminal offence for a person (with or without any previous convictions) to associate with two people who have previous convictions.

The offence is typically preceded by a warning to the putative offender that those with whom they are associating have convictions and that any continued association would be considered a criminal offence. Any association subsequent to that warning (which can be in person or communication by other means such as telephone, email, etc.) forms the basis of a criminal offence.

The purpose of a consorting offence is to restrict networking and communication between convicted offenders and *'make it harder for criminal gangs to engage in planned criminal activity.'*<sup>145</sup>

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### ARE CONSORTING OFFENCES USED IN OTHER JURISDICTIONS?

Yes. All other Australian jurisdictions, except for the ACT, have a form of consorting offence which provides for a number of defences and attracts an array of penalties.

A cross-jurisdictional comparative table of consorting offences, and any relevant warning provisions is Attachment 9.

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### WHAT ARE THE BENEFITS OF A CONSORTING OFFENCE OVER SECTION 60A OF THE CRIMINAL CODE?

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#### CONSTITUTIONALLY ROBUST

The High Court has found that the NSW consorting offence does not infringe the implied constitutional right to freedom of political communication and association.<sup>146</sup>

Adopting an offence with a surer constitutional footing means that it is much less likely to be subject of a High Court challenge.

It is all but assured that section 60A will be subject to a challenge on the basis of the implied constitutional rights to freedom of communication and association.

The cost to the state of a High Court challenge is not limited to that one particular case.

Once the High Court grants special leave, all court proceedings involving section 60A will inevitably be adjourned pending the outcome of the challenge which will, on a best case scenario, take six to 12 months to resolve. This will delay the course of justice and will almost certainly impact on the effectiveness of the offence for law enforcement.

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#### FAIRER

Consorting offences are arguably fairer than the section 60A anti-association offence in a number of ways:

- they are not contingent on a declaration of criminality by the executive branch of government and are, then, less exposed to any risk of misuse;
- they are targeted at associations with persons who have been proved to be guilty of criminal offending in a court of law;
- they target 'habitual' rather than 'one-off' associations;
- they provide for warnings about the offending conduct;
- they provide exceptions to allow all persons to participate in civic life (for example, lawful employment); and
- they are subject to regular review.

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#### MORE EFFECTIVE AND EFFICIENT

Between October 2013 and January 2016 43 people were charged with the anti-association offence under section 60A of the Criminal Code. **There have been no convictions under section 60A.**

Within 12 months of its introduction in NSW, however, over 1200 individuals had been given a warning under the NSW consorting offence scheme.<sup>147</sup>

The following figures on the use of the NSW consorting offence were recently released publicly by the NSW Police Gangs Squad:<sup>148</sup>

- in the nine months up to September 2015, 32 people were charged with the consorting offence;
- of those charged in 2015, 20 people have been convicted; and
- 2500 people have received warnings since the scheme was introduced in 2012 and 852 people received a warning in the nine months to September 2015.

Looking at the number of warnings issued compared to the number of people charged with the consorting offence, it would seem a fair assumption that a significant number of the people who were warned not to associate heeded the warning, and did not go on to commit the offence.

It is an obviously more efficient use of the limited resources of the criminal justice system to have people change their association behaviour because of a warning than processing them through the court system.

Lastly, the Commander of the NSW Gangs Squad, Superintendent Deb Wallace told the *Australian Broadcasting Corporation* that the consorting offence was being used effectively in relation to OMCGs, as 39 of the 50 people charged with consorting offence were OMCG members.<sup>149</sup>

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#### WHAT WOULD QUEENSLAND'S CONSORTING OFFENCE LOOK LIKE?

Below provides an overview as to how the consorting offence could be framed in the Queensland context:

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#### ALL THREE PERSONS MUST HAVE PREVIOUS RELEVANT CRIMINAL CONVICTIONS FOR OFFENCES RELATED TO ORGANISED CRIME

All states/territories limit the application of the consorting offence either by type of previous conviction or by the maximum penalty for that conviction – generally, to serious criminal offences only.

The limits are:

- New South Wales: limited to persons convicted of an indictable offence;
- Victoria: limited to persons convicted of an organised crime offence (an offence punishable by at least a maximum penalty of 10 years imprisonment, or more, and with organised crime characteristics);
- Tasmania: limited to 'reputed thieves' (not defined in the Act);
- Western Australia: limited only to persons who are convicted of certain sexual or drug-related offences;
- Northern Territory: limited to persons convicted of an offence punishable by at least a maximum penalty of 10 years imprisonment, or more; and
- South Australia: limited to persons convicted of an indictable offence – however this is further restricted by the conditions attached to the issuing of a consorting prohibition notice. A notice may only be issued to a person who has, in the previous three years, been convicted of a prescribed offence (being an indictable offence of violence, a serious organised crime offence, certain serious drug offences, an indictable firearm offence or extortion or money laundering). A consorting prohibition notice can also be issued to a person reasonably suspected of having committed one of those prescribed offences in that same time frame.

There are some potential problems with this kind of legislation. In reviewing the NSW consorting provisions, the NSW Ombudsman warned that:<sup>150</sup>

‘... because police strategies for identifying consorting rely on observations of behaviour in public places, there is potential for people who spend a lot of time in areas open to the public, such as young people, Aboriginal people and people experiencing homelessness, to be subject to the consorting provisions to a greater degree.’

It is notable that the NSW offence ‘casts the net wide’ to include persons convicted of any indictable offence, regardless of seriousness. This is in contrast to the approach taken by most other jurisdictions.

The Taskforce took careful note of the NSW Ombudsman’s Report in considering how Queensland’s consorting offences should be structured.

To overcome the ‘net-widening’ issues identified by the NSW Ombudsman the Taskforce recommends that the consorting offence only applies:

- to persons who are convicted of offences in the schedule to the renewed *Organised Crime Framework*;
- only if, and when, *all* three persons involved in the consorting have convictions; and
- to persons with organised crime offence convictions for which the ‘rehabilitation period’<sup>151</sup> under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) has not expired.

There should be a further limitation on applicable convictions where offences which are objectively low-level but which, by virtue of their maximum penalty, are captured under the serious organised crime sentencing scheme.

Small-scale drug addicts are arguably not the intended audience of consorting offences – the explicit exclusion of offences such as possession of a small quantity of cannabis for personal use would hopefully ensure those persons are not unnecessarily captured by the legislation.

It is suggested that an approach similar to that adopted in regards to the issuing of a Serious Drug Offence certificate under Schedule 1B of the *Penalties and Sentences Act 1992* (Qld) should be adopted, which places limits in respect of quantity and commercial purpose.

#### THE OFFENCE SHOULD NOT APPLY TO CHILDREN AGED 16 YEARS OR UNDER

The consensus model recommends that the consorting offence should not apply to persons aged 16 years and under.

Young people often spend more time in public spaces than adults for varying reasons (the drive for independence, or difficulties or limited space or resources in their homes, and for practical reasons such as a reliance on public transport).<sup>152</sup>

Young people can also be more vulnerable and susceptible to social pressures and in many cases have little control over their circumstances (housing, etc.).

Further, there are potential interface issues with the *Youth Justice Act 1992* (Qld) and the publication and naming of young person’s convicted of offences. The practicality of warning someone about another young person’s previous conviction, thus disclosing the conviction to a member of the public, would run contrary to those important protections and the purpose of the Youth Justice Act.

#### A CONSORTING OFFENCE SHOULD BE AN INDICTABLE OFFENCE

The consensus model recommends that the offence be designated as indictable, and

capable of being tried summarily only upon the election of the accused person.

The reasons that the new Criminal Code offences should have been designated as *indictable* rather than *simple* apply equally to a consorting offence.

The QPS noted that it is their experience that an accused in most circumstances will elect for trial by jury, therefore, if the Government accepts this recommendation they should be mindful of the additional resource burden this will place on government agencies and that the Director of Public Prosecutions will need to be consulted.

#### WRITTEN CONSORTING PROHIBITION NOTICES SHOULD FORM PART OF THE OFFENCE

The consensus model recommends that consorting prohibition notices should be required to be issued by police before a consorting offence can be said to have been committed.

It is important, in the interests of fairness, that an official written notice be given to a person explaining that someone with whom they are meeting *is* a convicted offender, and that continuing to consort with that person is an offence, prior to being charged with the offence.

The BAQ and QLS considered that it would be appropriate to provide a mechanism whereby a person could challenge or seek a review of a consorting prohibition notice issued by police.

The QPS noted that in the NSW consorting scheme verbal warnings are used. The QPS noted that there would be significant compliance costs involved for QPS if a written warning scheme was included in any future scheme.

All other Australian jurisdictions require the giving of a police warning.

#### TIME RESTRICTIONS ON THE EFFECT OF THE NOTICE AND THE COMMENCEMENT OF CRIMINAL PROCEEDINGS SHOULD BE IMPOSED

If, as suggested, the offence of consorting is designated as indictable, the time limits applicable to summary offences under the *Justices Act 1886* (Qld) would not apply.

The majority of other jurisdictions provide for the offence to be tried summarily and consequently have varying time restrictions on the commencement of criminal proceedings following a warning. These restrictions range from six months to two years.

The consensus model recommends that the offence should include a restriction that the occasions of consorting following the issuing of a prohibition notice must occur within a twelve month period.

#### CERTAIN FORMS OF CONSORTING SHOULD BE DISREGARDED

The consensus model recommends that, consistent with other jurisdictions, the offence should provide a defence that certain forms of consorting must be disregarded for the purposes of the offence.

Those forms of consorting include:

- consorting with family members;
- consorting which occurs in the course of lawful employment or in the lawful operation of a business;
- consorting that occurs in the course of training or education;
- consorting that occurs in the course of the provision of a health service;
- consorting that occurs in the course of the provision of legal advice;
- consorting that occurs in lawful custody or in the course of complying with a court order; and

- where a defendant has unintentionally associated with a person specified in the notice, and where the defendant terminated the association immediately.

Members of the Taskforce also considered that, in drafting the defence with respect to consorting with family members, the Government should pay close attention to Aboriginal and Torres Strait Islander norms of kinship.

#### A GENERAL DEFENCE OF REASONABLE EXCUSE IN ADDITION TO THE SPECIFIC DEFENCES

In addition to specific defences the consensus model recommends that a general defence of a ‘reasonable and sufficient excuse’ should be provided for the consorting offence.

A ‘reasonable and sufficient excuse’ defence is important to allow for situations which are not envisaged by the specific prescribed defences. Examples might include being a member of a sporting team, residing in a boarding house or refuge, attending outreach services (such as food kitchens, etc.) or attending a community or support group which may not be classified as a ‘health service’.

#### THAT POLICE ARE OBLIGED TO RECORD DATA ON THE ISSUING OF WARNINGS

Accurate data which records official warnings and incidents of consorting is important to analyse the operation of the new provisions.

The consensus model recommends that there should be a positive legislative obligation upon police officers to record basic antecedents and demographical information (including whether or not a person identifies as Aboriginal or Torres Strait Islander) as well as the location of the incident, police observations at the time, the nature of convictions of all persons involved in the consorting, etc.

Active data recording and retention like this will allow a proposed, later and periodic mandatory review to meaningfully analyse the practical effect of the consorting offence, and provide an important body of statistics from which conclusions about the use of the warnings can be drawn.

QPS notes that this requirement will have resource implications.

#### THE PENALTY FOR THE OFFENCE SHOULD BE A STATUTORY MAXIMUM PENALTY

The consensus model recommends that the penalty for the offence should be a statutory maximum (as opposed to a mandatory minimum) and should not exceed 3 years imprisonment (which is the current maximum penalty for the anti-association offence).

#### MANDATORY REVIEWS WITH A SUBSEQUENT SUNSET CLAUSE

The inclusion of a mandatory review provision for the offence is essential to monitor the use of the law and determine its effectiveness in addressing organised crime.

The review should be undertaken by a retired judicial officer (District or Supreme Court or interstate/Federal equivalent) and provide the opportunity for external stakeholders to engage in a discussion about the appropriateness of retaining the consorting offence once the proposed post-conviction control order scheme, discussed in detail in Chapter 14, has come into full effect.

The consensus model recommends that the consorting offence and exercise of power under it should be reviewed every two years post-commencement of the offence with a sunset clause set 7 years post-commencement.

All reviews should be required to be tabled in the Legislative Assembly.

The inclusion of a sunset clause ensures the review occurs in a timely manner, as directed

by the legislation; otherwise, the offence will lapse.

#### HOW DOES A SUNSET CLAUSE WORK?

A sunset clause is a clause in legislation which provides for that legislation to be repealed at a specific date.<sup>153</sup>

Therefore if the Legislative Assembly chooses to do nothing at the relevant date then the sunset clause will take effect, and the consorting offence will be automatically repealed seven years after commencement.

#### REPLACE SECTION 60B WITH A SCHEME BASED ON THE RESTRICTED PREMISES ACT 1943 (NSW)

#### HOW DOES THE RESTRICTED PREMISES ACT SCHEME WORK?

In October 2013 the NSW Parliament introduced amendments to assist police to investigate and control premises occupied by known criminal offenders into the *Restricted Premises Act 1943* (NSW).<sup>154</sup>

These amendments allow a senior police officer to make an application to the Supreme Court or District Court to have premises declared 'restricted' on the basis that there are reasonable grounds for suspecting that unlawful activity is occurring on those premises or that 'reputed criminals' or 'associates of reputed criminals' attend the premises.<sup>155</sup>

'Reputed criminals' is defined to include persons who are convicted of indictable offences. 'Associates of reputed criminals' includes persons who have received official consorting warnings under section 93X of the *NSW Crimes Act 1900*.<sup>156</sup>

Once the declaration is in place the owners and occupiers of the premises commit offences if proscribed activities occur on those premises. Police are also then permitted to search the premises without a warrant.

The amendments to the Restricted Premises Act also allow the police to apply for warrants to search any premises when there is a reasonable ground for believing that proscribed activities are taking place.

'Proscribed activities' include drunk and disorderly behaviour, the unlawful sale or supply of drugs or alcohol on the premises, or the attendance of reputed criminals or associates of recruited criminals. The information gathered using these warrants can assist in the preparation of the application to have a premises declared.<sup>157</sup>

Search warrants under the Restricted Premises Act enable the NSW police to seize any 'device related to alcohol' which has been used to facilitate the seizure of items such as furniture, stages, entertainment systems, pool tables, stripper poles, bar and bar utilities, cash boxes and paperwork. This is because they 'all contribute to enhance the ambience of the premises to support the sale and consumption of alcohol in the same way that legitimate commercial licensed premise undertake fitouts'.<sup>158</sup>

#### HAS THE RESTRICTED PREMISES ACT SCHEME BEEN USED SUCCESSFULLY AGAINST OMCG CLUB HOUSES IN NSW?

Yes. Police officers advised the NSW Ombudsman that the powers under the Restricted Premises Act have been used to dismantle 30 clubhouses in its first 20 months of operation.<sup>159</sup>

The NSW Ombudsman report reveals that the structure of the NSW legislation allows NSW police officers to adopt a more targeted intelligence-led approach to OMCG club houses.

Officers from NSW Strike Force Raptor told the NSW Ombudsman that *'the unit uses an approach it calls 'consequence-based policing', meaning that it develops strategies to respond to any detected increase in violence or over criminal activity by a particular OMCG, rather than targeting OMCGs generally.'*<sup>160</sup>

Strike Force Raptor advised the NSW Ombudsman that it has used the search warrant powers to close down OMCG clubhouses, seizing alcohol and drug and firearms.<sup>161</sup>

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### WHAT ARE THE BENEFITS OF USING THIS SCHEME OVER SECTION 60B?

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#### MORE EFFECTIVE

Section 60B of the Criminal Code was only charged five times in the 27 months from October 2013 to January 2016. The Taskforce is aware that at least one of those charges has been withdrawn by the prosecution. There have been no convictions under section 60B.

In the 20 month period examined by the NSW Ombudsman under the Restricted Premises Act warrants had been issued against seven different OMCG club houses, charges were laid against eight individuals and those individuals have all been convicted of offences relating to developments without appropriate consent, liquor offences, weapons offences and drug offences.<sup>162</sup>

NSW Police's 'consequence-based policing' also means that police resources are targeted at actual unlawful and anti-social behaviour rather than an entire genre or association (OMCGs). The latter is resource intensive and arguably not the best allocation of limited law enforcement resources.

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#### FAIRER

The Restricted Premises Act targets *individuals* on the basis of their criminal and/or anti-social behaviour.

There is a good argument that this is preferable to the situation which exists under the Queensland clubhouse offence, under which individuals are criminalised merely on the basis of their association.

The clubhouse offence in section 60B creates a circumstance in which members of clubhouses which are run in an orderly manner by law

abiding persons are criminalised in the same manner as clubhouses which facilitate illegal activity by known criminals.

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#### BETTER SAFEGUARDS

The proposal envisages judicial oversight of the declaration of premises, and thus provides for open and accountable decision (and reviewable) making.

Again, this appears preferable to the opaque and possibly unreviewable executive declaration of prescribed premises which exists under the section 60B scheme (see the detailed discussion of the executive declaration power at Chapter 8).

There is also provision for a review of the legislation by the NSW Ombudsman within two years of commencement.

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#### WHAT WOULD QUEENSLAND'S VERSION OF A RESTRICTED PREMISES SCHEME LOOK LIKE?

The safeguards that the consensus model recommends for this scheme are that:

- 'reputed criminals' under the scheme should be persons who have been convicted of organised crime offences contained in the schedule to the renewed Organised Crime Framework, and be 17 years of age or older;
- the duration of declarations under the scheme should be allowed to be fixed by the Court, but no declaration should exceed two years in total;
- any offences provided for under the legislation should be indictable, and able to be tried summarily only upon the election of the accused for reasons consistent with the consorting offence;
- persons who have items seized under the scheme should have an opportunity to object to that seizure

on the grounds that they do not fit the category of items allowed to be seized under the legislation; and, it follows that there should be provision for compensation to be awarded for items wrongly seized;

- the utility of the provisions should be reviewed every two years by an independently appointed senior retired judicial officer, and the reviews should be required to be tabled in Parliament to facilitate ongoing public scrutiny and debate (ideally, for reasons of efficiency these reviews would be carried out by the same person and at the same time as the reviews of the consorting offence); and
- a sunset clause should be provided within the scheme, at seven years post-commencement.

The QPS contended for a process whereby declarations are made by the Commissioner of Police accompanied by a safeguard in the form of Judicial Review, which would allow the QPS to quickly respond to changes in the organised crime environment at short notice, avoiding the cost, complexity and effort previously experienced in relation to court-based declarations. The Taskforce did not have the opportunity to consider this proposition.

Finally, the Taskforce notes that the COA Review recommended that consideration should be given to:

- transferring the public safety orders in COA into the *Peace and Good Behaviour Act 1982* (Qld);<sup>163</sup>
- expanding search warrant powers to facilitate the removal of fortifications;<sup>164</sup> and
- allowing QPS to bring proceedings for breaches of the Building Code of Australia under the *Sustainable Planning Act 2009* (Qld).<sup>165</sup>

The Taskforce notes that these recommendations from the COA Review appear intuitively complementary to a scheme like that which operates in the Restricted Premises Act.

If the Government is minded to accept the recommendations of the COA Review they should be added to the foundation elements which have proved successful in the NSW Restricted Premises Act to design a unique scheme for Queensland that may well sit comfortably in the Peace and Good Behaviour Act.

The powers exercised under the public safety orders and the expanded search warrant powers could be efficiently reviewed at the same time as the consorting offence and restricted premises scheme.

**REPLACE SECTION 60C WITH THE RECRUITMENT OFFENCE CURRENTLY CONTAINED IN THE CRIMINAL ORGANISATION ACT 2009**

The Taskforce recommends that the recruitment offence at section 60C of the Criminal Code be replaced with the recruitment offence at section 100 of the *Criminal Organisation Act 2009* (Qld) (COA).

#### **WHAT DOES THE RECRUITMENT OFFENCE UNDER THE COA PROVIDE?**

Section 100 of COA provides a person commits a crime if a member or controlled person recruits or attempts to recruit another person to become a member of the criminal organisation.

The maximum penalty for the offence is five years imprisonment.

#### **WHY IS THE COA RECRUITMENT OFFENCE PREFERABLE TO SECTION 60C?**

The COA recruitment offence is already indictable – which, for reasons explained earlier, is preferable to a designation as a simple offence.

Once the offence is transposed into the Criminal Code the new definition of 'criminal organisation' (see Chapter 8) can be applied.

The 'no criminal purpose' defence would not be required, and the onus of proof would be on the state to prove that an organisation was a criminal organisation.

Given that the state would have satisfied a court that the organisation was a criminal organisation beyond reasonable doubt, the higher maximum penalty for the offence in COA (that is, five years imprisonment) is more appropriate.

Finally, the 'controlled person' under the COA offence related to a person under a COA control order but, under the renewed Organised Crime Framework, this can now include a person who has a post-conviction control order.

#### RECOMMENDATION 18 (Chapter Eleven)

Section 60A of the Criminal Code should be repealed and replaced with a consorting offence per the consensus model in Chapter 11. (not preferred by the Commissioned Officers' Union and the Queensland Police Union)

#### RECOMMENDATION 19 (Chapter Eleven)

Section 60B of the Criminal Code should be repealed and replaced with a scheme per the consensus model in Chapter 11. (not preferred by the Commissioned Officers' Union and the Queensland Police Union)

#### RECOMMENDATION 20 (Chapter Eleven)

Section 60C of the Criminal Code should be repealed and replaced with the recruitment offence currently under section 100 of the *Criminal Organisation Act 2009* (Qld). (not preferred by the Commissioned Officers' Union and the Queensland Police Union)

## ENDNOTES

- 1 Criminal Code (Qld), section 60A.
- 2 Criminal Code (Qld), section 60B.
- 3 Criminal Code (Qld), section 60C.
- 4 <[http://www.legislation.qld.gov.au/Acts\\_Passed/Acts\\_Pas sed\\_NUM\\_2013.htm](http://www.legislation.qld.gov.au/Acts_Passed/Acts_Pas sed_NUM_2013.htm)>.
- 5 *Criminal Law Consolidation Act 1935 (SA)*, Part 3B, Division 2.
- 6 *Criminal Code Act 1899 (Qld)*, Section 8.
- 7 Eric Colvin, John McKechnie, Jodie O'Leary, *Criminal Law of Queensland and Western Australia* (LexisNexis Butterworths Australia, 7<sup>th</sup> ed, 2015) 8 [1.16].
- 8 Criminal Code (Qld), section 3.
- 9 Criminal Code (Qld), Section 3(5).
- 10 There are notable exceptions, for example the serious drug offences contained in the *Drugs Misuse Act 1986* (Qld).
- 11 Eric Colvin, John McKechnie, Jodie O'Leary, *Criminal Law of Queensland and Western Australia* (LexisNexis Butterworths Australia, 7<sup>th</sup> ed, 2015) 7 [1.13].
- 12 Eric Colvin, John McKechnie, Jodie O'Leary, *Criminal Law of Queensland and Western Australia* (LexisNexis Butterworths Australia, 7<sup>th</sup> ed, 2015) 7 [1.13].
- 13 Criminal Code (Qld), Section 23(2); and Eric Colvin, John McKechnie, Jodie O'Leary, *Criminal Law of Queensland and Western Australia* (LexisNexis Butterworths Australia, 7<sup>th</sup> ed, 2015) 7 [1.13].
- 14 Chapter 5 of the Criminal Code (Qld) generally and Chapter 26 of the Criminal Code (Qld) with respect to assaults and violence against a person.
- 15 Eric Colvin, John McKechnie, Jodie O'Leary, *Criminal Law of Queensland and Western Australia* (LexisNexis Butterworths Australia, 7<sup>th</sup> ed, 2015) 10 [1.22].
- 16 There is a different definition of 'participant' used in section 708A of the Criminal Code which provides the criteria the Minister may have regard to when declaring a criminal organisation by regulation. The section 708A definition of 'participant' aligns to the definition contained in the *Vicious Lawless Association Disestablishment Act 2013*. The problematic nature of inconsistent definitions across Queensland's statute book is expanded on in greater detail at Chapter 8 of this report.
- 17 (2014) 89 ALJR 59 ('Kuczborski').
- 18 *Kuczborski* (2014) 89 ALJR 59, [209].
- 19 The Taskforce notes that Queensland Courts statistics differ from those provided by the Queensland Police Service. The Queensland Police Service statistics are referenced in Chapter 4.
- 20 Marissa Calligeros, 'First bikies charged under Newman's anti-association laws', *Brisbane Times* (online), 14 November 2013 <<http://www.brisbanetimes.com.au/queensland/first-bikies-charged-under-newmans-antiassociation-laws-20131113-2xhvq.html>>.
- 21 Russel Varley, 'VLAD laws: Anti-association charges dropped against alleged bikies trio arrested at Gold Coast hotel', *Australian Broadcasting Corporation* (online), 15 October 2015 <<http://www.abc.net.au/news/2015-10-15/anti-association-charges-against-alleged-bikies-dropped/6856420>>.
- 22 Russel Varley, 'VLAD laws: Anti-association charges dropped against alleged bikies trio arrested at Gold Coast hotel', *Australian Broadcasting Corporation* (online), 15 October 2015 <<http://www.abc.net.au/news/2015-10-15/anti-association-charges-against-alleged-bikies-dropped/6856420>>.
- 23 Australian Associated Press, 'Victorian bike gang suspects charged under Queensland anti-association laws', *The Guardian* (online), 6 January 2014 <<http://www.theguardian.com/world/2014/jan/06/victorian-bikie-gang-suspects-charged-under-queensland-anti-association-laws>>.
- 24 Nino Bucci, 'Queensland police drop charges against ice-cream bikies', *The Age* (online), 26 September 2015 <<http://www.theage.com.au/victoria/icecream-bikies-walk-free-as-queensland-police-drop-charges-20150928-gjwh6f.html>>.
- 25 Meagan Weymes, 'Bikie association charges dropped against men buying ice cream on Gold Coast holiday', *Gold Coast Bulletin* (online), 28 September 2015 <<http://www.goldcoastbulletin.com.au/news/crime-court/bikie-association-charges-dropped-against-men-buying-ice-cream-on-gold-coast-holiday/news-story/d0ca09cf34d61c140380257bb5e1215b>>.
- 26 Further details of the ice cream bikie's bail applications and conditions of confinement are set out at Attachment 8 of this Report. The conditions of prisoners held under Criminal Organisation Segregation Orders are set out at Chapter 15 of this Report.

- 27 Nino Bucci, 'Queensland police drop charges against ice-cream bikies', *The Age* (online), 26 September 2015 <<http://www.theage.com.au/victoria/icecream-bikies-walk-free-as-queensland-police-drop-charges-20150928-gjwh6f.html>>.
- 28 Nino Bucci, 'Queensland police drop charges against ice-cream bikies', *The Age* (online), 26 September 2015 <<http://www.theage.com.au/victoria/icecream-bikies-walk-free-as-queensland-police-drop-charges-20150928-gjwh6f.html>>.
- 29 Australian Associated Press, 'Yandina Five bikie' Joshua Carew granted bail', *Brisbane Times* (online), 14 January 2014, <<http://www.brisbanetimes.com.au/queensland/yandina-five-bikie-joshua-carew-granted-bail-20140114-30rz9.html>>.
- 30 The bail applications by the then 'Yandina Five' are discussed further at Chapter 9 of this Report.
- 31 Frank Robson, 'Crack down', *The Sydney Morning Herald* (online), 14 June 2014 <<http://www.smh.com.au/lifestyle/crack-down-20140608-39rul.html>>.
- 32 'Anti-association charges dropped against first woman charged under Queensland's anti-bikie laws', *Australian Broadcasting Corporation* (online), 8 April 2015 <<http://www.abc.net.au/news/2015-04-08/a-librarian-who-was-charged-under-queenslands-antibikie-laws-ha/6377062>>.
- 33 Australian Associated Press with Amy Remeikis, 'Charges dropped over Queensland Pub meeting', *Brisbane Times* (online), 8 April 2015 <<http://www.brisbanetimes.com.au/queensland/charges-dropped-over-queensland-pub-meeting-20150408-1mgfo0.html>>.
- 34 This offence is discussed in detail at Chapter 17 of this Report.
- 35 Australian Associated Press with Amy Remeikis, 'Charges dropped over Queensland Pub meeting', *Brisbane Times* (online), 8 April 2015 <<http://www.brisbanetimes.com.au/queensland/charges-dropped-over-queensland-pub-meeting-20150408-1mgfo0.html>>.
- 36 Criminal Code (Qld), section 22(3).
- 37 Criminal Code (Qld), section 24.
- 38 Joshua Robertson, 'Prosecution of man under bikie laws dropped and \$30,000 awarded', *Guardian Australia* (online), 10 February 2016 <<http://www.theguardian.com/australia-news/2016/feb/10/prosecution-of-man-charged-under-bikie-laws-dropped-and-30000-awarded>>.
- 39 Joshua Robertson, 'Prosecution of man under bikie laws dropped and \$30,000 awarded', *Guardian Australia* (online), 10 February 2016 <<http://www.theguardian.com/australia-news/2016/feb/10/prosecution-of-man-charged-under-bikie-laws-dropped-and-30000-awarded>>.
- 40 Transcript of proceedings, *Glen Aaron Pitt v Queensland Police Service* (Brisbane Magistrates Court), MAG-00160160/14(4), Magistrate Cosgrove, 9 February 2016, 8 [Lines 20-30].
- 41 Transcript of proceedings, *Glen Aaron Pitt v Queensland Police Service* (Brisbane Magistrates Court), MAG-00160160/14(4), Magistrate Cosgrove, 9 February 2016, 8 [lines 35], 55 [lines 1-5].
- 42 Transcript of proceedings, *Glen Aaron Pitt v Queensland Police Service* (Brisbane Magistrates Court), MAG-00160160/14(4), Magistrate Cosgrove, 9 February 2016, 56-61.
- 43 Transcript of proceedings, *Glen Aaron Pitt v Queensland Police Service* (Brisbane Magistrates Court), MAG-00160160/14(4), Magistrate Cosgrove, 9 February 2016, 16 [line 5].
- 44 Transcript of proceedings, *Glen Aaron Pitt v Queensland Police Service* (Brisbane Magistrates Court), MAG-00160160/14(4), Magistrate Cosgrove, 9 February 2016, 48 [line 15].
- 45 Transcript of proceedings, *Glen Aaron Pitt v Queensland Police Service* (Brisbane Magistrates Court), MAG-00160160/14(4), Magistrate Cosgrove, 9 February 2016, 34 [Line 10], 45-51.
- 46 Transcript of proceedings, *Glen Aaron Pitt v Queensland Police Service* (Brisbane Magistrates Court), MAG-00160160/14(4), Magistrate Cosgrove, 9 February 2016, 63 [lines 40-45], 64 [lines 1-5].
- 47 Transcript of proceedings, *Glen Aaron Pitt v Queensland Police Service* (Brisbane Magistrates Court), MAG-00160160/14(4), Magistrate Cosgrove, 9 February 2016, 64-65.
- 48 Section 686 of the Criminal Code (Qld) provides for private prosecution on indictment with leave of the court.
- 49 Criminal Code (Qld), section 560.
- 50 An application can be made by either the accused or the prosecutor with the consent of the accused for a judge only trial in the District or Supreme Court – sections 614(1), 614(2) of the Criminal Code (Qld).
- 51 Eric Colvin, John McKechnie and Jodie O'Leary, *Criminal Law of Queensland and Western Australia* (LexisNexis Butterworths Australia, 7<sup>th</sup> ed, 2015) 755 [28.1].
- 52 Transcript of proceedings, *Glen Aaron Pitt v Queensland Police Service* (Brisbane Magistrates Court), MAG-

- 00160160/14(4), Magistrate Cosgrove, 9 February 2016, 26 [line 20].
- <sup>53</sup> Transcript of proceedings, *Glen Aaron Pitt v Queensland Police Service* (Brisbane Magistrates Court), MAG-00160160/14(4), Magistrate Cosgrove, 9 February 2016, 27, 61 and 62.
- <sup>54</sup> *Kuczborski* (2014) 89 ALJR 59, [244].
- <sup>55</sup> *Momcilovic v the Queen* (2011) 245 CLR 1, [54].
- <sup>56</sup> Criminal Code (Qld), sections 60A(2), 60B(3), 60C(2), 72(3), 92A(4B), 320(3), 340(1B) and 408D(1AB).
- <sup>57</sup> Eric Colvin, John McKechnie, Jodie O’Leary, *Criminal Law of Queensland and Western Australia* (LexisNexis Butterworths Australia, 7<sup>th</sup> ed 2015) 15 [2.7].
- <sup>58</sup> *Kuczborski* (2014) 89 ALJR 59, [246-247].
- <sup>59</sup> See further discussion about executive declaration at Chapter 8 of this Report.
- <sup>60</sup> *Summary Offences Act 2005 (Qld)*, section 11.
- <sup>61</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(2).
- <sup>62</sup> *Woolmington –v- DPP* [1935] AC 462, 481.
- <sup>63</sup> Queensland Government - Office of the Queensland Parliamentary Counsel, *Principles of good legislation: OQPC guide to FLPS – Reversal of onus of proof*, Version 1 – 19 June 2013, 5.
- <sup>64</sup> Explanatory Notes, Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013; Queensland, Parliamentary Debates, 15 October 2013, 3156-3518 (Jarrod Bleijie, Attorney-General and Minister for Justice).
- <sup>65</sup> The calculation of the number of pages includes the total number of pages of legislation and the Explanatory Notes that accompanied the legislation’s introduction into the Legislative Assembly.
- <sup>66</sup> Queensland Government - Office the Queensland Parliamentary Counsel, *Principles of good legislation: OQPC guide to FLPS*, Version 1-19 June 2013, 3.
- <sup>67</sup> Queensland, *Parliamentary Procedures Handbook*, Queensland Parliament, August 2014, 26 [7.8].
- <sup>68</sup> Criminal Code (Qld), Section 26.
- <sup>69</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms –Encroachments by Commonwealth Laws – Final Report*, Report No.129, December 2015, 259.
- <sup>70</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms –Encroachments by Commonwealth Laws – Final Report*, Report No.129, December 2015, 266 [9.37].
- <sup>71</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms –Encroachments by Commonwealth Laws – Final Report*, Report No.129, July 2015, 267 [9.42].
- <sup>72</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms –Encroachments by Commonwealth Laws – Final Report*, Report No.129, December 2015, 269 [9.51].
- <sup>73</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms –Encroachments by Commonwealth Laws – Final Report*, Report No.129, December 2015, 270 [9.58].
- <sup>74</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms –Encroachments by Commonwealth Laws – Final Report*, Report No.129, December 2015, 268 [9.43].
- <sup>75</sup> *Kuczborski* (2014) 89 ALJR 59, [121].
- <sup>76</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms –Encroachments by Commonwealth Laws – Final Report*, Report No.129, December 2015, 270 [9.57].
- <sup>77</sup> Office of the Queensland Parliamentary Counsel, Queensland Government, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, 36.
- <sup>78</sup> *Kuczborski* [(2014) 89 ALJR 59, [244].
- <sup>79</sup> Queensland Police Service, Submission 5.16 to the Taskforce on Organised Crime Legislation, undated, 18.
- <sup>80</sup> *R v Cluse* [2014] SASCFC 97.
- <sup>81</sup> Queensland Police Service, Submission 5.16 to the Taskforce on Organised Crime Legislation, undated, 18.
- <sup>82</sup> *Kuczborski* (2014) 89 ALJR 59, [246-247].
- <sup>83</sup> Queensland Police Service, Submission 5.16 to the Taskforce on Organised Crime Legislation, undated, 18.
- <sup>84</sup> Queensland Police Service, Submission 5.16 to the Taskforce on Organised Crime Legislation, undated, 18.
- <sup>85</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 22.
- <sup>86</sup> United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association, *The*

- Rights to Freedom of Peaceful Assembly and of Association*, <<http://freeassembly.net/about/freedoms>>.
- <sup>87</sup> United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association, *The Rights to Freedom of Peaceful Assembly and of Association*, <<http://freeassembly.net/about/freedoms>>.
- <sup>88</sup> United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association, *The Rights to Freedom of Peaceful Assembly and of Association*, <<http://freeassembly.net/about/freedoms>>.
- <sup>89</sup> (2014) 313 ALR 221 (*Tajjour*).
- <sup>90</sup> Office of the Queensland Parliamentary Counsel, Queensland Government, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, 95.
- <sup>91</sup> Office of the Queensland Parliamentary Counsel, Queensland Government, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, 94 [3.1.1].
- <sup>92</sup> Office of the Queensland Parliamentary Counsel, Queensland Government, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, 99 [3.1.7].
- <sup>93</sup> Explanatory Notes, Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013, 5.
- <sup>94</sup> Explanatory Notes, Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013, 5.
- <sup>95</sup> Queensland, *Parliamentary Debates*, 15 October 2013, 3156-3518 (Jarrod Bleijie, Attorney-General and Minister for Justice).
- <sup>96</sup> Anthony Gray, 'Freedom of Association in the Australian Constitution and the Crime of Consorting' (2013) 32 *University of Tasmania Law Review* 149, 150.
- <sup>97</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
- <sup>98</sup> *Lange v Australian Broadcasting Company* (1997) 145 ALR 96, 104-6, 112.
- <sup>99</sup> *Lange v Australian Broadcasting Company* (1997) 145 ALR 96.
- <sup>100</sup> Anthony Gray, 'Freedom of Association in the Australian Constitution and the Crime of Consorting' (2013) 32 *University of Tasmania Law Review* 149, 152-3; George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999), 194; Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 *Federal Law Review* 38, 55.
- <sup>101</sup> Diana Sedgwick, 'The Implied Freedom of Political Communication: An Empty Promise?' (2003) 7(1) *University of Western Sydney Law Review* 2; Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668.
- <sup>102</sup> (2015) 325 ALR 15 (*McCloy*).
- <sup>103</sup> (1997) 145 ALR 96.
- <sup>104</sup> *Kuczborski* (2014) 89 ALJR 59, [144].
- <sup>105</sup> *Tajjour* (2014) 313 ALR 221.
- <sup>106</sup> Justice Hayne has since retired from the High Court since the judgment in *Tajjour* was delivered.
- <sup>107</sup> *McCloy* (2015) 325 ALR 15,25 [45].
- <sup>108</sup> *Tajjour* [(2014) 313 ALR 221, [166].
- <sup>109</sup> Ann Carter, *Case Note: McCloy v New South Wales* (2015) 26 *Public Law Review* 245, 252.
- <sup>110</sup> Ann Carter, *Case Note: McCloy v New South Wales* (2015) 26 *Public Law Review* 245, 253.
- <sup>111</sup> *McCloy* (2015) 325 ALR 15, [80].
- <sup>112</sup> *McCloy* (2015) 325 ALR 15, [80].
- <sup>113</sup> *McCloy* (2015) 325 ALR 15, [80].
- <sup>114</sup> *McCloy* (2015) 325 ALR 15, [81].
- <sup>115</sup> *McCloy* (2015) 325 ALR 15, [81].
- <sup>116</sup> *McCloy* (2015) 325 ALR 15, [82].
- <sup>117</sup> *Tajjour* [(2014) 313 ALR 221, [115].
- <sup>118</sup> *McCloy* (2015) 325 ALR 15, [87].
- <sup>119</sup> *McCloy* (2015) 325 ALR 15, [87].
- <sup>120</sup> *McCloy* (2015) 325 ALR 15, [89].
- <sup>121</sup> *McCloy* (2015) 325 ALR 15, [93].
- <sup>122</sup> Criminal Code (Qld), section 708A(1)(e).
- <sup>123</sup> *Kuczborski* [2014] HCA 46, 64 [210].
- <sup>124</sup> *Acts Interpretation Act 1954* (Qld), section 32CA(1).
- <sup>125</sup> *Acts Interpretation Act 1954* (Qld), section 32CA(2).
- <sup>126</sup> *NAAJA v NT* (2015) 90 ALJR 38, 52 [34].
- <sup>127</sup> *Kuczborski* (2014) 89 ALJR 59.
- <sup>128</sup> *Criminal Code* (Cth), section 390.3.

- <sup>129</sup> *Summary Offences Act 1953 (SA)*, Section 66A(2)(b)(i).
- <sup>130</sup> *Criminal Organisations Control Act 2012 (VIC)*, Section 124A(4)(f).
- <sup>131</sup> *Police Offences Act 1935 (TAS)*, Section 6.
- <sup>132</sup> *Police Power and Responsibilities Act 2000 (Qld)*, Section 53BG.
- <sup>133</sup> *Tajjour* (2014) 313 ALR 221.
- <sup>134</sup> New South Wales Ombudsman, *Consorting Issues Paper: Review of the use of the consorting provisions by the NSW Police Force* (2013), 46.
- <sup>135</sup> Queensland Police Service Submission 5.16 to the Taskforce on Organised Crime Legislation, undated, 12-16.
- <sup>136</sup> Queensland Police Service Submission 5.16 to the Taskforce on Organised Crime Legislation, undated, 12-16.
- <sup>137</sup> Queensland Police Service Submission 5.16 to the Taskforce on Organised Crime Legislation, undated, 2 and 16.
- <sup>138</sup> The Right Hon. The Lord Mayor of the City of the Gold Coast Submission 11.5 to the Taskforce on Organised Crime Legislation, 24 August 2015.
- <sup>139</sup> Councillor Dawn Crichlow Submission 11.1 to the Taskforce on Organised Crime Legislation, 31 August 2015. .
- <sup>140</sup> Councillor Jan Crew Submission 11.2 to the Taskforce on Organised Crime Legislation, 27 August 2015.
- <sup>141</sup> Councillor Paul Taylor, Submission 11.3 to the Taskforce on Organised Crime Legislation, 27 August 2015..
- <sup>142</sup> The information was given a security level of ‘in-confidence’. However, given the public interest in its release the Chairperson of the Crime and Corruption Commission provided the Taskforce with written permission for information to be published as part of this report.
- <sup>143</sup> *Criminal Organisation Act 2009 (Qld)*, Part 10.5; Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015).
- <sup>144</sup> Taskforce on Organised Crime Legislation Terms of Reference, cl 8. Attachment 1.
- <sup>145</sup> The Hon. Barry O’Farrell MP (Premier of NSW), *New Laws to Tackle Drive-by Shootings*, media release, NSW Government, Ministry for Police and Emergency Services, 13 February 2012 quoted in New South Wales Ombudsman, *Consorting Issues Paper: Review of the use of the consorting provisions by the NSW Police Force* (2013).
- <sup>146</sup> *Tajjour* (2014) 313 ALR 221.
- <sup>147</sup> New South Wales Ombudsman, *Consorting Issues Paper: Review of the use of the consorting provisions by the NSW Police Force* (2013), 7.
- <sup>148</sup> Giselle Wakatama, ‘Gang squad chief says consorting data show anti-bikie laws working’, Australian Broadcasting Corporation (Online), 10 March 2016 <<http://www.abc.net.au/news/2016-03-10/gangs-squad-says-consorting-data-shows-anti-bikie-laws-working/7233840> >.
- <sup>149</sup> Giselle Wakatama, ‘Gang squad chief says consorting data show anti-bikie laws working’, Australian Broadcasting Corporation (Online), 10 March 2016 <<http://www.abc.net.au/news/2016-03-10/gangs-squad-says-consorting-data-shows-anti-bikie-laws-working/7233840> >.
- <sup>150</sup> New South Wales Ombudsman, *Consorting Issues Paper: Review of the use of the consorting provisions by the NSW Police Force* (2013), 28.
- <sup>151</sup> *Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)*, section 3.
- <sup>152</sup> New South Wales Ombudsman, *Consorting Issues Paper: Review of the use of the consorting provisions by the NSW Police Force* (2013), 32.
- <sup>153</sup> Queensland Government, *Legislation Handbook*, <<http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/glossary.aspx>>.
- <sup>154</sup> *Firearms and Criminal Groups Legislation Amendment Act 2013 (NSW)*.
- <sup>155</sup> *Restricted Premises Act 1943(NSW)*, section 3.
- <sup>156</sup> *Restricted Premises Act 1943 (NSW)*, section 2.
- <sup>157</sup> *Restricted Premises Act 1943 (NSW)*, section 13.
- <sup>158</sup> New South Wales Ombudsman, *Review of the Restricted Premises Act police powers and offence provisions, Issues Paper*, (August 2015).
- <sup>159</sup> New South Wales Ombudsman, *Review of the Restricted Premise Act: police powers and offence: Issues Paper*, (August 2015), 13.
- <sup>160</sup> New South Wales Ombudsman, *Review of the Restricted Premise Act: police powers and offence: Issues Paper*, (August 2015), 14.

<sup>161</sup> New South Wales Ombudsman, *Review of the Restricted Premise Act: police powers and offence: Issues Paper*, (August 2015), 14.

<sup>162</sup> New South Wales Ombudsman, *Review of the Restricted Premise Act: police powers and offence: Issues Paper*, (August 2015), 13.

<sup>163</sup> *Criminal Organisation Act 2009* (Qld), Part 9.3; Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015).

<sup>164</sup> *Criminal Organisation Act 2009* (Qld), Part 9.4; Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015).

<sup>165</sup> *Criminal Organisation Act 2009* (Qld), Part 9.4; Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015).

## PART 5.1

# CHAPTER TWELVE

## THE CRIMINAL CODE CIRCUMSTANCES OF AGGRAVATION

*The Taskforce unanimously recommends the repeal of the circumstances of aggravation which were inserted into the Criminal Code by 2013 suite, to be replaced by appropriate legislation within its proposed renewed Organised Crime Framework.*

### WHAT IS A CIRCUMSTANCE OF AGGRAVATION?

Section 1 of the Criminal Code defines a circumstance of aggravation to mean:

‘any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance.’

The five new circumstances of aggravation created by the 2013 suite provided for harsher penalties for pre-existing offences in the Criminal Code if they were committed by a participant in a criminal organisation.

### WHAT CIRCUMSTANCES OF AGGRAVATION WERE INTRODUCED BY THE 2013 SUITE?

The 2013 suite introduced five new circumstances of aggravation which created harsher penalties for criminal organisation participants committing the existing Criminal Code offences of affray,<sup>1</sup> misconduct in relation to public office,<sup>2</sup> grievous bodily harm,<sup>3</sup> serious assault<sup>4</sup> and obtaining or dealing with identification information.<sup>5</sup>

All of the new circumstances of aggravation commenced operation on 17 October 2013.<sup>6</sup>

### COMMON ELEMENTS WHICH APPLY TO ALL OF THE CIRCUMSTANCES OF AGGRAVATION

The new circumstances of aggravation inserted into the Criminal Code by the 2013 suite all utilise the definition of ‘participant’ from section 60A(3) of the Criminal Code and the definition of ‘criminal organisation’ in section 1 of the Criminal Code.

The definitions of participant and criminal organisation are discussed in greater detail at Chapter 8 of the Report.

All of the new circumstances of aggravation provide for a specific 'no criminal purpose defence'.

The no criminal purpose defence is also utilised by the new Criminal Code offences created by the 2013 suite, and is discussed in detail at Chapter 11 of this Report.

## AFFRAY

The offence of affray at section 72 of the Criminal Code provides that any person who takes part in a fight in a public place, or takes part in a fight of such a nature as to alarm the public in any other place to which the public has access, commits a misdemeanor.

The maximum penalty for the base offence is one year imprisonment.

The 2013 suite amendment means that if the offender was a participant in a criminal organisation the maximum penalty increases to seven years imprisonment *and* a strict mandatory minimum sentence of six months actual imprisonment applies.

## STATISTICS

Queensland Courts advised the Taskforce that between 17 October 2013 and 31 January 2016 **two** people were charged with the new circumstance of aggravation for the offence of affray.

## MISCONDUCT IN RELATION TO PUBLIC OFFICE

The offence of misconduct in relation to a public office at section 92A of the Criminal Code provides that a public officer who misuses information or fails to do a certain thing, with the intent of dishonestly gaining a benefit or causing another person harm commits an offence.

The maximum penalty for the base offence is seven years imprisonment. The 2013 suite amendment means that if the person who dishonestly gained a benefit from the criminal

conduct was a participant in a criminal organisation the maximum penalty doubles to 14 years imprisonment.

No new mandatory minimum sentence was created for this circumstance of aggravation.

## STATISTICS

Queensland Courts advised the Taskforce that between 17 October 2013 and 31 January 2016 **five** people were charged with the new circumstance of aggravation for the offence of misconduct in public office.

## GRIEVOUS BODILY HARM

Section 320 of the Criminal Code provides that any person who does grievous bodily harm commits a crime.

Grievous bodily harm is defined at section one of the Criminal Code to mean:

- the loss of a distinct part or an organ of the body; or
- serious disfigurement; or
- any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health.

The maximum penalty for the base offence is 14 years imprisonment.

The 2013 suite amendment means that if the offender is a participant in a criminal organisation and the victim of the grievous bodily harm is a police officer acting in the execution of their duties, a strict mandatory minimum sentence of one year imprisonment applies.

No increased maximum penalty was created for this circumstance of aggravation.

## STATISTICS

Queensland Courts advised the Taskforce that between 17 October 2013 and 31 January 2015 **nobody** has been charged with the new circumstance of aggravation for the offence of grievous bodily harm.

## SERIOUS ASSAULT

Section 340 (1)(b) of the Criminal Code provides that a person who assaults, resists, or willfully obstructs a police officer while acting in the execution of the officer's duty, or any person acting in aid of a police officer commits a serious assault which is a crime.

The base maximum penalty for a serious assault is seven years imprisonment.

However, if a person assaults a police officer in circumstances where they apply any bodily fluids, occasion bodily harm, or are armed or pretend to be armed this offence becomes an aggravated one and the maximum penalty is 14 years imprisonment.

The 2013 suite means that if the offender was a participant in a criminal organisation and commits the aggravated form of serious assault against a police officer a strict mandatory minimum sentence of one year actual imprisonment applies.

No increased maximum penalty was provided for this circumstance of aggravation.

## STATISTICS

Queensland Courts advised the Taskforce that between 17 October 2013 and 31 January 2016 **nobody** has been charged with the new circumstance of aggravation for the offence of serious assault.

## OBTAINING OR DEALING WITH IDENTIFICATION INFORMATION

Section 408D of the Criminal Code provides that a person who obtains or deals with another entity's identification information for

the purpose of committing, or facilitating the commission of, an indictable offence commits an offence.

The maximum penalty for the base offence is three years imprisonment.

The 2013 suite amendment means that if the offender obtaining or dealing with the identification information supplies it to a participant in a criminal organisation the maximum penalty increases to seven years imprisonment.

No new mandatory minimum sentence was created for this circumstance of aggravation.

## STATISTICS

Queensland Courts advised the Taskforce that between 17 October 2013 and 31 January 2016 **four** persons have been charged with the new circumstance of aggravation for the offence of obtaining or dealing with identification information.

**'PARTICIPATION IN A CRIMINAL ORGANISATION' AS AN ALLEGED CIRCUMSTANCE OF AGGRAVATION MAY PREJUDICE A JURY, AND JEOPARDISE A FAIR TRIAL**

The Bar Association of Queensland, in its submission to the Taskforce,<sup>7</sup> highlights that for the new circumstances of aggravation, whether or not the defendant is a participant in a criminal organisation is irrelevant to proving the elements of the base offence.

Nevertheless, the indictment must specify the circumstance of aggravation for the higher penalty to apply.<sup>8</sup>

However, the inclusion of this information about the defendant is potentially prejudicial to them in a jury trial. The jury will inevitably (and, necessarily) hear on several occasions during the trial process that the accused is alleged to be 'a participant in a criminal organisation' and this may impinge on their

ability to secure a fair trial on the base offence.

It is at least a possibility (and, arguably, a probability) that the inclusion of the circumstance of aggravation will result in an increase in applications to quash indictments, on the basis that the inclusion is calculated to prejudice or embarrass the defendant (in the absence of clear admissible evidence to establish it). The manner in which the circumstance of aggravation in the proposed renewed Organised Crime Framework overcomes this issue is discussed at Chapter 7.

The Commissioned Officers' Union and the Queensland Police Union support for this recommendation is contingent on the mandatory minimum penalties continuing to apply where the new circumstance of aggravation under the Organised Crime Framework is proved with respect to a serious assault or grievous bodily harm against a complainant police officer in the execution of their duties.

**THE TASKFORCE'S UNANIMOUS VIEW IS THAT ALL CIRCUMSTANCES OF AGGRAVATION CREATED BY THE 2013 SUITE SHOULD BE REPEALED**

The Taskforce unanimously supports a recommendation to the Government that all the circumstances of aggravation created by the 2013 suite should be repealed, and replaced with the new circumstance of aggravation proposed in the Organised Crime Framework discussed at Chapter 7.

### **RECOMMENDATION 21 (Chapter 12)**

All of the circumstances of aggravation created by the 2013 suite should be repealed and replaced with the new circumstance of aggravation that is part of the Organised Crime Framework. (unanimous recommendation)

## ENDNOTES

- <sup>1</sup> Criminal Code (Qld), section 72.
- <sup>2</sup> Criminal Code (Qld), section 92A.
- <sup>3</sup> Criminal Code (Qld), section 320.
- <sup>4</sup> Criminal Code (Qld), section 340.
- <sup>5</sup> Criminal Code (Qld), section 408D.
- <sup>6</sup> <[http://www.legislation.qld.gov.au/Acts\\_Passed/Acts\\_Pas sed\\_NUM\\_2013.htm](http://www.legislation.qld.gov.au/Acts_Passed/Acts_Pas sed_NUM_2013.htm)>.
- <sup>7</sup> Bar Association of Queensland, Submission 5.1 to the Taskforce on Organised Crime Legislation, 5 August 2015, 19.
- <sup>8</sup> Criminal Code (Qld), section 564(2).

## PART 5.1

# CHAPTER THIRTEEN

## AN ANALYSIS OF QUEENSLAND'S VLAD ACT: WHAT IT MEANS TO BE A VICIOUS LAWLESS ASSOCIATE

*The VLAD Act is at the core of the 2013 suite.*

*The challenge for the Taskforce was to consider its elements and features calmly and carefully, and to decide if they should be preserved or replaced – and if so, with what?*

### WHAT ARE THE DEFINING FEATURES OF THE VLAD ACT REGIME?

While the term 'VLAD' has become synonymous with the entire 2013 suite, it really is a reference to a single piece of legislation; the *Vicious Lawless Association Disestablishment Act 2013* (Qld).

The VLAD Act was introduced to Parliament on 15 October 2013<sup>1</sup> and commenced operation on 17 October 2013.<sup>2</sup>

The Act makes it clear that its aim is to:

- disestablish associations which encourage, foster or support people who commit serious offences;
- increase public safety and security by the disestablishment of associations; and
- deny perpetrators of *serious offences* any assistance and support that might be gained from their association with other people who participate in the affairs of the association.<sup>3</sup>

At the heart of the VLAD Act is the finding that a person is a *vicious lawless associate*.<sup>4</sup>

Through the imposition of *significant* terms of actual imprisonment upon persons who are categorised in that way, the implied expectation is that the VLAD Act will encourage cooperation with law enforcement agencies in the investigation and prosecution of serious criminal activity.

The VLAD Act, in effect, creates a distinct sentencing regime just for *vicious lawless associates*;<sup>5</sup> and otherwise, has no operation if an offence has not been committed under existing law.<sup>6</sup>

Section 7 sets out the substantive operation of the Act; it details the sentencing regime that must be followed by the court.

A court in sentencing a vicious lawless associate **must** first impose the base sentence

for the declared offence<sup>7</sup> (ie, the sentence the person would ordinarily get for the offence not taking into account the operation of the VLAD Act) and then *a further sentence* of 15 years imprisonment (on top of that base sentence) and a further 10 years imprisonment (on top of that base sentence plus 15 years) for officer bearers.

The whole of the 15 years (or 25 years in the case of an office bearer), in addition to being served cumulatively upon the base sentence, must be served in actual prison; the person is not eligible for parole release on that part of their sentence.<sup>8</sup>

A vicious lawless associate can avoid, to some extent, the severity of the regime if, *and only if*, they offer in writing to cooperate with law enforcement agencies in a *proceeding about a declared offence* and that offer of cooperation is accepted in writing by the Commissioner of Police.<sup>9</sup>

The Commissioner of Police *must* be satisfied that the cooperation offered is of such calibre that it will be of *significant use in a proceeding about a declared offence*.<sup>10</sup>

This determination by the Commissioner of Police is final and conclusive. The decision cannot be challenged, appealed against, reviewed, quashed, set aside or called in to question in any way (except for judicial review<sup>11</sup> to the extent that the decision is affected by jurisdictional error – a constitutionally entrenched, inherent power of the court which Parliament cannot abrogate).<sup>12</sup>

Section 5 of the VLAD Act defines what it means to be a *vicious lawless associate* – a person who:

- commits a *declared offence*; and
- *at the time* the offence is committed, or during the course of the commission of the offence, *is a participant* in the affairs of an *association*; and

- committed the declared offence for the purposes of, or in the course of participating in the affairs of, the relevant association.

An '*association*' is defined to mean: a corporation; an unincorporated association; a club or league; or *any other group of 3 or more persons by whatever name called, whether associated formally or informally and whether the group is legal or illegal*.<sup>13</sup>

The final category of '*association*' makes the definition very wide. In *Kuczborski v The State of Queensland* Justice Hayne observed, '*in its terms, this definition embraces any three-member conspiracy to commit a crime, as well as a wide variety of other formal and informal groups of three or more*'.<sup>14</sup>

What it means to be a participant (in the affairs of an association), is defined consistently with the definition of '*participant*' under section 60(3) of the Criminal Code, which is examined in detail in Chapter 8.<sup>15</sup>

The VLAD Act also includes the '*no criminal purpose defence*': a person is not a vicious lawless associate if they can prove that the relevant association in which they participate is not an association which has, as one of its purposes, the purpose of engaging in, or conspiring to engage in, declared offences.<sup>16</sup> Chapter 11 discusses the operation of the '*no criminal purpose*' defence in detail.

In practical terms, how the sentencing regime works (in circumstances where the undertaking to cooperate is accepted by the Commissioner of Police) is:

- The sentencing court must first decide upon the penalty that the person should receive for the declared offence. The court then adds 15 years imprisonment on top of that penalty;
- For example, if the offence ordinarily attracts a penalty of 6 years imprisonment; for a vicious lawless associate their overall penalty becomes 21 years imprisonment, by virtue of

section 7 of the VLAD Act (6 years for the *base sentence* plus 15 years for the *further sentence*);

- Section 9 of the VLAD Act then directs attention to the process under section 13A of the *Penalties and Sentences Act 1992* (Qld), which provides the longstanding means by which a person who cooperates can have their penalty significantly reduced in recognition of their assistance with authorities;
- In applying section 13A the court must state in closed court what penalty the person *would have* received without their cooperation; and must state in open court what the (reduced) penalty is. A detailed process must be followed under section 13A to ensure the confidentiality of the fact that the person has cooperated. This is to help ensure the safety of the informant;
- The fundamental key to section 13A is that, if the person later fails to honour their undertaking to cooperate, the reduced penalty is withdrawn and the sentence that would have been imposed without the cooperation becomes their punishment;
- For example, the 21 years imprisonment becomes the starting point sentence for the purposes of section 13A of the *Penalties and Sentences Act*. That is, the point from where the court then decides what reduction in penalty best acknowledges the extent of the cooperation (as is clear, cooperation by a vicious lawless associate does *not* stop the 15 years going on top of the base sentence);
- In reducing the sentence (for example, the 21 years imprisonment) the court can reduce both the head sentence and the minimum sentence to be served (for example, the court might drop the 21 years to 4 years imprisonment and include a parole eligibility date);
- If the vicious lawless associate does not follow through with their commitment to cooperate, the sentence that would have been imposed without their cooperation will be re-instated (for example, the 21 years imprisonment, including the requirement that they serve at least 15 years of it wholly in prison).<sup>17</sup>

## HOW HAS THE VLAD ACT BEEN USED TO DATE?

Although aspects of the 2013 suite came under scrutiny by the High Court in *Kuczborski*<sup>18</sup> (discussed in detail in Chapter 6), Mr Kuczborski lacked standing to challenge the VLAD Act regime.

Accordingly its operation has been untrammelled by any impediments in the nature of concerns about the validity/legality of aspects of it, whether along constitutional lines or otherwise – although, for reasons explored in some submissions, future questions may arise.<sup>19</sup>

## STATISTICS

Statistics from the Queensland Police Service (QPS) show that between 17 October 2013 and 31 December 2015, 202 people have been charged with an offence alleging that the person is a *vicious lawless associate*.

Of those 202 people charged, 10.4% are members of OMCGs and 7.4% are associates of OMCGs.<sup>20</sup> 82.2% have no known linkage to OMCGs.

Since 17 October 2013, two people have been sentenced as a *vicious lawless associate* for a declared offence, and proceeded against under the VLAD Act regime.

The two matters were unrelated to each other, and neither of the men had known or claimed links to OMCGs.

In both cases, the declared offence was drug trafficking and each pleaded guilty (so the

matter did not proceed to a jury trial). It would appear, based on the penalty imposed in each case, that section 13A of the Penalties and Sentences Act was applied to ameliorate the sentence that each would otherwise have received (noting that the ‘starting point’ sentence is not publicly known in accordance with the process under section 13A).

The statistics available do not record whether, of the 202 persons mentioned earlier, the allegation that the person was a vicious lawless associate has subsequently been withdrawn and discontinued from the charge by prosecuting authorities post-charge.

The Taskforce is aware though that such cases exist. It should be noted that after the general State Election on 31 January 2015 prosecutions have been adjourned, pending this Report.

#### CASE EXAMPLES

##### JOSHUA ROBIN ROHL

Mr Rohl was convicted in the Brisbane Supreme Court on 3 June 2015 of various drug-related charges, including one count of trafficking in a dangerous drug as a vicious lawless associate. Mr Rohl, it was accepted, was part of the Brisbane syndicate of a large wholesale cannabis distribution network operating between Victoria and Queensland. He pleaded guilty and was sentenced to five years imprisonment, suspended after serving 18 months.<sup>21</sup>

##### BRETT WILLIAM YOUNG

Mr Young was convicted in the Brisbane Supreme Court on 24 September 2015 of a number of drug offences including one count of trafficking in a dangerous drug as a vicious lawless associate, and three counts of possessing a dangerous drug as a vicious lawless associate. Mr Young’s role, it was accepted, was as a courier in a large methylamphetamine trafficking syndicate over a period of approximately two and a-half years. He pleaded guilty and his significant

and ‘genuine cooperation with the authorities in a material way’ was recognised as a mitigating feature at his sentence.<sup>22</sup> He received a head sentence of five years imprisonment which was wholly suspended.

#### DOES ANY OTHER AUSTRALIAN JURISDICTION HAVE A VLAD REGIME?

No other Australian jurisdiction has a sentencing regime which is directly analogous to the VLAD Act, in terms of its severity.

Chapter 3 contains a summary of Australian and international approaches to organised crime.

#### WHY HAS THE VLAD ACT REGIME RAISED SO MUCH CONTROVERSY?

The introduction of the VLAD Act ignited considerable debate amongst the legal fraternity, legal commentators and academics, media outlets, and across the community more generally. The passage of time has done little to quell that debate which has proceeded, unsurprisingly, in lock-step with the work of the Taskforce.

The VLAD Act, perhaps more so than any other change to our criminal laws of recent times, has had, and continues to have, a polarising effect on Queenslanders.

Two legal commentators summarised opposition from the legal professions in this way:<sup>23</sup>

*‘Lawyers across the board have condemned the laws as ill-conceived, rash, hurried, irresponsible, self-serving and dangerous; consistently mentioning attacks on the rule of law, our system of government and the separation of powers.’*

As the passage indicates, many legal and academic commentators<sup>24</sup> have focused on the *rule of law* as the backbone of a liberal democratic society and the protector of civil liberties and human rights.

Some express concern that, in the Queensland context, these principles are under threat in the name of a ‘war on OMCGs’:<sup>25</sup>

*‘First, in the text of a suite of laws that seek to wind back human rights considered central to just process of the law [a reference to the 2013 suite]. Secondly, the process undertaken in passing the [2013] laws challenges conceptions of good governance within the rule of law. Thirdly, the challenge of the authority of the courts by the [former] Executive government in terms of the separation of powers.’*

On the other hand, the 2013 suite obviously has its strong champions. Some media reports and commentators manifest support for the retention of the ‘VLAD laws’, arguing for their success in confronting OMCG crime and warning of serious adverse consequences for the community should the 2013 suite be repealed, or watered down.<sup>26</sup> These reports also quote politicians expressing the same or similar concerns, and convey statements indicating similar community concern.

Law enforcement authorities have, while properly refraining from attempting to dictate policy to the government, also pointed out perceived advantages. The Queensland Police Service, in a submission to the Taskforce, said that the ‘incentive to cooperate [under the VLAD Act regime] results in a breaking down of the code of silence and opens up opportunities to dismantle criminal networks.’<sup>27</sup>

The Queensland Police Union strongly supports the QPS’s submission on the value of an ‘incentive penalty’.

The ‘incentive’ is, of course, the very heavy sentences the VLAD Act imposes. Those sentences – at least 15, and up to 25 years – have attracted particularly strong expressions of concern. Dr Rebecca Ananian-Welsh, in her submission to the Taskforce, argues that the:<sup>28</sup>

*‘VLAD Act fundamentally alters the way that criminal law sentencing operates across a vast range of offences, requiring potentially large numbers of accused*

*persons to be faced with the pressure of providing useful information to police about the declared offences – lest they face 15 or 25 years of mandatory imprisonment.’*

In its examination of the VLAD Act, the Taskforce reflected carefully on why this regime has been so controversial. What follows are the particular matters which the Taskforce weighed and considered in its deliberations about the VLAD Act.

#### THE TITLE OF VLAD, AND THE DECISION TO MAKE IT A ‘STAND-ALONE’ ACT, WERE BOTH UNUSUAL

##### THE TITLE OF THE ACT

The title of the VLAD Act has been criticised as being emotive,<sup>29</sup> ambiguous, misleading, and potentially prejudicial to a fair trial.<sup>30</sup>

In *Kuczborski*,<sup>31</sup> Chief Justice French (and Hayne J) were highly critical of the title itself and of its relationship with the operation of the Act. French CJ noted that:<sup>32</sup>

*‘Neither “vicious” nor “lawless” is a defined term. The class of persons designated by the VLAD Act as ‘vicious lawless associates’ may include some who would attract the epithets “vicious” and “lawless” in ordinary parlance. It includes persons who would not.*

*The class of declared offences includes offences which, according to the facts of a particular case, could be described as “vicious”. It includes offences which would not.*

*The term vicious lawless association [as distinct from associate], which appears in the title to the VLAD Act, is not defined and appears nowhere in the body of the Act. It is a piece of rhetoric which is at best meaningless and at worst misleads as to the scope and substance of the law’.*

Hayne J considered the expression ‘vicious lawless associate’ to be *inapt*,<sup>33</sup> and noted that the definition is not, in truth, dependant on

any determination that the person is personally 'vicious' or generally 'lawless'. He said:<sup>34</sup>

*'Perhaps it was thought to reflect the stated political objective of dealing with criminal gangs but it is an expression which is likely to mislead in at least two ways. First, it is an expression which suggests a much narrower focus for the Act than its provisions require. Second it is an expression which at trial can only create prejudice and divert attention from the issues which a jury would have to decide.'*

The risk of prejudice to a fair trial that a term like *vicious lawless associate* presents is also something that both the Bar Association of Queensland (BAQ) and the Queensland Law Society (QLS) raised in submissions, and Taskforce deliberations.<sup>35</sup>

Both the Rule of Law Institute of Australia and Dr Ananian-Welsh highlight in their respective submissions to the Taskforce, concerns regarding the language used in the title of the Act; and, draw attention to the comments of the judges in *Kuczborski*.<sup>36</sup>

Some academics have observed that violent public criminal incidents (say for example, the Broadbeach incident) can generate, and become:<sup>37</sup>

*'... the points at which new phrases are invented to capture the horrors described in the media reports, the character and appearance of 'folk devils' are enumerated in fine detail and new categories of deviant behaviour emerge that appear to require amendments to criminal laws.'*

The language used in the title of the Act (with its acronym, VLAD) may illustrate the point.

Parliament offered no assistance – the Explanatory Notes to the Act<sup>38</sup> offer no insight into the naming of the Act or the reasons for adopting the term 'vicious lawless associate'.

The Taskforce was unanimous in its resolution that, in light of the High Court's pointed

criticism, whatever else might become of the constituent parts of the 2013 suite the name of the VLAD Act would have to be changed. (That resolution is irrelevant, of course, if the Government accepts other recommendations in the Report which would lead to the replacement of the 2013 suite with the proposed renewed *Organised Crime Framework*.)

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#### A STAND-ALONE ACT: WHY?

The decision to introduce a stand-alone Act to Queensland's statute books, dedicated solely to the *vicious lawless associate* sentencing regime, is unusual in itself; especially, when considered in the context of the ordinary approach to sentencing law reforms.

In Queensland, the Penalties and Sentences Act provides the sentencing framework for offenders aged 17 years and over.<sup>39</sup> The *Youth Justice Act 1992* (Qld) sets the sentencing framework for young people 16 years and under.<sup>40</sup>

The Penalties and Sentences Act provides (and has now done so for over two decades) the governing principles of sentencing and the sentencing options.

Two of the express purposes of the Penalties and Sentences Act are to collect, into a single Act, the general powers of courts to sentence offenders; and, to provide a sufficient range of sentencing options for the appropriate punishment and rehabilitation of offenders (and, in appropriate circumstances, to ensure that protection of the Queensland community is a paramount consideration).<sup>41</sup>

Uniquely (with the exception of youth sentencing, which is in its own Act) the sentencing regime for vicious lawless associates is placed outside and away from, and is extrinsic to, the Penalties and Sentences Act – yet, with cross-references to key sentencing provisions under the Penalties and Sentences Act (namely, section 13A).

The Taskforce is unaware (with the exception of the youth sentencing regime) of any other

example of a sentencing regime situated outside of the Penalties and Sentences Act.

Again, Parliament has provided no assistance: the Explanatory Notes to the VLAD Act do not address the necessity for a stand-alone Act.

The Taskforce was in agreement that it benefits the administration of the criminal justice system for sentencing schemes of wide application to be contained within the Penalties and Sentences Act.

Absent any apparent or compelling need for separate legislation (and the Taskforce found none) the approach taken regarding the VLAD Act regime creates an anomaly across the statute books.

The Taskforce was united in the view that, for the sake of consistency and a common-sense approach to legislation dealing with a single (but extremely important) matter like sentencing, the sentencing regime under the VLAD Act should have been placed within the Penalties and Sentences Act.

#### THE SIZE OF THE SENTENCES THE VLAD ACT IMPOSES (15 OR 25 YEARS), AND PRINCIPLES OF PROPORTIONALITY

All Taskforce members accepted that the apparently very high potential sentences the VLAD Act imposes confront, and necessarily require consideration of, the fundamental sentencing principles of proportionality and fairness. Those principles are conveyed, in short form, in the well-known phrase ‘does the punishment fit the crime?’

(This discussion about the *size* of the sentences is in addition to any consideration of the fact they are *mandatory*, and that the courts have no discretion about them – a matter considered separately, later in this Chapter.)

The common law principle of proportionality in sentencing is supported in Australia by substantial and authoritative case law, and academic authority.<sup>42</sup>

The principle of proportionality<sup>43</sup> requires that sentences of imprisonment bear a proportionate relationship to the nature of the criminal conduct being punished; and, also, a proportionate relationship with other offences, based on relative seriousness.

The principle, with its two central elements, is often also referred to as ‘just punishment’ and is legislatively enshrined under the Penalties and Sentences Act, which says in section 9 that any punishment imposed must be ‘*just in all the circumstances*’.

The Rule of Law Institute, in its submission to the Taskforce, argues vehemently that the VLAD Act:<sup>44</sup>

*‘... make(s) a mockery of the well-established principles of proportionality in sentencing. The use of law to impose excessive mandatory sentences to achieve the political objectives of the Parliament to be ‘tough on crime’ is incompatible with the operation of the rule of law in Australia.’*

Another submitter mentioned earlier, Dr Ananian-Welsh, also relies on the principle of proportionality in her submission to the Taskforce as a basis for the entire repeal of the VLAD Act.<sup>45</sup>

French CJ, in *Kuczborski*, observed that the VLAD Act requires the court to impose long custodial sentences on certain offenders which is *not* based upon the seriousness of their offences but, rather (and, solely) on their *association* with a particular group.<sup>46</sup>

This has been a consistent theme in the criticism levelled at the 2013 suite by the BAQ, and the QLS.

The other central element of VLAD is, of course, the ‘escape hatch’ it offers to persons facing these very high sentences: the *further sentence* of 15 imprisonment (or 25 years in the case of an office bearer) prescribed under section 7 of the VLAD Act can be mitigated by *significant cooperation in a proceeding about a declared offence*.

But no cooperation (or, of course, an inability to cooperate) means that the mandatory cumulative penalty, to be served wholly in prison without parole release, *must* be imposed by the court on top of the base sentence. This occurs irrespective of any other factors relating to the offence, or the offender, which might otherwise operate to mitigate the sentence under ordinary sentencing circumstances.

The Taskforce was cognisant that the ability of a person to mitigate their prison sentence by providing assistance to law enforcement is not, in itself, a novel or previously unknown element in Queensland legislation.<sup>47</sup>

But the unique feature of the VLAD Act is that, unlike those other sentencing regimes, it prescribes strict mandatory cumulative terms of imprisonment of such length that, objectively, the overall penalty is quite detached from any consideration of proportionality with the nature and seriousness of the actual offence committed.

The crushing length of the *further sentence* of 15, or 25, years provides a powerful incentive for people to cooperate with law enforcement agencies – and that is, of course, consistent with the express objects of the VLAD Act.<sup>48</sup>

While the word *crushing* is used in our everyday language and is commonly understood, *at law* it is a term that carries a particular significance. The notion of a *crushing sentence* is a reference to:<sup>49</sup>

*'... an extremely long total sentence may be "crushing" upon the offender in the sense that it will induce a feeling of hopelessness and destroy any expectation of a useful life after release. This effect both increases the severity of the sentence to be served and also destroys such prospects as there may be of rehabilitation and reform. Of course, in many cases of multiple offending, the offender may not be entitled to the element of mercy entailed in adopting such a constraint.'*

QPS has said, in a submission to the Taskforce, that it considers this incentive regime to have been very effective in increasing cooperation from accused persons, and thus enhancing public safety; and, that QPS regards the cooperation induced by the threat of a precise, known and heavy mandatory sentence as a successful element of the VLAD Act.

It is this perception which has led QPS to make submissions to the Taskforce in support of the retention of this particular feature of the regime in the future (a known, mandatory sentence as a method for encouraging cooperation) – while acknowledging a need to examine ways to 'temper the robust nature of the legislation with appropriate safeguards'.<sup>50</sup>

Taskforce discussions on this submission by the QPS were necessarily wide-ranging. One relevant aspect is that, while a person facing the VLAD Act's sentencing regime may know that the *further sentence* imposed upon them will not be required to be actually served if they cooperate (but must nevertheless be included by the sentencing court in setting the starting point sentence under section 13A of the Penalties and Sentences Act), it is not the case that they would know, with certainty, all of what will occur to them once they plead guilty.

That is, a vicious lawless associate will not know, with certainty, what the overall head sentence is that they face and what discount they may get if they cooperate, beyond not having to actually serve the mandatory component of the VLAD Act in prison. They may still be facing very significant sanctions, and with a high degree of uncertainty.

Some Taskforce members (BAQ, the QLS and the Public Interest Monitor (PIM), together with the chair) were also concerned that the *further sentence* still blatantly ignores the fundamental principles of proportionality.

This, too, was acknowledged by French CJ in *Kuczborski*.<sup>51</sup>

For example, a person convicted of the declared offence of affray (which ordinarily

carries a maximum penalty of one year imprisonment) if convicted as a vicious lawless associate potentially faces 25 years imprisonment without parole – for an offence which, by its nature, can involve objectively low level criminal behaviour not ordinarily attracting any custodial sanction.<sup>52</sup>

By way of comparison (and perspective), the statutory mandatory minimum non-parole period for a convicted murderer is 20 years imprisonment, increasing to 25 years where the victim is a police officer acting in the performance of their duties.<sup>53</sup>

In debating the merits of the regime, all Taskforce members recognised that the proportionality principle is a common law sentencing principle and state governments are constitutionally entitled to legislate in ways that are contrary to it.

Despite that, a number of members (the BAQ, the QLS, the PIM, and the chair) expressed the opinion that the proportionality principle is powerfully consistent with our rule of law values, and places an important limitation on the power of the state over its citizens.

It ensures that citizens can *only* be punished for their criminality, and prevents the state from further punishing them as a means to achieving any other end.

Of particular concern to these members is that the VLAD Act punishment regime is apparently engineered to gain assistance to law enforcement, which is later relied upon by the state under the criminal justice system to prosecute others – that is, an end goal which goes beyond those accepted limitations.

#### JURISDICTIONAL IMPACTS OF THE VLAD ACT AND ITS EFFECTS ON QUEENSLAND'S COURT SYSTEM

The District Court has jurisdiction to inquire of, hear and determine all indictable offences, with some exceptions.<sup>54</sup>

Generally, the District Court does not have jurisdiction to try a person charged with an

indictable offence if the maximum penalty for the offence is *more than* 20 years imprisonment. There are some limited exceptions to this, for example in the case of the offence of rape, sexual assault, robbery; in these instances the case can be tried before the District Court (rather than having to proceed in the Supreme Court).<sup>55</sup>

Many of the declared offences under the VLAD Act<sup>56</sup> are punishable by a maximum penalty of less than 20 years imprisonment and would ordinarily fall within the District Court's jurisdiction.

However, the cumulative nature of *the further mandatory sentence* prescribed under the VLAD Act has the effect of significantly increasing the maximum penalty for each of the declared offences.

For many of the declared offences, this change in maximum penalty means that it now exceeds the jurisdictional limit of the District Court and therefore the cases must proceed before the Supreme Court.

As a result, more offences must now be dealt with on indictment before the Supreme Court, which will impact on its administration.

It is not known from the VLAD Act, or the extrinsic materials to it, whether this was an intended consequence. It is possible that the legislators intended for these matters to be dealt with by the Supreme Court given the severity of the sanctions faced if convicted as a vicious lawless associate.

This impact on the operation of the criminal justice system has certainly contributed to the controversy surrounding the VLAD Act.

This issue was recently highlighted by a District Court Judge in Cairns, according to media reports. The matter involved three alleged participants in the Rebels OMCG who have been charged with an alleged assault over a Harley Davidson leather jacket. After commenting on the jurisdictional limits of the District Court, the Judge reportedly observed:

*‘Twenty-five years for bodily harm...what is the world coming to?’<sup>57</sup>*

(The Criminal Code offence of assault occasioning bodily harm is ordinarily punishable by a maximum penalty of seven years imprisonment, increasing to 10 years if aggravated.<sup>58</sup>)

#### THE ROLE OF THE POLICE COMMISSIONER UNDER THE VLAD ACT REGIME

##### TRANSPARENCY

A *vicious lawless associate* can avoid, to some extent, the severity of the regime if, *and only if*, they offer in writing to cooperate with law enforcement agencies in a proceeding about a declared offence *and that offer of cooperation is accepted in writing by the Commissioner of Police*.<sup>59</sup>

The Commissioner of Police *must* be satisfied that the cooperation will be of *significant use in a proceeding about a declared offence*.<sup>60</sup>

The decision of the Commissioner of Police is final. There are no avenues of appeal or review of the decision (with the exception of judicial review, for jurisdictional error).<sup>61</sup>

The VLAD Act is silent about the criteria to be applied by the Commissioner of Police in considering and determining whether the cooperation will be of significant use in a proceeding. The Commissioner of Police is also under no legislative obligation to provide reasons for the decision.

It is impossible for a *vicious lawless associate* to know what factors were taken into account in assessing their offer and whether, for example, consistent criteria are being used across each case.

Dr Ananian-Welsh, in her submission to the Taskforce, expresses the view that:<sup>62</sup>

*‘The perception that a crucial aspect of the sentencing role is being undertaken secretly by the Police Commissioner, rather than openly by a court in accordance with*

*traditional judicial process, seriously undermines the integrity of the judicial system and public faith in the separation of powers.’*

The level of discretion vested in the Commissioner of Police is extremely high and the process deliberately alters the prevailing approach under the Penalties and Sentences Act in terms of the way in which cooperation is to be taken into account.<sup>63</sup>

Ultimately the Taskforce, *with the support of the QPS*,<sup>64</sup> recommends vesting this discretion in the court.

If, despite this recommendation, the Government decides that the Commissioner of Police is to continue in this decision-making role then a greater level of transparency and oversight must be incorporated into the process.

This would logically include making the Commissioner’s decision one that is capable of being judicially reviewed. That oversight, intending no disrespect for or criticism of the Commissioner, will ensure accountability in the decision-making process and enshrine some principles of natural justice for the *vicious lawless associate*.

##### CONSTITUTIONAL CONCERNS

In reaching the view that the discretion vested in the Commissioner of Police under section 9 of the VLAD Act should be removed, the Taskforce took into account the possibility that if no change was made, this aspect of the VLAD Act might be challenged in the future on the basis that it offends the *Kable* principle.

It will be recalled from Chapter 6 that the *Kable* principle ‘prohibits the conferral or regulation of court power that violate the institutional integrity or essential features of a court.’<sup>65</sup>

In this regard, the chair expressed the view that there is a material risk that, because section 9 takes away the discretion traditionally vested in the court (and instead

assigns it to the Commissioner of Police), there is concern that this aspect of the VLAD Act might not withstand constitutional challenge.

As amplified by the Explanatory Notes,<sup>66</sup> *'only in circumstances where an offender provides such cooperation, to the satisfaction of the Commissioner of the Queensland Police Service, may a penalty be reduced.'*

Dr Ananian-Welsh also raised this question in a submission to the Taskforce.<sup>67</sup>

The concern is that, in reality, the Commissioner of Police is required to perform an important and crucial step in the sentencing process for a *vicious lawless associate*: that is, to make a determination which *must* be accepted by the sentencing court, without question, and which leads to a foregone sentencing result for the person (ie, in the absence of cooperation to the satisfaction of the Commissioner, 15 years imprisonment *must* be imposed on top of the base sentence determined by the court).

The net effect of section 9, it would be argued, is a usurpation of judicial power.

Dr Ananian-Welsh argues that there are in effect *two* sentencing decisions taking place:<sup>68</sup>

*'The judicial determination would be subject to traditional, and important, protections of judicial process including an open sentencing hearing at which both the prosecution and defence may make submissions on law and facts and contest the submission of the other side. This determination would be subject to the rules of evidence and appeal.'*

*'The Police Commissioner's determination, however, lacks all of these protections and qualities, but is in essence a determination as to sentence – namely, whether the person should serve an additional 15 or 25 years in prison in addition to the sentence ordered by the court.'*

The Taskforce accepted that if section 9 is to remain, without amendment, its constitutional

validity is tentative (noting that the Taskforce unanimously agreed, in any event, that this decision-making role is best vested in the court).

#### THE EFFECT OF COOPERATION UNDER THE VLAD ACT

##### IT WILL BE OBVIOUS AND APPARENT THAT A VICIOUS LAWLESS ASSOCIATE HAS SIGNIFICANTLY COOPERATED

Ensuring the confidentiality of informants (people who cooperate with law enforcement agencies) is important to ensure the safety of the individual, to foster and encourage others to cooperate, and to avoid the risk of jeopardising any ongoing investigations.

Section 13A of the Penalties and Sentences Act sets out a process to achieve this which requires parts of the sentencing proceeding to be carried out in closed court, some of the sentencing remarks and submissions to be sealed by court order, and through certain provisions limiting publication of information about the hearing.

The VLAD Act taps into this process under the Penalties and Sentences Act via its section 9 (discussed above). That is, once the Commissioner of Police accepts, in writing, the offer of cooperation, the sentence proceeds in accordance with the section 13A process.

But a potential problem with the VLAD Act regime is that, despite these protective mechanisms, it is always going to be abundantly clear when a *vicious lawless associate* has provided significant cooperation.

That will happen because a person will be publicly known to be exposed to the VLAD Act sentencing regime but, at the end of their sentencing hearing, is observed to have some lesser sentence than 15 (or 25) years imposed upon them.

The inevitable effect is public notification that the individual has significantly cooperated with law enforcement. While these extreme

mandatory penalties remain, this will always be the case.

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#### WHAT IF A VICIOUS LAWLESS ASSOCIATE HAS, IN TRUTH AND IN FACT, NO INFORMATION TO GIVE?

The Taskforce considered the risk, with a regime like the VLAD Act, that it has the potential to attract and even encourage ‘fictitious’ cooperation – ie, circumstances in which persons facing very high sentences will fabricate information to attract the chance of some relief from them.

A person can escape, to an extent, the VLAD Act regime if they cooperate with law enforcement.

But a person can only achieve this boon if they *actually* have information that is of *significant* use to law enforcement regarding a declared offence.

A person who is unable to ‘significantly’ cooperate (not through an unwillingness to do so, but because they simply do not know anything of importance) has no lawful means to mitigate the mandatory sentence.<sup>69</sup>

The Taskforce was concerned (over and above considerations of unfairness which would arise in that circumstance) that a potential consequence is that such a person has a strong incentive to provide false information, in the hope that they can avoid the VLAD Act mandatory sentence.<sup>70</sup>

In light of the severity of the VLAD Act punishment regime, Taskforce members did not believe that this concern is fanciful, or exaggerated.

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#### WHAT IF A VICIOUS LAWLESS ASSOCIATE CAN SIGNIFICANTLY COOPERATE, BUT NOT AS PROVIDED FOR BY THE VLAD ACT?

Currently there is no mechanism by which the sentencing court can mitigate the sentence for a vicious lawless associate who is *willing to cooperate and has information that will be of significant use* to law enforcement agencies,

but the criteria under section 9 of the VLAD Act cannot be met: for example, because the information does not relate to a ‘*proceeding about a declared offence*’.

In these circumstances, as the VLAD Act operates, the further mandatory cumulative penalty *must* be imposed on top of the base sentence (ie, the 15 or 25 years imprisonment). The sentencing court has no choice or discretion but to do so.

The Penalties and Sentences Act was recently amended<sup>71</sup> to insert new section 13B which enables a sentencing court to reduce a sentence because the person has significantly cooperated with a law enforcement agency in its investigations about an offence *but the cooperation falls outside the ambit of section 13A* (for example, the person is not willing to give a sworn statement or to testify, but the information they hold is nevertheless very important to law enforcement; or the information would be inadmissible in a criminal trial).

This type of cooperation will be presented in an affidavit by a law enforcement agency which is tendered to the court in support of a reduction in the otherwise appropriate penalty.

Section 13B of the Penalties and Sentences Act was inserted after the enactment of the VLAD Act. But a consequential amendment to the VLAD Act was *not* made at the time section 13B was inserted. The reason for this is unknown.

The Taskforce is unanimous in its view that, if the VLAD Act remains, section 9 must be expanded to incorporate the type of cooperation contemplated by section 13B of the Penalties and Sentences Act. Similarly, it is appropriate that any replacement regime must also acknowledge this other form of significant cooperation.

## DOES THE SCHEDULE OF 'DECLARED OFFENCES' NEED MODIFICATION?

French CJ, in *Kuczborski*, highlighted that '... the range of declared offences in Schedule 1 is wide in subject matter and gravity. They include offences punishable by a maximum sentence of one year imprisonment up to offences punishable by life imprisonment.'<sup>72</sup>

Submissions to the Taskforce from the BAQ,<sup>73</sup> the Queensland Council for Civil Liberties<sup>74</sup> and Rule of Law Institute,<sup>75</sup> express concern about the broad range of offences which fall within the ambit of the VLAD Act.

Prior to the VLAD Act the term 'serious criminal offence' was defined under the *Criminal Proceeds Confiscation Act 2002* (Qld) and the *Criminal Organisation Act 2009* (Qld) (COA).

Under that legislation a serious criminal offence:

- is an indictable offence for which the maximum penalty is at least 5 years imprisonment;<sup>76</sup> or
- is an indictable offence punishable by at least 7 years imprisonment; as well as a schedule of serious offences under the Criminal Code which are punishable by less than 7 years imprisonment.<sup>77</sup>

Schedule 1 of the VLAD Act includes offences with maximum penalties under five years imprisonment (for example, the offence of affray) and offences which would not ordinarily be considered to have a connection with organised criminal activity (for example, the offence of incest).

The Taskforce was mindful of these concerns in framing its proposal to replace the VLAD Act, and contemplating the offences which might appropriately fall within the ambit of a renewed regime.

## WHAT PROSPECT IS THERE OF ACTUALLY CONVICTING SOMEONE AS A VICIOUS LAWLESS ASSOCIATE IF THE PERSON DOES NOT PLEAD GUILTY?

To date, the two matters finalised under the VLAD Act involved persons who pleaded guilty to the charge/s. Those guilty pleas meant that the Crown case was accepted and a criminal trial was avoided (the evidence was never tested before a jury).

The question yet to be answered is whether prosecuting authorities can successfully proceed against a person under the VLAD Act, in the absence of a guilty plea?

There are some potentially serious practical challenges to be faced in actually establishing, beyond reasonable doubt, that a person is a 'vicious lawless associate'.

The Taskforce devoted attention to two hurdles in particular: the different language used under key provisions of the VLAD Act; and, the likely availability of key evidence necessary to establish a person is (at law) a vicious lawless associate.

## CONFUSED TENSES IN THE VLAD ACT

A difficulty arises with the language used in section 4 (which defines the meaning of *participant*) compared to that used in section 5 (which defines the meaning of *vicious lawless associate*) under the VLAD Act.

This inconsistency in language was observed by Hayne J in *Kuczborski*, although he did not seek to resolve the apparent tension between the requirements.<sup>78</sup>

For a person to be a *vicious lawless associate* (section 5) they must, inter alia, be a *participant* in the affairs of an association **at the time** the offence is committed, or during the course of the commission of the offence.

This language is cast in the present tense.

Section 4 contemplates four forms of conduct as amounting to being a participant in the affairs of an association. Two of the types of connection with an association include: *having attended* more than one meeting or gathering of persons who participate in the affairs of the association in any way; or *having taken* part on any one or more occasions in the affairs of the association in any other way.

This language is cast in the past tense.

The Taskforce questioned how the prosecution could establish, beyond reasonable doubt, that a person was a participant '*at the time of the offence*' when the basis upon which it is said they are a 'participant in the affairs of an association', rests upon them having previously attended a meeting or previously having somehow taken part in the affairs of an association.

On its face, this does not seem to be possible, absent a confessional statement from the accused.

#### DIFFICULTY IN OBTAINING EVIDENCE TO PROVE THE VLAD ACT CIRCUMSTANCE OF AGGRAVATION

The definition of *association* does not anchor the association to criminal activity. Under section 3, an association can be any corporation, unincorporated association, club, league or group of three persons who associate formally or informally.

Having said that, the definition must be read in conjunction with the objects of the VLAD Act which includes to *disestablish associations that encourage, foster or support persons who commit serious offences*.

The term *in the affairs of an association*, while fundamental to the VLAD Act, is not defined. This is a concept which is central to proving whether a person is a *vicious lawless associate*.

The first challenge foreshadowed by the legal representatives on the Taskforce is that, at trial, the prosecution would likely need to establish and particularise what the alleged

'affairs of' the association were at the time the declared offence was committed; and, then, prove beyond reasonable doubt that the person was a participant in those affairs – *at the time the offence was committed*.

In the absence of a definition in the legislation, the phrase *affairs of an association* falls to be interpreted by reference to the ordinary meaning of those words, within the context of the Act as a whole.<sup>79</sup>

It was suggested during Taskforce discussions that, in particularising what the 'affairs of an association' are, the prosecution could turn to expert evidence provided by law enforcement agencies.

There are, however, limitations on the admissibility of this kind of evidence. They were considered in the case of *R v Cluse*.<sup>80</sup>

In *Cluse* the Supreme Court of South Australia held that evidence of the general culture and operations of motorcycle gangs *is* admissible where it is based on a witness' personal knowledge obtained through long observation and study (for example, covert surveillance or undercover operatives); but, evidence regarding specific instances, events or acts of violence concerning a gang are not admissible *unless the witness was a direct observer*.

The second challenge is that evidence of the general culture and operation of an association will be of limited utility to the prosecution in establishing beyond reasonable doubt that *the person* was in fact a participant in the affairs of an association *at the time* of the offence – as required by the VLAD Act.

The legal representatives on the Taskforce also expressed some hesitation whether the prosecution would be able to establish this beyond reasonable doubt without a confessional statement, or admissible covert evidence or admissible co-offender testimony about the fact.

Arguably under sections 4 and 5 of the VLAD Act, it would be insufficient to show that the person was previously a 'participant' if the

prosecution cannot also show that they remained a participant *at the actual time* of the offence (although this directly raises the issue discussed above about the different language used under section 4 and 5).

It was suggested by QPS that, for future prosecutions, it may develop ‘expert police witnesses’<sup>81</sup> to attest to the involvement of persons in criminal organisations.

Questions linger over whether this category of evidence would be accepted by the court as sufficient to constitute ‘expert’ evidence’ (as distinct from an opinion, albeit an informed one).

The practical reality of the way in which the VLAD Act is framed is that the challenges faced in securing evidence to establish the person was a participant in the affairs of an association *at the time* of the offence will likely mean that the only matters to be successfully prosecuted will be those involving the commission of offences by three or more persons ie, that utilises the section 3(d) definition of ‘association’.

This approach would allow the prosecution to rely on the activities of the group (for example, buying and selling heroin in Brisbane) to particularise the *affairs of an association* (for example, carrying on the business of trafficking drugs).

In making these observations, the Taskforce was conscious that the VLAD Act was *not* intended to be used only in relation to OMCGs.

And recognised that these challenges are not, the legal representatives on the Taskforce thought, insurmountable; but, they were of the view that for the prosecution to establish beyond reasonable doubt that an accused person is a participant in a criminal organisation, based on admissible evidence (not criminal intelligence or general information about the association’s culture) will be difficult.

## THE VLAD ACT AND FUNDAMENTAL LEGISLATIVE PRINCIPLES

Section 4(2) of the *Legislative Standard Act 1992* (Qld) provides that legislation in Queensland should have regard to rights and liberties of individuals.

The Terms of Reference require the Taskforce to consider whether acknowledged breaches of the fundamental legislative principles contained in the 2013 suite can be justified.

The Explanatory Notes to the VLAD Act identify that it impacts on the rights and liberties of individuals through imposing increased penalties, imposing mandatory penalties, and through the denial of parole. The VLAD Act also contains a reversal of the traditional onus of proof – by providing a defence to an allegation that a person is a vicious lawless associate *if that person can prove* that the relevant association is not an association that has engagement in declared offences as one of its purposes.<sup>82</sup>

The justification provided for the breaches of the fundamental legislative principles in the Explanatory Notes is that it acts to enhance community safety by providing deterrence through increased penalties and encouraging cooperation with law enforcement. No further justification is attempted, or provided.

The Taskforce has considered, in detail, whether the VLAD Act should be retained as part of Queensland’s laws, which necessarily included an examination of the Act’s merits and the possible justifications for the contraventions of the fundamental legislative principles.

As is evident from the analysis under this Chapter in particular, the Taskforce has had effective cognisance of the Terms of Reference in this regard.

## MANDATORY SENTENCING: A DEBATE THAT SOMETIMES SEEMS INTERMINABLE

The *Kable* principle ‘has been invoked as a shield against laws that are perceived as harsh. It is not fanciful to expect that a legislative scheme that violates rule of law values, such as fair, equal and open justice will undermine the integrity of a court applying that law’.<sup>83</sup>

‘When a law involves state or territory courts in a scheme that infringes the rights and liberties of citizens, there is a good chance that a *Kable* challenge will be launched in an attempt to have the law read-down or overturned.’<sup>84</sup>

This is discussed in Chapter 6.

The constitutional validity of mandatory minimum sentencing was challenged in the High Court on the basis of the *Kable* principle in *Magaming v The Queen*.<sup>85</sup> The case involved a people smuggling offence. It was argued that:

- where the prosecuting authorities could choose between charging an offence that carried a mandatory minimum sentence and charging an offence that did not, the prosecuting authorities impermissibly exercised judicial power;
- fixing a mandatory minimum sentence was beyond legislative power as it is incompatible with the institutional integrity of the courts (the *Kable* principle); and
- the provisions required the court to impose a sentence that was arbitrary and non-judicial.<sup>86</sup>

By majority the High Court dismissed the appeal and upheld the constitutional validity of the provisions. So far as is relevant here, the Court held that the imposition of a mandatory minimum sentence was not inconsistent with the institutional integrity of

the courts, and did not involve the imposition of an arbitrary sentence.

Accordingly, the Taskforce accepts that state governments are constitutionally entitled to prescribe mandatory minimum sentences.

To that end, as noted by French CJ in *Kuczborski*: ‘the mandatory sentencing scheme under the VLAD Act rests on the rationale that a person’s links to a criminal group justify the imposition of significant restraints on his or her liberty’.<sup>87</sup>

### WHAT IS MANDATORY SENTENCING?

Mandatory sentencing can take many forms but at its core is the elimination or significant restriction of judicial discretion in the sentencing process through legislatively prescribed fixed penalties.<sup>88</sup>

Most Australian jurisdictions have by now incorporated some form of mandatory sentencing into their overall sentencing regime; whether in the form of fixed mandatory penalties,<sup>89</sup> mandatory minimum standard non-parole periods (MSNPP)<sup>90</sup> or presumptive sentencing regimes<sup>91</sup> (for example, where an offender must serve a period of imprisonment unless there are exceptional circumstances).

A *mandatory MSNPP* is a legislated non-parole period which provides guidance to the courts on the minimum length of time an offender should spend in prison before being eligible to apply for parole release.<sup>92</sup>

This type of scheme can take two forms – *defined term* or *standard percentage*:

- a defined term scheme is where Parliament sets the length of time, in years and months, that a person should serve in prison before parole eligibility or release (for example, the VLAD Act); and

- a standard percentage scheme is where Parliament sets the percentage of the sentence that the person should serve in prison before parole eligibility or parole release (for example, the Serious Violent Offence declaration scheme under Part 9A of the Penalties and Sentences Act).

Ordinarily, the rationale underpinning the introduction of a mandatory sentences, including a mandatory MSNPP scheme, is to promote consistency and transparency in sentencing, and to ensure that proper consideration is given to community expectations that the punishment fits the crime.<sup>93</sup>

In the course of its deliberations the Taskforce acknowledged that, in the context of the VLAD Act, the primary purpose of the defined term scheme is to induce cooperation with law enforcement, more so than to ensure consistency of punishment.<sup>94</sup>

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#### WHAT ARE THE ARGUMENTS IN FAVOUR OF MANDATORY SENTENCING?

In addition to consistency in sentencing outcomes, advocates<sup>95</sup> of mandatory sentencing (including a mandatory MSNPP scheme) argue it provides clearer and more effective deterrence, and sends a strong message that the criminality will not be tolerated.

Supporters consider that mandatory penalties strengthen the sentencing regime, which they often perceive is, overall, too lenient; and achieves community protection through incapacitation of offenders.

The Queensland Police Union (QPU) is a strong supporter of mandatory sentencing.

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#### WHAT ARE THE ARGUMENTS AGAINST MANDATORY SENTENCING?

Critics<sup>96</sup> of mandatory sentencing give recognition to the proposition that no two crimes are the same, whether in the details of

the crime or the impact on the victim and the community.

Judicial discretion is therefore vital, they contend, to ensure that the court can properly consider the features of each case when establishing the appropriate penalty.

Critics point to the societal effects of mandatory sentencing, particularly upon Aboriginal or Torres Strait Islander Queenslanders and other vulnerable groups, who are already over-represented in the criminal justice system; and, human rights concerns.<sup>97</sup>

Those against mandatory sentencing assert that there are limitations within deterrence theory. That is, it is often claimed that tougher penalties (in particular, lengthy imprisonment) will operate as an effective general deterrent, and reduce crime.

Accordingly, it is said, the imposition of a sanction at a certain level of severity will induce people who may be tempted to commit crimes not to do so out of fear of that penalty.

Deterrence theory assumes that individuals weigh up the costs and benefits of their actions whenever they make a decision. It relies on the assumption that offenders have sufficient knowledge of the potential criminal sanction for an offence they may be contemplating, and then make a rational choice whether or not to offend based on that knowledge.<sup>98</sup>

But persuasive research and studies indicate that people are not, in truth, absolutely rational and do not always make decisions in their best interests.<sup>99</sup>

The Victorian Sentencing Advisory Council concluded, after a comprehensive analysis of available research, that:

*'Increases in the severity of penalties, such as increasing the length of imprisonment, do not produce a corresponding increase in the general deterrent effect.'*<sup>100</sup>

Research in Tasmania, by its Law Reform Institute, came to the same conclusion:<sup>101</sup>

*'A review of the deterrence literature shows there is no scientific basis for expecting that general penalty increases, **which do not involve unacceptably harsh punishment, will do anything to control crime rates.**'*

(emphasis added)

As to whether harsher penalties deter individual offenders (also known as *specific deterrence*) and, in particular, whether imprisonment deters a previously convicted individual more effectively than other penalties, the evidence suggests no significant difference in recidivism rates between those offenders who were punished with a community based penalty, and those offenders who were imprisoned.<sup>102</sup> It would therefore seem that it is something other than penalty that influences recidivism risk.

Criminologist Professor Michael Tonry<sup>103</sup> has examined mandatory sentencing in the United States across a lengthy period 1975 – 1996 (by which time all States had adopted mandatory sentencing) and analysed its impacts, and effectiveness.

In terms of the deterrent effect of mandatory sentences Professor Tonry concluded that:<sup>104</sup>

*'No matter which body of evidence is consulted – the general literature on the deterrent effects of criminal sanctions or research on marginal deterrence effects,<sup>105</sup> or the evaluation literature on mandatory penalties – the conclusions are the same. **There is little basis for believing that mandatory penalties or severe penalties have significant marginal deterrent effects.**'*

(emphasis added)

Complementary research undertaken by Criminologist Professor Daniel Nagin,<sup>106</sup> found that: *certainty of apprehension has a greater deterrent effect on offenders than the prospective legal consequences of behaviour, for example, lengthy prison sentences.*<sup>107</sup>

## THE COMPETING VIEWS OF TASKFORCE MEMBERS

The BAQ,<sup>108</sup> the QLS and the PIM are fundamentally opposed to mandatory sentencing regimes on the grounds that they inevitably lead to unjust outcomes because there is no flexibility to take into account individual circumstances, and there is no evidence base to support the proposition that mandatory sentences deter criminal offending.

These Taskforce members and the stakeholders they represent do not support the retention of the VLAD Act.

Conversely, the QPU and the Commissioned Officers' Union support, at least, the continued use of mandatory minimum sentences in some manner (albeit less severe) akin to what the VLAD Act incorporates – a position in part influenced by the what was reported to the Taskforce to be the operational experience of their members with OMCGs since 17 October 2013.

### WHAT ARE (AS ARGUED BY SOME) THE PRACTICAL IMPLICATIONS OF MANDATORY SENTENCING?

Those opposed to mandatory sentencing in any form highlight the practical implications of this type of regime in support of their arguments.

In particular, the following exemplify what they contend are the common after-effects of mandatory minimum sentencing regimes:<sup>109</sup>

- The court is stopped from applying the principles of proportionality, and the principle that, in general, imprisonment should be a sentence of last resort;<sup>110</sup>
- The court is prevented from giving proper consideration to the subjective circumstances regarding the offence (its nature, and other important matters like its effects on the victim), and the offender – which, it is argued, usually leads to injustice. Penalties (especially for serious offences) must be tailored to fit the crime and the criminal; justice

must be individualised. Penalties fixed in advance by Parliament cannot achieve this;

- Legislatively fixed penalties detract from the independence of the judiciary and the principle of the separation of powers. People are deprived of their liberty not in accordance with a public balancing process that is individually accountable, but arbitrarily in accordance with penalties fixed in advance without regard for the individual circumstances;
- There is a risk of ‘over-charging’ accused persons, so as to bring them within the ambit of the mandatory penalty regime;
- Bail will commonly be refused, given the accused is facing certain imprisonment if convicted – the prospect of an inevitable prison sentence being seen as an added incentive to flee;
- It may result in matters moving ‘up the jurisdictional tree’ because the mandatory minimum sanctions increase the maximum penalties for offences and has the consequence of elevating matters to courts of higher jurisdiction;<sup>111</sup>
- The prospect of certain imprisonment can be a strong disincentive to a person pleading guilty. A decline in guilty plea rates impacts upon victims of crime and the administration of justice, and increases costs across the criminal justice system (given more matters must proceed by way of a trial);
- Some argue that mandatory sentencing means, in effect, the transfer of the sentencing discretion from the courts to police and prosecuting authorities (by the selection of charges to be brought, and leading to ‘charge-bargaining’);<sup>112</sup> and
- It is arguably a manifestation of political distrust of, and lack of confidence in, the judiciary by the government.

Professor Tonry, as part of his analysis, also found that lengthy mandatory minimum sentences have a *sleeper effect* on prison populations. That is, the number of offenders subject to the mandatory sentences grows, and the length of their time in prison increases, leading to a substantial increase in the prisoner population.<sup>113</sup>

#### EXAMPLES OF MANDATORY SENTENCING REGIMES AND THE OBJECTIVE INJUSTICE WHICH CAN RESULT

##### AN EXAMPLE OF A FIXED MANDATORY SENTENCING REGIME AT THE HIGHER END OF SERIOUSNESS

The Queensland *Drugs Misuse Act 1986* once provided for a penalty of mandatory life imprisonment, which could not be mitigated or varied, for certain drug offences.<sup>114</sup>

This mandatory life imprisonment regime applied until 1990.

It ended with the passage of the *Drugs Misuse Amendment Act 1990* (Qld), which removed the mandatory sentencing regime and replaced it with significant maximum penalties, *and provided that all cases where a prisoner was already serving the mandatory life sentence at the time of commencement be reviewed.*

This fixed mandatory sentencing regime (which targeted serious criminal offending) led to serious injustice, and that was largely the reason for its repeal (see the examples below).

During the Parliamentary debate of the amending Act<sup>115</sup> it was noted by the then-Member for Mt Gravatt, Ms Spence MP that:

‘Despite the statements in January 1989 by the then Premier, Mr Ahern, as reported in the Brisbane Sun, that he knew the identities of several ‘Mr Bigs’ in the Queensland drug underworld and was committed to getting the big boys of the drug trade behind bars, this legislation [Drugs Misuse Act] did no such thing.

Instead, judges were forced to sentence hopeless drug addicts to life imprisonment.

Many of the 21 [19] people now serving mandatory life sentences in Queensland gaols are little more than hopeless drug [addicts]. Under the amendments that are now proposed, the sentences of these people will be reviewed.<sup>116</sup>

All 19 prisoners who were serving mandatory life sentences under the Drugs Misuse Act, at the time of amendment, ultimately had their sentences overturned upon review and replaced with a lesser penalty (albeit nevertheless significant) *when the circumstances of the offence and offender were actually able to be taken into account by the sentencing court.*<sup>117</sup>

For example:

- *Roger Sencabaugh* (trafficking in heroin) was sentenced to mandatory life; on review his sentence was reduced to 10 years imprisonment with a recommendation for parole after 3 years.
- *Craig Warneminde* (trafficking in heroin) was sentenced to mandatory life; on review his sentence was reduced to 8 years imprisonment with a recommendation for parole after 3 and a-half years.
- *Kerrie-Ann Saverin* (supplying, possessing and trafficking heroin) was sentenced to mandatory life imprisonment; on review her sentence was reduced to 4 years imprisonment with a recommendation for immediate parole.

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#### AN EXAMPLE OF A DEFINED TERM MSNPP SENTENCING REGIME AT THE MIDDLE RANGE OF SERIOUSNESS

Section 236B of the *Migration Act 1958* (Cth) sets a mandatory sentencing regime for people-smuggling cases (both a minimum head sentence and a MSNPP).

The convicted person must be sentenced to at least five years imprisonment, and be required to serve a minimum of three years in prison before parole eligibility. For repeat offenders, they must be sentenced to at least eight years imprisonment and be required to serve in prison a minimum of five years before parole eligibility. These penalties cannot be mitigated or varied.

The case of Edward Nafi, who was sentenced as a repeat offender in the Supreme Court of the Northern Territory, demonstrates the injustice that can result from a mandatory sentencing regime like this one.<sup>118</sup>

In 2001, Mr Nafi was convicted of an offence relating to people smuggling and two counts of fishing within the Australian zone without a licence.

In 2011, he was again convicted in relation to people smuggling. He was the apparent captain of an illegal boat attempting to smuggle some people to Australia from Indonesia in 2010. The passengers, who provided evidence in the case, said they had paid between \$US10,000 and \$US20,000 to unnamed people in Indonesia to make the journey to Australia. They were taken from various places across Indonesia at night to a point on the coast where they boarded a small boat, which took them out to the larger vessel where Mr Nafi and two other Indonesian crew members were waiting.

The sentencing Judge found that Mr Nafi had been motivated by extreme poverty. He was earning about \$AUD60 a month as a fisherman in Indonesia and supporting his wife and daughter when he was approached by a man who offered him 10 million rupiah (approximately \$AUD1,200) to take on the job – for him, an extremely large sum.

Citing *Trenery v Bradley*,<sup>119</sup> the sentencing Judge said:

*Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or*

*more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.*

In the case of Mr Nafi, the sentencing Judge considered that the appropriate penalty *would have been* three years imprisonment, with a non-parole period of 18 months. Instead Mr Nafi was required, by the mandatory sentencing regime, to be sentenced to at least 8 years imprisonment with a non-parole period of 5 years.

(The Judge felt so strongly about the injustice to Mr Nafi that she recommended that the Commonwealth Attorney-General exercise his prerogative to extend mercy to him.)

The Taskforce understands that, as a consequence of the *Nafi case*, an agreement was reached between the Commonwealth Attorney-General and the Director of Public Prosecutions that ‘a charging policy would prevail of *avoiding offences carrying mandatory minimum sentences wherever that could be done*’. Thus the sentencing function was, effectively, to be pushed down to prosecutors who are not publicly accountable in the way that judges are.<sup>120</sup>

There are many other real-life examples of the objective injustice resulting from the people smuggling mandatory sentencing regime; Mr Nafi is not an isolated incident.<sup>121</sup>

#### **AN EXAMPLE OF A FIXED MANDATORY SENTENCING REGIME AT THE LOWER END OF SERIOUSNESS**

In 1997, the Northern Territory introduced a ‘three-strike’ mandatory sentencing regime for property offences: 14 days imprisonment for a first offence, increasing to three months imprisonment for a second offence, and increasing one year for a third offence.

A number of people caught by that regime received penalties which were, objectively and

on any view, grossly disproportionate to the seriousness of their offending.<sup>122</sup> These are some examples:

- *Joanne Coughlan*: a 27 year old school teacher, convicted of unlawful damage (she disputed the quality of a hotdog at a fast food bar and poured water on a cash register. She paid in full for the damage caused); sentenced to 14 days actual imprisonment.
- *Brett Willoughby*: 19 years old, convicted of stealing (alcohol worth \$2.04); sentenced to 14 days actual imprisonment.
- *Margaret Wyndbyne*: 24 year old Aboriginal and/or Torres Strait Islander mother no criminal history, convicted of receiving stolen property (one can of beer worth \$2.50); sentenced to 14 days actual imprisonment.
- *Jamie Wurraramara*: 22 years old, convicted of stealing (biscuits and cordial worth \$23); sentenced to 1 year actual imprisonment.
- *Kevin Cook*: 29 year old homeless Aboriginal man, had two previous minor property convictions, convicted of stealing (he wandered into a backyard when drunk and took a \$15 beach towel from a clothesline); sentenced to 1 year actual imprisonment.

In 1999, the Northern Territory amended the ‘three-strike’ regime to allow for sentencing alternatives in exceptional circumstances.<sup>123</sup> The laws were repealed in 2001.<sup>124</sup>

#### **THE VIEWS OF THE QUEENSLAND POLICE SERVICE**

QPS spoke to the Taskforce about what it sees as the merit, operationally, in the VLAD Act or any replacement regime that includes significant (but perhaps more proportionate) mandatory penalties.<sup>125</sup>

QPS expressed its institutional belief that a fixed mandatory regime (or defined term MSNPP scheme) like the VLAD Act, provides certainty of outcome to people contemplating becoming involved in a criminal organisation; and, certainty of result for those apprehended when assessing their options (ie, whether to cooperate, or maintain their right to silence).

Whether it is the VLAD Act regime, or a replacement model, QPS considers the scheme must contain sufficiently strong sanctions that a participant in a criminal organisation would *in fact* consider cooperating to avoid it.

In a proposal put to the Taskforce, QPS proffered a model reflecting these views. The model was provided to stimulate discussion and ideas amongst the Taskforce (and not the advancement of a policy proposal on behalf of the QPS).

The QPS model provides that a convicted person is to be given a head sentence (as determined by a Court) and is then liable to a *further cumulative penalty*, or what QPS terms an *'incentive penalty'*,<sup>126</sup> of a length equal to the *entire* maximum penalty for the relevant offence.

The QPS model includes a recommendation that the incentive penalty be 'capped' at 15 years imprisonment (ie, is as severe as the VLAD Act regime for persons who are not office bearers).<sup>127</sup>

Under the QPS model (like the VLAD Act) the *incentive penalty* will not apply to a person who provides significant cooperation with law enforcement agencies.

Taskforce members expressed a number of concerns about the model:

- the risk that explicit 'incentive' penalties would result in accusations that cooperation had been obtained by inducement by the state, and/or that the cooperation might be ruled inadmissible on the basis of unfairness

(this concern is discussed in detail below);

- that an 'incentive penalty' of up to 15 years imprisonment is grossly disproportionate (for the reasons discussed above); and
- the proposal continues to include offences which have been identified by some members as being inappropriate for a sentencing scheme with high sentences (for example, the offence of affray).

The QPS model (as presented to the Taskforce) was not favoured by the other members and ultimately, not endorsed by the Taskforce.

However, the concept underpinning the proposal (namely a further cumulative penalty) has been incorporated into the options for reform prepared by the Taskforce.

What the QPS model did, aside from generating robust debate about its merits, was vividly illustrate the depth of opposed views within the Taskforce about how best to frame the penalties to be applied to the proposed new Serious Organised Crime circumstance of aggravation, which is the Taskforce's primary recommendation for the replacement of the VLAD Act.

Those competing views and the many options considered are set out in detail later in the Chapter.

An aspect of the QPS model which raised particular concern for the chair, the BAQ, and the QLS, was the legal risks inherent with an overt 'incentive penalty' regime.

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## INDUCEMENT AND UNFAIRNESS

Considerable care and caution must be taken by law enforcement agencies when talking with alleged offenders about the operation of the VLAD Act. There is nothing extraordinary or new in that assertion.

The chair and legal representatives on the Taskforce warned that conversations between

police and defendants, if not carefully framed, are capable of amounting to an inducement *at law* which may result in confessions or statements of cooperation being ruled inadmissible by the court (and, therefore, unable to be relied upon during the trial process).

This is because the court has an overriding discretion in a criminal proceeding to exclude *any* evidence if the court is satisfied that it would be unfair to the person charged to admit it.<sup>128</sup>

For example representations by police to a defendant that they will not, or may not, *be charged*; or that they will, or may, receive a lesser penalty if they *cooperate in relation to their own offending*, can lead to anything said by the defendant thereafter being excluded by the court on the basis that what the officer said amounted to *a threat or inducement* and the statement by the defendant was not, then, freely and voluntarily made *at law*.

A statement that is involuntary at law is inadmissible, and will be excluded because it would be unfair to admit it in a proceeding against that person.<sup>129</sup>

Similarly, representations by police advising a defendant that they will or may receive a discount in their penalty if they *cooperate by giving evidence against another person* (for example, the other members of the drug syndicate or other network users in a paedophile ring) can also amount to an *inducement*.<sup>130</sup>

Some examples of representations made by law enforcement agencies which have been held to constitute a *promise or inducement*, resulting in the exclusion of the defendant's statement, include:

- a statement made by a police officer to a defendant that any statement made by him would be for his benefit;<sup>131</sup>
- a statement made by police officer to a defendant that it would be 'better' for the accused to tell the truth;<sup>132</sup>

- a statement made by police officer to a defendant that they would assist the accused in his bail application;<sup>133</sup> and
- a statement made by a police officer that if the defendant cooperated, the sentence would not involve jail time.<sup>134</sup>

In the context of the VLAD Act regime all the more caution is, arguably, needed to ensure that what is said about the operation of that regime cannot be misconstrued by the defendant. For example, for a police officer to say the following attracts risk of a future legal challenge at the trial of that person's co-accused:

- a police officer advising a person that if they cooperate and provide evidence against a co-accused, they will not be charged under the VLAD Act; and
- a police officer giving an indication as to the expected penalty discount the person may expect if he/she cooperates under the VLAD Act regime.

If those conversations are construed as having operated as a threat, promise or inducement on the mind of the person when deciding to cooperate against another, it is highly likely that the evidence will be excluded from the trial against that alleged co-offender on the basis that the reception of the 'tainted evidence' (ie, a statement not freely and voluntarily made) would be unfair to that co-accused.<sup>135</sup>

The potential consequences of such a ruling for the Crown case against the co-offender are dire – the matter may need to be discontinued because the prosecution case is so heavily reliant on that evidence; or, at least, so significantly weakened by its absence that the prospects of securing a conviction become remote (because, without that VLAD Act cooperation, the other evidence is not sufficient to prove the charges beyond reasonable doubt).

Even if that VLAD Act statement is *not* excluded, the challenge to its veracity is not

necessarily resolved. It can readily be anticipated that the legal representatives of the co-accused might nevertheless:

- *Apply for a stay of the indictment* (that is, a ruling by the court to halt the legal process, sometimes indefinitely) – on the basis that the defendant’s right to a fair trial has been compromised by the conduct of law enforcement agencies in the evidence gathering stage, such that the cooperating witness is tainted and inherently unreliable (granted, of course, that a stay is a remedy of last resort, and only used in rare and exceptional circumstances),<sup>136</sup> or
- *Undermine the credibility of the Crown case* – by attacking the credit of the cooperating witness and law enforcement agency witnesses; by drawing the jury’s attention to the discussions concerning the VLAD Act preceding the cooperation and thereby attempting to undermine the credibility and reliability of the prosecution case in the eyes of the jury; and/or
- *Seek a judicial warning to the jury* – with a trial judge advising a jury that they must *carefully and cautiously scrutinise* the evidence of the witness who has provided an undertaking in accordance with the VLAD Act, and that *they should only act on the evidence after considering it, and all other evidence in the case, they are convinced of its truth and accuracy.*<sup>137</sup> (This type of warning will likely be given regarding the evidence of a vicious lawless associate in any event.)

#### THE DIFFERENCE BETWEEN A STANDARD PERCENTAGE MSNPP SCHEME AND A DEFINED TERM MSNPP SCHEME

During the debate on the merits of a standard percentage MSNPP or a defined term MSNPP scheme as a possible option to penalise the new Serious Organised Crime circumstance of aggravation, the chair expressed the view that significant weight must be given to the fact

that no two crimes are the same, whether in the details of the offender or offending, or in the impact upon the victim and community.

Accordingly, the retention of some form of judicial discretion is an important (arguably, critical) protection against unjust sentencing outcomes.

Having regard to the case examples examined by the Taskforce it is apparent that defined term MSNPP schemes *will* inevitably lead to significant injustice *some of the time* (perhaps with the exception of the offence of murder which is, objectively, the most heinous of all crimes).

In that light, the arguable benefits of a standard percentage MSNPP scheme over a defined term scheme in the Queensland context are that:

- it enables the prevailing current approach to sentencing in Queensland to be retained: that is, first, the overall sentence to be imposed is determined; and, then, consideration turns to parole eligibility (effectively, a top-down approach to sentencing);
- the court retains its discretion to set the appropriate ‘head’ sentence for the particular offender having regard to the individual circumstances of the particular case. This type of MSNPP mitigates the risk of injustice, given its ability to accommodate differences within a single offence category through the setting of an appropriate head sentence;<sup>138</sup>
- it is the simpler and more straightforward approach to establishing an MSNPP regime, including implementing and applying such a regime in practice (including for the reasons below); and
- a standard percentage scheme was the model recommended by Queensland’s former Sentencing Advisory Council.<sup>139</sup>

In an attempt to overcome the risk of injustice created by a defined term scheme the solution is often to build in some form of judicial discretion.<sup>140</sup>

But any attempt to do so carries the risk that Queensland would run into the same complexities (and problems) which New South Wales has experienced with its defined term MSNPP scheme.<sup>141</sup>

Unlike a standard percentage scheme, where the same percentage applies to all offences covered by the scheme (and variance across offence seriousness is reflected through the head sentence), under a defined term scheme Parliament should articulate the level of offence seriousness that the fixed non-parole period is intended to represent.

For example, in NSW the legislated MSNPP is to represent the non-parole period for ‘*an offence in the middle of the range of objective seriousness*’ for that category of conduct.

What the non-parole period represents is important information for the sentencing judge, in order for them to decide whether the minimum sentence in the case before them should be more than the defined term.

But the NSW approach has proven to be very complicated, has led to confusion as to the proper interpretation to be given to the phrase, and has increased the likelihood of appeals.

This is particularly so as a result of the High Court ruling in *Muldock v The Queen*,<sup>142</sup> which found that the basis upon which the NSW regime had been interpreted and applied, for a lengthy period of time, was incorrect, necessitating the re-opening of many sentence matters to correct the error.

Further, in recognition of the High Court decision, the NSW regime was amended in 2013 to include a reference that:<sup>143</sup>

*‘The standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate*

*sentence for an offender, without limiting the other matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.’*

The recent Victorian approach also illustrates the complexity of a defined term scheme. In 2014, amendments were passed to the *Sentencing Act 1991* (Vic) to implement a ‘baseline’ sentencing scheme.<sup>144</sup>

The Victorian Sentencing Advisory Council summarises the regime as follows:<sup>145</sup>

The baseline sentence represents ‘the sentence that Parliament intends to be the *median sentence* for sentences imposed for that offence and courts must consider the baseline sentence set out for baseline offences. The ‘median’ is a statistical midpoint, and in the context of sentencing, it means that half the sentences are below the median and half the sentences are above the median.

This new scheme was considered for the first time by the Victorian Court of Appeal in *DPP v Walters*.<sup>146</sup> By majority decision, the Court found the scheme to be unworkable, and considered it to be ‘incapable of being given any practical operation’ as framed.

The Victorian Sentencing Advisory Council summarised the findings as follows:<sup>147</sup>

‘Their Honours held that there was a legislative gap, consisting in the failure to provide any mechanism for the achievement of the intended future median, and that it was beyond the judicial function to fill this gap. They said:

*The defect in the legislation is incurable. Parliament did not provide any mechanism for the achievement of the intended future median, and the Court has no authority to create one, as the Director of Public Prosecutions properly conceded. To do so would be to legislate, not to interpret.*

A particular issue with the scheme was the difficulty for a court in determining the features of a ‘median’ sentence case in order to compare the case before the court with either a historical or a hypothetical future median case.’

The Victorian Sentencing Advisory Council has been tasked by the Victorian Government to advise on the most effective legislative mechanism to provide sentencing guidance to the courts, in a way that promotes consistency of approach in sentencing offenders and promotes public confidence in the criminal justice system. The report date is 15 April 2016.<sup>148</sup>

## PROPOSAL FOR CHANGE

### A SERIOUS ORGANISED CRIME CIRCUMSTANCE OF AGGRAVATION

#### AN OVERVIEW

The renewed Organised Crime Framework proposed by the Taskforce contains a cohesive and workable model which provides a strong yet proportionate response to combating *all* forms of serious organised crime.

One of its cornerstones is the establishment of a new *Serious Organised Crime circumstance of aggravation* to be inserted into Queensland’s Criminal Code.

This new circumstance of aggravation would incorporate the new definitions of ‘participant’ and ‘criminal organisation’.

This initiative is to replace the VLAD Act, which it is recommended should be repealed in its entirety.<sup>149</sup>

The intention is that the new circumstance of aggravation will apply to a list of specific offences; in particular, offences which are objectively serious in nature, and often connected with organised criminal activity.

The focus is to be on: drug offending, sexual offending and child sex offending, fraud and

money laundering, serious violence, and attacks on the administration of justice.<sup>150</sup>

To indict with the circumstance of aggravation will require the written consent of the Director of Public Prosecutions.<sup>151</sup>

Establishment of the new circumstance of aggravation will not result in an increase to the existing statutory maximum penalty attached to each of the prescribed offences but, rather, it will enliven a sentencing regime which is specific to the Serious Organised Crime circumstance of aggravation (and, which includes a mandatory Control Order).

Like the VLAD Act (although with necessary modifications) this new *targeted sentencing regime* can only be avoided in circumstances where the person provides significant cooperation with law enforcement.

However, a fundamental point of distinction between the new scheme and the approach under the VLAD Act is that the new scheme relies upon the sentencing judge (not the Commissioner of Police) to assess the calibre of cooperation from the convicted person, to be used in an investigation or a proceeding about a serious criminal offence (with assistance from submissions by the Crown, and defence legal representatives).

The Taskforce envisages that the circumstance of aggravation might include elements such as:<sup>152</sup>

‘If the offender is a *participant* in a *criminal organisation* and committed the offence:

- (i) at the direction of a criminal organisation or a participant of a criminal organisation; or
- (ii) in association with one or more persons who, *at the time* of the commission of the offence were participants in the same criminal organisation; or
- (iii) for the benefit of a criminal organisation

the offence is declared to be a Serious Organised Crime Offence.’

Importantly, the Taskforce does *not* propose that this circumstance of aggravation be drafted as a floating circumstance of aggravation but, rather, it is to attach to a discrete list of offences *only*.

The Taskforce was unanimous in its view that the VLAD Act should be repealed; and, also, unanimous in its view that the above initiative should be inserted into the Criminal Code (and consequentially, the targeted sentencing regime should be inserted into the Penalties and Sentences Act) as replacement for the VLAD Act.

In developing the Serious Organised Crime circumstance of aggravation the Taskforce deliberated extensively over its merits, as compared to the prevailing approach under the VLAD Act regime.

All members of the Taskforce consider the establishment of the Serious Organised Crime circumstance of aggravation to be a better approach to confronting organised crime.

The initiative has the advantage of establishing the replacement sentencing regime in the Penalties and Sentences Act, which addresses one of the key concerns about the VLAD Act itself. To do so will also alleviate concerns surrounding the title of the legislation raised both by the High Court in *Kuczborski*, and in a number of submissions to the Taskforce.

The Taskforce recommends reducing the number of offences captured by the new circumstance of aggravation – thus, in turn, alleviating the criticisms raised in a number of submissions to the Taskforce surrounding the unacceptable breadth of the VLAD Act application.

The intention of the Taskforce is to direct this replacement model toward serious criminal activity.

All members of the Taskforce agreed that where someone convicted of the new

circumstance of aggravation provides cooperation with law enforcement agencies, whether by way of an undertaking in accordance with section 13A of the Penalties and Sentences Act or through the provisions of information and assistance in accordance with section 13B, they should receive recognition of their cooperation through a reduction of the otherwise appropriate penalty.

Supporters of the VLAD Act sentencing regime may yet consider that the retention of very harsh fixed mandatory minimum sentences (as provided in the VLAD Act) is necessary to encourage cooperation with law enforcement. The threat of a crushing, *fixed* term of imprisonment provides, it is argued, a crucial incentive for participants to give evidence and break the ‘code of silence’ associated with many criminal organisations.

The Taskforce analysed this proposition exhaustively. Most members concluded that a fixed, harsh mandatory minimum sentence is not a critical element in a sentencing ‘package’ which has, as one of its purposes, the aim of encouraging offenders to cooperate.

Rather, the majority was persuaded that the ability to remove oneself from a significant *targeted* sentencing regime, as is proposed for the new circumstance of aggravation, is a palpable and significant (and appropriate) incentive (recognising that there will always be some who will never cooperate, notwithstanding the benefit to them personally) to provide information or evidence to law enforcement that is of significant utility in an investigation or proceeding.

#### HOW TO FRAME THE PENALTY PROVISION?

All Taskforce members, including QPS, were of one mind that the fixed mandatory sentences prescribed in the VLAD Act are excessively harsh, rendering the regime grossly disproportionate to what is tolerable in a civilised democratic society like Queensland; and they should not be persisted with.

The challenge facing the Taskforce was how, then, to frame a new targeted sentencing

regime to apply to the Serious Organised Crime circumstance of aggravation?

What type of sentencing regime is robust enough to deter participation in criminal organisations and to effectively break the code of silence that often binds these groups, yet remains compatible with the rule of law which is at the core, and is the foundation, of our criminal justice system?

For the Taskforce, this question highlighted the tensions that it faced, including tensions amongst its membership.

On the one hand, the imposition of crushing and grossly disproportionate mandatory sentences, while likely to force cooperation (whether in the form of credible or fabricated information), is, the Taskforce strongly felt, untenable.

On the other hand, accepting that organised crime is a serious problem and that ‘cracking’ it works best if its participants have an inducement to cooperate, the lack of relatively strong punishment, involving some precision (sufficient for an accused to identify that they faced, on any view, lengthy incarceration), could mean the loss of an appropriate deterrent/encouragement element.

How much prison time is enough to secure cooperation by a person (recognising that some people will never cooperate)? And, how should it be calculated?

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#### VIEWES OF THE POLICE UNIONS

The Commissioned Officers’ Union considered that the Serious Organised Crime circumstance of aggravation *must* be accompanied by a mandatory sentencing regime, consistent with their view that a strong incentive is needed to secure cooperation.

The Commissioned Officers’ Union, at times, seemed persuaded toward a defined term MSNPP (despite the known complexities of this approach, as experienced in NSW and Victoria) and thought that it might contain more of an incentive, as compared to a

standard percentage MSNPP (even if the percentage were to be 100%; that is, the person must serve their entire sentence in prison).

The QPU also supports mandatory minimum sentencing, framed to provide certainty of outcome. The QPU is of the view that persons who are charged would appreciate the implications of a defined MSNPP, or a requirement that they serve the entire sentence in prison; but was concerned that a standard percentage scheme might create too much uncertainty as to penalty at the outset of proceedings.

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#### VIEWES OF THE LEGAL PROFESSIONS

As previously noted, the BAQ and the QLS remained fundamentally opposed to mandatory sentencing throughout and strongly defended the value and importance of retaining judicial discretion in the criminal justice system.

However both organisations, and the PIM, ultimately agree that a *targeted sentencing regime* ought to attach to the Serious Organised Crime circumstance of aggravation.

The chair supports this view.

To that end, if the Government is minded to enshrine a MSNPP regime, the preferred approach is that it be framed as a standard percentage scheme and *not* a defined term scheme – for all of the reasons set out above.

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#### THE OPTIONS

Taking into account the competing views of Taskforce members, it is clear that any targeted sentencing regime needs, at least, the following features:

- it must be clearly framed and provide certainty as to the consequences to follow if convicted of the circumstance of aggravation (unless the accused is able to significantly cooperate with law enforcement); and

- it must contain a sufficiently strong deterrent that a person would consider cooperating to avoid the sanction, **but** not be so severe as to be a crushing sanction, such that the overall penalty becomes detached from any consideration of proportionality with the nature and seriousness of the offence committed.

To that end, the Taskforce considered three options, to be considered by Government (noting that BAQ does not support the imposition of a mandatory Control Order, but says instead that it should be at the discretion of the court).<sup>153</sup>

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**OPTION 1: CREATE A MANDATORY MSNPP REGIME PLUS A MANDATORY CONTROL ORDER**

Under option 1 the court retains its discretion to determine the appropriate head sentence for the particular offending; and then, once determined, the MSNPP applies to determine parole release.

If this option is preferred the issue then becomes how best to frame that MSNPP, in the Queensland context.

One option is to introduce ‘defined term’ schemes like NSW and Victoria but, given the complexities and significant challenges confronting them (discussed above) and the injustice that can result irrespective of whether targeting low level offences or serious crimes (also discussed above), the Government may consider they should be avoided.

Alternatively, a scheme based upon a percentage of the sentence imposed would be the fairest and most appropriate approach.

The question then becomes: what percentage of the overall head sentence is strong enough that a person would consider cooperating to avoid the sanction?

The Taskforce discussed the possibility of requiring the convicted person to serve a

minimum on 80% of the overall head sentence before parole eligibility or release.<sup>154</sup>

This sentence, once served, does not acquit the convicted person of all accountability to the penal system; it is followed and supplemented under this model by a control order, discussed in detail in Chapter 14.

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**OPTION 2: ELIMINATE THE POSSIBILITY OF PAROLE RELEASE AND REQUIRE THE PERSON TO SERVE THE ENTIRE SENTENCE (100%) PLUS A MANDATORY CONTROL ORDER**

This option essentially means that the person is sentenced to a flat ‘mandatory’ sentence but of a variable duration, to be set by the sentencing court based on the gravity of the aggravated offence actually committed and the usual discretionary matters.

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**OPTION 3: CREATE A CUMULATIVE FIXED MANDATORY PENALTY, AS UNDER THE VLAD ACT, PLUS A MANDATORY CONTROL ORDER**

Option 3 acknowledges the QPS model (as outlined above).

QPS recommended, in its submission to the Taskforce, that the length of the cumulative fixed mandatory penalty should be equal to the statutory maximum penalty for the offence or 15 years imprisonment, whichever is the lesser.

If the Government was to prefer this option, the question devolves to determining a fixed sentence which is not grossly disproportionate and crushing, as under the VLAD Act; and instead is actually proportionate, appropriate, and fair – but, also, constitutes a sufficient deterrent.

The QPS model generates consideration of possible variants, and alternatives – for example, setting the length of the cumulative fixed mandatory penalty at, say, 5 years imprisonment (even 7 years) or the statutory maximum penalty for the offence, whichever is the lesser.

The challenge with option 3 is that it may carry risks of injustice which have, historically, been shown to attach to any cumulative fixed mandatory penalty regime.<sup>155</sup>

That risk is not limited to lower-level offending; it can also arise in the context of serious crimes because, even in a criminal organisation, the circumstances of each participant will differ and people will have different roles (and some people simply won't have information that is substantial enough to qualify as significant cooperation).

#### RECOMMENDATION 22 (Chapter Thirteen)

A new Serious Organised Crime circumstance of aggravation should be established under the Criminal Code. (unanimous recommendation)

#### RECOMMENDATION 23 (Chapter Thirteen)

This Serious Organised Crime circumstance of aggravation should apply to a prescribed list of serious offences and should not be framed as a 'floating' circumstance of aggravation. (unanimous recommendation)

#### RECOMMENDATION 24 (Chapter Thirteen)

The circumstance of aggravation relies on the new definitions for participant and criminal organisation, as discussed in Chapter 8. (unanimous recommendation)

#### RECOMMENDATION 25 (Chapter Thirteen)

The circumstance of aggravation must proceed by way of indictment and needs the consent of the Director of Public Prosecutions to indict. (unanimous recommendation)

#### RECOMMENDATION 26 (Chapter Thirteen)

The effect of the circumstance of aggravation is not to increase the prevailing maximum penalty for each of the prescribed offences; instead it is to enliven a new targeted sentencing regime to be inserted into the *Penalties and Sentences Act 1992* (Qld), which cannot be mitigated or varied except as provided for in recommendation 28 of this Report. (unanimous recommendation)

## RECOMMENDATION 27 (Chapter Thirteen)

The new targeted sentencing regime should provide that the convicted person:

- must be sentenced to mandatory *Control Order*, as discussed in Chapter 14 (the Bar Association of Queensland supports a discretionary control order); and
- Either:
  - *Option 1*: must be sentenced to a term of imprisonment for the prescribed offence, of a duration determined by the sentencing court; with a mandatory minimum standard non-parole period to apply.

(A percentage MSNPP scheme is the preferred option of the chair and the Public Interest Monitor; and also the Bar Association of Queensland and Queensland Law Society (should the Government commit to introducing some form of mandatory sentencing in this context)); or

- *Option 2*: must be sentenced to a term of imprisonment for the prescribed offence, of a duration determined by the sentencing court; and is required to serve the entire period in actual prison without parole release; or
- *Option 3*: must serve a cumulative fixed mandatory penalty *in addition* to the term of imprisonment for the prescribed offence.

(This is the preferred option of the Queensland Police Service, and the Commissioned Officers' Union and Queensland Police Union.)

## RECOMMENDATION 28 (Chapter Thirteen)

The convicted person can avoid the targeted sentencing regime if they provide cooperation of significant use to a law enforcement agency in the *investigation of or in a proceeding for* a serious criminal offence (as defined under the *Criminal Organisation Act 2009* (Qld)); and the utility of the cooperation is to be determined by the sentencing judge (consistent with the prevailing approach under section 13A of the *Penalties and Sentences Act 1992* (Qld)). (unanimous recommendation)

## RECOMMENDATION 29 (Chapter Thirteen)

The *Vicious Lawless Association Disestablishment Act 2013* (Qld) should be repealed. (unanimous recommendation)

## ENDNOTES

- <sup>1</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3154 (Bleijie, Attorney-General and Minister for Justice).
- <sup>2</sup> <[http://www.legislation.qld.gov.au/Acts\\_Passed](http://www.legislation.qld.gov.au/Acts_Passed)>.
- <sup>3</sup> Section 2(1).
- <sup>4</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [9] (French CJ).
- <sup>5</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [63] (Hayne J).
- <sup>6</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [159] (Crennan, Kiefel, Gageler, Keane JJ).
- <sup>7</sup> Section 3 (read in conjunction with Schedule 1).
- <sup>8</sup> Section 7.
- <sup>9</sup> Section 9.
- <sup>10</sup> Section 9.
- <sup>11</sup> *Judicial Review* is the process whereby an *administrative* decision is reviewed by a court to determine whether the correct legal process was followed in making that decision. Faults in decision-making may include a failure to afford natural justice, a failure to take into account a relevant consideration – or, conversely, that an irrelevant consideration was taken into account.
- <sup>12</sup> Section 9.
- <sup>13</sup> Section 3.
- <sup>14</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [69] (Hayne J).
- <sup>15</sup> Section 4.
- <sup>16</sup> Section 5.
- <sup>17</sup> *Penalties and Sentences Act 1992* (Qld), section 13A.
- <sup>18</sup> (2014) 89 ALJR 59.
- <sup>19</sup> Bar Association of Queensland, Submission 5.1 to the Taskforce on Organised Crime Legislation, 5 August 2015; Dr Ananian-Welsh, Submission 5.14 to the Taskforce on Organised Crime Legislation, 7 August 2015.
- <sup>20</sup> The numbers of members and associates includes ex-members who disassociated from the OMCG in that period and ex-associates.
- <sup>21</sup> Joshua Robertson, 'Bikie Gang Laws: First Person Convicted under VLAD Act is Spared Longer Jail Term', *The Guardian* (online), 3 June 2015 <<http://www.theguardian.com/australia-news/2015/jun/03/bikie-gang-laws-first-person-convicted-under-vlad-act-is-spared-longer-jail-term>>
- <sup>22</sup> *The Queen v Brett William Young* (Brisbane Supreme Court. Justice Boddice, 24 September 2015).
- <sup>23</sup> Kate Galloway and Allan Ardill, 'Queensland: a return to the moonlight State' (2014) 39 *Alternative Law Journal* 3, 3.
- <sup>24</sup> Kate Galloway and Allan Ardill, 'Queensland: a return to the moonlight State' (2014) 39 *Alternative Law Journal* 3, 3-4.
- <sup>25</sup> Kate Galloway and Allan Ardill, 'Queensland: a return to the moonlight State' (2014) 39 *Alternative Law Journal* 3, 3-4.
- <sup>26</sup> Paul Weston, 'Tough VLAD laws have community backing: MP', *Gold Coast Bulletin*, 28 October 2015, 4; Editorial, 'Real fears as bikies anticipate free rein', *Gold Coast Bulletin*, 6 January 2016, 18; Editorial, 'Top priority is to keep streets safe from thugs', *Courier Mail*, 18 January 2016, 20; Sarah Vogler, 'Police Sound Bikie Alarm and Police warn against weakening hard-line gang legislation', *Courier Mail*, 19 January 2016, 1; Caroline Marcus, 'Abolishing VLAD just a green light for return of outlaw bikies', *Sunday Mail*, 24 January 2016, 70; Des Houghton, 'I'll keep boot on bikies' throats', *Courier Mail*, 30 January 2016, 5.
- <sup>27</sup> Queensland Police Service, Submission 5.16 to the Taskforce on Organised Crime Legislation, 22.
- <sup>28</sup> Dr Ananian-Welsh, Submission 5.14 to the Taskforce on Organised Crime Legislation, 7 August 2015.
- <sup>29</sup> Rule of Law Institute of Australia, Submission 5.2 to the Taskforce on Organised Crime Legislation, 7 August 2015, 2.
- <sup>30</sup> Bar Association of Queensland, Submission 5.1 to the Taskforce on Organised Crime Legislation, 5 August 2015.
- <sup>31</sup> (2014) 314 ALR 528.
- <sup>32</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [13]-[14].
- <sup>33</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [67].

- <sup>34</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [67].
- <sup>35</sup> Bar Association of Queensland, Submission 5.1 to the Taskforce on Organised Crime Legislation, 5 August 2015
- <sup>36</sup> Dr Ananian-Welsh, Submission 5.14 to the Taskforce on Organised Crime Legislation, 7 August 2015. Rule of Law Institute of Australia, Submission 5.2 to the Taskforce on Organised Crime Legislation, 7 August 2015.
- <sup>37</sup> Kate Galloway and Allan Ardill, 'Queensland: a return to the moonlight State' (2014) 39 *Alternative Law Journal* 3, 4.
- <sup>38</sup> <[www.legislation.qld.gov.au](http://www.legislation.qld.gov.au)>.
- <sup>39</sup> *Penalties and Sentences Act 1992* (Qld), section 6.
- <sup>40</sup> *Youth Justice Act 1992* (Qld), sections 4 and 6; and Schedule 4.
- <sup>41</sup> *Penalties and Sentences Act 1992* (Qld), section 3.
- <sup>42</sup> Mackenzie and Stobbs, *Principles of Sentencing*, (Federation Press, 2010), 54.
- <sup>43</sup> *Veen v The Queen (No 2)* (1988) 164 CLR 465.
- <sup>44</sup> Rule of Law Institute of Australia, Submission 5.2 to the Taskforce on Organised Crime Legislation, 7 August 2015, 2.
- <sup>45</sup> Dr Ananian-Welsh, Submission 5.14 to the Taskforce on Organised Crime Legislation, 7 August 2015, 4-6.
- <sup>46</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [15] (French CJ).
- <sup>47</sup> *Penalties and Sentences Act 1992* (Qld), sections 13A and s13B.
- <sup>48</sup> Section 2.
- <sup>49</sup> *R v MAK* (2006) 167 A Crim R 159, [17]; Judicial Commission of New South Wales, *Concurrent and Consecutive Sentences* <[http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/concurrent\\_and\\_consecutive\\_sentences.html#d5e13821](http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/concurrent_and_consecutive_sentences.html#d5e13821)>.
- <sup>50</sup> Queensland Police Service, Submission 5.16 to the Taskforce on Organised Crime Legislation, 16.
- <sup>51</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [12] (French CJ).
- <sup>52</sup> Bar Association of Queensland, Submission 5.1 to the Taskforce on Organised Crime Legislation, 5 August 2015, 2.
- <sup>53</sup> Criminal Code (Qld), section 305; and *Corrective Services Act 2006* (Qld), section 181.
- <sup>54</sup> *District Court Act 1967* (Qld), section 60.
- <sup>55</sup> *District Court Act 1967* (Qld), section 61.
- <sup>56</sup> Schedule 1.
- <sup>57</sup> Grace Mason, 'Alleged gang trio 'in limbo'', *Cairns Post*, 17 February 2016, 9.
- <sup>58</sup> Criminal Code, section 339.
- <sup>59</sup> Section 9.
- <sup>60</sup> Section 9.
- <sup>61</sup> Section 9.
- <sup>62</sup> Dr Ananian-Welsh, Submission 5.14 to the Taskforce on Organised Crime Legislation, 7 August 2015, 4.
- <sup>63</sup> *Penalties and Sentences Act 1992* (Qld), section 13A.
- <sup>64</sup> Queensland Police Service, Submission 5.16 to the Taskforce on Organised Crime Legislation, undated, 24.
- <sup>65</sup> Dr Rebecca Ananian-Welsh, 'Kuczborski v Queensland and the Scope of the Kable Doctrine,' (2015) 34(1) *University of Queensland Law Journal* 47.
- <sup>66</sup> <[www.legislation.qld.gov.au](http://www.legislation.qld.gov.au)>.
- <sup>67</sup> Dr Ananian-Welsh, Submission 5.14 to the Taskforce on Organised Crime Legislation, 7 August 2015, 3.
- <sup>68</sup> Dr Ananian-Welsh, Submission 5.14 to the Taskforce on Organised Crime Legislation, 7 August 2015, 3.
- <sup>69</sup> Bar Association of Queensland, Submission 5.1 to the Taskforce on Organised Crime Legislation, 5 August 2015, 8.
- <sup>70</sup> Bar Association of Queensland, Submission 5.1 to the Taskforce on Organised Crime Legislation, 5 August 2015, 9.
- <sup>71</sup> *Criminal Law Amendment Act 2014* (Qld), Part 12 (assent date, 15 August 2014).
- <sup>72</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [12] (French CJ).
- <sup>73</sup> Bar Association of Queensland, Submission 5.1 to the Taskforce on Organised Crime Legislation, 5 August 2015.
- <sup>74</sup> Queensland Council for Civil Liberties, Submission 5.15 to the Taskforce on Organised Crime Legislation, 7 August 2015, 4.

- <sup>75</sup> Rule of Law Institute of Australia, Submission 5.2 to the Taskforce on Organised Crime Legislation, 7 August 2015.
- <sup>76</sup> *Criminal Proceeds Confiscation Act 2002* (Qld), section 17.
- <sup>77</sup> *Criminal Organisation Act 2009* (Qld), section 7.
- <sup>78</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [70]-[72] (Hayne J).
- <sup>79</sup> McAdam and Smith, *Statutes*, (Butterworths, 3<sup>rd</sup> revised ed), Chapter 6.
- <sup>80</sup> [2014] SASFCF 97.
- <sup>81</sup> Queensland Police Service, Submission 5.16 to the Taskforce on Organised Crime Legislation, 18.
- <sup>82</sup> <[www.legislation.qld.gov.au](http://www.legislation.qld.gov.au)>.
- <sup>83</sup> Dr Rebecca Ananian-Welsh, 'Kuczborski v Queensland and the Scope of the Kable Doctrine,' (2015) 34(1) *University of Queensland Law Journal* 47.
- <sup>84</sup> Dr Rebecca Ananian-Welsh, 'Kuczborski v Queensland and the Scope of the Kable Doctrine,' (2015) 34(1) *University of Queensland Law Journal* 47.
- <sup>85</sup> [2013] HCA 40.
- <sup>86</sup> *Magaming v The Queen* [2013] HCA 40, [1]-[12] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
- <sup>87</sup> Dr Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38 *Melbourne University Law Review* 362, 392.
- <sup>88</sup> Law Council of Australia, 'Policy Discussion Paper on Mandatory Sentencing (May 2014), 9.
- <sup>89</sup> For example, as provided for under the 2013 suite.
- <sup>90</sup> For example, the punishment for the offence of murder in Queensland; *Criminal Code* (Qld), section 305 and *Corrective Services Act 2006* (Qld), section 181.
- <sup>91</sup> For example, *Penalties and Sentences Act 1992* (Qld), section 9(4), (5) and (6).
- <sup>92</sup> Sentencing Advisory Council (Vic), 'Sentencing Guidance Reference: Consultation Paper,' December 2015, 24-28.
- <sup>93</sup> Sentencing Advisory Council (Vic), 'Sentencing Guidance Reference: Consultation Paper,' December 2015, 9.
- <sup>94</sup> *Vicious Lawless Association Disestablishment Act 2013* (Qld), section 2.
- <sup>95</sup> Law Council of Australia, 'Policy Discussion Paper on Mandatory Sentencing (May 2014), 10-19; New South Wales Parliamentary Research Service, 'Mandatory Sentencing Laws (e-Brief 1/2014, January 2014), 2-3.
- <sup>96</sup> Law Council of Australia, 'Policy Discussion Paper on Mandatory Sentencing (May 2014), 20-35; New South Wales Parliamentary Research Service, 'Mandatory Sentencing Laws (e-Brief 1/2014, January 2014), 2-3; Queensland Council for Civil Liberties, Submission 5.15 to the Taskforce on Organised Crime Legislation, 7 August 2015; Bar Association of Queensland, Submission 5.1 to the Taskforce on Organised Crime Legislation, 5 August 2015; and written communication from the Bar Association of Queensland to the Taskforce on Organised Crime Legislation, 22 January 2016 (in-confidence).
- <sup>97</sup> Written communication from the Bar Association of Queensland to the Taskforce on Organised Crime Legislation, 22 January 2016 (in-confidence): citing the Council of Australian Governments' (COAG) resolution in 2015 to put 'reducing Indigenous imprisonment' on its Closing the Gap agenda.
- <sup>98</sup> Sentencing Advisory Council (Vic), 'Sentencing Matters: Does Imprisonment Deter?' (April 2011).
- <sup>99</sup> Sentencing Advisory Council (Vic), 'Sentencing Matters: Does Imprisonment Deter?' (April 2011).
- <sup>100</sup> Sentencing Advisory Council (Vic), 'Sentencing Matters: Does Imprisonment Deter?' (April 2011), 23.
- <sup>101</sup> Tasmanian Law Reform Institute, *Sentencing*, Final Report No. 11 (June 2008), 82.
- <sup>102</sup> Tasmanian Law Reform Institute, *Sentencing*, Final Report No. 11 (June 2008), 85.
- <sup>103</sup> Michael Tonry is the McKnight Presidential Professor of Criminal Law and Policy, Director of the Institute on Crime and Public Policy of the University of Minnesota, and a Scientific Member of Germany's Max Planck Society; and since 2001, he has been a visiting Professor of law and criminology at the University of Lausanne, Switzerland and since 2003, a Senior Fellow in the Netherlands Institute for the Study of Crime and Law Enforcement, Free University Amsterdam.
- <sup>104</sup> Michael Tonry, 'Sentencing in America, 1975 – 2025' in Michael Tonry, *Crime and Justice in America, 1975 – 2025*, (University of Chicago Press, 2013), 141. In forming his conclusion, Tonry examined three sources of evidence: government reviews for policy making, scholarly surveys and evaluations of mandatory minimum and three-strike laws (176-180). See also, 181-183 regarding 'incapacitation theory' where Tonry suggests that the evidence indicated that mandatory sentences do not bring down crime rates because of offender incapacitation (the offenders were quickly replaced).

- 14 May 2014), 6-7 <[http://www.sydney.edu.au/law/events/2014/May/DSP\\_Cowdery15052014.pdf](http://www.sydney.edu.au/law/events/2014/May/DSP_Cowdery15052014.pdf)>.
- <sup>105</sup> ‘Marginal deterrence’ means: an individual will be deterred from committing a more harmful act owing to the deterrence, or margin between the expected sanction for it and for a less harmful act; the person is expected to choose to do the lesser of the two based on the severity of the sanction.
- <sup>106</sup> Daniel S Nagin is the Teresa and H John Heinz III University Professor of Public Policy and Statistics at Carnegie Mellon University.
- <sup>107</sup> Daniel Nagin, ‘Deterrence in the Twenty-First Century’ in Michael Tonry, *Crime and Justice in America, 1975 – 2025*, (University of Chicago Press, 2013), 199.
- <sup>108</sup> Written communication from the Bar Association of Queensland to the Taskforce on Organised Crime Legislation, 22 January 2016 (in-confidence).
- <sup>109</sup> Adjunct Professor Nicholas Cowdery AM QC, ‘Mandatory Sentencing’ (Speech delivered at the Distinguished Speakers Program, The Sydney Law School, 14 May 2014) <[http://www.sydney.edu.au/law/events/2014/May/DSP\\_Cowdery15052014.pdf](http://www.sydney.edu.au/law/events/2014/May/DSP_Cowdery15052014.pdf)>.
- <sup>110</sup> *Youth Justice and Other Legislation Amendment Bill 2015* (Qld) – inter alia, reinstates the fundamental sentencing principle that detention/prison is a sentence of last resort.
- <sup>111</sup> As has occurred in the Queensland context on account of the VLAD Act.
- <sup>112</sup> Written communication from the Bar Association of Queensland to the Taskforce on Organised Crime Legislation, 22 January 2016 (in-confidence).
- <sup>113</sup> Michael Tonry, ‘Sentencing in America, 1975 – 2025’ in Michael Tonry, *Crime and Justice in America, 1975 – 2025*, (University of Chicago Press, 2013), 141, 163.
- <sup>114</sup> Namely, trafficking in a Schedule 1 drug, supply by an adult to a minor of a Schedule 1 drug, production of a Schedule 1 drug exceeding a prescribed amount and possessing a Schedule 1 drug in excess of a prescribed amount under the *Drugs Misuse Act 1986* (Qld).
- <sup>115</sup> *Drugs Misuse Act Amendment Act 1990* (Qld).
- <sup>116</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 10 May 1990, 1385, (Spence).
- <sup>117</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 4 December 1991, 3629 (Milliner); includes an overview of each case reviewed.
- <sup>118</sup> SCC 21102367; Adjunct Professor Nicholas Cowdery AM QC, ‘Mandatory Sentencing’ (Speech delivered at the Distinguished Speakers Program, The Sydney Law School, 14 May 2014), 6-7 <[http://www.sydney.edu.au/law/events/2014/May/DSP\\_Cowdery15052014.pdf](http://www.sydney.edu.au/law/events/2014/May/DSP_Cowdery15052014.pdf)>.
- <sup>119</sup> (1997) 93 A Crim R 433.
- <sup>120</sup> Adjunct Professor Nicholas Cowdery AM QC, ‘Mandatory Sentencing’ (Speech delivered at the Distinguished Speakers Program, The Sydney Law School, 14 May 2014), 7 <[http://www.sydney.edu.au/law/events/2014/May/DSP\\_Cowdery15052014.pdf](http://www.sydney.edu.au/law/events/2014/May/DSP_Cowdery15052014.pdf)>.
- <sup>121</sup> *R v Hasim* (11.01.2012, Queensland District Court, Martin DCJ SC): ‘Commonly savage penalties are being imposed upon the ignorant, who are simply being exploited by organisers. It’s obvious from the legislation imposing a minimum mandatory penalty deprives a court from exercising a full and proper sentencing discretion in cases such as this’; *R v Ambo* [2011] NSWDC 182: ‘The deterrent effects of mandatory sentencing needed to be considered in the context of illiterate and poor fishermen from remote islands of the Indonesian archipelago where there is no electricity, no television and no radio’; *R v Nasir & Jufri* (02.12.2011, Queensland Supreme Court, Atkinson J); *R v Mahendra* (01.09.2011, Supreme Court of the Northern Territory, Bockland J).
- <sup>122</sup> See, for example, George Zdenkowski, ‘Mandatory Imprisonment of Property Offenders in the Northern Territory’ (1999) 22(1) *University of New South Wales Law Journal* 302; Northern Territory Office of Crime Prevention, ‘Mandatory Sentencing for Adult Property Offenders – The Northern Territory Experience’, (based on a speech at the *Australian and New Zealand Society of Criminology* Conference, August 2003).
- <sup>123</sup> Northern Territory Office of Crime Prevention, ‘Mandatory Sentencing for Adult Property Offenders – The Northern Territory Experience’, (based on a speech at the *Australian and New Zealand Society of Criminology* Conference, August 2003), 7.
- <sup>124</sup> Northern Territory Office of Crime Prevention, ‘Mandatory Sentencing for Adult Property Offenders – The Northern Territory Experience’, (based on a speech at the *Australian and New Zealand Society of Criminology* Conference, August 2003), 1.
- <sup>125</sup> Queensland Police Service, Submission 5.16 to the Taskforce on Organised Crime Legislation; and written communication from Queensland Police Service to the Taskforce on Organised Crime Legislation, undated (in-confidence).
- <sup>126</sup> Written communication from the Bar Association of Queensland to the Taskforce on Organised Crime Legislation, 22 January 2016 (in-confidence).
- <sup>127</sup> The QPS also made reference to incorporating the concept of a ‘safety valve’ into the regime so as to enable the court to deviate from the mandatory scheme in exceptional circumstances, as a means of addressing the

potential for unjust or manifestly unfair sentencing outcomes.

- <sup>128</sup> *Evidence Act 1977* (Qld), section 130.
- <sup>129</sup> *Criminal Law Amendment Act 1894* (Qld), section 10.
- <sup>130</sup> *R v Garcia* [2010] QSC 494 (per Wilson J).
- <sup>131</sup> *McNamara v Edwards* [1907] St R Qd 9.
- <sup>132</sup> *R v Beere* [1965] Qd R 370.
- <sup>133</sup> *R v Mackay* [2006] QSC 065 (McMurdo P).
- <sup>134</sup> *R v Vassallo* [2011] QSC 359 (Dalton J).
- <sup>135</sup> *Evidence Act 1977* (Qld), section 130.
- <sup>136</sup> *Jago v District Court* (NSW) (1989) 168 CLR 23, 31 (Mason CJ).
- <sup>137</sup> Criminal Code (Qld), section 632; *Robinson v R* (1999) 197 CLR 162.
- <sup>138</sup> This is important, for example, with regards to an offence like manslaughter where the circumstances surrounding the commission of the offence and the moral culpability of an offender can vary greatly from case to case; and accordingly, a wide sentencing ‘range’ necessarily, and correctly, attaches to the offence. A standard percentage scheme allows the court to set the appropriate head sentence for the particular case (reflecting the seriousness of the particular conduct) and thereafter the MSNPP applies. To attempt to define a set MSNPP (in years and months) for the offence of manslaughter would prove exceptionally difficult.
- <sup>139</sup> Sentencing Advisory Council (Qld), *Minimum standard non-parole periods*, Final Report, September 2011.
- <sup>140</sup> See for example with the Northern Territory experience as discussed in this Chapter.
- <sup>141</sup> Justice RA Hulme, ‘After Muldrock – sentencing for standard non-parole period offences in NSW’ (November 2012) 24 (10) *Judicial Officers’ Bulletin* 81; Thomas Spohr, ‘Changing the Way we sentence’ (February 2012) *Law Society Journal* 63.
- <sup>142</sup> [2011] HCA 39 (5 October 2011).
- <sup>143</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW), section 54B(2).
- <sup>144</sup> *Sentencing Amendment (Baseline Sentencing) Amendment Act 2014* (Vic).
- <sup>145</sup> Sentencing Advisory Council (Vic), Sentencing Guidance Reference: Consultation Paper, December 2015, 23.
- <sup>146</sup> [2015] VSCA 303.
- <sup>147</sup> Sentencing Advisory Council (Vic), Sentencing Guidance Reference: Consultation Paper, December 2015, 23 - 24
- <sup>148</sup> <<https://www.sentencingcouncil.vic.gov.au/projects/sentencing-guidance-reference>>.
- <sup>149</sup> For the two men sentenced under the VLAD Act regime, perhaps regard could be had to the transitional provision used when the mandatory life imprisonment regime was repealed – *Drugs Misuse Amendment Act 1990*.
- <sup>150</sup> Queensland, Commission of Inquiry into Organised Crime, *Final Report* (2015) (the Byrne Report); Queensland, Statutory Review of the *Criminal Organisation Act 2009*, *Final Report* (2015) 229-230.
- <sup>151</sup> Bar Association of Queensland, Submission 5.1 to the Taskforce on Organised Crime Legislation, 5 August 2015.
- <sup>152</sup> In noting these elements, the Taskforce acknowledges and recognises the fundamental role of the Office of the Queensland Parliamentary Counsel in drafting legislation for Queensland.
- <sup>153</sup> Irrespective of the option chosen, particular consideration will need to be given during implementation to the offence of murder; and the offence of drug trafficking. The offence of murder already provides a lengthy defined term MSNPP. No change is proposed in this regard. However, to reflect the Serious Organised Crime circumstance of aggravation, a mandatory control order could be imposed, to commence upon parole release (assuming the prisoner is released at all). In terms of the offence of drug trafficking, it is anticipated that a consequential amendment will be required to the *Penalties and Sentences Act 1992* to remove offenders convicted of the Serious Organised Crime circumstance of aggravation from the ambit of the 80% MSNPP regime under Part 9C. Depending upon the option chosen, consideration might be given to repealing Part 9C of the Penalties and Sentences Act; instead the offence of drug trafficking could be re-inserted in the Serious Violent Offence regime under Part 9A (given that the offence of drug trafficking is to be included in the new Serious Organised Crime circumstance of aggravation regime also). On this approach, the mandatory 80% regimes will target serious examples of drug trafficking, as compared to objectively lower level drug trafficking (often perpetrated by drug addicted people attempting to ‘feed’ their addiction).
- <sup>154</sup> During Taskforce deliberations, the following question was posed: Two prisoners are convicted of drug trafficking (all features appear the same except one has the additional element of having been convicted of the Serious Organised Crime circumstance of aggravation). Prisoner A (with no circumstance of aggravation) is facing in excess of 10 years and must serve 80% of the sentence before parole eligibility (Part 9C Penalties and Sentences

Act; or Part 9A if drug trafficking was re-inserted into the Serious Violence Offence regime and Part 9C repealed). Prisoner B (has the circumstance of aggravation) is facing in excess of 10 years prison and, on option 1 above, must serve 80% of the sentence before parole eligibility. What is the difference between them? The difference is that by virtue of the circumstance of aggravation, Prisoner B has been convicted of a much more serious crime, and it is expected that the court will sentence them to a higher penalty to reflect that. A mandatory Control Order will be

imposed upon Prisoner B, which will significantly impact upon the person long after parole release.

<sup>155</sup> The QPS considered that perhaps the risk of injustice could be mitigated by the inclusion of a 'safety valve' mechanism ie, to enable the court to deviate from the mandatory scheme in exceptional circumstances.

## PART 5.1

# CHAPTER FOURTEEN

## A CONVICTION- BASED CONTROL ORDER REGIME FOR QUEENSLAND

*A conviction-based control order regime offers a new sanction which enables conditions to be placed on a person who has been convicted of an organised crime offence.*

*Its aim is to control their behaviour in the community so as to prevent, restrict or disrupt them from engaging in further criminal activity.*

A cornerstone of the renewed Organised Crime Framework is the establishment of a *control order* regime – a new kind of penalty for Queensland to sit alongside existing sanctions under the *Penalties and Sentences Act 1992* (Qld).

The new regime is anchored to *convicted* individuals. The change heralds a policy return to traditional, well-proven and established criminal law practices.<sup>1</sup>

It is quite different from the approach adopted under the *Criminal Organisation Act 2009* (Qld) (COA). The COA set up a scheme in which, after a declaration by a court that a group was a *criminal organisation*, orders (including control orders) could be made against its individual members and the organisation – a strategy which the COA Review showed to be unwieldy and, ultimately, less than optimal.<sup>2</sup>

### A CONVICTION-BASED CONTROL ORDER REGIME

#### WHAT IS A CONTROL ORDER?

From the Australian perspective, control orders originated in the context of the anti-terrorism laws which were enacted in the wake of the September 11 attacks in 2001, and were focused on preventing future acts of terrorism.<sup>3</sup>

Since that time this measure, once considered an extreme and unique legislative response, has become an accepted part of the general criminal law landscape when it comes to stemming the threat of organised crime.<sup>4</sup>

The crux of a control order regime is that it enables conditions to be placed upon a person, who is in the community, in order to control their behaviour for the purpose of preventing and/or disrupting them from engaging in further criminal activity.<sup>5</sup>

As discussed below, most Australian jurisdictions provide for civil control orders under their criminal organisation statutes

analogous to Queensland's COA.<sup>6</sup> These existing regimes apply a declaration-based model to the making of control orders (not tethered to, or requiring, proof of *actual* offending by the *individual*) as distinct from a conviction-based model now proposed by the Taskforce.

As the COA Review showed,<sup>7</sup> no Australian jurisdiction (Queensland included) has succeeded in obtaining a valid declaration that an organisation is a *criminal organisation* and only one valid control order has ever been made in relation to one individual (which did not rely on a declaration being made). This disappointing outcome has occurred, of course, notwithstanding significant political will and the allocation of substantial resources to it in the six Australian jurisdictions which introduced it.<sup>8</sup>

But, despite the shortcomings of the prevailing approach, the COA Review concluded that the control order model was not inherently flawed.<sup>9</sup>

Instead, the COA Review supports a *conviction-based* control order regime for Queensland, styled on the United Kingdom approach (discussed below).<sup>10</sup>

This too is the view of the Taskforce; albeit reached from the perspective of its review of the 2013 suite.

#### THE USE OF CONTROL ORDERS THROUGHOUT AUSTRALIA

Chapter 8 of the COA Review (in particular Table 8.16)<sup>11</sup> provides a comprehensive examination of legislative attempts to combat organised crime throughout Australia, including identification of the control order regimes. It is not proposed to replicate that material in this Report.

This information assisted the Taskforce in its examination of the use of control orders throughout Australia.

It confirms that most Australian jurisdictions, except Tasmania and the Australian Capital

Territory, have a declaration-based control order regime.

From a Queensland perspective, the existing scheme:

- relies on the Supreme Court declaring an organisation to be a criminal organisation;<sup>12</sup>
- provides for an application by the Commissioner of Police to the Supreme Court for a civil order against an individual on the basis of their membership or association with a declared criminal organisation *and* their involvement with serious criminal activity;<sup>13</sup> and
- permits the Supreme Court to impose a control order *with conditions that the court considers appropriate*.<sup>14</sup>

No Australian jurisdiction has a conviction-based control order regime targeted at organised crime which forms part of its sentencing legislation.<sup>15</sup>

As this Report was in its final stages NSW announced legislation introducing pre-and post-conviction control orders, but not as part of its sentencing legislation. The NSW Bill is discussed later.

#### THE UNITED KINGDOM EXPERIENCE

The United Kingdom has what are called *Serious Crime Prevention Orders* (SCPOs). These control orders aim to protect the public by preventing, restricting or disrupting a convicted person's involvement in serious crime.<sup>16</sup>

The order can last up to five years, and may contain any prohibitions, restrictions and requirements or other terms that the court considers appropriate.

The provisions of the order can be broad and may relate to: financial or business dealings, working arrangements, anti-association or communication restrictions, travel etc.<sup>17</sup>

However, terms of the SCPO must be justified as appropriate for the purpose of protecting the public by preventing, restricting or disrupting serious crime.<sup>18</sup>

A breach of the order is a criminal offence punishable by a maximum penalty of five years imprisonment.<sup>19</sup>

A SCPO can be applied for as a stand-alone order (upon application to the High Court<sup>20</sup>) or can be imposed *at the time of sentence* after a person has been *convicted* of a serious offence (upon application to the Crown Court<sup>21</sup>).

In both instances, the proceedings are in the civil jurisdiction. These are civil orders, but punishable by criminal sanctions if contravened.<sup>22</sup>

In March 2015, the Great Britain Home Office reported that:<sup>23</sup>

*'The law enforcement agencies who use these orders find them to be a very effective tool against serious and organised crime.'*

#### WHAT IS THE DIFFERENCE BETWEEN THE UNITED KINGDOM APPROACH, AND THAT RECOMMENDED BY THE TASKFORCE?

The major difference between the United Kingdom approach and the prevailing Queensland position under the COA is that the SCPO is a *conviction-based* control order regime<sup>24</sup> (as distinct from one dependent upon judicial declaration that an organisation is criminal).

Again, however, despite being conviction-based, the United Kingdom SCPO is a civil order, which is consistent with the prevailing approach to control orders across Australia. The legislation envisages SCPOs as a *preventative measure*, and not a penal or punitive one.<sup>25</sup> The effect of this characterisation is to mitigate the risk of the order being viewed as a double punishment.<sup>26</sup>

The United Kingdom scheme can be categorised as a *conviction-based, preventative civil order regime*.

For Queensland the Taskforce, while impressed by the United Kingdom model, recommends a different approach; and, one that is also different to the prevailing Australian models.

The Taskforce recommends a control order incorporated as a *new sentencing option* which would sit alongside existing sanctions under the *Penalties and Sentences Act 1992*, and be called an **Organised Crime Control Order**.

This would be a new criminal sanction to be employed by sentencing courts to protect the community by preventing, restricting or disrupting involvement in serious crime.

#### WHAT ARE THE BENEFITS OF THE TASKFORCE ORGANISED CRIME CONTROL ORDER MODEL?

##### THE APPEAL OF A CONVICTION-BASED CONTROL ORDER REGIME

The COA Review endorsed, and the Taskforce supports, the use of conviction-based control orders in the Queensland context.

The COA Review concluded that:<sup>27</sup>

*'COA has two elements worth preserving in a new regime: control orders (but to be used, as in the UK, on a post-sentence basis to minimise the risk that a criminal organisation might re-form); and public safety orders, which may be used to prevent, forestall or disrupt potential incidents of 'barbarian' violence by OMCG members. Both may be transferred to other legislative homes.'*

In consultations for the COA Review the Queensland Police Service indicated that it continued to see a role for control orders, if they could be obtained more efficiently than through the COA process: *'Officers expressed the view that orders requiring drug testing or the wearing of monitoring devices could, in appropriate circumstances, play a role in their preventative strategies targeting organised crime.'*<sup>28</sup>

### CONVICTION-BASED CONTROL ORDERS TARGET INDIVIDUALS BECAUSE OF THEIR CRIMINAL BEHAVIOUR, AND NOT MERELY THEIR ASSOCIATION WITH OTHERS

As discussed in Chapter 8, a common criticism levelled at parts of the 2013 suite is that it punishes individuals on the basis of their associations with others, rather than on the basis of their actual criminal behaviour; and, that to do so is fundamentally at odds with the principles of a liberal democracy (and, historically-entrenched approaches to crime in our criminal justice system).<sup>29</sup>

In particular, strong concerns have been expressed about the effects of the 2013 suite upon rights of freedom of movement, which are associated with rights to liberty and security of the person, and historical freedoms of peaceful assembly. Concerns have also arisen about effects upon the ‘rule of law’ and the central role it plays in a successfully functioning democracy.<sup>30</sup>

A conviction-based control order regime has the appeal of targeting the individual because of *their proven involvement in serious criminal activity*; whether acting alone or as an active participant in the criminal affairs of a group.

It is the conclusion of the Taskforce that a number of practical operational advantages accrue to this proposed conviction-based regime:

- the evidentiary burden of establishing serious crime (or depending upon how framed, participation in a criminal organisation) is discharged in the course of the criminal trial process;
- there is no reliance upon, and no need to attempt to resort to, the use of criminal intelligence – the conviction will necessarily be based on admissible evidence;<sup>31</sup> and
- the finite resources of Queensland’s law enforcement agencies can be directed more efficiently to the intensive policing of individuals who have been *proven*, by

virtue of their conviction, to present a risk to community safety – rather than pursuing entire organisations (when only a percentage of its members may, in fact, pose a genuine risk to community safety).

### CONVICTION-BASED CONTROL ORDERS FOLLOW THE INDIVIDUAL, REGARDLESS WHETHER THEIR ASSOCIATIONS CHANGE

A conviction-based control order is tailored to the individual offender, based on the risk that they realistically present. It contains measures needed to help ensure that the particular individual does not engage in any further, post-conviction conduct from which the public requires protection.

The control order endures regardless of who the offender chooses to associate with or what organisation, if any, they chose to be a member of (or no longer be a member of).

This approach, unlike the operation of section 60A of the Criminal Code (as highlighted in Chapter 11), would prevent a person from associating with nominated individuals, irrespective whether they or those other persons are, or continue to be, members of known criminal groups.

In contrast a successful prosecution under section 60A requires, inter alia, proof beyond reasonable doubt that all three (or more) persons are participants in a criminal organisation *at that time*.

In practice it is possible that a member of a criminal organisation may choose to associate with a non-member or a disassociated member of a criminal organisation to facilitate their criminal activity, and yet may prove to be beyond the reach of section 60A of the Criminal Code (depending upon how the courts interpret the existing definition of ‘participant’).

This would not be a concern under a conviction-based control order, which could include anti-association provisions regarding those particular individuals whether or not

they are, or were, participants in a criminal organisation.

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### CONVICTION-BASED CONTROL ORDERS ARE FLEXIBLE ENOUGH TO DISRUPT ALL FORMS OF SERIOUS ORGANISED CRIME

As discussed in Chapter 2, while OMCGs have traditionally favoured hierarchical and highly visible models of organisation, the same cannot be said for all forms of organised crime.<sup>32</sup>

Organised crime groups are now, commonly, informally arranged, flexible and adaptable in structure, and have a membership composition which shifts over time depending upon the availability, reliability and specialist capabilities of the individuals recruited to them.<sup>33</sup>

To effectively confront the threat of organised crime it is important that government looks to solutions which capture every entity within the full spectrum of serious organised crime groups.

A conviction-based control order regime offers the flexibility needed to disrupt *all* forms of serious organised crime.

*It 'offers the possibility of appropriately tailored restrictions against appropriately targeted offenders in order to combat the causes of organised crime.'*<sup>34</sup>

For example:

- if the convicted person is a participant in a traditionally structured criminal organisation, the conditions of the control order might include anti-association provisions; or
- if the convicted person is part of an opportunistically formed drug syndicate, the conditions of the control order might include requirements relating to their bank accounts, and prohibition on the possession and purchase of items needed to produce drugs; or

- if the convicted person is an online child sexual offender, the conditions of the control order might include prohibiting ownership and access to information technology sources and restrictions on working arrangements; or
- if the convicted person is involved in financial crimes, the conditions of the control order might limit their engagement in certain types of business ventures, or from taking out certain commercial leases on property, and like transactions.

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### CONVICTION-BASED CONTROL ORDERS ARE LESS SUSCEPTIBLE TO LEGAL CHALLENGE

Legal challenges have been mounted against the declaration-based civil control order regimes operating across Australia (as provided for under interstate criminal organisation statutes analogous Queensland's COA).<sup>35</sup>

The COA Review provides a thorough comparative analysis of those challenges.<sup>36</sup> The Taskforce had regard to this analysis when assessing the benefits of a conviction-based regime over other forms of the order.

The challenges which confront existing declaration-based control order regimes do not apply to a conviction-based scheme.

For example, the use of 'criminal intelligence' does not arise in the context of a conviction-based control order regime.

In contrast, under the declaration-based regime in the COA, reliance upon criminal intelligence (to establish that a group is a criminal organisation) is, in effect, the bedrock of the Act.<sup>37</sup> The admission of criminal intelligence in judicial proceedings raises many legal issues, in particular the lack of procedural fairness and adherence to the fundamental principles of the rule of law (these challenges are discussed in detail in Chapter 10 and, earlier, in Chapter 4 of the COA Review).

The COA Review exhaustively analysed the use of criminal intelligence in a judicial process and concluded that:<sup>38</sup>

*'It is a clear and unavoidable conclusion that criminal intelligence adds greatly to the length and complexity of COA proceedings. It makes the Act prohibitively expensive, slow and cumbersome to use...*

*As an innovation to traditional court processes, it has proved to be self-defeating. **The experience under COA provides compelling evidence that criminal intelligence contributes substantially to rendering ineffective any judicial process into which it is inserted.***

(emphasis added)

A post-conviction control order regime does away with the need to rely upon criminal intelligence (and its manifest shortcomings as a tool in the prosecution of crime) altogether.

Reliance under the proposed new regime would be placed entirely upon the proven criminal behaviour for which the person was convicted. That is, a conviction secured via traditional criminal law processes (ie, a trial, or plea of guilty) based on properly admissible evidence capable of being challenged in open court.

It is necessary to acknowledge that the one avenue in which a control order regime can be vulnerable to challenge is through its anti-association provisions.

Depending upon how they are framed, control orders have the *potential* to impermissibly infringe upon implied constitutional freedoms of communication and association about matters of political and governmental interest.<sup>39</sup>

But a conviction-based control order regime is less susceptible to a challenge of this kind, as compared to a declaration-based model (ie, under the COA).

The High Court has accepted that an abrogation of the implied freedom of political communication can be justified where the infringement is for the purpose of disrupting or restricting the activities of criminal organisations and their members. That is, a possible abrogation of these freedoms can be allowed where it is reasonably appropriate and proportionate to serve the legitimate ends of preventing crime – so long as any infringement occurs in a manner which is consistent with the proper conduct of a representative government (this is discussed in detail in Chapter 11).<sup>40</sup>

The Taskforce considers that tying the control order regime (with its anti-association capabilities) to a conviction renders it less susceptible to constitutional challenge because it has the express, legitimate purpose of preventing *further* criminal activity.<sup>41</sup>

#### THE BENEFIT OF A CONTROL ORDER BEING A NEW SENTENCING ORDER

The principle benefit of establishing the conviction-based control order regime as a new sentencing order, rather than a preventative civil order, is that this course eliminates any risk of the regime being challenged on the basis that it offends the rule against sentencing double jeopardy.

In Queensland section 16 of the Criminal Code provides that a person cannot be twice punished for the same (punishable) acts or omissions.<sup>42</sup>

The United Kingdom describes its SCPO regime as *preventative*.

However, there is scope for argument that the making of a control order is penal in nature, given the duration of these orders and the potentially onerous conditions that may apply under them.

If that argument was accepted, then to apply a control order *in addition to* a sentence already imposed by the court for the offence for which the person was convicted (noting that the conviction is the foundation for the activation

of the control order regime) might be considered a double punishment.

A conviction-based *civil* order regime arguably risks challenge on this basis. It is not known how Queensland courts would rule on such a challenge. But the problem can be circumvented. To make the conviction-based regime a new sentencing order under the Penalties and Sentences Act eliminates this concern.

Further, it provides an additional sentencing tool for the courts to utilise when structuring the appropriate penalty to combat organised crime. The analysis undertaken for the COA Review confirms that *'there are no sentencing options currently available which would provide the same outcomes as a control order regime targeted at offenders involved in organised crime.'*<sup>43</sup>

The Taskforce proposal offers a new sanction directed at preventing, restricting or disrupting individuals involved in serious criminal activity.

It also provides certainty as to the nature and purpose of the control order regime. It is an approach most likely to accord with the understanding of ordinary Queenslanders that a control order, while preventative, is clearly a form of criminal sanction.<sup>44</sup>

## THE PROPOSAL

The Taskforce considers that the following features have merit (and are in line with those known to work in the United Kingdom), when developing the new Organised Crime Control Order penalty:<sup>45</sup>

- *Application*: the control order regime should apply to offenders sentenced under the Penalties and Sentences Act, irrespective of whether a conviction is recorded (BAQ supports imposition only if a conviction is recorded); and
  - should apply as a *mandatory consequence*<sup>46</sup> of conviction for an offence aggravated by the new Serious Organised Crime circumstance of
    - aggravation (detailed in Chapter 13); and
    - should apply at the court's discretion for *any* indictable offence,<sup>47</sup> upon application by the prosecuting authority, where the court is satisfied on the balance of probabilities that the offender was a participant in a criminal organisation at the time of the offence (having regard to all of the circumstances) and there are reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in *serious* criminal activity.<sup>48</sup>
- *Conditions of the order*: the control order should contain any conditions that the court considers appropriate in order to prevent, restrict or disrupt the person's involvement in serious criminal activity;<sup>49</sup>
- *Duration of the order*: the control order might be up to five years in duration and with the possibility of extension for up to a further five years upon any conviction for a breach of the order. Consideration could also be given to: a mechanism to delay commencement of the control order to accommodate an initial period of incarceration; and the possibility for conditions to commence at different times (ie, an anti-association provision might commence despite the initial incarceration);
- *Consequences for breach*: it is suggested that contravention of the control order should be an offence; perhaps punishable by a maximum of three years imprisonment for the first breach, increasing to five years imprisonment for a second or any subsequent breach (consistent with the approach under COA);<sup>50</sup>
- *Variation*: consideration should be given to a mechanism that allows the control order to be varied should it become operationally inoperable or the person is no longer capable of complying with its conditions

because of a physical, intellectual or psychiatric disability acquired after imposition of the order;

- *Enforcement*: responsibility for the monitoring and enforcement of the new control order regime will likely fall to the Queensland Police Service, the powers necessary to do so (if they do not already exist) will need to be incorporated into the regime; and
- *Concurrent control orders*: provision may need to be made to accommodate the situation where a person is subject to more than one control order; for example, a requirement that the sentencing court must have regard to the conditions of any existing control order in deciding the terms of the fresh order to ensure that overall the restrictions upon the person remain objectively fair and are not crushing.

#### POSTSCRIPT: NEW NSW CONTROL ORDER LEGISLATION

As this Report was in its final stages the NSW Government announced, on 22 March 2016, a new *Crimes (Serious Crime Prevention Orders) Bill* providing for both pre-and post-conviction control orders. The late hour prevented re-convening the Taskforce to consider and discuss the Bill.

The control order regime is similar to the United Kingdom SCPOs, discussed above. Upon commencement the legislation will enable the NSW District and Supreme Courts, on the application of either the Commissioner of Police, the Director of Public Prosecutions or the NSW Crime Commissioner, to make a serious crime prevention order against a specified person if:

- (a) In the case of a natural person – the person is 18 years or older, and;
- (b) The court is satisfied that:
  - (i) The person has been convicted of a serious criminal offence, or

- (ii) The person has been involved in serious crime related activity for which the person has not been convicted of a serious criminal offence (including by reason of being acquitted of, or not being charged with, such an offence) and

- (c) The court is satisfied that there are reasonable grounds to believe that the making of the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activities.<sup>51</sup>

A SCPO can be made by either the Supreme Court or a District Court with respect to a specified person who has been convicted of a serious criminal offence.<sup>52</sup> Only the Supreme Court can impose a SCPO with respect to a person who is allegedly involved in serious criminal activity and has not been convicted.

In an application to the Supreme Court for a SCPO on the ground that the person has been involved in serious crime related activity for which the person has not been convicted by reason of acquittal, the application must include the following information:

- (a) the serious criminal offence of which the person was acquitted;
- (b) the court in which the offence was tried;
- (c) the date on which the person was acquitted.<sup>53</sup>

The definition of serious criminal offence is as defined in section 6 of the *Criminal Assets Recovery Act 1990 (NSW)* and includes drug trafficking, an offence that is punishable for 5 years or more including offences of theft, fraud, extortion, violence and homicide.<sup>54</sup>

#### CONTENT OF SERIOUS CRIME PREVENTION ORDERS

A SCPO may contain such prohibitions, restrictions, requirements and other

provisions as the Court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person in serious crime related activities.<sup>55</sup>

The SCPO cannot contain provisions that require a person to require certain information, including a requirement to: answer questions or provide information orally; provide information that is subject to legal professional privilege; disclose protected confidants.<sup>56</sup>

#### DURATION OF SERIOUS CRIME PREVENTION ORDERS

A SCPO must not exceed a period of 5 years.<sup>57</sup>

Proceedings for SCPOs are civil proceedings and rules of evidence (including the civil standard of proof) apply.<sup>58</sup>

A person who contravenes a serious crime prevention order is liable to the following maximum penalties:

- (a) In the case of a corporation – 1,500 penalty units, or
- (b) In the case of an individual – 300 penalty units or imprisonment for 5 years, or both.<sup>59</sup>

An applicant for a serious crime prevent order, or a person against whom an order is made, can appeal a decision of the Supreme Court or District Court to the Court of Appeal.<sup>60</sup>

#### DISCUSSION

The NSW legislation builds upon and expands previous legislative attempts to effectively introduce and use control orders in Queensland (under COA), South Australia, Victoria, NSW itself and, of course, the UK all of which are discussed in detail in Chapter 3 (and, earlier, in the COA Review at Chapter 8 and Table 8.16).

In Taskforce discussions the Commissioned Officers' Union made a submission for pre-

conviction control orders, but the proposition did not otherwise attract support. It is not impossible the position of other members and, in particular, the QPS and the QPU might change in light of the NSW Bill. At the same time it seems unlikely that members representing the legal professions would support anything similar here.

The NSW Bill involves, with respect, a thoughtful and subtle effort to confront the problems and concerns discussed above, and earlier in this Report at Chapter 3, and at exhaustive length in the COA Review at Chapter 8. It involves a simplified process *vis a vis*, eg, COA; it is directed at first instance at individuals, and their alleged or proven criminal activity; the process does not anticipate or provide for the use of criminal intelligence; and, it has transparent built-in safeguards – in particular, by making the final decision a discretionary, judicial one.

The challenges it faces are those discussed earlier: the history of this type of legislation to date indicates the likelihood of a legal challenge; and, questions must arise about its utility in practice – although the civil standard of proof applies, on the *Briginshaw* principle it might be thought that highly persuasive proof would be needed to induce the Supreme Court to make orders limiting the freedoms of a person who has been acquitted of charges said to be part of their 'serious crime related activity' or whose conviction for them has been quashed or set aside.

### RECOMMENDATION 30 (Chapter Fourteen)

The *Penalties and Sentences Act 1992* (Qld) should be amended to insert a new sentencing order which creates a conviction-based control order regime targeting organised crime. (unanimous recommendation)

### RECOMMENDATION 31 (Chapter Fourteen)

In developing the new sentencing order, regard should be had to the conviction-based preventative civil order regime operating in the United Kingdom under the *Serious Crime Act 2007* (Serious Crime Prevention Orders). (unanimous recommendation)

### RECOMMENDATION 32 (Chapter Fourteen)

The Queensland Police Service be allocated the necessary resources to monitor and enforce the new sentencing order. (unanimous recommendation)

## ENDNOTES

- <sup>1</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), 231.
- <sup>2</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015) taken as a whole and at 231.
- <sup>3</sup> Dr Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38 *Melbourne University Law Review* 362.
- <sup>4</sup> Dr Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38 *Melbourne University Law Review* 362, 365-388.
- <sup>5</sup> For example – *Serious Crime Act 2007* (UK), sections 1 and 19.
- <sup>6</sup> With the exception of Tasmania and the Australian Capital Territory; Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), Chapter 8.
- <sup>7</sup> On 15 December 2015, the Honourable Alan Wilson SC (separate to his role as Chair of the Taskforce on organised crime legislation) delivered his Report on the statutory review of the *Criminal Organisation Act 2009* (the COA Review) to the Honourable Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for Training and Skills. The Report must be tabled by the Attorney-General in the Legislative Assembly during May 2016.
- <sup>8</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), 136 and 213.
- <sup>9</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), 138 and 203.
- <sup>10</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), 217.
- <sup>11</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), Chapter 8; Table 8.16 *Table comparing key tests under declaration and control order legislation*, 206 – 212.
- <sup>12</sup> *Criminal Organisation Act 2009* (Qld), Part 2.
- <sup>13</sup> *Criminal Organisation Act 2009* (Qld), sections 16 and 18.
- <sup>14</sup> *Criminal Organisation Act 2009* (Qld), section 19.
- <sup>15</sup> South Australia and the Northern Territory, in addition to their declaration-based control order regimes, have a control order that, while not contingent upon a declaration, is a civil order punishable by criminal sanctions (*Serious and Organised Crime (Control) Act 2008* (SA), Part 3; *Serious Crime Control Act* (NT), Part 4). On 3 March 2015, the New South Wales Government committed to introducing Serious Crime Prevention Orders modelled on the United Kingdom approach: <<https://www.nsw.gov.au/media-releases-premier/targeting-king-pins-cracking-down-organised-crime>>.
- <sup>16</sup> *Serious Crime Act 2007* (UK), section 1 and 19.
- <sup>17</sup> *Serious Crime Act* (UK), section 5.
- <sup>18</sup> *Serious Crime Act* (UK), section 5.
- <sup>19</sup> *Serious Crime Act 2007* (UK), section 25.
- <sup>20</sup> *Serious Crime Act 2007* (UK), section 1.
- <sup>21</sup> *Serious Crime Act 2007* (UK), section 19.
- <sup>22</sup> *Serious Crime Act 2007* (UK), sections 25, 35 – 36.
- <sup>23</sup> Great Britain, Home Office, 'Serious Crime Act 2015: Fact Sheet: improvements to serious crime prevention orders' (March 2015). The National Crime Authority keeps a public register of Serious Crime Prevention Order which is accessible at: <<http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/organised-crime-command/lifetime-management>>.
- <sup>24</sup> Great Britain, The Crown Prosecution Service, *Serious Crime Prevention Orders: Serious Crime Act 2007: Section 1 – 41 and Schedules 1 and 2*: <[http://www.cps.gov.uk/legal/s\\_to\\_u/serious\\_crime\\_prevention\\_orders\\_\(scpo\)\\_guidance/](http://www.cps.gov.uk/legal/s_to_u/serious_crime_prevention_orders_(scpo)_guidance/)>.
- <sup>25</sup> Great Britain, Home Office, 'Serious Crime Act 2015: Fact Sheet: improvements to serious crime prevention orders' (March 2015).
- <sup>26</sup> Criminal Code (Qld), section 16; *R v Dibble; Ex parte Attorney-General (Qld)* [2014] QCA 8.
- <sup>27</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), 232; 213 – 217.
- <sup>28</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), 78.
- <sup>29</sup> As borne out by the submissions made to the Taskforce (either orally and/or in writing) by the Bar Association of Queensland; the Queensland Law Society; and the Queensland Council for Civil Liberties.

- considers it should be an order at the discretion of the court.
- <sup>30</sup> Queensland Government – Office of Queensland Parliamentary Counsel, *Fundamental Legislative Principles Notebook*, 99 [3.1.7].
- <sup>31</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), 203; *Evidence Act 1977* (Qld).
- <sup>32</sup> Australian Crime Commission, *Organised Crime in Australia 2015* (May 2015), 6-7.
- <sup>33</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), Chapter 2.
- <sup>34</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), 204.
- <sup>35</sup> With the exception of Tasmania and Australian Capital Territory; Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), Chapter 8.
- <sup>36</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), Chapter 8.
- <sup>37</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), 213.
- <sup>38</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), 62.
- <sup>39</sup> *Kuczborski v Queensland* (2014) 89 ALJR 59, [216] (Crennan, Kiefel, Gageler, and Keane JJ).
- <sup>40</sup> *Tajjour v New South Wales* (2014) 313 ALR 221; and *McCloy v New South Wales* [2015] 89 ALJR 857.
- <sup>41</sup> *Tajjour v New South Wales* (2014) 313 ALR 221.
- <sup>42</sup> See – *R v Dibble; Ex parte Attorney-General (Qld)* [2014] QCA 8, which summarises the test under section 16 of the Criminal Code.
- <sup>43</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015), 217.
- <sup>44</sup> Office of Queensland Parliamentary Counsel, *Principles of good legislation: OQPC guide to FLPs – clear meaning*, 14 February 2014.
- <sup>45</sup> In developing the proposal, the Taskforce was influenced by the UK model; and had regard to aspects of the *Criminal Organisation Act 2009*.
- <sup>46</sup> The Bar Association of Queensland does not support the mandatory imposition of a control order and instead
- <sup>47</sup> The Bar Association of Queensland does not support the discretionary control order regime applying to *any indictable* offence; instead it is considered it should be restricted to offences carrying a maximum penalty of at least 14 years imprisonment and it should be an ‘organised’ offence.
- <sup>48</sup> In developing the proposal, the Taskforce had regard to the application of section 132C of the *Evidence Act 1977*; and notes that reliance is placed on section 132C in the context of the Serious Drug Offence chapter of the *Penalties and Sentence Act 1992* (ie, to decide ‘commercial purpose’ during the sentencing hearing for a drug offence; a finding of fact that places the defendant within the serious drug offender confiscation order scheme).
- <sup>49</sup> For example: *Criminal Organisation Act 2009* (Qld), sections 4 (read in conjunction with Schedule 2 – ‘personal relationship), 19; and *Serious Crime Act 2007* (UK).
- <sup>50</sup> (*Criminal Organisation Act 2009* (Qld), section 24.
- <sup>51</sup> *Crimes (Serious Crime Prevention Orders) Bill 2016* (NSW), section 5.
- <sup>52</sup> *Crimes (Serious Crime Prevention Orders) Bill 2016* (NSW), section 3(1)(a)
- <sup>53</sup> *Crimes (Serious Crime Prevention Orders) Bill 2016* (NSW), section 5(2).
- <sup>54</sup> See *Criminal Assets Recovery Act 1990*, section 6(2) for the full list of offences that are defined as a ‘serious criminal offence’.
- <sup>55</sup> *Crimes (Serious Crime Prevention Orders) Bill 2016* (NSW), section 6(1).
- <sup>56</sup> *Crimes (Serious Crime Prevention Orders) Bill 2016* (NSW), section 6(2).
- <sup>57</sup> *Crimes (Serious Crime Prevention Orders) Bill 2016* (NSW), section 7.
- <sup>58</sup> *Crimes (Serious Crime Prevention Orders) Bill 2016* (NSW), section 13.
- <sup>59</sup> *Crimes (Serious Crime Prevention Orders) Bill 2016* (NSW), section 8.
- <sup>60</sup> *Crimes (Serious Crime Prevention Orders) Bill 2016* (NSW), section 11.

## PART 5.2

# CHAPTER FIFTEEN

## MANAGING PARTICIPANTS OF CRIMINAL ORGANISATIONS AS PRISONERS

*The 2013 suite contained uniquely harsh conditions for persons in the prisons system who were alleged to be participants in criminal organisations.*

*Although not central to the 2013 reforms, one matter associated with them caught the public eye – the ‘pink jumpsuits affair’.*

The 2013 changes to the *Corrective Services Act 2006* (Qld) had a significant impact on the way identified participants in criminal organisations were supervised in Queensland correctional facilities and under community-based orders.

Amongst the array of amendments introduced by the 2013 suite was a new regime for the management of participants in criminal organisations by Queensland Corrective Services (QCS).

The doubtful practical use of the regime, along with its serious implications for prisoners both in corrective service facilities and in the community, and the absolute abrogation of administrative appeal rights, has led the Taskforce to recommend that the 2013 amendments to the *Corrective Services Act* should be repealed in their entirety.

### AN EXPLANATION OF THE AMENDMENTS: WHAT WERE THEY?

The 2013 amendments create an additional control and supervision scheme for persons who are incarcerated or subject to community-based orders.

In effect, all prisoners who are identified as *participants in a criminal organisation* become subject to this scheme over and above normal, routine prisoner management techniques.

### HOW DO THE AMENDMENTS AFFECT INCARCERATED PRISONERS?

The 2013 suite established a *Criminal Organisation Segregation Order* (COSO) scheme providing QCS with enhanced powers to manage prisoners identified as participants in criminal organisations.

These orders apply to prisoners regardless of whether they have been convicted of their offences, or whether they are on remand pending trial.

Upon request by the QCS Chief Executive Officer, the Commissioner of Police must advise the CEO whether a prisoner is an

identified participant in a criminal organisation.<sup>1</sup> If a prisoner *is* said to be a participant in a criminal organisation, the CEO *must* place that prisoner under a COSO.<sup>2</sup>

This decision is not judicially reviewable (save for jurisdictional error) – normal administrative review rights, such as merits review, are explicitly and deliberately carved out of the legislation.

The COSO will last for the entire duration of the prisoner’s incarceration unless the Commissioner of Police informs the CEO that the prisoner is no longer an identified participant in a criminal organisation (for example, in a situation where a prisoner has formally disassociated from a declared OMCG).

The information that a prisoner is an identified participant in a criminal organisation may also be used to inform the CEO’s recommendation to the Parole Board upon an application for parole release by a prisoner subject to a COSO.

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#### **THE IMPACT ON THE PRISONER’S SECURITY CLASSIFICATION AND LOCATION**

A COSO automatically alters the security classification of a prisoner to *at least* ‘high’ – the CEO can then increase that classification to ‘maximum’ if the circumstances of the prisoner satisfy factors contained in section 12(2) of the Corrective Services Act.

Prisoner security classifications are ordinarily made on the basis of a comprehensive assessment of the individual, and reflect things like their correctional status (on remand or sentenced), immediate risks and concerns, rehabilitation needs, and responsivity factors.

The nature of the offence for which a person is in custody and their previous criminal history will also affect their security classification.

Classifications of high and maximum are generally reserved for the most serious prisoners. For example, a person convicted of murder and rape will almost certainly have a higher security classification than a prisoner

who is incarcerated for the non-payment of fines.

Ordinarily, prisoners subject to a high or maximum security classification must have their status reviewed at intervals of at least 12 and 6 months respectively.

The Corrective Services Act requires these regular reviews because the nature of the classification presents extraordinary intrusions on the rights of incarcerated persons. These are important issues for the community given they also present basic human rights breaches. It is therefore essential that there are regular re-evaluations to ensure the classification is still appropriate to the individual offender.

However, these routine reviews do *not* apply to persons who are subject to a COSO.<sup>3</sup>

(There is an exception to this exclusion where existing prisoners have their security classification increased as a result of a COSO.<sup>4</sup> In those circumstances, the prisoner has seven days to request that the CEO reconsider the decision. After that time, there is no review process available to the affected prisoner to either review the initial decision or any on-going review right regarding the appropriateness of the COSO.)

The making of a COSO and the resulting impact on a prisoner’s security classification may require a change to the location where the prisoner is to be detained.

For example, if a prisoner’s security classification was previously ‘low’ but as a result of a COSO it was necessarily altered to ‘high’, the increased security classification may mean that the prisoner must be transferred to a corrective services facility appropriate to that classification (not all Queensland prisons are equipped with the facilities to accommodate high or maximum security prisoners).

A prisoner who is subject to a COSO is not able to have this transfer decision administratively reviewed or reconsidered by the CEO.

### THE CONDITIONS PLACED ON A PRISONER AS A RESULT OF A CRIMINAL ORGANISATION SEGREGATION ORDER

A COSO places a number of serious restrictions on the prisoners managed under them.

The legislation specifically provides for their segregation from other prisoners and limits privileges such as visits, mail and access to activities (detailed below).<sup>5</sup>

Prisoners subject to a COSO must be medically examined as soon as reasonably practicable after the COSO is implemented, and then again every 28 days for the duration of the order.<sup>6</sup> This is due to the serious nature of the conditions of a COSO – including the limited interaction with other persons, significant periods of time spent in their cells and restricted access to physical activity – and the impact that those conditions can have on the health and wellbeing of prisoners.<sup>7</sup>

The precise extent of the conditions attached to a COSO and the QCS departmental policy regarding the implementation of COSOs in the initial period following their introduction was brought to light in a series of matters heard before Justice Applegarth of the Supreme Court of Queensland at the end of 2013.<sup>8</sup>

All prisoners managed under a COSO were to be subject to a number of serious restrictions which were revealed to Applegarth J in the course of those hearings. They included, but were not limited to:<sup>9</sup>

- no visits from other OMCG members or affiliates (including family members);
- the prisoner will only be entitled a single 1 hour non-contact personal visit with family members per week;
- the prisoner will be restricted to seven, six-minute personal phone calls per week;

- all calls (other than those to legal representatives) will be monitored by QCS intelligence staff;
- the prisoner's mail (other than that which is protected by legal privilege) will be opened, searched and censored by QCS intelligence staff;
- the prisoner's cell will be frequently and pro-actively searched (at least once a week);
- the prisoner will be subject to increased drug testing;
- the prisoner will have no access to gymnasium facilities or the oval (that is, the *only* active exercise available in prison); and
- the prisoner's out of cell time will be restricted to at least two daylight hours per day.

This last restriction was clarified in an affidavit provided to the court by the Acting Deputy Commissioner of Queensland Corrective Services. That clarification revealed the following matter, which it is not melodramatic to describe as alarming:<sup>10</sup>

Any prisoner subject to an order containing this condition would receive a **total** of two daylight hours out of cell time per day, with **the remainder of the time (22 hours) to be spent in solitary confinement.**

(emphasis added)

Australian Lawyers for Human Rights, in their submission to the Taskforce, endorsed the observations of Applegarth J in these matters, submitting that:

*...cruel and degrading punishment of prisoners in the form of solitary confinement... should have no place in Queensland prisons.*<sup>11</sup>

While COSOs continue to have a segregation condition attached to them, as envisaged by

the legislation, QCS has advised the Taskforce that a decision was made to cease the segregation of prisoners subject to COSOs in mid-2014.

That is, the conditions of the order that would mean a prisoner is to be segregated in solitary confinement, with a specific limitation on the amount of time they could spend 'out-of-cell' conditions (based on the above QCS explanation, this was two hours per day) has been abandoned.

From July 2014 any 'segregation decision' that is made about a prisoner under a COSO has been made on the basis of an individual risk assessment of that particular prisoner.<sup>12</sup>

Thus, segregation is no longer a standard condition imposed for all prisoners subject to a COSO but, instead, appropriately tailored to individual cases.

#### HOW DO THE AMENDMENTS AFFECT OFFENDERS SUBJECT TO PAROLE OR OTHER COMMUNITY BASED ORDERS?

The 2013 suite gives QCS the power to restrict the movements and monitor the location of offenders who are identified participants in a criminal organisation and who are subject to parole or other community based orders.

These powers, found under section 267A(3) of the Corrective Services Act, extend so far as requiring an offender to wear a location tracking device and permitting the installation of surveillance devices and other equipment at the offender's home.<sup>13</sup>

The amendments also allow QCS to require a test sample from *any* community based offender who is an identified participant in a criminal organisation.<sup>14</sup> A test sample means a sample of blood, breath, hair, saliva or urine. Those samples are then tested for traces of illicit substances.

Ordinarily, QCS would only be able to direct an offender to provide such a sample if it is required by a parole or court order, or if there

is a reasonable belief that the offender poses a risk of harm to themselves.<sup>15</sup>

There is no mechanism to review these directions for an offender who has been categorised as a participant in a criminal organisation.

#### THE PINK JUMPSUITS AFFAIR

While not part of the legislative package which introduced amendments to the Corrective Services Act in the 2013 suite, an associated decision by prison authorities seemed to resonate strongly with the public, and the media – a management decision which has been colloquially referred to as *pink jumpsuits for prisoners*.

The use of pink jumpsuits for OMCG prisoners was a policy initiative introduced by the government in October 2013. It began with the Minister for Police and Community Safety requesting QCS to investigate changing the colour of the prison uniform, with special attention to the American penal system as 'inspiration'.<sup>16</sup>

QCS advised the Taskforce that prisoners who were identified as participants in criminal organisations were required to wear pink jumpsuits from November 2013.<sup>17</sup>

The Premier told media at the time:<sup>18</sup>

*'They are bullies. They like to wear scary looking gear, leather jackets, they have tattoos, they have their colours. We know that telling them to wear pink is going to be embarrassing for them.'*

One commentator described the policy as 'forced feminisation as a punishment'.<sup>19</sup>

A total of 27 prisoners accommodated at Woodford Correctional Centre were required to wear the pink jumpsuits during their incarceration.<sup>20</sup>

The requirement ceased on 21 July 2014.<sup>21</sup> The Taskforce understands that the jumpsuits

have since been donated to breast cancer organisations for fundraising activities.<sup>22</sup>

### WHAT IS THE APPROACH TAKEN IN OTHER AUSTRALIAN JURISDICTIONS?

No other Australian state or territory has legislation which creates a specific prison monitoring regime for participants in criminal organisations.

Prisoners in all other jurisdictions are managed based on their individual security classification which determines their placement, movement, privileges and restrictions. For high-risk prisoners whose security classification is maximum (or the equivalent), Corrective Services in each relevant jurisdiction have restricted management regime powers which are similar or equivalent to those available to QCS under a Maximum Security Order (MSO) (explained below).

### HOW THE AMENDMENTS OPERATE IN PRACTICE: ADVICE FROM QUEENSLAND CORRECTIVE SERVICES

QCS has helpfully provided the Taskforce with a wealth of material around the current prison landscape in Queensland, with specific attention to the operation of the 2013 amendments and the management of prisoners who are identified participants in criminal organisations.

### PRISONER BREAKDOWN

As at 30 June 2015 there were 7,318 offenders detained in correctional facilities across the state. 1,796 of those persons were being held on remand (that is, not yet convicted so legally presumed to be innocent and awaiting the finalisation of their charges).<sup>23</sup>

Those prisoners include 32 identified participants in criminal organisations and 82 unconfirmed (suspected) participants in criminal organisations.

### USE OF CRIMINAL ORGANISATION SEGREGATION ORDERS

Since the commencement of the 2013 suite there have been 22 individual prisoners subject to a COSO. As at 14 January 2016, 12 of those COSOs are currently active across various Queensland correctional facilities.<sup>24</sup>

Six of those COSOs related to sentenced prisoners and the remaining six related to prisoners on remand.

### ADVANTAGES OF CRIMINAL ORGANISATION SEGREGATION ORDERS IDENTIFIED BY QCS

QCS considers there are certain advantages associated with the implementation and use of COSOs in Queensland prisons.

Primarily, QCS identified that COSOs provide increased legislative support, protection and legitimacy for decisions pertaining to the management of prisoners involved in criminal organisation activities. COSOs also provide QCS with, amongst other things, the ability to limit visitors to prevent conspiracies involving criminal activity, the imposition of certain conditions to manage the risks presented by certain prisoners, and an enhanced intelligence capability.

These advantages are not necessarily unique, however, to COSOs.

All of those powers are available to QCS under an MSO where a prisoner's individual circumstances and security classification has deemed them in need of enhanced supervision and restriction within the already rigid and controlled prison environment.<sup>25</sup>

The difference is that the COSO will apply to all identified participants in criminal organisations, **even if their security classification is low and their behaviour does not otherwise pose a risk to the prison**; or other circumstances that warrant any special measures.

There is an argument, discussed in more detail below, that it is inappropriate to impose such a restrictive management regime on a prisoner without proper consideration of their behaviour or risk level.

### CHALLENGES OF CRIMINAL ORGANISATION SEGREGATION ORDERS IDENTIFIED BY QCS

QCS identified several challenges that the implementation of COSOs has presented across Queensland correctional facilities.

For example, the need to establish a new Restricted Movement Unit (ie, enhanced solitary confinement capability at the Woodford Correctional Centre) to specifically manage prisoners under COSOs, the development of new policies and procedures and subsequent training of staff were among those expressed to the Taskforce.<sup>26</sup>

There was also a need to increase the hours of intelligence operations to cope with the increased monitoring and supervision required. Intelligence officers were required to spend additional time sourcing intelligence, monitoring the prisoners and liaising with the Queensland Police Service to gather and maintain intelligence on the identified and unidentified OMCG members being held across Queensland prisons.<sup>27</sup>

### ARE THERE ANY DEMONSTRATED RESULTS OF CRIMINAL ORGANISATION SEGREGATION ORDERS?

QCS has advised the Taskforce that, at the present time, there is insufficient data to make any concrete assessment about whether the use of COSOs has contributed to increased security within correctional facilities, or whether they have actually provided any additional benefits to overall prisoner management which were not already available.<sup>28</sup>

QCS hypothesised that the use of COSOs may show an increase in the detection of illicit drug use, a reduction in staff intimidation and a decrease in general criminal behaviour that is

disruptive to a prison, but there is as yet no hard evidence to confirm or corroborate these changes.<sup>29</sup>

### WHAT WAS THE JUSTIFICATION FOR THE AMENDMENTS?

The amendments were introduced with the principal purpose of deterring offenders who were participants in criminal organisations from engaging in illegal activity whilst in correctional facilities and under the supervision of the state.<sup>30</sup>

It was suggested that the amendments also assist with the maintenance of order and security in correctional facilities and the safety of staff, visitors and other prisoners.

### WAS THERE A GAP IN THE LEGISLATION PRIOR TO THE AMENDMENTS WHICH MEANT THAT THESE OFFENDERS WERE NOT ABLE TO BE EFFECTIVELY MANAGED BY QCS?

Correctional facilities, and community based supervision services such as Probation and Parole offices, have significant and compelling legislative powers for the management of offenders both within correctional facilities and in the community.

These powers include a well-established and extensive regime developed for the specific purpose of appropriately supervising and managing high-risk prisoners.

These all existed before the creation of the COSO regime by the 2013 suite.

Nothing in that suite or in information that the Taskforce has received from QCS or any other institution or submitter suggests that the pre-existing legislative framework was inadequate, or in need of strengthening.

### HOW ARE HIGH-RISK PRISONERS WHO ARE NOT PARTICIPANTS IN CRIMINAL ORGANISATIONS MANAGED?

Ordinarily under the Corrective Services Act QCS would implement a MSO for serious and

high-risk incarcerated offenders where their circumstances render it necessary.

These orders are not contingent on a person's participation in a criminal organisation (though that may be a factor for consideration) and instead require an informed assessment of a subject prisoner.

A MSO can be made where:

- a prisoner's security classification is maximum; and
- where there is a reasonable belief that the prisoner is a high risk of escaping (or attempting to escape); or
- a high risk of killing or seriously injuring another person or prisoner; and/or
- the prisoner is a substantial threat to the security or good order of the corrective services facility.<sup>31</sup>

The making of a MSO has a number of consequences for the affected prisoner:<sup>32</sup>

- the prisoner must be detained in a Maximum Security Unit at a high-security correctional facility;
- the prisoner may be separated from other prisoners in the Unit;
- prisoner privileges may be restricted (including access to activities, property, telephone calls, etc.); and
- the prisoner may be prevented from associating with other prisoners.

A Maximum Security Unit is different from the mainstream prison environment. The Unit provides a secure environment for the safe management of high-risk prisoners. Privileges which can be accessed within the Unit are restricted (such as personal property, telephone calls, etc.)

An MSO, and placement in a Maximum Security Unit, is determined in accordance with their assessed risk to staff, other prisoners and the community. It also ensures the security and good order of the facility as well as providing enhanced behaviour management of the prisoner.<sup>33</sup>

MSOs must only be made for a maximum of six months, at which point the maximum security classification must also be reviewed.

In stark contrast a COSO is not, however, required to be reviewed at any stage of a prisoner's term in custody unless QCS receives information from the Commissioner of Police that the prisoner is no longer a participant in a criminal organisation.

There is a provision which allows for consecutive MSOs to be made for a prisoner where their risk level and circumstances render it appropriate.<sup>34</sup>

A prisoner subject to an MSO may request that the order be reviewed and has the full, ordinary appeal rights available to them.<sup>35</sup>

Because of the harsh and restrictive nature of MSOs, these review rights are even more important.

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#### **WHAT IS THE DIFFERENCE BETWEEN A MAXIMUM SECURITY ORDER AND A CRIMINAL ORGANISATION SEGREGATION ORDER?**

Noting the justification advanced for the introduction of the 2013 amendments, and in particular COSOs, there is an obvious difference in the purpose of an MSO and a COSO.

MSOs are, in essence, for the appropriate management of maximum security prisoners who pose some sort of significant risk to the correctional facility. COSOs, though, are a blanket order which apply to all prisoners who are identified as participants in a criminal organisation irrespective of their individual risk classification (they might, for example, be otherwise a low risk prisoner).

There is also a distinction between the two orders in terms of the review mechanisms open to an affected prisoner.

A prisoner subject to an MSO is able to request that an Official Visitor review the order and provide a recommendation about the appropriateness of it (ultimately to confirm, amend or cancel). There is no avenue of review for a prisoner who is subject to a COSO – save for jurisdictional error; internal review, and judicial review, are strictly excluded.

But from an in-practice perspective there is effectively no difference between the operation of an MSO and a COSO. QCS has provided advice to the Taskforce to indicate as much, advising that there are no directions which can be made with respect to a prisoner subject to a COSO that could not also be made with respect to a prisoner subject to an MSO.

The implementation of both COSOs and MSOs are evidently very similar in practice.

The only factor that QCS identifies as an additional tool provided by a COSO which was not otherwise previously available is that the legislation requires the order to remain in place for the entire period of the prisoner's incarceration, with no need for review.

This means there are fewer administrative tasks for QCS in managing a prisoner under a COSO when compared with one held under an MSO.<sup>36</sup>

The Taskforce appreciates the difficulties and challenges faced by QCS and its staff in their work, but administrative efficiencies are not a compelling argument for the implementation of such a serious and punitive order on a prisoner who, save for the 2013 amendments, may not otherwise be subject to a restrictive management regime (such as an MSO).

### WHAT ISSUES DID THE TASKFORCE IDENTIFY?

Equipped with the operational perspective provided by QCS, the Taskforce identified a number of issues that are presented by the

2013 amendments to the Corrective Services Act.

These issues included discussion around the breaches of fundamental legislative principles and the rights and liberties of individuals (including prisoners), as well as an appreciation of the legal ramifications of the amendments for the use of controversial tools such as secret criminal intelligence.

### THE USE OF CRIMINAL INTELLIGENCE FOR IDENTIFICATION OF PARTICIPANTS IN CRIMINAL ORGANISATIONS

The basis for the making of a COSO or an additional supervisory condition for community-based offenders (a section 267A(3) direction) is advice received from the Commissioner of Police that a prisoner is a participant in a criminal organisation.

The contents of that advice, in so far as it contains secret criminal intelligence, is never revealed to the affected prisoner.

Limitations upon a person's right or ability to know the case against them are a significant infringement on natural justice and procedural fairness rights.

Procedural fairness ordinarily requires that a person subject to a decision has an opportunity to challenge any evidence received against them, and to put their case before a decision-maker.

Using secret criminal intelligence as a basis for the decision obviously impairs the ability of the decision-maker (court or tribunal) to afford and ensure procedural fairness.

### CRIMINAL INTELLIGENCE: DEFINITION

Criminal intelligence is defined under the Corrective Services Act as advice provided to the CEO that a person is a participant in a criminal organisation and information held by the Commissioner of Police that is relevant to whether the person is an identified participant in a criminal organisation.<sup>37</sup>

## THE APPROACH IN OTHER JURISDICTIONS

No other Australian jurisdiction provides for the use of criminal intelligence in their respective corrective services legislation (ie, in the decision-making process about appropriate prisoner management strategies).

## HOW CRIMINAL INTELLIGENCE IS USED

The way in which a COSOs and section 267A(3) directions are made by QCS has already been discussed.

Essentially, the decision is based on advice from the Commissioner of Police about an offender's status as an identified participant in a criminal organisation. That advice can be based solely upon criminal intelligence material held by police.

As noted, none of the ordinarily available review mechanisms (such as judicial review) are available to an offender affected by a COSO or a section 267A(3) direction. Those mechanisms are purposefully excluded by the legislation.

Where a decision to implement a COSO or give a section 267A(3) direction is based on criminal intelligence provided by the Commissioner of Police, there is a limited avenue of review open to the affected prisoner (ie, confined to *jurisdictional error* only).

Consequently, the review available to the prisoner is limited to the following issues:

- whether the identification by the Commissioner of Police that a prisoner is a participant in a criminal organisation was correct; and
- whether the information relied on by the Commissioner of Police is correctly categorised as criminal intelligence.

This means that the court *cannot* review the decision to place a prisoner on a COSO, or give a section 267A(3) direction; neither can it make the decision afresh.

The decision to place a prisoner on a COSO or to give a section 267A(3) direction is (absent any jurisdictional error) final and conclusive – like the bulk of the amendments made to the Corrective Services Act by the 2013 suite, judicial review is excluded.<sup>38</sup>

## WHAT MAKES THE USE OF CRIMINAL INTELLIGENCE CONTROVERSIAL?

Criminal intelligence – its use, its utility and its secretive nature – was discussed at great length in the recent review of the *Criminal Organisation Act 2009* (Qld) (the COA Review).<sup>39</sup>

Ultimately, the COA Review found that the use of criminal intelligence in a judicial proceeding was complex and, in the end, inherently unfair; and, that this would likely also be the case so far as an administrative decision-making process was concerned (though the COA Review did not go so far as to conclusively make that finding as the scope of its Terms of Reference did not allow it).

The issues presented by the use of criminal intelligence, especially insofar as procedural fairness to affected persons is concerned, were live questions for the Taskforce. The helpful discussion in the COA Review around this and other issues arising from the use of criminal intelligence was relied on by the Taskforce to inform its deliberations and decisions around its use in the corrective services setting.

Chapter 10 provides a comprehensive analysis of the use of criminal intelligence in administrative decision-making processes, and the conclusions reached by the Taskforce in the context of the 2013 suite.

## IMPLICATIONS FROM A HUMAN RIGHTS AND CIVIL LIBERTIES PERSPECTIVE

Incarceration is one of the most severe and absolute deprivations of a citizen's individual liberty.

The 2013 amendments to the Corrective Services Act epitomise the inherent conflict

between the punitive nature of imprisonment (and the ability of QCS to determine the terms of that imprisonment) and the rights of the individual as an unfree citizen of the state.<sup>40</sup>

The Taskforce received submissions from the Bar Association of Queensland<sup>41</sup> (BAQ) and the Australian Lawyers for Human Rights<sup>42</sup> which addressed, to different degrees, the human rights repercussions of COSOs and associated segregation and solitary confinement conditions.

These issues were similarly addressed by Applegarth J in the three cases referred to earlier.<sup>43</sup>

### A HUMAN RIGHTS BREACH

The rights of prisoners, whilst naturally limited as a result of their criminal conduct and incarceration, are protected by the United Nations *International Convention on Civil and Political Rights* (ICCPR).<sup>44</sup>

#### Article 10

(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

...

(3) The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.

Australia became a signatory to the ICCPR in 1980 and it is annexed as a schedule to the *Australian Human Rights Commission Act 1986* (Cth) so as to monitor compliance with its principles.

In 2007 the International Psychological Trauma Symposium was held in Istanbul, Turkey. The symposium was a meeting of 24 leading experts from around the world, including psychiatrists, doctors, professors and legal experts who came together to draft the Istanbul Statement on the Use and Effects of Solitary Confinement. That statement specifically addressed the use of solitary

confinement as an administrative prisoner management tool and reported that:<sup>45</sup>

*'It has been convincingly documented on numerous occasions that **solitary confinement may cause serious psychological and sometimes physiological ill effects...** A long list of symptoms ranging from insomnia and confusion to hallucinations and psychosis has been documented. Negative health effects can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions.'*

(emphasis added)

The ICCPR and Istanbul Statement principles around segregation and solitary confinement are echoed in the Australian Standard Guidelines for Corrections to which Queensland subscribes. The Standard Guidelines note that:<sup>46</sup>

1.82 Prisoners placed in segregation for the security and good order of the prison are to be managed under the least restrictive conditions consistent with the reasons for their placement.

These three sources – the ICCPR, the Istanbul Statement and the Standard Guidelines for Corrections – are not legally binding on the Queensland Government or QCS. They do, however, signal an agreement on the guiding principles and basic minimum standards of how prisoners should be treated across the state.

Prisoners should only be punished in a manner appropriate to their offending and their behavioural risk whilst in the correctional facility.<sup>47</sup> This principle must, the Taskforce concluded, be breached by the blanket use of COSOs without regard to the individual circumstances of the prisoner.

There is also an abundance of academic research which supports these conclusions and which identifies the profound and adverse

impact that solitary confinement will have on the health of prisoners.<sup>48</sup>

The Taskforce was cognisant of these guiding principles and they appropriately informed much of the discussion around the 2013 amendments to the Corrective Services Act.

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### BREACH OF THE FUNDAMENTAL LEGISLATIVE PRINCIPLES

Legislation in Queensland must have sufficient regard to the fundamental legislative principles (FLPs) set out in the *Legislative Standards Act 1992* (Qld).

Those principles include the rights and liberties of individuals – incarcerated or otherwise.<sup>49</sup> Legislation which dictates the terms of a person’s lawful custody should contain some appropriate protection of their individual rights in relation to that custody.

The FLPs also enshrine the protection of appropriate reviews of administrative decision-making.<sup>50</sup> The consequences of the administrative decisions made under the amendments are very serious for the individual prisoner.

It is unjust to provide for this administrative decision-making without also providing for an appropriate review process (in situations where individual rights and liberties are jeopardised, the most appropriate type of review is merits-based).

Legislative clauses which remove avenues of judicial review should be rarely contemplated and even more rarely implemented. On this issue, the Explanatory Notes to the legislation are sparse. They do little but note the reduction in review rights without providing any genuine explanation.

More broadly, though, the Taskforce acknowledged that the 2013 amendments do not have sufficient regard to the rights and liberties of imprisoned individuals. The former Scrutiny of Legislation Committee consistently took the approach that the prescribed protections under section 4(3) of the

Legislative Standards Act did not constitute an exhaustive list.

The identification of rights and liberties is flexible and expansive and includes rights that arise out of Australia’s international treaty obligations.<sup>51</sup> As noted above, that includes the principles prescribed to under the ICCPR that the 2013 amendments are clearly at odds with.

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### TASKFORCE DISCUSSION

The BAQ, in its submission to the Taskforce on this issue, noted that the use of the powers provided to QCS by the 2013 amendments offend the rule of law ‘*by imposing punishment by reference to factors other than those pertaining to the individual and the actions for which he/she is responsible*’.<sup>52</sup>

Notably, QCS advice to the Taskforce reflects that measures of segregation and solitary confinement, like those which were addressed by Applegarth J, are no longer being imposed on the basis of a COSO alone (they ceased in July 2014).<sup>53</sup>

The Taskforce was comforted that such a serious decision about the treatment of a prisoner is now being made by reference to their individual circumstances and risk profile.

This is presently, however, entirely at the discretion of QCS departmental policy – the measures are still clearly contemplated by the legislation and there is little preventing their reintroduction in a blanket-style form.

The potential for the inappropriate use of segregation and solitary confinement, based *only* on a person’s identification as an alleged participant in a criminal organisation *without any* consideration of their actual proven offending and behaviour in prison, is a serious concern.

### SUBSEQUENT IMPACT ON THE SENTENCING PROCESS

The implementation of the 2013 amendments, and in particular the use of COSOs, has had an

impact on the sentencing outcomes for relevant prisoners.

The Taskforce considered the three offenders sentenced by Applegarth J in December 2013 as an example of this impact.

In determining the appropriate sentences for the three contemnors, Applegarth J had specific regard to the evidence around the use and effect of solitary confinement. The Judge considered it necessary for him to have regard, when determining the sentences to be imposed, to the likelihood that any term of imprisonment would be '*... served in solitary confinement and in the other circumstances dictated by the policy.*'<sup>54</sup>

This notion of considering that the burden of incarceration would fall more heavily on a particular prisoner is not a novel proposition.<sup>55</sup> It is a relevant factor to which the court can have regard in structuring the appropriate penalty for an individual.

As a result of the conditions attached to a COSO, which almost certainly would have applied to the three defendants before the court, the sentences imposed by Applegarth J were significantly ameliorated.

He concluded that one day of solitary confinement would be the equivalent of one week spent in mainstream prison conditions.<sup>56</sup> The sentences were reduced as follows:

- *Attendee X* would have ordinarily received a term of five months imprisonment, however due to the likely conditions of that imprisonment it was reduced to a term of four weeks,<sup>57</sup>
- *Attendee Y* would have ordinarily received a term of five months imprisonment, however due to the likely conditions of that imprisonment it was reduced to a term of four weeks,<sup>58</sup> and
- *Attendee Z* would have ordinarily received a term of six months

imprisonment, however due to the likely conditions of that imprisonment it was reduced to a term of six weeks.<sup>59</sup>

#### THE ABILITY FOR QCS TO APPROPRIATELY MANAGE HIGH-RISK OFFENDERS WITHOUT RELYING ON THE 2013 AMENDMENTS

As discussed above, prior to the 2013 amendments QCS already had a number of powers available for the development of appropriate and effective prisoner management plans for a diverse range of offenders both in custody, and in the community.

QCS advised the Taskforce that there are 'no specific risks posed by prisoners involved in organised crime that cannot be appropriately managed using the established prisoner management and security strategies available to QCS.'<sup>60</sup> Those established strategies do not rely on the 2013 amendments.

#### PROPOSAL FOR CHANGE

The Taskforce discussed, at length, the utility of retaining the 2013 laws (with or without amendment).

Ultimately, their retention was thought to be untenable (citing the serious rights and liberties concerns discussed above, and acknowledging that QCS already has the ability to effectively manage all prisoners without reliance on the 2013 amendments). The Taskforce consequently recommends that they be repealed in their entirety.

During Taskforce discussions the QPS expressed some perceived operational benefit of COSOs – namely, a greater level of scrutiny of prisoners who are participants in criminal organisations, including the monitoring of telephone calls and restrictions on their interactions with non-prisoners.

These monitoring and restricting powers are, however, already available to QCS without the need for a COSO.

The Taskforce understands that these benefits must be linked from a QPS perspective to enhanced criminal intelligence capabilities, given prisoner management and supervision is the responsibility of QCS which falls within the Justice ministerial portfolio and is not the responsibility of the QPS.

The Taskforce recognised that an advantage may be found in the *purpose* of a COSO – as an incentive to disassociate from a criminal organisation in order to cease being subject to the restrictive order – but, in its deliberations, balanced that advantage against the serious practical consequences of the actual use of the restrictive measures and the lack of administrative appeal rights.

The Taskforce also recognised the serious breaches of human rights, and of the FLPs, that the 2013 amendments present. These issues were particularly concerning for the BAQ, the Queensland Law Society and the Public Interest Monitor members.

The Taskforce ultimately concluded that the harsh constraints of COSOs and the intrusive consequences of section 267A(3) directions outweighed any perceived advantage to the use of these measures, especially when considered in light of the other powers that were already available to QCS to manage prisoners effectively.

There was a broad consensus across the Taskforce that prisoner management regimes should only be imposed on a case-by-case basis, with appropriate consideration of the individual's security classification and other relevant factors.

The Taskforce was comforted by the advice from QCS that they already had the powers and ability to appropriately manage *all* prisoners – including participants in criminal organisations – within the ambit of the legislation prior to the 2013 amendments.

Prisoner management should be based *only* on the individual risk profile of a prisoner, which necessarily takes into account the threat the individual poses to the safety of Corrective Services officers and the good order of the correctional facility.

The Taskforce has confidence in the ability of QCS to make appropriate assessments of prisoners, using the full scope of all information available to them, and to develop appropriate and considered strategies for the management of offenders both within correctional facilities and in the community, without the need for the 2013 amendments.

### RECOMMENDATION 33 (Chapter Fifteen)

The 2013 amendments to the *Corrective Services Act 2006* (Qld) should be repealed in their entirety. (unanimous recommendation)

## ENDNOTES

- 1 *Corrective Services Act 2006* (Qld), section 344AA.
- 2 *Corrective Services Act 2006* (Qld), section 65A.
- 3 *Corrective Services Act 2006* (Qld), section 13.
- 4 *Corrective Services Act 2006* (Qld), section 16.
- 5 *Corrective Services Act 2006* (Qld), section 65B.
- 6 *Corrective Services Act 2006* (Qld), section 65C.
- 7 Explanatory Notes, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013* (Qld) 11.
- 8 *Callanan v Attendee X* [2013] QSC 340; *Callanan v Attendee Y* [2013] QSC 341; *Callanan v Attendee Z* [2013] QSC 342.
- 9 *Callanan v Attendee X* [2013] QSC 340, 28.
- 10 *Callanan v Attendee X* [2013] QSC 340, 29.
- 11 Australian Lawyers for Human Rights, Submission No 4.1 to the Taskforce on Organised Crime Legislation, 24 July 2015, 28.6.
- 12 Advice from Queensland Corrective Services to the Taskforce on Organised Crime Legislation, 22 January 2016 (in confidence).
- 13 *Corrective Services Act 2006* (Qld), section 267A(3).
- 14 *Corrective Services Act 2006* (Qld), section 41(1)(c).
- 15 *Corrective Services Act 2006* (Qld), section 41(1)(b).
- 16 Greg Stolz, 'Newman Government looks at Dressing Jailed Bikies in Fluorescent Pink Jumpsuits', *The Courier Mail* (online), 21 October 2013 <<http://www.couriermail.com.au/news/queensland/newman-government-looks-at-dressing-jailed-bikies-in-fluorescent-pink-jumpsuits/story-fnihsrf2-1226743441270>>.
- 17 'Advice from Queensland Corrective Services to the Taskforce on Organised Crime Legislation, 24 March 2016 (in confidence)
- 18 'Pink for Punks: Queensland Plan to Embarrass Bikies in Jail', *The Guardian* (online), 21 October 2013 <<http://www.theguardian.com/world/2013/oct/21/pink-for-punks-queensland-bikies>>.
- 19 Catherine Traywick, 'Jury's Out on Newman Plan to Put Jailed Bikies in Pink', *The Sydney Morning Herald* (online), 25 October 2013 <<http://www.smh.com.au/comment/>jurys-out-on-newman-plan-to-put-jailed-bikies-in-pink-20131024-2w462.html>.
- 20 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 June 2015, 1022 (Jo-Ann Miller, Minister for Police, Fire and Emergency Services and Minister for Corrective Services).
- 21 Advice from Queensland Corrective Services to the Taskforce on Organised Crime Legislation, 14 March 2016 (in confidence).
- 22 Minister for Police, Fire and Emergency Services and Minister for Corrective Services, the Honourable Jo-Ann Miller, 'Pink Jumpsuits Donated to Library, Museum and Charity' (Media Statement, 20 August 2015) <<http://statements.qld.gov.au/Statement/2015/8/20/pink-jumpsuits-donated-to-library-museum-and-charity>>.
- 23 Advice from Queensland Corrective Services to the Taskforce on Organised Crime Legislation, 22 January 2016 (in confidence).
- 24 Advice from Queensland Corrective Services to the Taskforce on Organised Crime Legislation, 22 January 2016 (in confidence).
- 25 Advice from Queensland Corrective Services to the Taskforce on Organised Crime Legislation, 22 January 2016 (in confidence).
- 26 Advice from Queensland Corrective Services to the Taskforce on Organised Crime Legislation, 22 January 2016 (in confidence).
- 27 Advice from Queensland Corrective Services to the Taskforce on Organised Crime Legislation, 3 March 2016 (in confidence).
- 28 Advice from Queensland Corrective Services to the Taskforce on Organised Crime Legislation, 22 January 2016 (in confidence).
- 29 Advice from Queensland Corrective Services to the Taskforce on Organised Crime Legislation, 22 January 2016 (in confidence).
- 30 Explanatory Notes, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013* (Qld) 9 – 10.
- 31 *Corrective Services Act 2006* (Qld), section 60(2).
- 32 *Corrective Services Act 2006* (Qld), section 62.
- 33 Queensland Corrective Services, *Procedure – Maximum Security Orders – Assessment, Approval and Review* <[www.correctiveservices.qld.gov.au](http://www.correctiveservices.qld.gov.au)>.
- 34 *Corrective Services Act 2006* (Qld), section 61.
- 35 *Corrective Services Act 2006* (Qld), section 63.

- <sup>36</sup> Advice from Queensland Corrective Services to the Taskforce on Organised Crime Legislation, 22 January 2016 (in confidence).
- <sup>37</sup> *Corrective Services Act 2006* (Qld), section 350A(6).
- <sup>38</sup> *Corrective Services Act 2006* (Qld), section 350B(2)(b).
- <sup>39</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009*, *Final Report* (2015) commencing 39.
- <sup>40</sup> For discussion on the tension between the two concepts see generally, Chris Butler and Paulette Duputy, 'Denying Administrative Justice to Prisoners in Queensland' (2007) 32(2) *Alternative Law Journal* 101.
- <sup>41</sup> Bar Association of Queensland, Submission No 1.8 to the Taskforce on Organised Crime Legislation, 31 July 2015.
- <sup>42</sup> Australian Lawyers for Human Rights, Submission No 4.1 to the Taskforce on Organised Crime Legislation, 24 July 2015.
- <sup>43</sup> *Callanan v Attendee X* [2013] QSC 340; *Callanan v Attendee Y* [2013] QSC 341; *Callanan v Attendee Z* [2013] QSC 342.
- <sup>44</sup> *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- <sup>45</sup> *Istanbul Statement on the Use and Effects of Solitary Confinement* (Statement delivered and adopted at the International Psychological Trauma Symposium in Istanbul, Turkey, 9 December 2007).
- <sup>46</sup> Queensland Corrective Services, *Standard Guidelines for Corrections in Australia* (2012) <[www.correctiveservices.qld.gov.au](http://www.correctiveservices.qld.gov.au)>.
- <sup>47</sup> Queensland Corrective Services, *Standard Guidelines for Corrections in Australia* (2012) <[www.correctiveservices.qld.gov.au](http://www.correctiveservices.qld.gov.au)>.
- <sup>48</sup> See, for example, Sharon Shalev, *A Sourcebook on Solitary Confinement* (Mannheim Centre for Criminology, London School of Economics and Political Science, 2008).
- <sup>49</sup> *Legislative Standards Act 1992* (Qld), section 4(2) and (3).
- <sup>50</sup> *Legislative Standards Act 1992* (Qld), section 4(3)(a)(second limb).
- <sup>51</sup> Scrutiny of Legislation Committee, Parliament of Queensland, *Annual Report 1998-1999*, 6.
- <sup>52</sup> Bar Association of Queensland, Submission No 1.8 to the Taskforce on Organised Crime Legislation, 31 July 2015, 28.
- <sup>53</sup> Advice from Queensland Corrective Services to the Taskforce on Organised Crime Legislation, 22 January 2016 (in confidence).
- <sup>54</sup> *Callanan v Attendee X* [2013] QSC 340, 48; *Callanan v Attendee Y* [2013] QSC 341, 48; *Callanan v Attendee Z* [2013] QSC 342, 46.
- <sup>55</sup> John Robertson and Geraldine Mackenzie, *Queensland Sentencing Manual* (Westlaw AU, at Service 15.2, at August 2015) [10.260 and 10.380].
- <sup>56</sup> *Callanan v Attendee X* [2013] QSC 340, 54; *Callanan v Attendee Y* [2013] QSC 341, 54; *Callanan v Attendee Z* [2013] QSC 342, 52.
- <sup>57</sup> *Callanan v Attendee X* [2013] QSC 340, 19 and 57.
- <sup>58</sup> *Callanan v Attendee Y* [2013] QSC 341, 19 and 57.
- <sup>59</sup> *Callanan v Attendee Z* [2013] QSC 342, 18 and 55.
- <sup>60</sup> Advice from Queensland Corrective Services to the Taskforce on Organised Crime Legislation, 27 July 2015 (in confidence).

## PART 5.2

# CHAPTER SIXTEEN

## PUBLICISING THE CRIMINAL HISTORIES OF PARTICIPANTS IN CRIMINAL ORGANISATIONS

*Should the Commissioner of Police have broad power to disclose, and make public, a person's criminal history?*

*The Taskforce thought this was both inconsistent with traditional notions of fairness and justice, and an unnecessary and undesirable impediment to rehabilitation.*

The 2013 suite made an amendment to Queensland's *Police Service Administration Act 1990* (PSAA) to give the Commissioner of Police the power to make public the criminal history of *any* person who is, or was, a participant in a criminal organisation.

### OVERVIEW OF THE AMENDMENTS

Section 10.2AAB was inserted into the PSAA to confer on the Commissioner of Police the power to disclose, *to any entity*, the criminal history of a current or former *participant in a criminal organisation*.

The notion of 'former participant' extends to a person who has, *at any time in their life*, been identified as a participant in a criminal organisation – irrespective of whether it was two days, or 20 years, ago.

To disclose the criminal history, the Commissioner of Police need only be satisfied that it is in the public interest to do so. The legislation gives the Commissioner of Police no guidance as to the criteria s/he ought to apply for determining this 'public interest' test.

Under section 10.2AAC, the disclosed criminal history may be passed on to others. It gives the Commissioner of Police the power to authorise that the entity to which the criminal history has been disclosed *may publish or further disclose it to another entity*. This, importantly, includes media outlets.

This authorisation is not dependent on any application being made to the Commissioner of Police by the entity – the Commissioner may simply give the authorisation for further disclosure, and for publication at the same time as the initial dissemination.

The only constraint is that this power is conferred upon the Commissioner of Police alone – it cannot be delegated to any other person (for example, a Deputy or Assistant Commissioner).

The 2013 amendments also inserted necessary definitions into the PSAA, consistent with the meaning given to them in the Criminal Code –

ie, the wide definitions of *participant* and *criminal organisation* discussed in Chapter 8.

### WHAT WAS THE JUSTIFICATION FOR THE AMENDMENTS?

The Explanatory Notes to the amendment Bill do not provide any justification for the amendments – nor do they provide any reason why the Commissioner of Police may need, or should have, the power. The fact that the amendments constituted significant breaches of the fundamental legislative principles was also an issue that was left without justification.

The Legal Affairs and Community Safety Committee (LACSC), whose members scrutinised the amendment Bill under the truncated Parliamentary Committee process to which it was subject, noted this gap in the Explanatory Notes.

The LACSC members understood that the Commissioner of Police was being given this discretion to release criminal history information for the purpose of addressing *'concerns about some of the misinformation appearing in the public domain about the criminal history of members of criminal gangs'*.<sup>1</sup>

### IS THERE A SIMILAR POWER IN ANY OTHER AUSTRALIAN JURISDICTION?

No other Australian jurisdiction has legislation which permits the Commissioner of Police (or equivalent) to publically release the criminal histories of any person, including persons who are participants in criminal organisations.

### HAS THE POWER EVER BEEN USED BY THE COMMISSIONER OF POLICE?

The Queensland Police Service (QPS) have advised the Taskforce that, to date, the power to disclose a person's criminal history in accordance with the 2013 amendments has never been exercised by the Commissioner of Police.<sup>2</sup>

### WHAT ISSUES DID THE TASKFORCE IDENTIFY?

The power to disclose and publish a person's criminal history seemed to receive little public attention in debate and discussion about the 2013 suite – yet its effect is both far-reaching, and quite troubling.

The Taskforce struggled to understand the need for, or the reasoning behind, the amendments. It could only conjecture. Nevertheless, whatever the explanation, members were concerned by a number of aspects of the amendments.

Ultimately, members came to the view that those concerns could not be ameliorated, nor those issues overcome, by any option other than repeal. In doing so they concluded that no compelling reason for maintaining the amendments is apparent, or can be discovered.

Particular Taskforce concerns, set out and discussed below, have an additional gloss in terms of troubling aspects.

The amendments also constitute breaches of the fundamental legislative principles set out in section 4(2)(a) of the *Legislative Standards Act 1992*. It is unnecessary, and it would be superfluous, to repeat the same concerns as each issue is traversed.

The release and publication of a person's criminal history without their consent is such a serious abrogation of the rights and liberties of individuals, highlighted in those principles, that it cannot be justified in the circumstances of the PSAA.

### THE POWER UNDER SECTION 10.2AAB OF THE PSAA JEOPARDISES THE INDEPENDENCE OF THE COMMISSIONER OF POLICE

The Commissioner of the Queensland Police Service is appointed on a recommendation agreed to by both the Minister for Police, and the Chairperson of the Crime and Corruption Commission.<sup>3</sup>

The Commissioner of Police is responsible for the efficient and proper administration, management and functioning of the police service in accordance with law.<sup>4</sup> The Commissioner is, as expected, acting in an impartial and wholly apolitical role.

If the purpose of this amendment was that which was understood by the LACSC (and the Taskforce knows no other reason) – ie, to allow the Commissioner of Police to correct misinformation in the public domain – concerns immediately arise about the position in which this places the Commissioner of Police. A strong inference is that s/he is being thrust into a political role.

The misinformation referred to is, presumably, claims or statements appearing in the public domain concerning the role of OMCGs in criminal activity, and their threat to the community.

It is clear that, as discussed in Chapter 4, opinions differ about the actual levels of OMCG involvement in crime. The statistics suggest one picture, but law enforcement authorities hold a different view.

There is a broad range of public opinion about OMCGs (mirrored within the Taskforce) and the extent and seriousness of criminal activity engaged in by them. That discussion spills over, of course, into the very questions this Taskforce is addressing.

Absent a plausible, or indeed any, explanation for the amendments from Parliament, the Taskforce was forced to hypothesise about the circumstances in which they might be intended to operate.

One example may be a circumstance in which a view is publicised (by any source) that a person is being unfairly targeted under the 2013 suite because of their association with an OMCG when they are, they claim, a law-abiding citizen. In truth, they may have an extensive criminal history redolent of serious organised crime-style offences.

In an effort to combat what the Commissioner of Police may believe to be an attempt to mislead the public, based upon misinformation, the Commissioner may elect to disclose and make public that person's criminal history.

Inevitably both events are bound up and may be perceived as being closely linked with debate about the merits or weaknesses of the 2013 suite. The publication would become, in that circumstance, a step in a political event or exercise.

The publication of the person's criminal history in that kind of circumstance is an act fraught with the suggestion or at least the possibility that the Commissioner of Police is being asked to take a political role and, in effect, provide aid and comfort to one side in a political exercise.

For the Commissioner of Police to engage in *any* way in public debate undoubtedly undermines public confidence in the independence of the office. Independence, and indeed impartiality and political neutrality, are necessary and important features of the Commissioner of Police's role.

The power given to the Commissioner of Police by the amendment seriously risks directly engaging the Commissioner in public debate regarding the worthiness of government legislation. That is, the entire Taskforce agreed, a plainly inappropriate role for the Commissioner.

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### RETAIN THE POWER, BUT GIVE IT TO SOMEONE ELSE?

The Taskforce unanimously agreed that, if the power were to remain at all, it was not appropriate that it remain with the Commissioner of Police.

That said, the Taskforce was unable to conceive what other office-holder might more appropriately exercise the power.

The Queensland Police Union raised whether responsibility might instead be given to the

Attorney-General and Minister for Justice. All other Taskforce members were opposed: the proposition arguably injected an even stronger political element into the discretionary exercise set up by the amendments.

#### THE LACK OF CRITERIA FOR THE PUBLIC INTEREST TEST AND THE LACK OF ANY REQUIREMENT TO PROVIDE REASONS FOR THE DECISION

The absence of any guidance for the Commissioner of Police about the factors relevant to the discretion was, Taskforce members felt, both unwise and (intending no disrespect to the holder of the office) potentially dangerous.

#### WHAT IS 'IN THE PUBLIC INTEREST'?

Public interest is a notion that is difficult to define – various courts and governmental bodies have, over time, acknowledged the dilemmas involved in pinning down its precise meaning.

The Australian Senate Committee on Constitutional and Legal Affairs addressed the quandary in 1979 and, where they needed to give the term *some* definition, described the public interest as:<sup>5</sup>

*'a convenient and useful concept for aggregating any number of interests that may bear upon a disputed question that is of general – as opposed to merely private – concern.'*

The meaning of the term will change with circumstance. Opinions as to what will be in the public interest *'have differed, do differ and doubtless always will differ.'*<sup>6</sup>

It is because of this possibility for broad, varying opinions about what is in the public interest, and what factors should be taken into account, that legislation like this should provide some guidance.

Recently in 2011 the High Court acknowledged that the public interest test is confined by the objects, scope and purpose of the legislation in

which it is found – what is in the public interest in a certain case must be informed by what the legislation is trying to achieve, and why.<sup>7</sup>

#### THE ABSENCE OF MEANING WAS DELIBERATE

The LACSC, when examining the amendment, raised the fact that it provides no guidance as to what the Commissioner of Police may, or should, take into account when determining whether the disclosure of a person's criminal history is in the public interest.

It was made clear to the LACSC in the course of the public briefing on the Bill that the amendment *deliberately* offers no guidance, nor provides any criteria, about how such a determination is to be made.<sup>8</sup>

This can only mean that Parliament intends, through the legislation, that the Commissioner of Police determine the 'public interest' on a case-by-case basis. That, in turn, means that the matters considered by the Commissioner of Police in making each decision could be very narrow, or very broad – but, regardless, may be entirely subjective.

The Attorney General was not concerned by that prospect. He told the LACSC that *'imposing prescriptive criteria may unnecessarily restrict the Commissioner of Police's ability'* to determine a specific case.<sup>9</sup>

#### TASKFORCE DISCUSSION

The legal representatives of the Taskforce (in particular, the Bar Association of Queensland) were concerned by the lack of instruction to the Commissioner of Police on what they felt was an important matter.

While the Taskforce has, of course, proper confidence in the independence of the Commissioner of Police and in the ability of the Commissioner to act appropriately and impartially, Taskforce members felt that the outcome of the decision was so serious for the affected person that the amendment should provide at least *some* guidance about the

grounds upon which the discretion ought be exercised.

#### THE ABSENCE OF ANY REQUIREMENT FOR REASONS

The concerns of Taskforce members about that matter were exacerbated by the fact that there is no requirement in the legislation for the Commissioner of Police to give reasons for the decision to disclose and/or make public a person's criminal history.

The worrying consequence is that there is no way of knowing what factors the Commissioner took into account or, ultimately, how s/he reached the conclusion that it *was* in the public interest to disclose the history.

In light of the absence of any guidance about the matters to be properly taken into account, the lack of any requirement to provide reasons compounded the concerns of Taskforce members (as it did the LACSC in 2013).

#### THE BROAD DEFINITION OF 'CRIMINAL HISTORY'

The definition of *criminal history* under section 10.2AAA of the PSAA is very wide. It includes:

- the person's **convictions** in relation to offences committed in Queensland or elsewhere; and
- information about
  - offences of any kind **alleged** to have been committed in Queensland or elsewhere; and
  - the administering of **cautions**, or the **referrals of offences to conferences**, under the *Youth Justice Act 1992* (Qld).

(emphasis added)

It is the second limb of this definition which most troubled the Taskforce.

It relates to alleged charges, without any proof of conviction; and, to diversionary schemes specifically designed for young people under the age of 17.

This wide definition of criminal history is taken from a subsequent division in the PSAA which provides guidelines for the exchange of information between agencies (such as interstate law enforcement) for a policing purpose.<sup>10</sup>

In those situations it can be argued that a wide definition, which includes disclosing unproven charges and juvenile cautions, is appropriate given the limited use of the information and the restrictive scope of the circumstances in which it can be disclosed.

But the 2013 amendments to the PSAA adopt this broad definition for current and former participants of criminal organisations.

Prior to the 2013 amendments the Commissioner of Police was already invested with the power to disclose a person's criminal history in more common scenarios – for example, as part of an employment screening process. This pre-existing power under section 10.2, however, embraces a definition of criminal history which is considerably more limited.

In those circumstances the definition of criminal history under the *Criminal Law (Rehabilitation of Offenders) Act 1986* is applied and what can be disclosed on a criminal history is significantly limited and confined, appropriately, *only* to actual convictions that have been recorded against a person<sup>11</sup> and to those convictions which have not yet 'expired' under the rehabilitation period<sup>12</sup> (and which are not excluded from that rehabilitation period by another provision in the Act<sup>13</sup>).

This legislation, which is rehabilitation-focused, is discussed in further detail below.

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**TASKFORCE DISCUSSION**

All Taskforce members agreed that there is a real and obvious danger in adopting an overly-wide definition of *criminal history* for the purpose of the 2013 amendments.

By their very nature criminal histories are recognised as highly prejudicial documents. That is why for example there is almost no circumstance in which they may be disclosed before verdict in a criminal trial.

To disclose them for no other purpose than public discussion is both novel, and remarkable; to include, within them and for public consumption, information about juvenile misbehaviour and, even more remarkably, *unproven* allegations takes their prejudicial effects to new heights.

The Taskforce was unanimous that, if the purpose of the power is to allow a person's criminal history to be disclosed and published (including, for example, in the media) then it is inherently unfair and unjust to have mere allegations of charges, and juvenile cautions, included in that information.

**THE WIDE INTERPRETATION OF 'ENTITY'**

Under section 10.2AAB the Commissioner of Police may disclose a person's criminal history to any 'entity' – a term which, also, is not defined in the legislation.

This lack of definition was identified by the LACSC. In addressing what would be encompassed by the term the Department of Justice and Attorney-General advised that the definition under the *Acts Interpretation Act 1954* (Qld) should apply.

That Act defines *entity* as: 'including a person and an unincorporated body.' The government was of the view that this would include any interstate or overseas person or body.<sup>14</sup>

This broad interpretation of 'entity' would include, troublingly for the Taskforce, news media organisations.

The disclosure of a person's criminal history to the media and its ability to make that information public was concerning to the Taskforce for a very obvious and compelling reason: that it potentially jeopardises a person's right to a fair trial.

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**THE RIGHT TO A FAIR TRIAL**

The right to a fair trial before an independent and impartial judge and/or jury is an important tenet of any just, fair and effective legal system.<sup>15</sup>

Indeed, the United Nations *International Convention on Civil and Political Rights* (ICCPR) enshrines the right.<sup>16</sup>

It is the ordinary practice in Queensland courts that, unless exceptional circumstances exist,<sup>17</sup> a person's prior criminal history will not be disclosed to a judge or jury at their trial.

The rules of evidence '*facilitate the right to a fair trial by shielding jurors from evidence which is more prejudicial than probative.*'<sup>18</sup>

The reasoning for this is relatively straightforward – if a judge or jury knows that a defendant has previously been convicted of criminal offences there is a real risk that this knowledge will colour their judgment as to the defendant's innocence or guilt of the crime for which they are on trial.

Judges and juries must determine the case before them based solely on the facts and evidence presented at the trial, and not upon any extrinsic material.

The publication of a person's criminal history – and, again, a criminal history which could include *unproven charges* and juvenile cautions – has the very real potential to hinder the fairness of that person's current criminal trial.<sup>19</sup>

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**TASKFORCE DISCUSSION**

All members of the Taskforce were convinced that the section 10.2AAB amendment created

a real difficulty in ensuring fair trials, and the effective administration of justice.

No Taskforce member suggested that there was any way to overcome this concern through amendment.

### THE PRINCIPLE OF REHABILITATION

The 2013 amendments to the PSAA are, on their face, inimical to the important doctrine of *rehabilitation*.

Rehabilitation is the ‘reorientation of the offender towards society’s values.’<sup>20</sup> It is a therapeutic process that is integral to afford all persons, including those who have previously been convicted of an offence, the opportunity to meaningfully and positively contribute to their community.

Both the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) and the *Youth Justice Act 1992* (Qld) regulate the disclosure of information about the criminal history of an individual.

Section 10.2AAB(2) completely overrides the provisions under those Acts.

### THE CRIMINAL LAW (REHABILITATION OF OFFENDERS) ACT 1986

The CLROA is the governing legislation with respect to the disclosure of criminal history information, in accordance with the principle of rehabilitation, in Queensland.

The CLROA provides a person who has a criminal history with some protections in terms of when they are required to disclose their history. These protections apply in relatively limited situations.

The CLROA generally allows a person not to disclose that they have a criminal history if they were not imprisoned as part of their sentence (or were imprisoned for less than 30 months) and a rehabilitation waiting period has passed. The rehabilitation waiting period for convicted people 17 years and over, where they were sentenced in the Supreme or

District Courts of Queensland, is 10 years and for all other convictions in Queensland it is five years.<sup>21</sup>

The rehabilitation waiting period begins from the date of the conviction, however, if a person is convicted of a subsequent offence after that date, the rehabilitation waiting period must start over again (and from the date of that subsequent conviction).

Unproven charges and convictions which have been set aside or quashed are excluded from the definition of criminal history under the CLROA (these matters are, though, included in the definition under the PSAA amendment as noted above).<sup>22</sup>

In the same vein offences for which a person is convicted but where the court has exercised its discretion not to formally record a conviction will not form part of a person’s criminal history (although it does for law enforcement and criminal justice purposes).<sup>23</sup>

The 2013 amendment to the PSAA explicitly overrides these important and longstanding legislative principles under the CLROA, and allows matters which, otherwise, may not usually be disclosed to be made public.

### THE YOUTH JUSTICE ACT 1992

The Youth Justice Act is the basis for all juvenile justice matters across the state. It attaches strict guidelines around matters of confidentiality relating to juvenile criminal proceedings, and the disclosure of a young person’s identifying information.<sup>24</sup>

It provides two diversionary options under which a young person can be dealt with by police for an offence that does not involve a formal charge – a *caution* and a *youth justice conference*.

A *caution* is a formal warning given by a police officer to a young person that their conduct constitutes a criminal offence.<sup>25</sup> If a young person is given a caution then they are not liable to be prosecuted for that offence in court.<sup>26</sup>

A *youth justice conference* is a mediation process that usually occurs between a young person who has committed an offence, police officers, community representatives and the victim of the offence (where there is one).

The conference has a therapeutic purpose and, when completed, means that a young person is no longer liable to be prosecuted for that offence in court.<sup>27</sup>

These processes are an important feature of the juvenile justice regime in Queensland. They facilitate the diversion of young people away from the criminal justice system.

The Youth Justice Act allows for very limited circumstances under which cautions and youth justice conferences can be disclosed. Ordinarily, they may *only* be disclosed to the parents of the child, a member of the police service, or a legal representative.

Where a young person is charged with an offence and it is prosecuted in the Childrens Court, it is an imprisonable offence for another person or entity to publish *any* identifying information about a young person who is a first-time offender.<sup>28</sup>

For subsequent offences, the court has the power to make a publication prohibition order to prevent the publication of the young person's identifying information.<sup>29</sup> These provisions apply regardless whether a formal conviction is recorded, or not.

In 2007 the Chair of the New South Wales Legislative Council Standing Committee on Law and Justice, the Honourable Christine Robertson MLC, observed that:<sup>30</sup>

*The naming and publication of identifying information about child offenders 'is ultimately short-sighted since it is likely to stigmatise the offender and impact negatively on their rehabilitation, increasing the likelihood of reoffending.'*

These protections play an important role in protecting vulnerable young people who have

entered the criminal justice system, and encourages their rehabilitation.

As the LACSC pointed out in its scrutiny of the legislation:<sup>31</sup>

*'The potential impact of these provisions is that someone with criminal convictions more than 20 years old who has reformed and made a valuable contribution to society, may face disclosure of their old criminal convictions, without their consent, and the publication of their criminal past.'*

#### TASKFORCE DISCUSSION

BAQ, in its submission to the Taskforce, explained the importance of the principles espoused in the CLROA and the Youth Justice Act:<sup>32</sup>

*'The legislative provisions give people a second chance by relieving them of the stigmatising effect of their criminal conviction in certain limited circumstances.*

*A sufficiently lengthy period must have arisen for those convictions to become "spent".*

*Circumvention of such legislative provisions should not be taken lightly.*

*It is concerning that offences might be taken into account from a person's childhood, or from many years earlier, where, through rehabilitation and the absence of re-offending, those convictions are otherwise spent.'*

The Queensland Law Society, the Public Interest Monitor, and the chair shared that concern.

The QPU, the Commissioned Officers' Union and the QPS took a neutral position.

## PROPOSAL FOR CHANGE

The majority of the Taskforce (BAQ, QLS, the PIM and the chair) came to the view that the amendments made to the PSAA by the 2013 suite are plainly excessive, unfair and unnecessary, and incapable of satisfactory modification; and, hence, that they should be repealed in their entirety.

The QPU advocated for retention of the amendments but proposed, as noted earlier, that the decision-making responsibility should be delegated to another person, or entity. QPU has not, however, nominated an alternative.

The QPS and the Commissioned Officers' Union did not take a position; but, did not argue against the conclusions already set out, or the recommendation below.

## RECOMMENDATION 34 (Chapter Sixteen)

The 2013 amendments to the *Police Service Administration Act 1990* (Qld) should be repealed. (not preferred by the Queensland Police Union; no position was taken by the Commissioned Officers' Union).

## ENDNOTES

- <sup>1</sup> Legal Affairs and Community Safety Committee, Parliament of Queensland, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013* (2013) 16.
- <sup>2</sup> Advice from Queensland Police Service to the Secretariat to the Taskforce on Organised Crime Legislation, 14 March 2016.
- <sup>3</sup> *Police Service Administration Act 1990* (Qld), section 4.2.
- <sup>4</sup> *Police Service Administration Act 1990* (Qld), section 4.8.
- <sup>5</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, *A Report on the Operation and Administration of the Freedom of Information Legislation* (1987) 5.25.
- <sup>6</sup> *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 128 ALR 238 (Lokhart J).
- <sup>7</sup> *Hogan v Hinch* (2011) 243 CLR 506.
- <sup>8</sup> Evidence to the Legal Affairs and Community Safety Committee, Parliament of Queensland, Brisbane, 20 November 2013, 5.
- <sup>9</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 21 November 2013, 4254 (Jarrod Bleijie, Attorney-General and Minister for Justice).
- <sup>10</sup> *Police Service Administration Act 1990* (Qld), section 10.21.
- <sup>11</sup> *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), section 3.
- <sup>12</sup> *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), sections 3 and 5.
- <sup>13</sup> *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), sections 9, 9A and 10.
- <sup>14</sup> Evidence (written) to the Legal Affairs and Community Safety Committee, Parliament of Queensland, Brisbane, 20 November 2013 (John Sosso, Director-General of the Department of Justice and Attorney-General).
- <sup>15</sup> *Dietrich v The Queen* (1992) 117 CLR 292, 326.
- <sup>16</sup> *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.
- <sup>17</sup> Queensland Supreme and District Courts, *Benchbook* (May 2014) Queensland Courts, direction 42.2 <[www.courts.qld.gov.au/information-for-lawyers/benchbooks-and-ucpr-bulletin/supreme-and-district-courts-benchbook](http://www.courts.qld.gov.au/information-for-lawyers/benchbooks-and-ucpr-bulletin/supreme-and-district-courts-benchbook)>.
- <sup>18</sup> Roxanne Burd and Jacqueline Horan, 'Protecting the Right to a Fair Trial in the 21<sup>st</sup> Century – Has Trial by Jury been caught in the World Wide Web?' (2012) 36 *Criminal Law Journal* 103, 116.
- <sup>19</sup> Justice Virginia Bell, 'How to Preserve the Integrity of Jury Trials in a Mass Media Age' (2005) 7 *Judicial Review* 311, 311.
- <sup>20</sup> H Anthony Cooper, 'Toward a Rational Doctrine of Rehabilitation' (1973) 19(2) *Crime & Delinquency* 228, 228.
- <sup>21</sup> *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), sections 3 and 6.
- <sup>22</sup> *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), section 5.
- <sup>23</sup> See *R v Millar* [1998] QCA 276. The discretion of the court to record or not record a conviction is afforded under section 12(1) of the *Penalties and Sentences Act 1992* (Qld).
- <sup>24</sup> *Youth Justice Act 1992* (Qld), Part 9.
- <sup>25</sup> *Youth Justice Act 1992* (Qld), section 14.
- <sup>26</sup> *Youth Justice Act 1992* (Qld), section 15(2).
- <sup>27</sup> *Youth Justice Act 1992* (Qld), Part 2, Division 3.
- <sup>28</sup> *Youth Justice Act 1992* (Qld), section 301.
- <sup>29</sup> *Youth Justice Act 1992* (Qld), section 299A.
- <sup>30</sup> Standing Committee on Law and Justice, Parliament of New South Wales, *The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings* (2007) ix.
- <sup>31</sup> Legal Affairs and Community Safety Committee, Parliament of Queensland, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013* (2013) 31.
- <sup>32</sup> Bar Association of Queensland, Submission 7.1 to the Taskforce on Organised Crime Legislation, 21 September 2015, 5.

## PART 5.2

# CHAPTER SEVENTEEN

## EXCLUDING OMCG MEMBERS FROM LICENSED VENUES

*The Taskforce accepted that members of the general public have the right to enjoy themselves in liquor licensed venues free from any fear or intimidation that the presence of 'colour-wearing' OMCG members might incite.*

*Business owners and staff of those venues also require adequate legislative protection.*

*But the penalties imposed under the 2013 suite for non-compliance were excessive, unnecessary and disproportionate.*

### AN EXPLANATION OF THE LIQUOR ACT AMENDMENTS: WHAT WERE THEY?

The 2013 suite amended the *Liquor Act 1992* (Qld) to create a series of discrete offences to prohibit patrons in licensed premises from wearing or displaying material (termed 'prohibited items') associated with a declared criminal organisation.

The only groups declared to be criminal organisations under the Criminal Code are OMCGs.

The offences were inserted via a new Division 5 into Part 6 of the Act.

### PROHIBITED ITEMS (AKA OMCG 'COLOURS')

The Liquor Act defines prohibited items as clothing, jewellery or another accessory that displays any one of the following:<sup>1</sup>

- the name of a declared criminal organisation; or
- the club patch, insignia or logo of a declared criminal organisation (otherwise known as the 'colours' of the club); or
- any image, symbol, abbreviation, acronym or other form of writing that indicates membership of, or an association with, a declared criminal organisation (including '1%', '1%er', etc.).

### SECTION 173EB:

IT IS AN OFFENCE FOR A LICENSEE OR EMPLOYEE TO ALLOW A PERSON TO ENTER OR REMAIN IN A LICENSED PREMISES IF THAT PERSON IS WEARING OR CARRYING A PROHIBITED ITEM

Section 173EB of the Liquor Act creates an offence that applies to:

- the licensee or permittee of a licensed premises;

- an approved manager of a licensed premises; and
- an employee of a licensed premises.

It is an offence for those persons to *knowingly allow entry, or allow a person to remain in, the premises where they are wearing or carrying a prohibited item.*

The offence is punishable by a maximum of 100 penalty units (the equivalent<sup>2</sup> of a fine of \$11,780).

**SECTION 173EC:**  
IT IS AN OFFENCE FOR A PERSON TO ENTER OR REMAIN IN A LICENSED PREMISES IF THEY ARE WEARING OR CARRYING A PROHIBITED ITEM

Section 173EC renders it an offence for *a person who is wearing or carrying a prohibited item to enter or remain in a licensed premises.*

The offence is punishable by an escalating scale of maximum penalties for repeat offenders:

- a first offence is punishable by a maximum of 375 penalty units (being \$44,175);
- a second offence is punishable by a maximum of 525 penalty units (being \$61,845) or 6 months imprisonment; and
- a third or subsequent offence is punishable by a maximum of 750 penalty units (being \$88,350) or 18 months imprisonment.

**SECTION 173ED:**  
IT IS AN OFFENCE FOR A PERSON TO REFUSE TO LEAVE A LICENSED PREMISES, OR RESIST REMOVAL, IF THEY ARE WEARING OR CARRYING A PROHIBITED ITEM

If a person is present in a licensed premises wearing or carrying a prohibited item, section

173ED(1) of the Liquor Act allows an authorised person (being a licensee, permittee or employee of a licensed premises or a police officer) to require that person to immediately leave the premises.

If the person fails to leave the premises immediately they commit an offence punishable by the same escalating scale of penalties provided under section 173EC.

In the event that a person fails to leave the premises when required, then the authorised person may use necessary and reasonable force to remove that person.<sup>3</sup>

A person who resists the use of reasonable and necessary force commits a further offence which is, again, punishable by the same escalating scale of penalties provided under section 173EC.

#### WHAT WAS THE JUSTIFICATION FOR THE AMENDMENTS?

The creation of these offences in the Liquor Act was justified on the basis that they were necessary to prevent violent conflicts and confrontations between rival gangs at licensed premises.<sup>4</sup>

It was also thought that the presence of OMCGs at licensed premises has a tendency to intimidate other patrons, and inhibit their enjoyment of a public venue.<sup>5</sup>

The legislation, it should be noted, does *not* prevent OMCG members from attending a licensed premises. They are *only* banned when they are wearing or displaying their club colours, insignia or symbols. OMCG members may remain in the premises so long as their 'colours' are removed or covered.

It is apparent that the banning of colour-wearing OMCG members from licensed venues leaves members of the public with the perception that they are safer than if members wearing their colours are visibly present.

In fact the legislation has no tangible impact in terms of actually stopping OMCG members, as such, from attending licensed venues.

### WHAT IS THE APPROACH IN OTHER AUSTRALIAN JURISDICTIONS?

Prior to the 2013 suite both New South Wales and the Northern Territory had some mechanism for the exclusion of OMCG members from licensed premises when they are present wearing or carrying something that identifies them as an OMCG member (symbols, insignia, colours, etc.).

South Australia introduced and passed similar legislation last year.

#### NEW SOUTH WALES

NSW bans the presence of identifiable OMCG members in licensed premises in two ways.

The first is via local Liquor Accord provisions under Part 8 of the *Liquor Act 2007* (NSW).

A local Liquor Accord agreement is a code of practice which regulates the operation of licensed premises within a certain area (for example, there are separate Liquor Accord bodies for the central Sydney city region and the Coffs Harbour region).

They are voluntary, industry-based agreements developed by, for example, members of the local business community, councils, police, and government departments for the purpose of eliminating or reducing alcohol-related violence, anti-social behaviour and other alcohol-related harm.<sup>6</sup>

Some local Liquor Accords (such as that for Manly and the Northern Beaches) prohibit OMCG members from entering licensed premises within their precincts if they are wearing club colours.<sup>7</sup>

Legislatively, colour-wearing OMCG members are also excluded from licensed premises in the Kings Cross precinct under the *Liquor Regulation 2008* (NSW).<sup>8</sup>

If a person is refused entry or turned out of a licensed premises on the basis of either of the above they commit an offence punishable by a maximum of 50 penalty units<sup>9</sup> (which is the equivalent of a \$5,500 fine).<sup>10</sup>

#### THE NORTHERN TERRITORY

While the Northern Territory does not specifically legislate for the exclusion of colour-wearing OMCG members from licensed premises, there is a ministerial power which has been used to that effect.

The Minister for Racing, Gaming and Licensing may impose additional conditions on liquor licences if satisfied that it is needed for the wellbeing of those communities which might be affected by the operation of the license.<sup>11</sup>

That ministerial power has been exercised to make it a condition of a liquor licence in the Northern Territory that licensees and their employees must request any OMCG 'member to remove any item identifying their club before entering, or remaining on, licensed premises.'<sup>12</sup>

If a licensee fails to comply with this condition it is an offence punishable by a maximum of 100 penalty units<sup>13</sup> (the equivalent of a \$15,300 fine).<sup>14</sup>

If a person has been refused entry or excluded from a premises on the basis that allowing their entry would render the licensee liable to penalty as per above, that person must leave the premises immediately. If they fail to do so they commit an offence punishable by a maximum of 20 penalty units (the equivalent of a \$1,530 fine).<sup>15</sup>

#### SOUTH AUSTRALIA

In 2015 South Australia made amendments to its *Liquor Licensing Act 1997* (SA) imposing offences replicating those introduced by the 2013 suite in Queensland.<sup>16</sup>

The maximum penalties are similar (with slight variations to the monetary fines based on the value of penalty units).

## HAS ANY PERSON BEEN CONVICTED OF THE NEW QUEENSLAND OFFENCES?

The data provided to the Taskforce by Queensland Courts indicates that, as at 31 January 2015:

- 12 people have been convicted of an offence under section 173EC (enter/remain in a licensed premises whilst wearing/carrying a prohibited item); and
- 51 people have been convicted of an offence under section 173ED (failing to leave a licensed premises immediately or resisting removal).

All persons convicted of these offences received monetary fines, with the exception of three persons who received good behaviour orders and two persons who received a non-custodial sentence the details of which are not known due to the recording practices of Queensland Courts (it is likely their sentences fell into the category of: ‘accused discharged’, ‘admonished and discharged’, ‘cautioned’, ‘convicted and not further punished’, ‘no action taken’, ‘no penalty imposed’, ‘released absolutely’ or ‘reprimand’).<sup>17</sup>

There have been no convictions, or charges, for an offence under section 173EB (the licensee/employee offence).

## WHAT ISSUES DID THE TASKFORCE IDENTIFY?

Taskforce members turned their minds to a number of different issues arising out of the Liquor Act offences introduced by the 2013 suite.

## THE COMMON LAW POWER TO REFUSE ENTRY TO, OR EXCLUDE A PERSON FROM, A LICENSED PREMISES

Separate from the offences introduced by the 2013 suite, the Liquor Act already has built-in mechanisms which provide authorised persons

(licensees, managers, employees, etc.) with the power to refuse entry, or to require a person to leave a licensed premises in certain circumstances.<sup>18</sup>

Under sections 165 and 165A these powers are able to be used in situations where, for example, a person is unduly intoxicated, behaving in a disorderly way, or creating a disturbance.<sup>19</sup>

In addition to these legislative refusal and removal powers, the Liquor Act recognises a licensee’s common law right to refuse entry to, or remove a person from, the premises.<sup>20</sup>

This means that a licensee has the right to refuse entry or remove persons from the premises for reasons *other* than those specified in sections 165 and 165A, so long as that is done within the bounds of the *Anti-Discrimination Act 1991* (Qld).

These conditions are colloquially referred to as ‘house policies’. They are commonly used to enforce dress codes intended to maintain the standard of the premises – for example, the banning of thongs, singlets and soiled workwear is routinely enforced at various licensed venues across the state.

Conceivably, these common law powers could be used for restricting the presence of persons wearing OMCG-related clothing in licensed premises across Queensland.

In fact, as discussed above, many licensed premises and local Liquor Accords throughout NSW already rely on these powers as a strategy to exclude any person displaying OMCG colours from a licensed premises.

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## PRE-2013 LAWS: THE VIEWS OF THE TASKFORCE

The Taskforce recognised that, prior to the 2013 suite, licensed premises across Queensland already had the power to ban any person wearing or carrying an OMCG-related item from entering or remaining in the venue.

Despite those pre-existing powers, the Taskforce was persuaded of the utility of the new offence provisions.

Members of the general public have, Taskforce members accepted, the right to enjoy themselves in liquor licensed venues free from any fear or intimidation that the presence of colour-wearing OMCG members might incite. So, too, do the business owners and staff of those venues.

The purpose of the offences introduced by the 2013 suite was to protect these rights and minimise the adverse risks and consequences for the community presented by OMCG members. This was generally recognised across the board by the Taskforce as being a genuine objective, achieved through the Liquor Act offences.

The Taskforce acknowledged that, while the common law powers may already exist to allow a licensed premises to exclude colour-wearing OMCG members, there is a clear benefit in providing specific legislation to that effect.

The Liquor Act offences deflects the refusal or exclusion decision away from the individual licensee and provide a legislative foundation on which they can rely.

#### THE EFFECT OF THE 2013 LIQUOR ACT OFFENCES ON LICENSEES AND STAFF OF LICENSED PREMISES

The offence under section 173EB places a heavy onus on licensees and their staff.

In effect, the offence places the staff member in a position where they are required to either refuse entry to an identified OMCG member, or require them to leave the premises.

The provision is clear: that a staff member *must not* knowingly allow a person to enter or remain in the premises if they are wearing or displaying a prohibited item associated with an OMCG, regardless of the circumstances and irrespective of any risk that might be associated with a challenge to the entrant.

This, Taskforce members were concerned, has the undoubted potential to place at risk the safety of individual staff in their attempts to adhere to the provision, and avoid committing an offence themselves.

It is not inconceivable that an employee, when placed in a position envisaged by the offence, would feel intimidated and/or threatened by the OMCG entrant/s.

If it is accepted that OMCGs pose an actual threat to the community – a proposition inherent in the amending legislation, and one the Taskforce was not prepared to gainsay – then there is a clear distinction between refusing entry to, or excluding, an OMCG member from a premises (as opposed to excluding a non-OMCG member).

It logically follows that the legislation must impliedly acknowledge the existence of a risk to the personal safety of the employee, as well as members of the public.

Some members of the Taskforce considered that this risk would be heightened in circumstances where the employee is, for example, the *only* staff member present and does not have the resources of security personnel to support them (for example, in a regional venue, late at night).

#### TASKFORCE DISCUSSION ABOUT THE RISKS TO LICENSEES AND STAFF

##### THE MAJORITY VIEW

The Bar Association of Queensland, the Queensland Law Society, the Public Interest Monitor and the chair agreed that the section 173EB offence placed licensees and employees in an uncomfortable, and indeed risky, position.

These members felt that the offence, as it currently stands, unfairly burdens and compromises workers in the course of their employment.

It was suggested that, if the offence is retained, it should be amended to afford appropriate and necessary protections to the persons it affects (licensees and employees, etc.).

Those amendments are outlined in more detail below, where a proposal for change is discussed.

### THE MINORITY VIEW

The Queensland Police Union (QPU) and the Commissioned Officers' Union held a different view.

The QPU acknowledged the concerns raised earlier but disagreed that the risk to licensees or employees was any greater, in terms of excluding an OMCG member, than arose for staff excluding a person who was not an OMCG member.

Both the QPU and the Commissioned Officers' Union submitted that, if a situation arose where a licensee or staff member felt threatened or uncomfortable with the task of excluding an OMCG member, then the QPS officers were appropriately available and should be called upon to assist.

The Commissioned Officers' Union also felt it relevant to note that QPS have a discretion in relation to the preferring of charges and it appears, on the statistics available, that no persons have in fact been charged with an offence under this provision.

### THE LACK OF CONSISTENCY IN PENALTIES

The maximum penalties which attach to offences under section 173EC and section 173ED are, the majority of the Taskforce (the BAQ, PIM, QLS and chair) concluded, unnecessarily harsh and inconsistent with the balance of offences under the Liquor Act.

For a first offence under either section the maximum fine is 375 penalty units, which is the equivalent of a \$44,175 fine. The penalties then escalate for repeat offences, with any third or subsequent offence being punishable

by a maximum of 750 penalty units (equal to an \$88,350 fine) or 18 months imprisonment.

In comparison, the maximum penalty attached to both the broader removal and refusal powers under sections 165 and 165A is 50 penalty units, which is the equivalent of a \$5,890 fine – ie, about 1/8<sup>th</sup> of the new fines under the 2013 suite.

The Taskforce struggled with the notion that the new offences are, objectively, eight times more serious than the pre-existing offences.

In light of this significant disproportionality the Taskforce found it useful to have recourse to the maximum penalties imposed in NSW and the Northern Territory.

While the regime in those states is markedly different legislatively, the operational effect of banning colour-wearing OMCG members from licensed premises is, the Taskforce concluded, largely analogous.

The maximum penalties in those jurisdictions are similar to the maximum penalties provided for in Queensland under the broader removal and refusal powers (sections 165 and 165A).

### TASKFORCE DISCUSSION

Taskforce members acknowledged that the significant disproportionality in maximum penalties attached to the offences introduced by the 2013 suite was impractical, and unnecessary.

The majority of the Taskforce (with the exception of the Commissioned Officers' Union and the QPU) agreed that it was more appropriate and just that the maximum penalties should be consistent with those provided for under the broader removal and refusal powers (sections 165 and 165A), and with the approach taken in NSW and the Northern Territory.

It was agreed by the whole of the Taskforce that the conduct involved in the offence under section 173ED (which involves the OMCG member actively refusing and resisting

reasonable requests to leave the premises) was conduct worthy of a higher maximum penalty than the offence under section 173EC (which involves simply entering or being in a licensed premises).

The Commissioned Officers' Union disagreed that there should be any reduction in the penalties for these offences. Their representative felt that the crushing sanctions for OMCG members under these provisions were necessary from a deterrence perspective and that they should be retained in their current form. The Commissioned Officers' Union and the QPU felt that the offences and associated crushing penalties significantly contribute to public order, community and Police Officer safety.

#### PROPOSAL FOR CHANGE

The Taskforce accepts there is utility in retaining the offences inserted into the Liquor Act by the 2013 suite.

Those new offences provide the Queensland community with protection from the intimidation that the presence of identifiable OMCG members may cause when other members of the public are attempting to enjoy themselves in a public licensed space.

In order to address the concerns raised above, however, the Taskforce recommends that appropriate amendments be made to each offence, as follows.

#### AMENDMENT TO SECTION 173EA: THE DEFINITION OF PROHIBITED ITEM

If it is accepted that the Liquor Act offences are to be retained (albeit with amendment), as is the Taskforce recommendation, then the definition of prohibited item will require some modification.

As it currently stands, what constitutes a prohibited item is anchored to a declared criminal organisation. If it is accepted, as recommended in Chapter 8, that the executive declaration power should be repealed then it ultimately leaves a gap in the Liquor Act

insofar as those offences that apply *only* to declared criminal organisations.

The QPS has provided the Taskforce with information detailing the involvement of OMCGs in occupational licensing and, in particular, of their involvement in the operations of nightclubs on the Gold Coast and in the central Brisbane area.<sup>21</sup> This involvement is in terms of infiltration into the security operations of some premises and the exploitation of these venues to facilitate their involvement in the drug trade.<sup>22</sup>

Based on this specific, identified risk, it may be appropriate for Queensland to adopt a similar approach to that taken in NSW (where their Liquor Regulation excludes, in certain precincts, persons wearing/carrying items relating to certain OMCGs).

The exclusion of colour-wearing OMCG members from licensed premises across Queensland would both limit their ability to infiltrate legitimate venues and restrict their involvement in the 'nightclub drug trade', and allow other patrons to enjoy themselves free from the concerns that OMCGs may present.

The approach in NSW is to ban, by regulation, certain items, clothing and jewellery typically associated with a prescribed list of OMCG organisations. The exclusion of persons from licensed premises is anchored explicitly to organisations that appear in that list (an analogous approach in Queensland is distinct from an executive declaration because it is targeted to a specific, identified risk present in licensed venues across the state).

A similar method could be adopted for the Queensland Liquor Act offences to overcome any interface issue that occurs should the executive declaration power under the Criminal Code be repealed.

**AMENDMENTS TO SECTION 173EB:  
IT IS AN OFFENCE FOR A  
LICENSEE/EMPLOYEE TO ALLOW A PERSON  
TO ENTER OR REMAIN IN A LICENSED  
PREMISES IF THAT PERSON IS WEARING OR  
CARRYING A PROHIBITED ITEM**

The majority of the Taskforce (with the exception only of the QPU) recommends that section 173EB be amended to provide adequate and appropriate protections for the licensees and employees of licensed venues, while removing the risk of unfairly penalising them for offending which may, in practice, be outside their control.

The amendments should reflect that:

- a person to whom section 173EB applies will not commit an offence where they have taken reasonable action or steps to exclude or remove a person wearing or carrying a prohibited item; and
- a person to whom section 173EB applies will not commit an offence where they have reasonable grounds to believe that their personal safety may be endangered or where it is not reasonably practical or safe for them to refuse entry or remove or exclude a person.

**AMENDMENTS TO SECTION 173EC:  
IT IS AN OFFENCE FOR A PERSON TO ENTER  
OR REMAIN IN A LICENSED PREMISES IF  
THEY ARE WEARING OR CARRYING A  
PROHIBITED ITEM**

The majority of the Taskforce recommends that section 173EC be retained as an offence, but that the maximum penalties attached to it be amended to reflect a similar approach to the remainder of the Liquor Act. (The Commissioned Officers' Union and the QPU do not support this approach.)

For example, a maximum penalty of 50 penalty units (the equivalent of a \$5,890 fine) would bring the punishment in-line with the broader removal and refusal powers and would

appropriately punish the conduct of the offence. The Taskforce is of the view that there should be no tiered punishment regime for repeat offences. This conduct can be appropriately dealt with by the sentencing court.

**AMENDMENTS TO SECTION 173ED:  
IT IS AN OFFENCE FOR A PERSON TO  
REFUSE TO LEAVE A LICENSED PREMISES,  
OR RESIST REMOVAL, IF THEY ARE  
WEARING OR CARRYING A PROHIBITED  
ITEM**

Similarly to the approach taken to section 173EC, the Taskforce recommends that section 173ED be retained as an offence but that the maximum penalties attached to it be amended to reflect a similar approach to the remainder of the Liquor Act.

The Taskforce recognised, though, that the offence under section 173ED was conduct worthy of a higher maximum penalty than the offence under section 173EC; for example, an increase in the maximum penalty from 50 penalty units to 100 penalty units (the equivalent of an \$11,780 fine) where the offender actively refuses or resists the request to leave the premises. The Taskforce is of the view that there should be no tiered punishment regime for repeat offences. This conduct can be, again, appropriately dealt with by the sentencing court. Members of the Taskforce believe that these amendments will both ameliorate the concerns raised above *and* appropriately prevent identifiable-OMCG members from being present in liquor licences premises.

### RECOMMENDATION 35 (Chapter Seventeen)

Section 173EB of the *Liquor Act 1992* (Qld) should be retained, but amended to afford protections to licensees and their staff, namely that:

- a person to whom section 173EB applies will not commit an offence where they have taken reasonable action or steps to exclude or remove a person wearing or carrying a prohibited item; and
- a person to whom section 173EB applies will not commit an offence where they have reasonable grounds to believe that their personal safety may be endangered or where it is not reasonably practical or safe for them to refuse entry or remove or exclude a person.

(not preferred by the Commissioned Officers' Union or the Queensland Police Union)

### RECOMMENDATION 36 (Chapter Seventeen)

Section 173EC of the *Liquor Act 1992* (Qld) should be retained but the maximum penalties reduced and the tiered punishment regime for repeat offences removed. (not preferred by the Commissioned Officers' Union or the Queensland Police Union)

### RECOMMENDATION 37 (Chapter Seventeen)

Section 173ED of the *Liquor Act 1992* (Qld) should be retained but the maximum penalties reduced and the tiered punishment regime for repeat offences removed. (not preferred by the Commissioned Officers' Union or the Queensland Police Union)

## ENDNOTES

- <sup>1</sup> *Liquor Act 1992* (Qld), section 173EA.
- <sup>2</sup> The penalty unit value in Queensland is currently \$117.80.
- <sup>3</sup> *Liquor Act 1992* (Qld), section 173ED(2).
- <sup>4</sup> Explanatory Notes, *Tattoo Parlours Bill 2013* (Qld) 1.
- <sup>5</sup> Explanatory Notes, *Tattoo Parlours Bill 2013* (Qld) 1.
- <sup>6</sup> *Liquor Act 2007* (NSW), section 131.
- <sup>7</sup> Alison Branley, 'Police, Pubs Crackdown on Bikie Gang Colours', *The Herald* (online), 5 April 2013 <<http://www.theherald.com.au/story/1410781/poll-police-pubs-crackdown-on-bikie-gang-colours/>>; John Morcombe, 'Bikie Ban Spreads its Wings Across all Licensed Venues on the Northern Beaches', *The Daily Telegraph* (online), 4 February 2015 <<http://www.dailytelegraph.com.au/newslocal/northern-beaches/bikie-ban-spreads-its-wings-across-all-licensed-venues-on-the-northern-beaches/news-story/f5b843618ec4cd2e711275adc3d9d9a2>>.
- <sup>8</sup> *Liquor Regulation 2008* (NSW), section 53K. Section 116A(2)(g) of the *Liquor Act 2007* (NSW) contains a regulation-making power which attaches conditions to all licences in the Kings Cross precinct.
- <sup>9</sup> The penalty unit value in New South Wales is currently \$110.
- <sup>10</sup> *Liquor Act 2007* (NSW), section 77(4).
- <sup>11</sup> *Liquor Act 1992* (NT), section 33AA(1).
- <sup>12</sup> Department of Business, Government of the Northern Territory, *Outlaw Motorcycle Gangs* (20 February 2016) <<http://www.dob.nt.gov.au/gambling-licensing/liquor/>>.
- <sup>13</sup> The penalty unit value in the Northern Territory is currently \$153.
- <sup>14</sup> *Liquor Act 1992* (NT), section 331.
- <sup>15</sup> *Liquor Act 1992* (NT), section 121(2).
- <sup>16</sup> *Liquor Licensing Act 1997* (SA), sections 117D, 117E and 117F.
- <sup>17</sup> Advice from Queensland Courts Performance and Reporting Unit, Department of Justice and Attorney-General to the Taskforce on Organised Crime Legislation, 14 March 2016 (in confidence).
- <sup>18</sup> *Liquor Act 1992* (Qld), sections 165 and 165A.
- <sup>19</sup> *Liquor Act 1992* (Qld), section 165(1).
- <sup>20</sup> *Liquor Act 1992* (Qld), section 165B.
- <sup>21</sup> Advice from Queensland Police Service to the Taskforce on Organised Crime Legislation, undated (in confidence).
- <sup>22</sup> Advice from Queensland Police Service to the Taskforce on Organised Crime Legislation, undated (in confidence).

## PART 5.2

# CHAPTER EIGHTEEN

## DISQUALIFYING THE DRIVING LICENCES OF PARTICIPANTS IN CRIMINAL ORGANISATIONS

*The 2013 suite introduced mandatory driver licence disqualification even if the offence is unrelated to driving, or vehicles.*

*The Taskforce could see no necessity to cut across the principle that the punishment should fit the crime.*

The punitive sentencing regime introduced by the 2013 amendments included a mandatory minimum licence disqualification penalty for certain offences which was inserted into the *Penalties and Sentences Act 1992* (Qld).<sup>1</sup>

### AN EXPLANATION OF THE AMENDMENTS: WHAT WERE THEY?

Under section 187 of the Penalties and Sentences Act a court may order that an offender's driver licence be disqualified, in addition to any other sentence imposed.

Section 187(1) of the Act requires, logically, that there be some connection between the use of the vehicle and the substantive offence.

The 2013 suite amended section 187 to insert a new subsection (2) which applies to participants in criminal organisations who have been convicted of one of four prescribed offences under the Criminal Code.

If a person is convicted of any one of those four offences (set out below), then section 187(2) provides that the court *must* order a mandatory driver licence disqualification for a period of at least three months, in addition to any other sentence imposed.

The mandatory licence disqualification must be imposed *regardless* whether the offence was committed in connection with (or arising out of) the driving of a motor vehicle.

The prescribed offences to which the mandatory minimum licence disqualification attaches are:<sup>2</sup>

- section 60A of the Criminal Code (the anti-association offence);
- section 60B of the Criminal Code (the clubhouse offence);
- section 60C of the Criminal Code (the recruitment offence); or
- section 72(2) of the Criminal Code (affray, where the offender is

convicted of the offence with the circumstance of aggravation that they are a participant in a criminal organisation).

### WHAT WAS THE JUSTIFICATION FOR THE AMENDMENTS?

The mandatory licence disqualification was introduced on the basis that it contributed to the overall deterrence aspect of the 2013 suite.

The Explanatory Notes to the Bill do not specifically address this amendment, but it appears to be consistent with the dismantling of OMCG groups and is targeted at inhibiting their ability to move around freely (and ride their motorcycles).

### WHAT IS THE APPROACH IN OTHER JURISDICTIONS?

No other Australian jurisdiction has, in their sentencing legislation or elsewhere, an analogous mandatory driver licence disqualification regime for participants in criminal organisations.

### HAS ANY PERSON HAD THEIR LICENCE DISQUALIFIED AS A RESULT OF THE PROVISION?

There have been no finalised matters which have resulted in the mandatory licence disqualification being imposed on a person at sentence.

This is because there have been no convictions across Queensland for any of the prescribed offences to which the mandatory disqualification applies.

### WHAT ISSUES DID THE TASKFORCE IDENTIFY?

In the course of their deliberations Taskforce members identified three primary issues arising out of this mandatory licence

disqualification inserted into the Penalties and Sentences Act by the 2013 suite.

Those issues were:

- the broad application of the regime (including the lack of a requirement for any connection between the offence and the penalty);
- the mandatory nature of the scheme; and
- the fact that courts *already* have the power to make a disqualification order at sentence, where that is appropriate.

### THAT THE PUNISHMENT MAY NOT FIT THE CRIME: THE ABSENCE OF A TANGIBLE NEXUS BETWEEN THE OFFENCE AND THE PENALTY

The principles of retribution, and of structuring punishments that are appropriate to both the offending conduct and the circumstances of the offender, are important considerations for law and policy makers.

Ensuring that penalties are imposed in a manner which wholly reflects the nature of the offending criminal conduct is fundamental to maintaining the integrity of the sentencing process.

Adjunct Professor Nicholas Cowdery AM QC (former Director of Public Prosecutions for New South Wales) captured the significance of these principles in 2007 when he said:<sup>3</sup>

*The modern historical objective of sentencing in our system is to make the punishment fit the crime.*

In immediate and, it must be said, stark contrast with this principle, a mandatory disqualification under section 187(2) applies to *all* persons who are convicted of one of the prescribed offences, *regardless* whether the offence involves the use of a motor vehicle.

Take, for example, a person who is convicted of an association offence under section 60A of the Criminal Code. The facts of their offending conduct involve three persons who had walked from their respective homes to a restaurant to share a meal. Irrespective of the fact that the offence they commit is entirely unrelated to the use of a motor vehicle, their driver licences *must* be disqualified at sentence.<sup>4</sup>

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### THE MAJORITY VIEW

In discussion around this issue the Bar Association of Queensland (BAQ), Queensland Law Society (QLS), the Public Interest Monitor (PIM) and the chair raised strong concerns around this provision.

It was, for these members, troubling that the mandatory disqualification was not contingent upon *any* nexus between the substantive offence and the offender's participation in a criminal organisation; nor, upon any connection between the offence and the use of a motor vehicle.

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### THE MINORITY VIEW

The Queensland Police Union (QPU) and the Commissioned Officers' Union were, conversely, of the view that mandatory licence disqualification was an important aspect of the 2013 suite.

Both the QPU and the Commissioned Officers' Union, no doubt informed by the experiences of their members and the operational concerns of the QPS as a whole, took the position that preventing OMCG members from holding a driver licence removes their ability to ride motorcycles and consequently disrupts the operation of the club – and, inferentially, that these were both necessary and desirable outcomes.

Neither the QPU nor the Commissioned Officers' Union were perturbed by the possibility that disqualification may be imposed on a person whose offending conduct did not involve the use of a vehicle, and was

not connected to their participation in an OMCG or other criminal organisation.

### THE MANDATORY NATURE OF THE PROVISION

The licence disqualification provision is, effectively, a mandatory sentence. There is no avenue for the exercise of any judicial discretion.

The legislation does not comprehend or envisage *any* situation where a person who has been convicted of one of the four prescribed offences *should not also* be disqualified from holding a driver licence for *at least* three months, in addition to any other penalty they receive. The disqualification *must* be imposed, regardless of the nature of the offending or the circumstances of the offender.

The arguments surrounding mandatory sentencing are set out in Chapter 13. It was, always, a live issue for individual members of the Taskforce and their respective positions about it (also discussed in Chapter 13) were maintained, and repeated, in Taskforce discussions around the mandatory licence disqualification provision.

The legal representatives on the Taskforce, the PIM and the chair were concerned by the provision, and felt that it unduly impinged upon the proper realm of the judiciary and interfered with the sentencing Judge's discretion, and their obligation to impose a sentence which is just and appropriate in the circumstances.

The QPU and the Commissioned Officers' Union, and the QPS from an operational perspective, were supportive of the mandatory nature of the condition as another feature contributing to the overall deterrent aspects of the entire 2013 suite.

THE PENALTIES AND SENTENCES ACT  
ALREADY OFFERS LICENCE  
DISQUALIFICATION AS AN OPTION AT  
SENTENCE

Section 187(1) of the Penalties and Sentences Act already provides the sentencing court with the power to order that an offender be disqualified from holding or obtaining a Queensland driver licence.

To make a licence disqualification order under section 187(1) the court must be satisfied, at the time of sentence, of two circumstances:

- that the offence was committed in connection with, or arising out of, the operation of a motor vehicle by the offender (or interference in any way with the operation of a vehicle); and
- that, having regard to the nature of the offence or the circumstances in which it was committed, it is in the interests of justice to disqualify the offender from holding or obtaining a licence.

These arguably reasonable, and certainly unsurprising and uncontroversial, criteria are the nexus which is missing from the mandatory disqualification provision introduced by the 2013 suite.

The views of the Taskforce on this particular issue are, logically and also unsurprisingly, the same as those expressed by members regarding the lack of any tangible connection between the offence, and the mandatory disqualification penalty.

The legal representatives considered that it was unnecessary and problematic to retain section 187(2) when section 187(1) already deals adequately with the matter.

The QPU and the Commissioned Officers' Union reiterated their view that the disqualification should be mandatory – and that section 187(1), which leaves the matter to the discretion of the court, is not enough.

PROPOSAL FOR CHANGE

Given the offences to which the mandatory licence disqualification applies, the approach taken to section 187(2) of the Penalties and Sentences Act is directly influenced by other recommendations of the Taskforce.

As outlined in Chapter 12, the Taskforce has unanimously recommended that the circumstances of aggravation inserted into the Criminal Code by the 2013 be repealed. This includes the circumstance of aggravation attaching to the offence of affray (section 72(2) of the Criminal Code) – which would consequently remove it from the scope of the mandatory disqualification provision.

Should, as recommended, the offences under sections 60A, 60B and 60C of the Criminal Code also be repealed, then section 187(2) of the Penalties and Sentences Act would be rendered ineffectual.

The positions of Taskforce members differed in terms of the ultimate recommendation for section 187(2) of the Act.

The legal representatives and the PIM were of the view that the power under section 187(1) of the Penalties and Sentences Act adequately provides sentencing courts with the ability to order that an offender's licence be disqualified in the appropriate circumstances – that is, *where there is a connection between the offence and the use of a motor vehicle and it is in the interests of justice to do so*. The repeal of section 187(2) will not leave a legislative gap.

They were concerned by the mandatory nature of section 187(2) (consistent with, for some, their global position on mandatory sentencing), the exclusion of any judicial discretion about disqualification, and the very broad application of the penalty in the absence of any necessary connection in the provision between the offence and the use of a vehicle.

The Taskforce chair shared those concerns.

These members argued for repeal.

The QPU and the Commissioned Officers' Union were not supportive of repealing the mandatory disqualification provision. They were of the view that the deterrence aspect of the provision outweighed any and all concerns identified by the broader Taskforce. The operational view of the QPS accorded with that of the QPU and the Commissioned Officers' Union in this respect.

### RECOMMENDATION 38 (Chapter Eighteen)

Section 187(2) of the *Penalties and Sentences Act 1992* (Qld) should be repealed. (not preferred by the Commissioned Officers' Union or the Queensland Police Union)

## ENDNOTES

- <sup>1</sup> Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Final Report* (1989) 161 (the Fitzgerald Inquiry).
- <sup>2</sup> Section 187(2) *Penalties and Sentences Act 1992* (Qld).
- <sup>3</sup> Nicholas Cowdery AM QC, 'Some Aspects of Sentencing' (Speech delivered at the Legal Studies Association Conference, Sydney, 23 March 2007).
- <sup>4</sup> The Taskforce acknowledges that in some circumstances the disqualification of a person's licence is used by the State Penalties Enforcement Registry (SPER) as a means to recover unpaid fines. This is distinct from the 2013 amendment to the Penalties and Sentences Act because it is *not* a sentencing order.

## PART 5.3

# CHAPTER NINETEEN

## AMENDMENTS TO THE POLICE POWERS AND RESPONSIBILITIES ACT

*Taskforce discussion about additional police powers in the 2013 suite highlighted tensions between opinions based upon the operational advantages which serving police officers believe the new powers give them, and concerns about the legitimacy and desirability of the powers, and the need for them.*

*The majority of Taskforce members ultimately supported changes to vehicle impoundment, 'stop, detain and search', identifying information and 'evade police' laws, all introduced in 2013.*

### WHAT AMENDMENTS DID THE 2013 SUITE MAKE TO THE POLICE POWERS AND RESPONSIBILITIES ACT?

The 2013 suite made three significant amendments to the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA).

The changes:

- created a *motor vehicle impoundment scheme* targeted at participants in criminal organisations;<sup>1</sup>
- provided new powers for police to *stop, detain and search suspected participants in criminal organisations*<sup>2</sup> as well as *require identification information*;<sup>3</sup> and
- created a *new mandatory minimum penalty* for the offence of *evading police if the offence was aggravated by a link with a criminal organisation*.<sup>4</sup>

These amendments were all contained in the first tranche of the 2013 suite and were not considered by a Parliamentary Committee before their debate and passage in the Legislative Assembly.

The new provisions commenced on 17 October 2013.<sup>5</sup>

### BACKGROUND TO THE PPRA AND ITS ROLE IN QUEENSLAND'S CRIMINAL JUSTICE SYSTEM

The Fitzgerald Inquiry<sup>6</sup> recommended a comprehensive review of police powers.<sup>7</sup>

That review was subsequently undertaken by the Criminal Justice Commission (now, the Crime and Corruption Commission) which made a number of proposals that, in conjunction with the results of a Government Discussion Paper, resulted in legislative enactments culminating in the PPRA.<sup>8</sup>

The PPRA provides Queensland police officers with the power to do things which are

obviously incidental to their expected duties, but would be unlawful for private citizens: searching people; searching vehicles; searching private residences; arresting and questioning suspects; conducting covert operations; demanding identification information; setting up road blocks; moving people on or excluding them from physical spaces; taking identifying particulars (such as DNA and fingerprints); and, using surveillance devices.<sup>9</sup>

Those powers are tightly constrained; contravention of either the PPRA or the Police Responsibilities Code<sup>10</sup> can have significant adverse consequences:

- a police officer's conduct may be deemed unlawful;
- charges for offences involving assaulting or obstructing police or contravening directions may be withdrawn; and
- evidence may be excluded from any trial.<sup>11</sup>

## THE NEW MOTOR VEHICLE IMPOUNDMENT SCHEME

### THE MOTOR VEHICLE IMPOUNDMENT SCHEME PRIOR TO THE 2013 SUITE

Chapter 4 of the PPRA contains a motor vehicle impoundment framework which existed in Queensland prior to 17 October 2013 (the pre-existing scheme).

The pre-existing scheme continues to operate, but in parallel with the new scheme introduced by the 2013 suite.

The pre-existing scheme provides for the impoundment and forfeiture of motor vehicles as a consequence of committing certain offences involving motor vehicles, including:

- dangerous operation of a vehicle;<sup>12</sup>
- careless driving,<sup>13</sup>

- participation in road trials (for example, 'drag racing');<sup>14</sup>
- unlicensed and disqualified driving;<sup>15</sup>
- offences related to drink driving;<sup>16</sup> and
- high end speeding.<sup>17</sup>

The scheme is complex but in short it provides for a range of escalating consequences for persons who repeatedly engage in dangerous offences involving motor vehicles.

The consequences start as periods of vehicle impoundment, moving up to forfeiture of a motor vehicle for habitual offenders.

### THE NEW CHAPTER 4A SCHEME – MOTOR VEHICLE FORFEITURE FOR PARTICULAR CRIMINAL ORGANISATION OFFENCES

The amendment to the motor vehicle impoundment scheme was publicly announced before the legislation was introduced into the Queensland Legislative Assembly.

It was made clear that the amendment was directed at OMCs. The Attorney-General told the media on 14 October 2013:

*'I've announced today that we are going to be crushing the bikes. Just as we are going to be crushing the criminal motorcycle gang enterprises; we are going to crush the bikes.'*<sup>18</sup>

(emphasis added)

The Explanatory Speech to the Criminal Law (Criminal Organisation Disruption) Bill 2013 explained these amendments in the following terms:

*'Any vehicle used before, during or after the commission of these four offences will be confiscated and then be crushed on conviction.'*<sup>19</sup>

The *four* criminal organisation offences referred to are the three new Criminal Code offences (see Chapter 11) and the new circumstance of aggravation created for the Criminal Code offence of affray<sup>20</sup> (see Chapter 12).

The term '*criminal organisation offences*' under the Chapter 4A scheme also incorporates a *fifth* offence not mentioned in the Explanatory Speech, but referenced in the Explanatory Notes:<sup>21</sup> the aggravated form of the offence of *evade police* at section 754 of the PPRA (discussed later).

The Chapter 4A scheme utilises the definition of 'criminal organisation' at section 1 of the Criminal Code (explained in Chapter 8).

#### WHAT IS THE KEY DIFFERENCE BETWEEN THE PRE-EXISTING SCHEME AND THE NEW CHAPTER 4A SCHEME?

There is a great deal of similarity between the two schemes in terms of the process of issuing notices to appear, defences for innocent third party owners of vehicles and the discretion available to the Commissioner of Police whether forfeited vehicles are destroyed, or sold.

The key difference between the two schemes is that the Chapter 4A scheme does not just target motor vehicle offences. Rather, to trigger the new scheme facilitating impoundment and forfeiture, the vehicle *merely needs to be used as mode of transportation to or from the place where one of the five offences was committed* (with no proximity in time to when the person arrived and the offence was committed).<sup>22</sup>

By way of hypothetical example: the Chapter 4A scheme could be triggered if a participant in a criminal organisation drove his or her motor vehicle to a beach at the Gold Coast at 8:00am, parked the vehicle in the public car park outside the local surf club, spent the morning at the beach and then went for lunch at the club at 1:30pm where he or she met with two other *participants in a criminal organisation* (thereby committing the anti-

association offence at section 60A of the Criminal Code).

In these circumstances, the motor vehicle driven to the beach could be impounded upon the participant in the criminal organisation being *charged* with the anti-association offence at section 60A of the Criminal Code.

The vehicle could only be forfeited to the state upon the participant being *convicted* of the section 60A offence. (This requirement may carry its own challenges – the difficulties involved in securing such a conviction are set out in detail at Chapter 11.)

#### HAVE ANY MOTOR VEHICLES BEEN 'CRUSHED' UNDER THE CHAPTER 4A SCHEME SINCE OCTOBER 2013?

Not to the Taskforce's knowledge. For a vehicle to be destroyed under the Chapter 4A scheme it needs to be forfeited. For a vehicle to be forfeited the participant in a criminal organisation needs to have been convicted of one of the five criminal organisation offences<sup>23</sup> or have a warrant issued for their arrest because the driver has failed to appear before the court in relation to the charge for the criminal organisation offence.<sup>24</sup>

There have been no convictions for any of the five nominated criminal organisation offences.

In any event, destruction is not the only option available to the Commissioner of Police under the Chapter 4A scheme.

The Commissioner of Police may dispose of a forfeited vehicle in any manner he/she deems appropriate, including selling the vehicle.<sup>25</sup>

Queensland Courts advised the Taskforce that there have been convictions under the Chapter 4A scheme for non-compliance at impoundment stage of the scheme.

Between 17 October 2013 and 31 January 2016:

- 29 people have been convicted of the offence of operating a motor vehicle

to which a number plate confiscation order is attached;<sup>26</sup>

- 37 people have been convicted of the offence of tampering with or modifying a number plate confiscation notice;<sup>27</sup>
- 2 people have been convicted of the offence of breaching a condition made on release of a motor vehicle;<sup>28</sup> and
- 2 people have been convicted of failing to comply with a requirement to produce a motor vehicle.<sup>29</sup>

#### THE OPERATIONAL VIEW OF THE QUEENSLAND POLICE SERVICE

The QPS submission in support of the preservation of this new power was, its nominee Taskforce members made clear, based solely upon ‘operational’ considerations.

It will be remembered that, in Chapter 1, the role the QPS saw for itself on the Taskforce was clearly stated: *policy* matters are, QPS says, matters for government; and, police officers on the Taskforce served its purposes best if they provided it with information about their *operational* experience with the various elements of the 2013 suite.

In its submission QPS advised the Taskforce (in a view based, as its representatives conceded, *solely* upon operational experiences and observations) that one of the most useful elements of the Chapter 4A scheme was the ability for officers to ‘impound’ vehicles by confiscating the registration plates.<sup>30</sup>

It provides, QPS said, a cost effective alternative to physically impounding a vehicle. (Confiscation by taking registration plates is also used in the pre-existing scheme.)

QPS’s submission to the Taskforce was that the number of charges and convictions for offences at the pre-forfeiture stage of the scheme: ‘... suggest that the scheme in Chapter 4A has been used on a number of occasions,

*positively contributing to the disruption of criminal organisations’.*<sup>31</sup>

#### BREACH OF THE FUNDAMENTAL LEGISLATIVE PRINCIPLES ENshrINED IN QUEENSLAND’S LAW

Opposition to the 2013 amendments from other Taskforce members cannot however be described as, simply, *policy*-based. It rested in deep-rooted concerns about the legitimacy of the new powers, in the face of statements of principle found in important Queensland legislation.

Section 4(3)(i) of the *Legislative Standards Act 1992* (Qld) provides that it is a *fundamental legislative principle* (FLP) that legislation should provide for the compulsory acquisition of property only with fair compensation.

The Office of the Queensland Parliamentary Counsel (OQPC) Notebook on the FLPs says that legislation should only authorise interference with property rights without compensation if there is a good reason – eg, confiscation of the profits of crime.<sup>32</sup>

The Chapter 4A scheme is not confiscating the profits of crime or even, necessarily, an instrument of crime. The Chapter 4A scheme could apply where there is only a very tenuous connection to the commission of any criminal offence.

There are, it must be acknowledged, schemes operating under legislation like the *Criminal Proceeds Confiscation Act 2002* (Qld) (CPCA) which do provide for confiscation of property upon criminal conviction, even if the property has no connection to the offending conduct.

For example only a month before the 2013 suite was introduced the Serious Drug Offender Confiscation Order (SDOCO) scheme under the CPCA came into effect.<sup>33</sup> This scheme was considered in the COA Review<sup>34</sup> and provides that, upon conviction for a serious drug offence, *all* of a person’s property can be forfeited to the state regardless whether it was obtained with lawful funds, or

whether it was obtained prior to the offence period.<sup>35</sup>

Unlike the Chapter 4A scheme the SDOCO scheme was, however, considered at length by the Legal Affairs and Community Safety Committee (LACSC). The LACSC recommended the passage of the legislation introducing the SDOCO, despite this FLP breach.<sup>36</sup>

The Explanatory Notes to the Bill introducing the Chapter 4A scheme do not identify the specific breach of the FLP at section 4(3)(i) of the Legislative Standards Act although the Explanatory Notes do recognise, in a global sense, that the scheme infringes an individual's rights and liberties; and, the justification provided arguably carries an implied acknowledgment of the specific breach.

The Explanatory Notes justify the breach of the FLP by pointing to the processes for review and appeal provided under the Chapter 4A scheme.

#### OTHER RECOMMENDATIONS OF THE TASKFORCE RELEVANT TO THIS POWER

Earlier in this Report the majority of Taskforce members, it will be remembered, supported these recommendations:

- repealing the powers of the minister to recommend the 'declaration' of a criminal organisation;
- repealing the offences at sections 60A, 60B and 60C of the Criminal Code; and
- repealing the aggravated form of the evade police offence (discussed below).

Further, the Taskforce has unanimously recommended that the circumstance of aggravation for the offence of affray<sup>37</sup> be repealed.

If the Government agrees with all of those recommendations, the Chapter 4A scheme loses all of its key elements and effectively becomes redundant.

#### TASKFORCE DISCUSSION OF THE CHAPTER 4A SCHEME

That said, it will also be recalled that Taskforce members representing the Commissioned Officers' Union and the Queensland Police Union did not support the majority recommendation to repeal the executive declaration power at section 708A of the Criminal Code, or the majority recommendation to repeal sections 60A, 60B and 60C of the Criminal Code.

Both of these members supported the retention of the Chapter 4A scheme. The QPU representative referred to motor vehicles as an OMCG's 'tools of the trade' and, in a vivid example, likened removing a vehicle from an OMCG member to taking away a computer away from a child sex offender who makes child exploitation material.

Again, QPS took an 'operational' position which was also in general support of a motor vehicle impoundment and forfeiture scheme directed at participants in criminal organisations; but, in Taskforce debate, its representatives accepted that such a scheme would be fairer and more proportional if the penalty was restricted to offences which actually involved the use of a motor vehicle.

Taskforce members representing the Bar Association of Queensland, the Public Interest Monitor and the Queensland Law Society recognised (and accepted) that their support of other recommendations would effectively make the Chapter 4A scheme redundant.

In the alternative, those same members support a recommendation for an amendment being made to the 'prescribed offences' under the Chapter 4A scheme to provide that the scheme applies to offences *only* if that offence actually involved the use of a motor vehicle and where, at sentence, the Judge or Magistrate is satisfied on the balance of probabilities that the person was a participant in a criminal organisation (using the new definition of 'participant' and 'criminal organisation' under the proposed Organised Crime Framework).

## STOP AND DETAIN POWERS

The 2013 suite amended the PPRA to allow a police officer to stop, search and detain a person<sup>38</sup> (and their motor vehicle<sup>39</sup>) *without a warrant* on the basis that the officer *reasonably suspects* that a person is a participant in a criminal organisation.

These amendments provide police officers with the power to require a person suspected of being a participant in a criminal organisation or a person found at a prescribed place<sup>40</sup> to provide their full name and address.<sup>41</sup>

They also provide that, if the suspected participant in a criminal organisation cannot provide evidence corroborating their name and address, then police officers are empowered to detain<sup>42</sup> them and take and photograph all or any of their 'identifying particulars'.<sup>43</sup>

These amendments represent a significant expansion in the scope of police powers to search without a warrant in Queensland.

Before the commencement of the 2013 suite, outside of emergency periods<sup>44</sup> police did *not* have a power to stop, search and detain an otherwise free person<sup>45</sup> without a warrant where there was no reasonable suspicion of the commission of a criminal offence, possession of an article used to commit a criminal offence, or domestic violence.<sup>46</sup>

Taskforce research showed that no other Australian jurisdiction provides for similar stop, search and detain powers merely on the basis of suspicion about a person's associations.

### DEFINED TERMS USED IN THE STOP, SEARCH AND DETAIN, AND IDENTIFICATION INFORMATION PROVISIONS

#### 'CRIMINAL ORGANISATION' AND 'PARTICIPANT'

These provisions utilise the definitions of 'participant' and 'criminal organisation' at section 1 of the Criminal Code.<sup>47</sup>

#### 'REASONABLY SUSPECTS'

The term 'reasonably suspects' is defined at Schedule 6 of the PPRA as 'suspect on grounds that are reasonable in the circumstances'.

A Queensland Supreme Court Judge, Justice Dalton, summarised the common law case authority on the concept of 'reasonable suspicion' in *R v Bossley*:<sup>48</sup>

*'A suspicion and a belief are different states of mind. A suspicion is a state of conjecture or surmise.*

*It is more than idle wondering. It is a positive feeling of apprehension or mistrust, but it is a slight opinion without sufficient evidence.*

*Facts which reasonably ground a suspicion may be quite insufficient to reasonably ground a belief.*

*Nonetheless, to have a reasonable suspicion some factual basis for the suspicion must exist. There must be sufficient factual grounds reasonably to induce the suspicion.*

*The facts must be sufficient to induce the suspicion in the mind of a reasonable person. The suspicion must be reasonable, as opposed to arbitrary, irrational or prejudiced.'*

#### 'IDENTIFYING PARTICULARS'

The term 'identifying particulars' is defined at schedule 6 of the PPRA to mean any of the following:

- palm prints;
- fingerprints;
- handwriting;
- voiceprints;
- footprints;

- photographs of the person, their scars or tattoos; and
- measurement of any part of the person's body, other than the person's genital or anal area, buttocks or, for a female, breasts.<sup>49</sup>

**CASE EXAMPLE – BROADBEACH WATERS, 26 OCTOBER 2015**

QPS was not able to supply data to the Taskforce on the frequency of the use of these specific powers.<sup>50</sup>

A well-publicised example of an incident involving the exercise of the stop, search and detain powers occurred on 26 October 2015 when police officers intercepted an alleged member of the Rebels Motorcycle Club (a prescribed criminal organisation), Mr Clayton Foelemi, by the roadside at Broadbeach Waters on the Gold Coast.

The interaction between the police officers and Mr Foelemi was filmed on the mobile phone of a passenger travelling with Mr Foelemi and posted on the internet. The film was subsequently reposted on the internet by several news organisations.

This transcript extract has been drafted from the video reposted by *The Guardian* (online)<sup>51</sup>:

**Police officer:** *we're already recording mate*

**Mr Foelemi:** *huh*

**Police officer 1:** *we're already recording all of our interaction with you so you don't have to stress*

**Police officer 1:** *have you got your ID mate*

**Mr Foelemi:** *ah yeah*

**Police officer 1:** *you know why we pulled you over?*

**Mr Foelemi:** *uh I don't know why you pulled me over*

**Police officer 2:** *yeah your 1% tat mate*

**Mr Foelemi:** *cos I got tattoos on my neck*

**Police officer 2:** *yep*

**Mr Foelemi:** *is that why you pulled me over?*

**Police officer 2:** *yep. Have you got your licence on you?*

**Mr Foelemi:** *no*

**Police officer 2:** *are you from Queensland mate?*

**Mr Foelemi:** *no, I'm from Victoria*

**Police officer 2:** *yeah mate the uh, obviously you'd be aware that we've got legislation down here where if we identify a potential member of a criminal motorcycle gang, we have the power to stop, detain and search you. So at this moment I'm exercising that power now. Do you understand that?*

**Mr Foelemi:** *I, I wasn't doing anything illegal driving*

**Police officer 2:** *nah you don't have to be mate. Okay*

**Mr Foelemi:** *so you've just pulled me over because you've seen the tattoos on my neck?*

**Police officer 2:** *yep, absolutely*

**Mr Foelemi:** *alright no worries*

**Police officer 2:** *alright, do you have your driver's licence on you?*

**Mr Foelemi:** *Hayley*

**Police Officer 2:** *and what I'll get you to do is just uh, hand me that mobile phone*

**Mr Foelemi:** *nah I'm not handing it to you*

**Police officer 2:** *give us your mobile phone*

**Police officer 1:** *hold on, hold on*

*Police officer 2: give me the phone*

*Mr Foelemi: you're telling me I can't film?*

*Police officer 2: mate, we're already filming you*

*Police officer 1: Mate it's a taser (point's taser at Mr Foelemi)*

It is apparent that Mr Foelemi had been stopped solely because of a tattoo that indicated he may be a member of a prescribed criminal organisation. That circumstance vividly illustrates the remarkably wide reach of the new power under the 2013 amendments.

At the date of writing this report the Crime and Corruption Commission was finalising an investigation into the conduct of four police officers relating to this incident. The CCC has advised the Taskforce that the only issue of concern to the CCC is an allegation in a Facebook post that a police officer had deleted a video recording of the incident.

(It is also appropriate to note that the CCC indicated that, on the basis of the video recording it had seen, the police officers did not act in a manner that would amount to misconduct with respect to the presentation of the Taser.)

Further, the CCC advised the Taskforce that no allegation had been raised about the appropriateness or otherwise of the exercise of the stop, search and detain powers during the incident.

There was no suggestion during the Taskforce discussion of this incident that the police officers involved in the incident exercised the stop, search and detain powers in a manner other than in accordance with the powers provided to them under the 2013 amendments to the PPRA.

SEARCHING A PERSON WITHOUT A WARRANT ON SUSPICION OF THEIR ASSOCIATIONS: A SIGNIFICANT SHIFT IN POLICE POWERS IN QUEENSLAND

## THE HISTORY OF WARRANTLESS STOP, SEARCH AND DETAIN POWERS IN QUEENSLAND

At common law police officers do not have any power to stop, search and detain persons without a warrant.<sup>52</sup>

The common law principle, strictly applied, was not conducive to effective modern policing and in its review of police powers in 1993 the Criminal Justice Commission recommended the creation of a consolidated provision for warrantless stop, search and detain powers.<sup>53</sup>

Those recommendations are largely reflected at section 26 of the PPRA's predecessor legislation, the *Police Powers and Responsibilities Act 1997* (Qld) (the 1997 Act), which provided for stop, search and detain powers upon reasonable suspicion that a person has something in their possession that may be:

- an unlawful weapon;
- an unlawful dangerous drug;
- stolen property;
- unlawfully obtained property;
- tainted property;
- evidence of the commission of an offence carrying a maximum sentence of seven years imprisonment *if* there is a reasonable suspicion that evidence is concealed or may be destroyed;
- an item used for house breaking, stealing or administering a dangerous drug; or
- an item that may be used to harm any person.

This list of circumstances, which might be described as carefully drawn, is consistent with the cautious language used in the Second Reading speech which accompanied the

introduction of the 1997 Act, and indicates that the legislation strove to achieve a balance between protecting the fundamental rights and entitlements of suspects, and the need for police to have the powers necessary to adequately combat modern criminal activity.<sup>54</sup>

In the years since, the list of prescribed circumstances in which warrantless searches can take place reflects both a consolidation of existing powers from other Acts and some expansion over time.

Section 30 of the current PPRA provides for warrantless stop, search and detain powers where reasonable suspicion exists in all of the circumstances listed in the 1997 Act and, also, when a person may have something that could be:

- evidence of the commission of an offence of wilful damage under the Criminal Code (if the thing may be concealed or destroyed);
- evidence of the commission of graffiti-related offences under the *Summary Offences Act 2005* (Qld); or
- evidence of the commission of offences related to the possession and sale of liquor in restricted areas under the *Liquor Act 1992* (Qld).

Police can also stop, search and detain persons if they reasonably believe that they have contravened the *Casino Control Act 1982* (Qld), the *Racing Act 2002* (Qld) or the *Corrective Services Act 2006* (Qld).

The prescribed circumstances for the warrantless search of a motor vehicle in section 31 of the PPRA are almost identical to those for the warrantless search of a person.

The 2013 suite's amendments to sections 29 and 31 of the PPRA empowering police to stop, search and detain a person are the only prescribed circumstances for the warrantless search of a person or vehicle in those sections which are not connected, in some way, with

the suspected commission of a criminal offence.

#### QPS SUBMITS THAT THESE POWERS SUPPORT INTELLIGENCE GATHERING CAPACITY, ENHANCE OFFICER SAFETY AND ENCOURAGE INTEGRITY IN POLICING PRACTICES

Again, QPS provided the Taskforce with conclusions reached on the basis of its operational experience with these new powers. Its representatives advised the Taskforce that the 2013 amendments have, in its view, assisted its officers to engage with integrity and legitimacy in the proactive policing of a group of persons whom QPS believes are significantly more likely than other members of the general public to engage in serious criminal activity – namely, OMCGs.<sup>55</sup>

QPS also submits that the powers significantly increase the likelihood of police detecting unlawful behaviour by suspected participants in criminal organisations which, in itself, creates a deterrent effect.<sup>56</sup>

QPS informed the Taskforce that as at 30 December 2015 no complaints had been made to the Ethical Standards Command about the way in which the stop, search and detain powers had been used by Queensland police officers.

#### ADVICE FROM THE CRIME AND CORRUPTION COMMISSION ON THE EXERCISE OF THE POWERS

The CCC advised the Taskforce that it has no information which would suggest there has been any systematic breaches of these powers.

Further, the CCC advised the Taskforce that allegations of corrupt conduct against Queensland Police are rare, and make up only a small number of complaints received by the CCC.

**ARE THE POWERS IN BREACH OF  
FUNDAMENTAL LEGISLATIVE PRINCIPLES?****COMMON LAW RIGHTS**

The OQPC FLP Notebook records that the list of specific examples of rights and liberties provided in section 4(3) of the Legislative Standards Act is not exhaustive.<sup>57</sup>

The general principle in section 4(2) of the Legislative Standards Act, which requires legislation to have sufficient regard to the rights and liberties of individuals, means that Queensland laws should not abrogate common law rights without sufficient justification.<sup>58</sup> Those rights are discussed individually, below.

**THE RIGHT TO PERSONAL LIBERTY**

The 2013 amendments provided for the stopping and detaining of individuals – arguably, on its face a breach of a citizen’s common law right to personal liberty.

The OQPC FLP Notebook notes that this right (personal liberty) has been described by the High Court of Australia as ‘*the most elementary and important of all common law rights*’.<sup>59</sup>

The FLP Notebook also records that, in the High Court case of *Williams v R*,<sup>60</sup> Justices Mason and Brennan noted the continuing importance of this warning about breaching that liberty, taken from Blackstone’s *Commentaries on the Laws of England*:

*‘Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper.... There would soon be an end for all other rights and immunities’*

**THE RIGHT TO PRIVACY**

The amendments arguably breach a citizen’s right to privacy by authorising the police to:

- stop, search and detain individuals and their vehicles;
- compel persons to provide their full name and address; and
- take ‘identifying particulars’ from persons.

The OQPC FLP Notebook observes that the right to privacy is ‘incompletely’ recognised at common law, but that the former Parliamentary Scrutiny Committee acknowledged it as a right which comes within the ambit of the ‘rights and liberties’ contemplated by section 4(2) of the Legislative Standards Act.<sup>61</sup>

Privacy is also recognised as a universal human right: Article 17 of the *International Covenant on Civil and Political Rights*<sup>62</sup> (ICCPR) provides:

*(1) No one shall be subjected to arbitrary or unlawful interference with [their] privacy, family, home or correspondence, nor to unlawful attacks on [their] honourable reputation.*

*(2) Everyone has the right to the protection of the law against such interference or attacks.*

As noted elsewhere in this Report Australia has ratified the ICCPR, although its provisions are not legally binding on state legislatures.<sup>63</sup>

**THE RIGHT TO SILENCE**

The amendments require a person to provide their name and address to police officers.

Persons who do not comply with this requirement commit an offence<sup>64</sup> and may also be subject to detention so that their ‘identifying particulars’ can be taken.

This power involves an arguable breach of the traditional common law right to silence. This is

an ancient common law right which allows a person to elect not to answer questions asked by a person in authority if they believe, on reasonable grounds, that they are suspected of committing an offence.

The Latin maxim is *nemo debet seipsum prodere*: ‘no-one may be compelled to betray himself’.<sup>65</sup>

It is still the case that the right to silence is one of the principal common law protections provided to persons at the accusatory stage of the criminal justice process.<sup>66</sup>

The OQPC FLP Notebook puts it this way:

*‘The right to silence is one of the most basic rights developed by the common law and undoubtedly is a right to which legislation should have sufficient regard’.*<sup>67</sup>

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#### HOW WERE THESE ARGUABLE BREACHES OF THE FLPS JUSTIFIED IN THE EXPLANATORY NOTES?

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##### STOP SEARCH AND DETAIN POWERS

The Explanatory Notes to the Bill introducing these amendments<sup>68</sup> acknowledged the possibility of a breach, noting that the stop search and detain powers:

*‘... might be seen to infringe the rights and liberties of individuals as the only requirement to activate the powers of search is a reasonable suspicion of a police officer that a person is a participant of a criminal organisation’.*<sup>69</sup>

The Explanatory Notes justify the breach on the basis that the ‘existing safeguards’ under the PPRA are not abrogated, and that the amendments were ‘aimed at ensuring the protection of the community by making the establishment of organised crime in Queensland a difficult prospect’.<sup>70</sup>

The ‘existing safeguards’ are not explored further in the Explanatory Notes but, presumably, the intended reference is to the

general requirements in Chapter 20 of the PPRA.

Section 624 of the PPRA provides that a police officer who searches a person should:

- as far as reasonably practicable ensure that minimal embarrassment is caused to the person;
- take reasonable care to protect the dignity of the person;
- ordinarily confine their search to a person’s outer clothing; and
- if the search is not confined to outer clothing it should not take place in view of the public.

Section 626 of the PPRA provides that police officers should not detain persons or vehicles for stop and search for any longer than is reasonably necessary.

Section 627 of the PPRA provides police officers with general obligations of courtesy if the vehicle being searched needs to be taken to a different location.

It is compelling that these ‘safeguards’ go no further than requiring that certain proprieties should be observed when a citizen is stopped, searched or detained. They do not address, in any meaningful way, the primary initial infringement upon traditional rights and liberties.

It remains relevant, of course, that there can be significant consequences if police officers do not comply with the requirements of the PPRA.

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##### POWER TO REQUIRE NAME AND ADDRESS AND TO DETAIN AND TAKE IDENTIFYING PARTICULARS

The Explanatory Notes justify the FLP breach on the basis of a perceived threat to public safety:

*'The Bill seeks to address the difficulty of identifying criminal organisation members who often supply false details or do not carry sufficient proof of name and address on them so as to avoid identification by the police. Recent events show that criminal organisations have no regard for the Queensland public and pose a serious threat to the safety of the community. In order to prevent and detect offences by members involved in criminal organisations the police require sufficient powers to establish their identity'.<sup>71</sup>*

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### THE TASKFORCE CONSIDERED WHETHER THESE ARGUABLE FLP BREACHES ARE JUSTIFIED

The criteria used by the Criminal Justice Commission (whose recommendations provided the foundations of the PPRA) suggested that a claim for increased police powers should be analysed in this way:

- What is the problem to be addressed?;
- How would increasing police powers help to solve it?;
- What are the alternatives?; and
- What are the costs of increasing powers and might these outweigh the benefits?<sup>72</sup>

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### WHAT IS THE PROBLEM THE AMENDMENTS SEEK TO ADDRESS, AND HOW DOES THE INCREASE IN POLICE POWERS HELP TO SOLVE IT?

QPS expressed concerns that, without these provisions, its officers do not otherwise have adequate powers to properly control OMCG members who, they believe, are significantly more likely to commit serious criminal offences (than the community average) and whose mere visual presence can make members of the public feel unsafe.

The QPS perception – advanced, again, on the basis of operational experience – is that these powers give officers the level of control they require, and allow for the exercise of that control in a manner which provides the maximum level of safety to police officers.

QPS also advised the Taskforce that, in its view, these powers allow officers striving to enhance the community's confidence in public safety to safely and legitimately engage in proactive interactions with a high risk group – OMCGs.

The Commissioned Officers' Union and the QPU supported the QPS position and advised the Taskforce of feedback from their members to the effect that officers felt their personal safety, whilst carrying out their duties, was greatly enhanced by these powers.

The Commissioned Officers' Union noted that police officers can require a person to provide their name and address in many different circumstances<sup>73</sup> and said that it held fears that the removal of these powers would lead to a compromise in public safety and good order.

The QPU provided the Taskforce with an example given by one of their members of the stop, search and detain powers being exercised, and uncovering evidence of unlawful behaviour.

Non-police members of the Taskforce were concerned to do nothing to threaten or diminish the safety of serving police officers. But, in their view, officers already had adequate and appropriate powers before the 2013 amendments and there was no tangible evidence that those pre-existing powers endangered officer safety.

The BAQ submitted, in this vein, that police and other statutory crime bodies already had 'formidable powers' to fight organised crime.<sup>74</sup> (The extensive powers of the CCC are set out at Chapter 20.)

The BAQ noted that the stop, search and detain provisions created by the 2013 suite give police a very wide scope to act before a

police officer could be said to have breached their powers.

The BAQ, the PIM and the QLS members also expressed doubts about the justification advanced for such intrusive powers – that their announced targets allegedly represented a ‘high risk’ offending group – when the statistical evidence did not, on its face, support the assertion.

Those members were, additionally, concerned that these powers are not limited to OMCGs *per se* but could be extended to other organisations – and, on one view, to any group that a government minister recommends should be declared to be a criminal organisation.<sup>75</sup>

The Taskforce proceeded to debate the risk, expressed by these members, that under the 2013 suite a particular ethnic, racial, religious, political or professional group might be considered ‘high risk’ on the basis, for example, that its members make up a proportionately larger group of an offending population. Public political demonstrations by an ethnic or racial group could, for example, lead to a number of arrests and, hence, to an argument that it is ‘high risk’.

Those Taskforce members were concerned that the fact a certain group may tend to make up a statistically larger proportion of an offending population could have causes which would not justify ‘criminalising’ all of its members: eg, poverty; social isolation; marginalisation; or, again, political activism.

These members argued that the powers provided to police prior to 17 October 2013, activated upon reasonable suspicion of the commission of a criminal offence or possession of an item related to a criminal offence, were sufficient to enable the investigation and detection of serious criminal offending.

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#### ARE THERE ALTERNATIVES?

There was already, pre- the 2013 amendments, legislation in Queensland which

provided police with extraordinary stop, search and detain powers in times of emergency.<sup>76</sup>

The new mandatory post-conviction control orders proposed under the Organised Crime Framework can provide police with the power to stop, search and detain persons subject to those orders without a warrant. These powers are appropriately targeted at persons who have been convicted of serious organised crime offences and are a *proven* risk.

Finally, the Taskforce noted that the COA Review recommended the retention of a public safety order regime under that Act.<sup>77</sup> It allows for the Commissioner of Police to obtain a court order of up to 6 months duration preventing persons or groups of persons entering certain premises, events or areas on the basis that they pose a serious risk to public safety or security.<sup>78</sup> Enforcement powers under these orders allow police to:

- search any place without warrant to search for a person who is the subject of a public safety order;
- stop, search and detain any vehicle to search for a person who is the subject of a public safety order;
- stop persons subject to public safety orders from entering a place or area; and
- remove persons subject to a public safety order from premises or events.<sup>79</sup>

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#### WHAT ARE THE COSTS OF INCREASING THE POWERS? DO THEY OUTWEIGH THE BENEFITS?

All Taskforce members recognised that these amendments represented a very significant policy shift in police powers in Queensland.

Taskforce members also recognised that it was QPS’s genuine operational concern for the safety of the community, and of its officers, which lead it to advocate for the retention of

these powers (with the strong support of the QPU and the Commissioned Officers' Union).

Those legitimate concerns, while acknowledged by non-police members, had in their view to be balanced against the risk of serious adverse consequences for traditional, hard-won individual rights and liberties if law enforcement officials are permanently empowered to stop, search, detain and obtain identifying particulars from individuals *not* on the basis of suspected criminal activity, but solely on the basis of their *associations*.

Those members did not feel it was melodramatic or excessive to consider the infringements of those rights in the overall context of our democratic society, its long and deep history, and the fundamental principles it has evolved and developed – based, as they claim to be, on the Rule of Law. It was submitted to the Taskforce, that such wide powers as those the 2013 amendments created involved an excessive, disproportionate and unnecessary intrusion upon those rights which was not justified by the apparent level of risk or danger.

Nor, these members contended, was it inappropriate to observe that one of the risks associated with investing police officers with powers which are to be exercised in reliance upon a declaration of criminality by government, rather than a reasonable suspicion of actual criminal activity, is the potential to undermine the perceived legitimacy and independence of the Queensland Police Service.

#### RELEVANCE OF OTHER RECOMMENDATIONS OF THE TASKFORCE, AND THE RECOMMENDATIONS OF THE COA REVIEW

The majority of Taskforce members, it will be recalled, support a recommendation repealing the powers of a government minister to recommend the declaration of a criminal organisation under section 708A of the Criminal Code.

If the Government accepts this recommendation (and the recommendation of

the COA Review to repeal the declarations power under that Act) then the stop, search and detain powers created under the 2013 suite become effectively redundant.

This is because it would be almost impossible for a police officer to form a reasonable suspicion to exercise the power on the basis of the remaining limb of the definition of 'criminal organisation' contained at section 1 of the Criminal Code.

#### CONCLUSIONS OF THE TASKFORCE ON THE STOP, SEARCH AND DETAIN POWERS

##### THE MAJORITY VIEW

The BAQ, the PIM and the QLS do not support the retention of section 708A of the Criminal Code and recommend the repeal of the stop, search, detain and identification information powers. The chair supports that position.

Whether or not section 708A is repealed these members do not believe that the possible breaches of the FLPs within these powers are justified, and recommend that the stop, search, detain and identification information powers be repealed.

##### THE MINORITY VIEW

The Commissioned Officers' Union and the QPU support the retention of the Minister's powers to recommend the declaration of a criminal organisation under section 708A of the Criminal Code and also support the retention of the stop, search, detain and taking of identification information powers under the PPRA.

#### CIRCUMSTANCES OF AGGRAVATION FOR THE 'EVADE POLICE' OFFENCE

Under section 754 of the PPRA a person commits an offence when they fail to stop a motor vehicle when directed to do so by a police officer (colloquially known as the 'evade police' offence).

There is a mandatory minimum sentencing regime for section 754, whereby a person convicted of the simpliciter offence is liable to a mandatory minimum sentence of 50 penalty units or 50 days imprisonment (served wholly in jail), and a mandatory licence disqualification of two years.

The 2013 PPRA amendments introduced a circumstance of aggravation whereby, if the offender is a participant in a criminal organisation, the mandatory minimum penalty is increased to 100 penalty units or 100 days actual imprisonment (with a two year licence disqualification).

### MANDATORY SENTENCING

It is not within the scope of the Taskforce Terms of Reference to consider the appropriateness of the mandatory minimum sentencing regime which applies to the simpliciter evade police offence.

However, the Taskforce noted that the simpliciter sentencing regime has the potential to create injustice: for example, where an offender is convicted and the Court finds that there is no capacity to pay the fine, the offender must serve 50 days in jail regardless of previous history, or the circumstances of the offending (or the offender).

As noted throughout this report, the Taskforce was divided on the issue of mandatory sentencing.

(The differing views of Taskforce members on mandatory sentencing generally are set out in greater detail at Chapter 13.)

### THE MAJORITY VIEW

Members of the Taskforce representing the legal professions and the PIM are fundamentally opposed to mandatory minimum sentences on the grounds that they lead to some unjust outcomes because there is no flexibility to take into account individual subjective circumstances around the nature of the offending, etc; and, as they also contend,

because there is no evidence base to support the proposition that mandatory sentences deter criminal offending.

These Taskforce members and the stakeholders they represent do not support the retention of this circumstance of aggravation. The chair shares that conclusion.

However, if the Government elects to retain this circumstance of aggravation, the preference of these members is that mandatory minimum sentences should be repealed and replaced with statutory maximum penalties.

### THE MINORITY VIEW

The Commissioned Officers' Union and the QPU support the retention of mandatory minimum terms of imprisonment which they believe, on the basis of feedback from their members, is an effective deterrent device.

### IS THIS AN APPROPRIATE CIRCUMSTANCE OF AGGRAVATION?

QPS submitted to the Taskforce that the significant penalties for this offence operate as a deterrent to individuals from refusing to stop for police, supports the QPS pursuit policy, and lowers the risk of harm associated with police pursuits.<sup>80</sup>

All Taskforce members agreed that persons who evade police compromise their own safety, the safety of other motorists, and the safety of police. This is a serious offence and no Taskforce member argued that it should not carry serious consequences for persons convicted of it.

Where Taskforce members differed is on the question of whether this offence should be treated more seriously on the basis of the *associations* of the person who commits it.

Members representing the BAQ, the PIM and the QLS held the view that this offence is a serious offence whether it is committed by a participant in a criminal organisation, or any other citizen. The conduct that the offence is aimed at does not become more objectively serious on the basis of the associations of the person who commits it. For that reason, these members recommend the repeal of this circumstance of aggravation. The QPU and the Commissioned Officers' Union support the retention of the circumstance of aggravation on the basis that it acts as an additional deterrent to participants in criminal organisations.

#### INTERPLAY WITH OTHER RECOMMENDATIONS OF THE TASKFORCE

If the Government decided to retain this circumstance of aggravation it should note that it could continue to be operable utilising the new definitions of 'criminal organisation' and 'participant' proposed as part of the renewed Organised Crime Framework.

#### RECOMMENDATION 39 (Chapter Nineteen)

An amendment should be made to the 'prescribed offences' under the Chapter 4A scheme for Motor Vehicle impoundment under the *Police Powers and Responsibilities Act 2000* (Qld) to provide that it only applies to offences involving the use of a motor vehicle where, at sentence, the Judge or Magistrate is satisfied on the balance of probabilities that the person was a participant in a criminal organisation (using the new definition of 'participant' and 'criminal organisation' under the proposed organised crime framework). (not preferred by the Commissioned Officers' Union or the Queensland Police Union)

#### RECOMMENDATION 40 (Chapter Nineteen)

The amendments to the *Police Powers and Responsibilities Act 2000* (Qld) under the 2013 suite that expanded the police powers to stop, search and detain, and require identification information on the basis of a reasonable suspicion that a person is a participant in a criminal organisation, should be repealed. (not preferred by the Commissioned Officers' Union or the Queensland Police Union)

## RECOMMENDATION 41 (Chapter Nineteen)

The circumstance of aggravation added by the 2013 suite for the 'evade police' offence under section 754 of the *Police Powers and Responsibilities Act 2000* (Qld) should be repealed. (not preferred by the Commissioned Officers' Union or the Queensland Police Union)

## ENDNOTES

- 1 *Police Powers and Responsibilities Act 2000* (Qld), Chapter 4A.
- 2 *Police Powers and Responsibilities Act 2000* (Qld), sections 29 (Searching persons without warrant); 32 (Prescribed circumstances for searching vehicle without warrant); and 40 (Person may be required to state name and address).
- 3 *Police Powers and Responsibilities Act 2000*, section 41 (Prescribed circumstances for requiring name and address).
- 4 *Police Powers and Responsibilities Act 2000* (Qld), section 75A.
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<sup>70</sup> Explanatory Notes, Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013, 7.

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<sup>72</sup> Criminal Justice Commission, *Report on a review of police powers in Queensland*, Volume 1, May 1993, [62]; and Volume 2, [316].

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## PART 5.3

# CHAPTER TWENTY

## AMENDMENTS TO THE CRIME AND CORRUPTION ACT

*The Crime and Corruption Commission has always had significant investigative powers well beyond those ordinarily available to traditional law enforcement agencies like the Queensland Police Service.*

*The significant expansion of the CCC's already wide powers in the 2013 suite (and the question whether they were necessary and desirable) required, the Taskforce believed, careful scrutiny.*

### CRIME AND CORRUPTION ACT 2001 (QLD)

The *Crime and Corruption Act 2001 (Qld) (CCA)* aims to combat and reduce the incidence of *major crime*; and, the incidence of corruption in the public sector.<sup>1</sup>

'Major crime' is a reference to *criminal activity that involves an indictable offence punishable by a maximum penalty of not less than 14 years imprisonment; or criminal paedophilia; or organised crime; or terrorism (or something that is preparatory to, or undertaken to avoid detection of or prosecution for, those matters).*<sup>2</sup>

The CCA achieves its purpose through:

- the establishment and operation of the *Crime and Corruption Commission (CCC)*;
- establishment of the *Parliamentary Crime and Corruption Committee* (a standing committee of the Legislative Assembly with special responsibility for monitoring and reviewing the CCC's performance<sup>3</sup>); and
- the creation of the *Office of the Parliamentary Crime and Corruption Commissioner* (who helps the Parliamentary Committee in the performance of its functions<sup>4</sup>).

### WHAT IS THE CRIME AND CORRUPTION COMMISSION?

The CCC is a permanent, independent statutory body.

It has investigative powers, not ordinarily available to the police service, which enable it to effectively investigate major crime and criminal organisations.<sup>5</sup> It has particular oversight of the police service, and the public sector.

It also investigates more serious cases of corrupt conduct, and has particular powers with regards to the criminal asset confiscation-

related investigations;<sup>6</sup> and, plays an important role in protecting witnesses.

The CCC works very closely with other state, national and international law enforcement and anti-corruption agencies such as the Australian Crime Commission.<sup>7</sup>

The CCC has now been in operation, in various forms, for over two decades. It was initially known as the Criminal Justice Commission and then became the Queensland Crime Commission, before changing to the Crime and Misconduct Commission (CMC); and, is now known as the CCC.<sup>8</sup>

The CCC is headed by a full-time Chairman [*sic*]<sup>9</sup>, sometimes known as the Commissioner, who is aided by a part-time Deputy Chairman, two part-time ordinary Commissioners and a full-time Chief Executive Officer. The Chairman and Deputy Chairman must possess experience and qualifications necessary for appointment as a Supreme Court judge.<sup>10</sup>

The Commissioners are appointed by the Governor-in-Council, but only if there is bipartisan support in the Parliamentary Committee.<sup>11</sup>

#### WHAT ARE THE ORIGINS OF THE CRIME AND CORRUPTION COMMISSION?

The CCC, with its important role in providing independent oversight of the police service and public sector and protecting witnesses, originated out of recommendations made in the Fitzgerald Inquiry.<sup>12</sup> That inquiry, it will be recalled, changed the policing and political landscape in Queensland (and, indeed, across Australia).<sup>13</sup>

The Fitzgerald Inquiry recommended the establishment of an independent body with parliamentary committee oversight which was permanently charged with monitoring, reviewing, coordinating and initiating reform of the administration of criminal justice; and, to fill the roles not appropriately carried out by the police or other agencies – to help, as Tony Fitzgerald AC QC anticipated, restore

confidence in Queensland's public institutions.<sup>14</sup>

It was envisaged that this criminal justice commission would have divisions relating to official misconduct, witness protection, research and coordination, and intelligence gathering; and, that it would have special powers – for example, to undertake coercive hearings and secret investigations, and to compel the production of materials and attendance to give evidence.<sup>15</sup>

Over time there have been extensive reviews, restructures and legislative changes to the body once known as the Criminal Justice Commission culminating, today, in the CCC in its present form, and clothed in its present legislative raiment.

#### WHAT FUNCTIONS AND POWERS DOES THE CRIME AND CORRUPTION COMMISSION HAVE?

Chapter 2 of the CCA sets out the *functions* of the CCC and Chapter 3 sets out its *powers*.

#### FUNCTIONS

The key functions of the CCC are its:

- *prevention function* – to help prevent major crime through analysis of the intelligence it gathers and the results of its investigations; informing the community about its findings; and, reporting on ways to prevent major crime;<sup>16</sup>
- *crime function* (set out below) – modified by the 2013 suite;
- *corruption function* – to ensure a complaint about, or information or other matter, involving corruption is dealt with in an appropriate way;<sup>17</sup>
- *research function*;<sup>18</sup>
- *intelligence function* (set out below) – modified by the 2013 suite;

- *immediate response function* (set out below) – inserted by the 2013 suite;
- *witness protection function*, linking in with the *Witness Protection Act 2000* (Qld);<sup>19</sup> and
- *civil confiscation function*, linking in with its role administering the non-conviction-based civil confiscation scheme and serious drug offender confiscation scheme under the *Criminal Proceeds Confiscation Act 2002* (Qld) (CPCA). The regimes are aimed at confiscating property derived from criminal activity or used in committing an offence or which belongs to serious drug offenders.<sup>20</sup>

### CRIME FUNCTION

The *crime function* is governed by Chapter 2, Part 2 of the CCA.

The *crime function* of the CCC is to investigate major crime referred to it by the Crime Reference Committee;<sup>21</sup> and to investigate, under an authorisation given by the CCC Chairman, where a criminal organisation (or a participant) has engaged in (or is planning to engage in) an incident that threatened or may threaten public safety.

It performs this function by conducting investigations, gathering evidence to be used for the prosecution of offences and to recover proceeds of crime (or to enable the forfeiture of unexplained wealth), and engaging with other law enforcement agencies and prosecuting authorities nationally and internationally about major crime.

The first aspect of the *crime function* (that is, to investigate major crime) relies on an authorisation from the Reference Committee, which can make either a specific or a general referral to the Commission.

A *specific crime referral* is when the Reference Committee refers a particular incident of major crime to the CCC for investigation. This referral can only be made if the Reference

Committee is satisfied a police investigation of the matter has been carried out and has not been effective, and further investigation using the powers ordinarily available to police is not likely to be effective; and that it is in the public interest to refer the matter to the CCC for investigation: for example, a cold-case murder investigation.

In contrast, a *general crime referral* is when the CCC is asked to investigate major crime more broadly (ie, not in a way that is anchored to any particular incident or event) where it is in the public interest for it to do so: for example, criminal paedophilia using the internet to groom children.

This second type *crime function* (that is, to investigate a criminal organisation) can be undertaken under the authorisation of the CCC Chairman and is a cross-reference to the *immediate response function* (discussed below).

### INTELLIGENCE FUNCTION

The *intelligence function* is governed by Chapter 2, Part 4, Divisions 2 and 2B of the CCA.

In part it involves the analysis of intelligence data, the minimisation of unnecessary duplication of intelligence data, and ensuring that what is collected and held is appropriate for the proper performance of the CCC's functions.

The *intelligence function* of the CCC also involves undertaking intelligence activities including:

- *specific intelligence operations* as authorised by the Reference Committee, including holding hearings; and
- *intelligence function hearings* under its own authorisation, conducted under the *immediate response function*.

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## SPECIFIC INTELLIGENCE OPERATIONS

A *specific intelligence operation* can occur if the Reference Committee is satisfied that there are reasonable grounds to *suspect* that a criminal organisation (or a participant in one) is engaging in criminal activity (or has, or is planning to); or, that a person is engaging in corruption to support or help a criminal organisation or participant therein (or has or is planning to). Before it can give approval, the Reference Committee must also be satisfied that the operation is in the public interest.

This is an expansion of the intelligence function, inserted under the 2013 suite.

Any hearings conducted as part of a specific intelligence operation are known as *intelligence function hearings*.

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## IMMEDIATE RESPONSE FUNCTION

The *immediate response function* is governed by Chapter 2, Part 4, Division 2B of the CCA.

It is a new initiative, inserted under the 2013 suite.

The CCC is given, by the 2013 amendments, an *immediate response function* in relation to an incident that threatened or may threaten public safety.

This function is exercisable under the CCC's own authorisation – and, hence of course, its own initiative; that is, the Chairman of the CCC may authorise that a *crime investigation*<sup>22</sup> shall begin, or that *intelligence function hearings* be held, if satisfied that there are reasonable grounds to *suspect* that a criminal organisation (or participant therein) has engaged in, or is planning to engage in, an incident that threatened or may threaten public safety; and, it is in the public interest for the CCC to act in response to, or to prevent, the threat.

An example would be an event like the Broadbeach incident which immediately preceded the 2013 suite, and a CCC decision to conduct intelligence function hearings into it. (That did not, it should be emphasised,

occur – but, it is plainly the kind of event which might now trigger the function.)

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## POWERS

The CCC has investigative powers which are not available to police or any other government agency in conducting an investigation, including the power to conduct *coercive hearings* requiring a witness to attend and give evidence, and to hold public inquiries.

Investigators are able to override the right to silence, and the privilege against self-incrimination, to enable them to secure otherwise unobtainable information, including *criminal intelligence* (as distinct from admissible evidence) regarding activity by a criminal organisation.

These powers compel a person to answer questions against their will or in circumstances where, by answering the question they may implicate themselves in an offence (even if that offence is very serious – eg, murder). The CCC can also compel a person to produce information, records or things as part of its investigations.<sup>23</sup> These remarkable powers mean it is not excessive to ascribe the term '*coercive hearings*' to the process.

While the CCC is not a court and cannot convict or discipline a person, it can have people arrested, charged and prosecuted (in terms of a crime investigation); and/or refer allegations of corruption for criminal prosecution or consideration of disciplinary action.

The CCA includes offence provisions for failure to comply with CCC requirements made under the Act: for example, non-compliance with a notice to produce a document or thing, or failure to attend a hearing as required, or to answer questions. In addition, non-compliance carries the risk of a charge and conviction for contempt of the Commission.

On any view the CCC powers in coercive hearings far exceed those available to other law enforcement authorities like the police –

and, are light years away from the powers of prosecutors in courts, and courts themselves.

A number of the CCA offence and contempt provisions were augmented under the 2013 suite.

#### IS THERE AN EQUIVALENT BODY/AGENCY IN THE OTHER AUSTRALIAN JURISDICTIONS?

Queensland, New South Wales, Victoria and Western Australia all have state legislation governing an independent body created to deal with both public administration corruption, and crime.<sup>24</sup>

South Australia, the Northern Territory, Tasmania and the Australian Capital Territory are all governed by the Australian Crime Commission legislation.

South Australia has a separate *Independent Commissioner against Corruption* but the legislation only applies to corruption in public administration.

Tasmania has a separate *Integrity Commission* but, like South Australia, the scope of that role and the legislation only applies to corruption in public authorities.

Neither the Northern Territory nor the ACT has an independent anti-crime commission.

#### HOW DID THE 2013 SUITE AMEND THE CRIME AND CORRUPTION ACT?

The 2013 suite amended the CCA:<sup>25</sup>

- to enable the declaration of a criminal organisation by Regulation, on the recommendation of the Minister (consistent with new, similar provisions in the Criminal Code). The concept of *participation in a criminal organisation*, encountered throughout this Report, is central to many aspects of the CCA;
- to introduce *specific intelligence operations*, intended to enable the CCC to gain intelligence and investigate the activities of criminal organisations or

corruption connected to criminal organisations, including through the use of coercive hearings in support of its intelligence function (sections 55A-C);

- to introduce the new *immediate response function* which, as mentioned above, allows the CCC to undertake a crime investigation or to hold an intelligence function hearing in relation to an actual or potential threat to *public safety* (sections 55D-F);
- to create a tiered, fixed mandatory minimum sentencing regime for the punishment of contempt of the CCC, where the contempt is constituted by a refusal to take an oath, answer a question, or produce a document or thing (sections 1998A-F);
- to allow witnesses who are to be certified as being in contempt of the CCC to be immediately arrested (section 198A);
- to amend the provisions allowing a person to claim, advance and rely upon a *reasonable excuse for non-compliance* so as to remove, from its scope, a claim that a reasonable excuse exists which is based on a fear of reprisal (including, in circumstances in which the CCC accepts that the fear is genuinely held) for a participant in a criminal organisation, and where the crime investigation or intelligence function hearing is about a criminal organisation or a participant in a criminal organisation (section 85 and 190). In other words, even a genuine and reasonable fear of reprisal – conceivably, say, a fear of personal harm or worse – avails an alleged ‘participant’ nothing and they *must* answer questions, etc.;
- to increase the maximum penalties for the statutory offences of non-compliance such as a failure to answer a question or refusal to produce a document (sections 82, 183, 185, 188, 190 and 192);

- to provide that a person subject to a crime investigation under an immediate response function is *not* entitled to apply to the Attorney-General for financial assistance to obtain legal services (section 205);
- to provide that the CCC is *not* required to disclose *exculpatory materials* (that is, information that may assist a person with their defence to a charge) obtained in an intelligence function hearing (section 201);
- to permit inculpatory evidence given by a person, under a coercive hearing, to be used against them in a proceeding for the confiscation of proceeds of crime (section 197); and
- to clarify the position in the wake of the High Court decision of *X7 v Australian Crime Commission*<sup>26</sup> – ie, that the CCC may start or continue to investigate a person (including requiring them to answer questions) even *after* the person has been charged with an indictable offence (section 331).

The 2013 suite also allows the CCC to seek a warrant for a witness who fails to attend a hearing from a Magistrate rather than a Supreme Court Judge (sections 167-8); and, makes certain proceedings arising out of the CCC functions confidential in the Supreme Court (section 200A). These provisions were supported by the CCC in a submission to the Taskforce; no contentious issues were identified by Taskforce members, and their retention is recommended. For that reason, they are not mentioned again in this Report.

With regards to the other listed amendments, the Taskforce considered the merits of each in detail.

What follows is an outline of the issues the Taskforce identified, the analysis it undertook in respect of each of them, and the conclusions it reached about each of the key changes introduced in the 2013 suite.

## THE EXPANSION OF CCC FUNCTIONS AND POWERS

Again, the 2013 suite expanded the scope of the CCC's functions and powers through the introduction of:

- *specific intelligence operations*, to enable the CCC to gain intelligence and investigate the activities of criminal organisations or corruption connected to criminal organisations, including through the use of coercive hearings, in support of its intelligence function; and
- an *immediate response function*, which allows the CCC to undertake a crime investigation or to hold an intelligence function hearing in relation to an actual or potential threat to *public safety*.

In confidential advice the CCC advised the Taskforce that, in response to its expanded intelligence functions, it established a dedicated team known as the *Criminal Organisations Hearing Team* which conducts high-volume hearings in relation to alleged criminal organisations, such as OMCGs.

The team undertakes coercive hearings to support both the intelligence function and crime function of the CCC. Since its inception and up to 18 January 2016 the team has examined 171 witnesses over 182 days.

The CCC also advised that since the establishment of the intelligence hearings program 431 Intelligence Reports have been produced up to 18 January 2016.

These reports deal with aspects of information derived through the hearings and, once appropriately anonymised, are generally uploaded to state and federal law enforcement intelligence databases.

The CCC made a submission to the Taskforce supporting the retention of its enhanced intelligence function capability which, it averred, provides it with the capacity to forensically test and evaluate intelligence provided by witnesses. It can help, the CCC

said, to confirm or identify specific information gaps – in particular, with respect to OMCGs.

From a tactical perspective, the CCC advised that as a result of its expanded intelligence function a number of crime investigations were commenced, progressed or assisted by information derived through intelligence hearings.

The CCC also submitted that, strategically, its enhanced intelligence functions have contributed to an improved understanding of OMCG activity and methodology, and assisted in the formation of strategies to mitigate, disrupt and dismantle their activities.

The CCC also argues for the retention of the *immediate response function* – albeit never, to date, having had occasion to use it. The CCC contends that the utility of the function lies in the ability for it to respond rapidly if required (ie, because of an actual or threatened public safety incident) and, in particular, it envisages the function being beneficial in the context of terrorist activity.

#### TASKFORCE DISCUSSION

Unlike *special intelligence operations*, which can only be undertaken by the CCC with the authorisation of the Reference Committee, the *immediate response function* (whether exercised by way of a crime investigation or an intelligence function hearing) does not require the same authorisation – and therefore, oversight.

The immediate response function is exercisable under the sole authorisation of the CCC Chairman.

In considering the scope of this new function the Taskforce remained alert to the statutory obligation, under section 57 of the CCA, which requires the CCC *to, at all times, act independently, impartially and fairly* having regard to the purposes of the Act and the importance of protecting the public interest.

The general terms of the proviso (which, the Taskforce was comfortable, would guide the

Chairman and the CCC at all relevant times) have to be weighed, however, against the scope of the powers exercisable under the CCA and the consequences for non-compliance including, as they do, significant penalties for contempt. Those powers are of a nature that, in the view of the legal representatives on the Taskforce and the Queensland Police Union, it was both appropriate and compelling that there should be some oversight of them.

This is not, again, to suggest any concern on the part of Taskforce members that the Chairman would act otherwise than properly and with due regard for the purposes underpinning the CCA; but, rather, in recognition of the prevailing view within the Taskforce that the nature and effect of the powers themselves warranted additional precautions and safeguards – as an appropriate and logical adjunct to such wide powers and, too, to reassure the community that no occasion could ever arise in which they might be misused.

The Taskforce therefore recommends that consideration be given to amending the CCA to incorporate oversight by the Reference Committee or the Public Interest Monitor (PIM) or a Supreme Court judge.<sup>27</sup>

Acknowledging the possibility of a sudden unpredictable need for a rapid response in relation to the exercise of this particular function, the Taskforce had regard to Chapter 6, Part 2, Division 5 of the CCA, which sets out the conduct of the Reference Committee meetings. The provisions expressly contemplate the use of modern technology in the conduct of the meetings (thus negating the need to physically marshal the Reference Committee in the same geographical location before a decision can be made).

The Taskforce also noted that under the CCA there is a role, already, for a Supreme Court judge to secure the immediate attendance of a witness (although this is not presently applicable to the immediate response function).<sup>28</sup>

The Taskforce is, otherwise, unanimous in its support for the retention of the expanded intelligence functions and acknowledges the force of the CCC's advocacy for their retention.

## THE PUNISHMENT FOR CONTEMPT BY FIXED MANDATORY PENALTIES

### WHAT IS CONTEMPT?

Contempt is an unusual construct. While it is punishable by criminal sanctions, it is not an offence per se.<sup>29</sup>

The Supreme Court of Queensland has inherent power to punish for contempt; it is part of the court's general powers to control its own procedures:<sup>30</sup>

*'...it is a power that is invoked sparingly, but in a very wide variety of circumstances. There are, in that sense, many forms of contempt. There is no 'single' offence of the kind that the criminal law knows.'*

Under the CCA a person is in contempt of the presiding officer conducting a CCC hearing if the person:<sup>31</sup>

- insults the member while conducting the hearing;
- deliberately interrupts the hearing;
- at the hearing contravenes a CCA provision relating to the hearing;
- creates or continues (or joins in) a disturbance in or near a place where a hearing is being conducted; and/or
- does anything at the hearing or otherwise that would be contempt of court if the presiding officer were a judge acting judicially.

The information provided by the CCC to the Taskforce in confidential advice confirms that the number of people brought before the Supreme Court for contempt of the commission, in the five years preceding the 2013 suite, was objectively low: two in 2008;

two in 2009; three in 2010; three in 2011; two in 2012; and two in 2013 up to 17 October.

The 2013 suite amended the contempt provision *to remove any doubt and to declare* that certain contraventions can amount to contempt, namely:<sup>32</sup>

- a failure by a person to take an oath when required to do so (which is also an offence under the CCA, section 183);
- a failure by a person to produce a document or thing at a hearing under an attendance notice or a requirement without reasonable excuse (which is an offence under the CCA, sections 185 and 188); and
- a failure to answer a question put to the person at the hearing without reasonable or lawful excuse (an offence under sections 190 and 192).

The tiered, fixed mandatory sentencing regime inserted in the CCA by the 2013 suite is anchored to these particular contraventions.

Similarly, the offences identified above are also those where the maximum penalties were increased by the 2013 suite.

An existing provision under the CCA ensures against sentencing double jeopardy<sup>33</sup> by providing that the person may be proceeded against for either the offence or the contempt but cannot be punished twice for the same conduct.<sup>34</sup>

### WHAT PROCESS IS FOLLOWED IF A PERSON IS ALLEGED TO BE IN CONTEMPT OF THE COMMISSION?

In Queensland, the *Uniform Civil Procedure Rules 1999* (Part 7) sets out the practice for proceedings leading to punishment for contempt.<sup>35</sup>

For example if a person attends a CCC hearing to give evidence in response to an attendance notice issued under the CCA and, in the course of any part of that hearing, refuses to answer a

question of importance (assuming there is no reasonable excuse for not answering), the presiding officer may decide to ‘certify’ the person, in writing and to the Supreme Court, as being in contempt.<sup>36</sup>

An application for punishment for contempt must be filed in the Supreme Court by the CCC representative and specify the alleged contempt.<sup>37</sup> Despite the fact this is a civil procedure and not a criminal one, the court must inquire into and be satisfied *beyond reasonable doubt* of the contempt (ordinarily, the civil standard of proof is on the balance of probabilities).<sup>38</sup>

If the court is satisfied the person has committed the contempt the court may punish the person as if the person has committed the contempt in relation to proceedings of the court<sup>39</sup> – but, subject to the new (tiered) mandatory minimum sentencing regime inserted into the CCA by the 2013 suite.

The court will ordinarily punish the person for the contempt without undue delay, given the public interest in this occurring promptly.<sup>40</sup>

#### THE PUNISHMENT FOR CONTEMPT UNDER THE CCA

At common law there is no maximum penalty for the punishment of contempt; the court can impose a term of imprisonment of indefinite length.<sup>41</sup> However it is rare that a person would be sentenced to something so harsh as, say, life imprisonment for contempt.<sup>42</sup>

Section 199 of the CCA sets out new, special punishments for contempt. The provision initially adopts the common law approach of not fixing a maximum penalty (ie, the court may punish the person as if the person had committed the contempt in the face of the court; and the maximum punishment is at the discretion of the court<sup>43</sup>).

But, the 2013 suite amended section 199 to insert a tiered, fixed mandatory minimum punishment regime where the contempt that is certified is:

- a failure by a person to take an oath when required to do so;
- a failure by a person to produce a document or thing at a hearing under an attendance notice or a requirement without reasonable excuse; and
- a failure to answer a question put to the person at the hearing without reasonable or lawful excuse.

In such cases the court *must* now condemn the person to a term of actual imprisonment, *to be served wholly in prison*.

Further, the minimum punishment the court *must* impose is: a term of imprisonment for a first contempt; increasing to two and a half years imprisonment for a second contempt; and, increasing to five years imprisonment for a third or subsequent contempt.

For this tiered CCA scheme to apply the second or subsequent contempt must relate to a hearing dealing with the same subject matter as that dealt with in the previous hearing.<sup>44</sup>

The Explanatory Notes to the amending Act acknowledge that the imposition of mandatory minimum sentences impacts upon the rights and liberties of individuals but justifies this contravention of the fundamental legislative principles in a manner consistent with a submission of support (regarding this aspect of the 2013 suite) provided to the Taskforce by the CCC, and detailed below.

#### THE PURPOSE OF PUNISHMENT

The ‘cardinal feature’ of the power to punish for contempt is:<sup>45</sup>

*‘...that it is an exercise of judicial power by the courts, to protect the due administration of justice. And that would still be so, even if, contrary to the position with other offences, the courts had power to review the exercise of such prosecutorial discretion in a case of contempt. **The function that is exercised when a court***

*proceeds against an alleged contemnor is not one to be exercised or controlled by the executive.'*

(emphasis added)

The court has already developed a non-exhaustive list of factors relevant to the process of assessing the proper punishment for contempt of the CCC.<sup>46</sup>

- the seriousness of the contempt proved;
- whether the contemnor was aware of the consequences;
- the actual consequences of the contempt on the relevant trial or inquiry;
- whether the contempt was committed in the context of serious crime;
- the reason for the contempt;
- whether the contemnor has received any benefit by indicating an intention to give evidence;
- whether there has been any apology or public expression of contrition;
- the character and antecedents of the contemnor;
- general and personal deterrence; and
- denunciation of the contempt.

Contempt of a commission when the person refuses to take an oath or give evidence when lawfully required to do so is a very serious matter; at worst it may mean, for example, that an offender is never brought to justice or that a person is unjustly charged because someone withholds important exculpatory evidence.<sup>47</sup>

As Justice Margaret Wilson said in one case:

*'In fashioning the punishment, it is important to bear in mind the community*

*interest in persons fulfilling their lawful obligation to assist in investigative hearings in connection with serious crimes.*

*Accordingly, the sentence must provide not only punishment but also deterrence – deterrence directed both at the particular respondent and at persons in the community who might be like minded.'*<sup>48</sup>

#### THE ABILITY TO 'PURGE' THE CONTEMPT

After the court has punished a person for contempt, if they subsequently signify a wish to 'purge' their contempt during the currency of the punishment, they can be brought back before the CCC to determine whether they wish for that to occur.

If so, the person is returned to the court, on application, for a declaration that they have purged their contempt. The court can then order the discharge of the person from prison before the end of their term of imprisonment.<sup>49</sup>

If the person imprisoned for contempt changes their mind and, say, signifies that they will now answer the question asked by the presiding officer of the CCC which lead to their contempt conviction, they can do so – this is what is meant by 'purging' the contempt.

The court has indicated that: *'... the punishment for a serious contempt should not be so moderate as to provide no practical encouragement to purge the contempt'*.<sup>50</sup>

#### EXAMPLES OF CONTEMPT OF THE CRIME AND CORRUPTION COMMISSION

In terms of the adequacy of the punishment of contempt and CCA offences prior to the 2013 suite, the CCC expressed concern that the maximum penalties for the CCA offences (listed above) were lower than their interstate counterparts; and, it was said that the punishments for contempt were more lenient than elsewhere in Australia.

The CCC was concerned that the punishment for contempt in Queensland did not instill the same deterrent effect as elsewhere.

For these reasons, the CCC indicated, it had advocated for the punishments to be strengthened under the 2013 suite.

The mandatory minimum sentencing regime for contempt is intended to have a strong coercive effect. It sends a message, it was submitted, that the matter is not going to be resolved by simply declining to answer questions once, and then serving a short term of imprisonment.

The CCC submitted that since the introduction of the new sentencing regime there have been fewer contempt proceedings than were otherwise expected – although the Taskforce notes the objectively low number of cases prior to the 2013 amendments.

The CCC advised that between August 2015 and 17 February 2016 four people had been punished for contempt of the Commission. The punishments imposed were: 3 months imprisonment for two of the contemnors, four months for one, and six months for the other.

The CCC also indicated that seven witnesses who had been imprisoned for contempt since the introduction of the 2013 regime had been recalled and gave evidence. Two other witnesses, upon legal advice, elected to purge their contempt prior to being sentenced.

These submissions lead the Taskforce to conclude that it was important to examine and compare the punishment of contempt of the Commission before, and after, the 2013 suite – to gauge and assess the nature and extent of the problem prior to the introduction of the 2013 mandatory regime and, of course, the need for that new regime now.

#### CASE EXAMPLES PRIOR TO THE 2013 SUITE

In 2010, in the matter of *Callanan v Dion Gerhard Pydde*<sup>51</sup> the respondent was sentenced to eight months imprisonment for contempt. The CMC (as it was then) was

conducting an inquiry into a murder and the respondent was required to attend to give evidence under a notice. He was a serving prisoner at the time. He refused to answer questions, despite legal advice and with knowledge of the consequences of his refusal. He was sentenced to *eight months imprisonment to be served cumulatively upon the sentence he was already serving*.

In the matter of *Callanan v Fobes*,<sup>52</sup> (to which the court referred in *Pydde*) the alleged contemnor was a serving prisoner and refused to answer a question before the CMC after being compelled to attend. The court considered the appropriate penalty to be nine months imprisonment which would have been imposed but for his cooperation in the contempt proceedings. His punishment was reduced to *eight months imprisonment to be served cumulatively upon the sentence he was serving for another offence*.

In the matter of *O'Connor v Witness "G"*<sup>53</sup> the coercive hearing related to the murder of the respondent's brother-in-law (there was no suggestion, however that the respondent, Witness "G", was involved in the death). He was required to attend hearings to give evidence under notice. He was legally represented. He answered questions over a number of different days. He agreed that he had taken \$1.8M from a safety deposit box which had been put there by his brother-in-law (the proceeds, it seemed, of a lucrative drug trafficking business conducted by the deceased) and that he did so to avoid the police taking it. The respondent refused to tell the CCC where the money had gone.

The respondent was 31 years of age and a carpenter by trade. He had never been to prison before. He refused to answer the question because, he said, he wanted the money to be available for his sister's children (his sister was the partner of the deceased, and was said to be a drug addict).

The range of possible sentences in that case was assessed at *seven to eight months imprisonment* (he was sentenced to five

months 27 days, noting he had already spent 33 days in prison).

This case is significant, because (as discussed below), Witness “G” went on to become Queensland’s first contemnor to test the new mandatory minimum sentencing regime under the CCA for what was alleged to be a second strike – ie, he potentially faced *another two years and six months* to be served wholly in prison when he again refused to say where the money has gone.

#### CASE EXAMPLES POST THE 2013 SUITE

In the matter of *O’Connor v Witness “I”*<sup>54</sup> the CMC was conducting an inquiry into a murder and the respondent was required to attend to give evidence under a notice (he was, and is, a key suspect). He was certified and found to be in contempt for his refusal to take the oath: ‘*I won’t be answering any questions so I don’t wish to proceed in any way at all...I am refusing.*’ An effective term of imprisonment of *12 months* was imposed.

In the matter of *Callanan v Attendee “Z”*<sup>55</sup> the alleged contemnor was required to attend a special intelligence hearing to give evidence under a notice. He had allegedly been identified as a probationary member of an OMCG, nominated to become a full member. He refused to take an oath and was formally proven to be in contempt. The applicant submitted a sentencing range of *five to six months imprisonment*, which the court agreed six months was the effective punishment warranted.

That being said, however, by the presiding judge, the actual punishment imposed was *six weeks imprisonment*; substantial allowance was made to account for the departmental policy, at the time, that alleged OMCG ‘participants’ must serve their time in prison under significantly harsher conditions (a matter discussed in Chapter 15).

In the matters of *Callanan v Attendee “X”*<sup>56</sup> and *Callanan v Attendee “Y”*<sup>57</sup> both alleged contemnors followed the course the witness had taken in *Attendee “Z”*. Each refused to

take an oath and was found to be in contempt of the commission.

Both “X” and “Y” were in their early 20s, neither had been to prison before, and both had a minor criminal history involving no more than fines. Both had been identified as having close personal ties to an OMCG – they were allegedly associated with the President, been to the OMCG clubhouse, and were publicly consorting with members when the OMCG was on a ‘run’.

For each, an effective term of imprisonment of *five months imprisonment* was said to be warranted for their contempt – but again, for both, this was reduced to four weeks for the same reasons the court had given in “Z”.

#### JUDICIAL INTERPRETATION OF THE FIXED MANDATORY SENTENCING REGIME

The case of *Witness “JA” v Scott*<sup>58</sup> follows on from the case above regarding the respondent who, under a notice to attend in May 2013 (prior to the 2013 suite), refused to disclose what had been done with \$1.8M believed to be the proceeds of crime derived by his brother-in-law (a murder victim).

Witness JA served five months and 27 days in jail for contempt of the commission. In September 2014 (more than one year after he had first refused to answer the question) he was again compelled to attend and give evidence under the same attendance notice issued in 2013. Again he refused to say what he had done with the money.

The presiding officer applied to a Supreme Court judge to have him punished for contempt. The court did so, finding that the refusal in September 2014 was a new contempt. The contempt was treated as a ‘second contempt’ under section 199(8B) of the CCA with the consequence that the mandatory minimum punishment of two years and six months imprisonment was imposed.

Witness JA appealed to the Court of Appeal on the basis that he should not have been further

punished, or at least not by the term which was imposed.

A key issue in the case was whether the 2014 refusal should be seen as one episode constituting one continuing refusal to answer. The sentencing judge considered them to be separate (*though identical in their essentials, they are distinct acts, separated in time by months during which he was imprisoned for contempt*).

The Court of Appeal unanimously decided that the appeal should be allowed and that Witness JA should be discharged.

Justice Philip McMurdo, (with Justice Gotterson in agreement) considered and rejected a number of arguments made in support of the imposition of the fixed mandatory minimum penalty of two years and six months upon Witness JA – namely:

Firstly, whether the 2014 refusal was a different contempt from that for which he was punished in 2013 and if not, whether there was any power to punish him again? No.

The contempt constituted by his refusal to answer that same question persisted as long as the hearing continued and the contempt was not purged; it was a continuing contempt and not a series of distinct contempt. For witness JA, on each occasion he appeared before the commission he did so under the same attendance noticed issued back in 2013 (he was never excused from the hearing).

*‘The court has power to make several orders against a contemnor for a continuing contempt. But where, as here, the contemnor has been punished not by an interim order but by a judgment which has determined the appropriate penalty for a continuing contempt which will not be purged, the court can make no further order. Because it was not a distinct contempt in 2014, it was not a ‘second contempt’ under section 199(8B). Nor was it a ‘first contempt’ because it was a*

*contempt which began before the section 199(8B) commenced to operate [ie, before the 2013 suite].’*

Secondly, if (contrary to the position taken by the Court) the 2014 refusal was a distinct contempt, was the subsequent contempt proceedings an abuse of process? Yes.

The 2013 sentence was determined upon the expectation that the contempt would not be purged; he was sentenced to a fixed penalty on the basis that he intended to permanently withhold information from the CCC and would never supply the information as to the whereabouts of that money.

If the 2014 refusal was a separate contempt, then because it was in substance the same case as in 2013, the proceedings to punish him again was an abuse of process – *unjustifiably vexatious and oppressive for the reason that it sought to litigate anew a case which has already been disposed of by earlier proceedings...*

Thirdly, if the 2014 refusal was a distinct contempt and the proceeding was not an abuse of process (contrary to the position taken by the Court), was the 2014 refusal actually a ‘second contempt’ under section 199(8B) of the CCA? No.

For section 199(8B) to apply to a contempt that preceded its date of commencement, clear words to that effect were required in the amending Act. This was not the case. The ‘first contempt’ must have happened on or after commencement (here it did not).

Fourthly, is the mandatory minimum sentencing regime for contempt under section 199(8A)-(8B) of the CCA constitutionally valid? Yes.

Two challenges were made; both arguments were rejected. Firstly, that the provision is an invalid intrusion upon the power of the Supreme Court to exercise its

contempt jurisdiction (support drawn from the *Kirk* principle)<sup>59</sup>. Secondly, that the provision is an invalid intrusion upon one of the Supreme Court's defining characteristics ie, its power to deal with contempt; thereby affecting the institutional integrity of the Supreme Court (support drawn from the *Kable principle*).<sup>60</sup>

At the time of printing of the Report, the Taskforce understands that no special leave application has been made, seeking to challenge the orders, before the High Court of Australia.

#### TASKFORCE DISCUSSION

The punishment regime under section 199 again raised, for consideration by the Taskforce, the arguments in support of and against mandatory sentencing. Those arguments have previously been outlined exhaustively in this Report in the context of the VLAD Act and need not be repeated.

The Bar Association of Queensland (BAQ)<sup>61</sup>, the Queensland Law Society (QLS) and the PIM remained fundamentally opposed to mandatory sentencing regimes in this context also.

The Taskforce acknowledges that the punishment for contempt must be sufficiently strong to encourage compliance with the Act and/or the contemnor to purge the contempt.

However, the concern of all Taskforce members (with the exception of the Commissioned Officers' Union) is that the new sanctions under the CCA, particularly by the time of the third contempt, are manifestly excessive and approach levels that would be viewed as 'crushing' at law.<sup>62</sup>

Objectively, those members concluded, the severity of the penalty regime taken as a whole is quite detached from any consideration of proportionality with the nature and seriousness of the conduct (acknowledging, of course, that contempt is very serious).

The punishment of contempt falls, historically and naturally, within the inherent power of the Supreme Court; the imposition of the fixed mandatory sentencing regime in the exercise of that power is an unnecessary, unwarranted and, arguably, unattractive intrusion into this traditional power by Parliament.

In the result the Taskforce, with the exception of the Commissioned Officers' Union (and operationally, the Queensland Police Service), supports the repeal of the fixed mandatory minimum sentencing regime in section 199(8A-B) of the CCA.

Instead, those members support an escalating, tiered *maximum penalty* scheme to punish conduct amounting to contempt of the CCC (and, also, support the inclusion of provisions that would allow the convicted person to purge their contempt).<sup>63</sup>

It should be noted, too, that the Taskforce (other than the Commissioned Officers' Union) was also concerned by the broad scope of this particular amendment. While couched within an amending Act clearly targeted at OMCGs, and unlike the new *special intelligence operations*, the new mandatory sentencing regime *is of general application*.

That is, it applies to contempt of the Commission (in the manner outlined in section 199(8A)), irrespective whether the hearing relates to a criminal organisation or its participants; and, irrespective whether the person is identified as having ties with OMCGs.

It is a regime which applies equally to those who are peripheral to organised crime and will apply to corruption and other investigations where there is not, necessarily, any perceived need to break the 'code of silence' seen to exist within OMCGs.

That concern was addressed by the Commissioned Officers' Union and QPS (who support the retention of the mandatory minimum penalties) with the concession that, if considered necessary by the Government, the regime might be restricted to participants in criminal organisations only.

### INCREASED MAXIMUM PENALTIES FOR CERTAIN OFFENCES

The Taskforce recommends no change to the increased maximum penalties under sections 82, 183, 185, 188, 190 and 192 of the CCA: that is for the offences of non-compliance with a notice to attend hearing, a refusal to take an oath, a refusal to produce a document or thing, or a refusal to answer a question (including, in the context of a corruption investigation).

The maximum penalty for these offences was increased from 85 penalty units and 1 year imprisonment to 200 penalty units and 5 years imprisonment respectively.

The CCC supports these increased maximum penalties: it says the change brings Queensland into better alignment with similar provisions at the national level.

In confidential advice, the CCC advised the Taskforce that since the increase, no one has been proceeded against for the statutory offences (noting that, ordinarily, a witness is proceeded against under the CCA offence provisions *or* for contempt of the Commission – but not, usually, both).

The Taskforce accepted the force of these submissions.

### REMOVING FEAR OF RETRIBUTION AS A REASONABLE EXCUSE

The CCC has investigative powers not ordinarily available to police and which also override certain longstanding fundamental principles of criminal justice. Those very strong and unusual powers reflect, however, the historical influences which lead to its creation and its continuing purposes.

Adjunctive to its power to compel witnesses to attend to give evidence or to produce information or a thing, it is an offence under the CCA (separate to the issue of contempt) for a witness to fail or refuse to comply *unless the person has a reasonable excuse*.<sup>64</sup>

The CCA makes it very clear that a person cannot refuse to do any of these things on the basis of self-incrimination, or by claiming a right to silence, and they are not *reasonable excuses*; but, the CCA also puts clear restrictions on the *use* that can be made of compelled evidence against the individual (with one logical exception, perjury).<sup>65</sup>

While that evidence is not admissible against *the person* in a criminal, civil or administrative proceeding (except in the context of a confiscation proceeding, discussed below) it *can* be used against others.<sup>66</sup>

This is known as *derivative use* – evidence obtained as a result of compelled answers such as any documents obtained, or other witnesses identified; the ‘fruits’, as it were, of lines of investigation opened as a result of the compelled testimony.

Crucially, the 2013 suite included an additional caveat in relation to these particular non-compliance offences; that is, to provide that:<sup>67</sup>

A person’s fear, *whether genuinely held or not*, of:

- (a) personal physical harm or damage to the person’s property; or
- (b) physical harm to someone else, or damage to the property of someone else, with whom the person has a connection or bond;

is *not* a reasonable excuse, where that person is a participant in a criminal organisation and the crime investigation or intelligence hearing is about a criminal organisation or a participant in a criminal organisation.

(emphasis added)

This is a very significant amendment. The Explanatory Notes justify this grave infringement on the rights and liberties of individuals largely on what might, again, be called ‘operational’ grounds, without recourse

or reference to those rights or any effects upon them.

The Explanatory Notes said the amendments were necessary because ‘aspects of the amendments relating specifically to criminal organisations are justified on the basis that the CMC [now the CCC] will be more able to effectively deal with the clandestine operations of criminal organisations and protect public safety.’<sup>68</sup>

This new statutory qualification on the ability of a witness to raise and rely upon a reasonable excuse for non-compliance troubled the Taskforce. The matters it considered are set out below.

#### JUDICIAL INTERPRETATION OF WHAT CONSTITUTES A ‘REASONABLE EXCUSE’

The Taskforce first analysed how the courts had interpreted a ‘reasonable excuse’ based on fear of retribution to see whether the amendment was apparently necessary to address a gap, or perceived gap, in the legislation.

The Taskforce found, unequivocally, that it was not.

Case law shows that the courts had taken a very strong position against unsustainable claims of ‘reasonable excuse’ on the basis of a claimed fear of retribution even before the amendment so as to ensure the integrity of, and unimpeded achievement of, the public policy objective which underpins the conferral on the Commission of its exceptional powers.<sup>69</sup>

The case of *Crime and Misconduct Commission v WSX & EDC*<sup>70</sup> illustrates this approach to the legislation *before* the 2013 amendments:

WSX was the victim of a serious assault committed by armed men, in disguise, who entered his work premises. He was rendered unconscious and hospitalised. He did not complain or make a statement to police about the matter.

The CMC started an investigation, with coercive hearings, into offences of violence suspected of having been carried out (or which may in the future be carried out by) members and associates of a particular OMCG.

WSX was required to attend under notice to answer questions in order to determine the identity of his attackers and their motives. (It was thought that the assault was part of a tit-for-tat series of attacks between rival OMCGs).

The CMC conducted a closed hearing and non-publication orders were made but it was also made clear that WSX’s answers would be given to law enforcement agencies and the prosecution.

WSX answered some questions, but would not answer questions related to the attack. He said:

*‘I have a reasonable excuse specifically I was the victim to a severe bashing. I’m genuinely fearful of my safety and life if I answer any questions about these matters.’*

The presiding officer examined his claim of reasonable excuse and invited WSX to lead evidence about why he was genuinely fearful. (It might be thought that to do so would, in effect, have required WSX to answer the question that he feared responding to). WSX did not do so, although his legal representative made submissions. The presiding officer nevertheless ruled that he *did not* have a reasonable excuse for not answering.

The hearing involving EDC proceeded along the same lines. (He was a co-worker of WSX and was also assaulted during the property invasion on that day.)

WSX and EDC appealed to the Supreme Court against the decision of the presiding officer.

The judge considered that *there is a real prospect that if compelled to answer the questions they will be exposed to further violence. On the assumption that the answer would assist in identifying those who assaulted the applicants, its use in those circumstances is likely to suggest they are the source of it. The conclusion that the applicants face a real prospect of further violence is reinforced by the nature of the organisation under investigation.* The court held that it was unreasonable to require either WSX or EDC to answer.

The CMC appealed that ruling to the Queensland Court of Appeal. It was considered that the only *evidence* justifying a reasonable excuse to answer was that the respondents had been victims of a serious assault and that they *subjectively* feared reprisal (because they refused to lead evidence).

The Court found that: ***whether reasonable excuse exists is a matter for objective determination, and the consequences of a refusal to answer, to both the examinee and the commission, are relevant considerations.***

***There is a high public interest in identifying those responsible for serious criminal offending.***

***In order to constitute duress [in the sense of relieving the witness of the obligation to give evidence under compulsion] it is necessary that there be elements of immediacy, directness and fear in respect of what has been done.***

***...The decision maker had to balance the respective considerations of the public interest in tracking those responsible for violent crime, and the private concerns of those who may be able to disclose those responsible.***

(emphasis added)

In the case of WSX and EDC, the Court of Appeal considered that the public interest prevailed and they could not claim a

reasonable excuse based on fear of retribution to avoid answering the questions in the coercive hearing.

The majority of the Taskforce acknowledged the very high threshold judicially required in order to raise reasonable excuse on the basis of fear of retribution (a prevailing position at the time of the 2013 suite).

The concern of the majority of the Taskforce is that the 2013 amendment constitutes a blanket refusal to permit the fear of reprisal to constitute an acceptable basis for non-compliance, even in compelling circumstances – eg, where the person not only has a subjective fear but, also evidence to objectively substantiate that fear (including, for example, fear of reprisals against family members or a child).

This consequence was one the Taskforce found alarming. The proposition that a person might be compelled to answer a question despite a strong, vivid and immediate – and, objectively justified – fear of physical harm to themselves or those close to them was, in the strong view of the Taskforce, simply untenable.

#### FAIRNESS

Taskforce concern was only heightened when this ‘blanket refusal’ provision was viewed in the context of the newly inserted definition of *participant in a criminal organisation*.

The breadth of the current definition of this phrase (discussed in detail elsewhere in the Report) means that it is not only obvious members of criminal organisations who are prohibited from relying on a fear of retribution but, also, persons who are much more peripherally categorised as ‘participants’ – eg, *a person who attends more than one meeting or gathering of persons who participate in the affairs of the organisation in anyway; or someone who takes part in the affairs of the organisation in any other way* (at any time across the preceding two years).<sup>71</sup>

By way of a hypothetical example:

A former girlfriend of a person who associates with an OMCG called 'B' might conceivably be issued with a notice to attend and give information as part of an intelligence hearing. She may have been partnered with B for many years before he became involved with the OMCG; they may have children together; and their relationship may be characterised by significant domestic violence (a fact which, for the purpose of the example, is clearly established on the materials before the CCC). She fled the relationship because of the violence. She has no criminal history, has steady employment and, since separation from B has rebuilt her life. The information sought by the CCC is of a nature that B might readily infer came from her.

The 2013 amendment means that this witness would have no legitimate or effective legal grounds to refuse to answer the questions on the basis that she genuinely fears reprisal. Indeed, to refuse means that she faces criminal sanctions or contempt (punishable by actual imprisonment, with the escalating fixed mandatory minimum sentencing regime).

This is a vivid illustration but not, the Taskforce believes, a fanciful one. It exemplifies what can be the dangerous reality of the operation of the amendment, for some witnesses. It also exemplifies, the Taskforce concluded, the manifest and striking injustice dormant within the amendment.

It raises, the Taskforce concluded, a compelling and legitimate (and not, its members felt, sensational) question: whether Queenslanders wish to give their law enforcement institutions such powers despite the plain risks attached to their exercise (in the worst cases, risks to life and limb).<sup>72</sup>

To be clear, the Taskforce members who hold concerns about the 'blanket refusal' are *not* suggesting that non-compliance without reasonable excuse should not be an offence, or that punishment of contempt should not be available (and indeed, on the example

provided, the witness may appropriately and reasonably face both prospects).

What troubles the majority of the Taskforce is that the witness is denied any right to raise fear of reprisal (even if it is subjectively and objectively substantiated) to ground a claim that they have a reasonable excuse not to comply; or, to have that claim properly scrutinised and tested by the CCC and, if desired, the decision appealed to the Supreme Court for adjudication.<sup>73</sup>

The consequences are so potentially serious that the majority of the Taskforce considers that process that existed prior to the amendments *must* be afforded to the witness before they are compelled to comply.

#### RISK OF PERJURY

For some on the Taskforce these concerns converge into another problem: the risk that witnesses with a genuine and legitimate fear of retribution might make a calculated decision (after weighing up their realistic, and unattractive options) to chance prosecution for perjury rather than face harm, or imprisonment for contempt.

That is, the person may quite reasonably consider it better in terms of self-preservation to perjure themselves before the Commission, by fabricating an answer or information, rather than say or do nothing.

This prospect was of equal concern to the majority of the Taskforce in the context of the mandatory minimum sentencing regime for contempt.

In confidential advice the Taskforce was informed by the CCC that, already, witnesses faced with the prospect of further prosecution for contempt have given evidence of varying quality, and the CCC considered that two were significantly untruthful in their evidence.

The CCC further reported that it appears that some witnesses, faced with the prospect of further mandatory term of imprisonment of two years six months, decide to attempt

perjury instead – presenting a challenge for investigators and counsel assisting to ensure that sufficient evidence is available to disprove false testimony. However, the CCC did not consider this problem extinguished what it saw as the coercive value of the new regime.

The majority of Taskforce members took a different view: that the risk of fabrication of information and perjury is of significant concern, given that it strikes at the heart of the central purpose for which the CCC was created and given its extraordinary functions and powers.

The risk of perjured testimony plainly, some members felt, is anathema to worthwhile, properly directed CCC investigations. It carries all sorts of potential problems: misguided and misdirected enquiries, untruthful and unjust accusations, and wasted resources.

#### TASKFORCE DISCUSSION

The Taskforce (with the exception of the Commissioned Officers' Union, and the QPS) considered the statutory exclusion of the fear of retribution as a reasonable excuse under sections 74(5A); 82(6); 185(3A); 190(4) of the CCA should be repealed on the basis, at least, that the jurisprudence in this regard already reveals a robust approach was being taken by the courts prior to the 2013 suite. Other difficulties produced by the amendments simply cemented the view of the majority of members.

#### EXECUTIVE DECLARATION AND THE DEFINITIONS OF PARTICIPANT AND CRIMINAL ORGANISATION

Prior to the 2013 suite, the CCA did not include a definition for the term '*participant in a criminal organisation*'.

The CCA used (and continues to use) the concept of 'major crime' which, by definition, includes, 'organised crime'.

*Organised crime* is a reference to criminal activity that involves:<sup>74</sup>

- indictable offences punishable by not less than seven years imprisonment; and
- two or more persons; and
- substantial planning and organisation or systematic and continuing activity; and
- a purpose to obtain, profit, gain, power or influence.

The purpose of the CCA is anchored to the concept of *major crime* and it is the foundation of the CCC's prevention, crime, intelligence and research functions.<sup>75</sup>

The 2013 suite inserted a new concept into the CCA; that is, a '*participant*' in a '*criminal organisation*' (to sit alongside the existing definitions under the Act).<sup>76</sup>

The definition of the term 'participant in a criminal organisation' underpins the CCC's *special intelligence operations* (for crime and corruption purposes) and the *immediate response function*.

The approach taken is essentially consistent with the way the term is defined under the modified definition in the Criminal Code (but, instead, relies on the *Crime and Misconduct Regulation 2005* (Qld), section 18). The Code definition, and the areas of focus for the Taskforce in regard to it, are discussed elsewhere in this Report and need not be repeated.

Again as discussed elsewhere in this Report, the nature of organised crime is changing with a shift, at least for some groups, away from the traditional hierarchical models toward a more flexible, less rigid, shape-shifting style of grouping. This trend has also been observed by the CCC and communicated to the Taskforce.

The CCC considers that the current definition of 'criminal organisation' presents a challenge to the expansion of its intelligence hearings beyond OMCGs.

The Taskforce considers that its proposed change to the definition of *participant in a criminal organisation* under its renewed Organised Crime Framework will complement the CCC's expanded powers, while appropriately harnessing the parameters of what it means to be a participant.

While operations by the CCC relating to criminal organisations have related to declared organisations under the Regulation, the CCC has advised the Taskforce that it is developing a strategy for the identification of further criminal organisations beyond OMCs which may in the future be the subject of a special intelligence operations.

Therefore to omit Limb 3, the 'executive declaration' limb of the prevailing definition of *criminal organisation*, while likely to impact upon the CCC, will not prohibit it from exercising its functions and is not an insurmountable hurdle.

Indeed, the CCC has advised that it is already developing a strategy to go beyond examination of the 26 organisations declared under the 2013 suite, which have been the subject of extensive focus already.

### THE ABSOLUTE DISCRETION OF THE CCC TO REFUSE TO DISCLOSE EVIDENCE TO AN ACCUSED PERSON

Before the 2013 suite, evidence which was given or produced at any hearing before the CCC relevant to an accused person's defence against a charge before a court *had to be* disclosed (upon request) by the CCC, either to the accused or their legal representatives.<sup>77</sup>

This strict disclosure requirement could only be circumvented by application to the Supreme Court of Queensland for a declaration that it would be 'unfair to a person or contrary to the public interest' to disclose the information.<sup>78</sup>

The amendments contained in the 2013 suite inserted section 201(1) into the CCA. It gave the Commission full authority to refuse to

disclose information given or produced at an intelligence function hearing or a hearing authorised under the immediate response function power.

The amendment does not explicitly prevent the CCC from disclosing information obtained in these hearings of its own volition.

Instead, it gives the CCC an absolute discretion to refuse to disclose it if it so chooses, although it is still bound by general obligations of fairness and impartiality<sup>79</sup> and must consider any request for the disclosure of evidence in light of those obligations.<sup>80</sup>

Taskforce members considered this abrogation of the traditional disclosure rule carefully – but not, it must be said, without a measure of something approaching shock. It turns a long-settled principle of our criminal law on its head and it was, unsurprisingly, of considerable concern to all members – such that a strong consensus arose, for its repeal.

### WAS THERE ALREADY A RESTRICTION ON THE DISCLOSURE OF CCC EVIDENCE BEFORE THE 2013 AMENDMENTS?

Prior to the 2013 amendments section 201(4) of the CCA was open to be used to protect the integrity of evidence obtained by the CCC by restricting its disclosure to a defendant or their legal representative in appropriate and necessary circumstances.

The CCC is required to make an application to the court to prevent the disclosure of evidence. Given the very serious implications for fairness when evidence is not disclosed to an accused, orders under section 201(4) appropriately lie within the exclusive jurisdiction of the Supreme Court.

The Supreme Court can only grant the order if it is satisfied that it would be either unfair to a person, or contrary to the public interest, to allow the evidence to be disclosed.

This affords an appropriate level of protection for the sometimes highly sensitive information which comes into the possession of the CCC

while, also, carefully balancing the need to protect the integrity of that evidence against the fundamental rights of an accused person to know all and any evidence relevant to their charge.

The Court provides a necessary safeguard, ensuring that an important system of checks and balances is in place to exclude any potential for misuse, or *perceived* misuse, of the power.

#### WHAT IS THE APPROACH IN OTHER JURISDICTIONS?

Different jurisdictions across Australia have similar caveats governing the disclosure of evidence given or produced in coercive hearings.

All relevant jurisdictions, though, leave the ultimate decision regarding any restriction on the disclosure of evidence to the courts (unlike Queensland, after the 2013 suite amendments).

#### VICTORIA

In terms of the disclosure of coerced evidence given to the Independent Broad-Based Anti-Corruption Commission (IBAC), Victoria takes a similar approach to Queensland, pre-2013 amendment.

In those circumstances, a person (presumably an accused or their legal representative) may issue a subpoena for evidence, documentary or otherwise, in the possession of IBAC.<sup>81</sup> IBAC may then object to the disclosure of evidence via an application to the court.<sup>82</sup>

In considering whether the evidence in question should be disclosed, the court must consider (among other things):<sup>83</sup>

- the need to protect the confidentiality of IBAC investigative methods;
- any risk to the identity of an informer or other witness; and
- the public interest.

#### NEW SOUTH WALES

New South Wales allows its Crime Commission to direct that any evidence given before it, or any document produced at a coercive hearing, may not be published or disclosed *except* as directed by the Commission.<sup>84</sup>

An accused person may then apply to the court for a certificate to the effect that the Commission must make the evidence available to the court.<sup>85</sup>

Once received by the court, the evidence is then examined and, if appropriate, made available to the accused or their legal representative – and the prosecutor, although the disclosure of coerced evidence to prosecutorial agencies is further restricted by the next section in the NSW legislation,<sup>86</sup> which addresses issues raised in the recent High Court decision in *Lee v The Queen*.<sup>87</sup>

In considering firstly whether to issue a certificate for the production of evidence, and secondly whether the evidence need be disclosed to the parties, the court must have regard to question whether it would be in the interests of justice to do so.

#### THE COMMONWEALTH, SOUTH AUSTRALIA, THE NORTHERN TERRITORY, TASMANIA & THE AUSTRALIAN CAPITAL TERRITORY

For those jurisdictions which are covered by Australian Crime Commission legislation (that is, the Commonwealth and those states listed above, which do not have a dedicated independent body separate from their police service which deals specifically with crime – eg, the CCC, IBAC, and the NSW Crime Commission), a similar approach is taken to New South Wales.

In effect, where a person has been charged with a federal or state offence the court in those jurisdictions can issue a certificate requiring that the evidence be disclosed to the accused, or their legal representative, if it is desirable in the interests of justice to do so.<sup>88</sup>

**THE RIGHT TO A FAIR TRIAL**

The right to a fair trial is a ‘cardinal requirement of the rule of law’ in any democratic society.<sup>89</sup> The Australian legal system guarantees an accused person this right.<sup>90</sup>

What characterises a fair trial will ultimately turn on the facts of each case,<sup>91</sup> but the *International Covenant on Civil and Political Rights* (ICCPR) prescribes some very basic elements common to all cases – eg, the presumption of innocence, and a hearing before an independent and impartial court.<sup>92</sup>

Implicit in the right of an accused person to defend themselves against any criminal charge is the right to know the particulars of the case of the case against them, and to obtain all relevant evidence in the case.<sup>93</sup>

**BREACHING THE GOLDEN RULE OF FULL DISCLOSURE**

Ancillary to the right to a fair trial is the prosecutorial duty to disclose, to an accused person, any and all relevant evidence in its possession. The duty has been referred to by Lord Bingham as the ‘golden rule’ of full disclosure.<sup>94</sup>

The disclosure of all relevant evidence in an accused’s criminal trial serves the proper administration of justice.<sup>95</sup>

The High Court has clearly articulated ‘the desirability, in the interests of justice, of obtaining the fullest possible access to the facts relevant to the issues in a case’.<sup>96</sup>

This well-established common law principle is reflected in section 590AB of the Criminal Code which requires Queensland prosecution bodies to give an accused person *full and early disclosure* of:

- (a) all evidence the prosecution proposes to rely on in the proceeding; and
- (b) all things in the possession of the prosecution, other than things the

disclosure of which would be unlawful or contrary to public interest, that would tend to help the case for the accused person.

Where this does not occur and evidence is not disclosed, an appealable error arises. The Queensland Court of Appeal has previously considered a breach of section 590AB and found that the court ‘cannot ignore *even a relatively slim possibility* that the defence has been forensically disadvantaged by the non-disclosure’ (emphasis added) and said that appeals in those circumstances should be allowed.<sup>97</sup>

**OFFENDING THE FUNDAMENTAL LEGISLATIVE PRINCIPLES**

Abrogation of the disclosure principle also offends the fundamental legislative principles of natural justice and procedural fairness protected under section 4(3)(b) of the *Legislative Standards Act 1992* (Qld).

Natural justice and procedural fairness dictate that information relevant to an accused person’s case must be disclosed, and that legislation should be drafted in a manner which is consistent with that obligation.

The Explanatory Notes to the 2013 amendment acknowledge that section 201(1A) of the CCA impinges on these principles, but explain the necessity of restricting disclosure in terms that it maintains the integrity of CCC intelligence, and ensures that defendants are not allowed unfettered access to it.<sup>98</sup>

It is difficult to comprehend why this provision was considered necessary in light of the pre-amendment state of the legislation, which already gave the CCC an avenue to seek a restriction on the disclosure of evidence in appropriate circumstances.<sup>99</sup>

This pre-existing legislative protection, which the Explanatory Notes entirely ignore, must inform any assessment of the adequacy of the justification provided in the Notes.

### A POSSIBLE CONSTITUTIONAL FLAW

If, contrary to the ultimate recommendation of the Taskforce, the Queensland Government elects to retain subsection 201(1A) it should be alert that there are (at least potentially) questions and concerns about the constitutionality of the provision.

The issue with the amendment lies in the fact that it significantly alters the balance between the power of the state as the prosecutor, and the power of the accused.<sup>100</sup> In effect, it allows an accused person to be convicted of an offence despite, for example, the existence of directly relevant and exculpatory evidence.

The right to a fair trial is, again, ingrained in Australia's legal system. The High Court has acknowledged as much in *McKinney v The Queen* and *Dietrich v The Queen* where the court expressly recognised that the entitlement of an accused person to a fair trial is 'the foundation of the rule of practice'.<sup>101</sup>

Generally, fundamental tenets of the adversarial justice system (and, as it is referred to in *Lee v The Queen*<sup>102</sup>, the *accusatorial* system) cannot be altered without express legislative intent.

While there is some limited scope for legislative abrogation of these fundamental tenets in certain circumstances it would be difficult, in light of the obiter in *Dietrich*, to '... argue that Parliament could, consistently with the separation of judicial power, require courts to conduct unfair trials'.<sup>103</sup>

If the Government elects to retain this aspect of the 2013 amendments despite the recommendation of the Taskforce, it should consider commissioning independent legal advice as to the constitutional viability of section 201(1A) of the CCA.

### THE PERSPECTIVE OF THE CCC

In confidential advice given to the Taskforce the CCC identified what were, to its perception from an operational perspective, three benefits flowing from section 201(1A).

First, the CCC raised that the restriction on the disclosure of evidence was relevant only to that information which was obtained under an intelligence function hearing or a hearing convened under the immediate response function.

The purpose of intelligence function hearings is, as discussed above, as a proactive measure to gather information regarding specific areas of interest. This may include, for example, exploring the composition and dynamics of criminal networks, and the manner in which they function.

Intelligence function hearings are unique in that they are not undertaken to investigate specific incidents of criminal activity – major crime investigative hearings<sup>104</sup> are, for example, used in those kinds of cases.

The CCC advised the Taskforce that the information gathered in an intelligence function hearing (as opposed to a major crime investigation hearing) was 'more sensitive in that it may touch on ongoing investigations, or be the basis of future investigative strategy or direction' and that 'any positive obligation to disclose such information may undermine the effectiveness of the intelligence gathering function'.<sup>105</sup>

But it is relevant to note, again, that where the disclosure of certain evidence presents a concern for the CCC in terms of protecting its integrity and sensitivity, an application can always be made to the Supreme Court to restrict the disclosure;<sup>106</sup> and, again, that this avenue for restriction does *not* rely on the section 201(1A) amendment.

Secondly, the CCC submitted that the candour of witnesses called before these coercive hearings may be influenced by the knowledge that any evidence or information which they do provide may be disclosed in the course of later criminal proceedings.<sup>107</sup> The CCC was concerned that witnesses, in particular those who are fearful of retribution or reprisal, 'may be discouraged from giving truthful evidence by this fact'.<sup>108</sup>

But, again, the protection of a witness or informer would arguably be a public interest consideration for the Supreme Court to take into account in any application by the CCC to restrict the disclosure of certain evidence under the pre-existing provision in section 201(4) of the CCA.

Thirdly, the CCC expressed the opinion that including intelligence function hearings and immediate response hearings within the ambit of section 201 of the CCA would have additional resourcing implications. The CCC advised that ‘identifying all intelligence gathered through hearings and collating it for disclosure could be an onerous undertaking’.<sup>109</sup>

That is a matter for proper concern, but any administrative burden must be weighed against the way the new provision gravely impinges upon the ‘golden rule’. On any view, the affront to this fundamental principle is substantial, and grave.

The three matters raised by the CCC, while relevant considerations in a practical, operational sense, do not in the opinion of the Taskforce provide an adequate justification for the retention of the amendment. The first two can be appropriately addressed by an application to the Supreme Court to restrict disclosure, and the third relates to a subjective administrative matter which, the Taskforce believes, pales beside its drastic consequence.

#### TASKFORCE DISCUSSION

In the course of its discussions all members of the Taskforce accepted that there will be instances where it may become necessary to restrict the disclosure of certain evidence from a defendant and/or their legal representative.

The majority of Taskforce members were, though, of the firm view that the pre-existing disclosure regime under the CCA (by application to the Supreme Court) was both a sufficient, and the most appropriate, means by which to restrict disclosure of evidence.

The BAQ, in its submission to the Taskforce, provided what some other members saw as a useful insight into one practical effect of the 2013 amendment on the administration of justice:<sup>110</sup>

*The continued existence of the provision ‘causes potential bases for trials to be stayed until such material are disclosed raising the potential for further unnecessary costs being expended in criminal trial litigation’.*

The QLS agreed with the concerns raised by BAQ. The legal representatives, along with the PIM and the chair felt that giving the CCC an absolute discretion to withhold evidence from an accused person, without any oversight by the court, was inherently unfair and without any compelling justification – and, was unnecessary.

The Queensland Police Union was, similarly, of the view that restricting the disclosure of evidence under section 201(1A) of the CCA involves a fundamental breach of the core principles of the criminal justice system.

The Commissioned Officers’ Union, while not specifically signifying its preferred course of action with respect to the section 201(1A) amendment, preferred a global approach to the CCA which included the retention of the amendment.

Ultimately, the Taskforce (with the exception of the Commissioned Officers’ Union) concluded that the complete abrogation of the disclosure principle, and lack of oversight, under section 201(1A) of the CCA was unnecessary and so offensive to core principles of Queensland’s legal system that its retention could not be supported.

#### RESTRICTING A PERSON’S ABILITY TO ACCESS FINANCIAL ASSISTANCE FOR LEGAL REPRESENTATION

Section 205 of the CCA provides that a person who has been summoned by notice to attend a CCC hearing is able to make an application

for financial assistance to retain legal representation for the purpose of participating in the hearing.<sup>111</sup>

This financial assistance is also available for persons who are appealing a decision made by the Presiding Officer at a CCC hearing.<sup>112</sup>

The 2013 amendments removed this right to apply for financial assistance for a hearing authorised under the immediate response function of section 55F of the CCA.<sup>113</sup>

Part of the 2013 suite also allowed the CCC to conduct intelligence function hearings. Prior to those amendments, there was no ability for the CCC to hold hearings pursuant to this function.

Section 225 of the CCA is limited in its scope to persons who 'have been given a notice to attend a commission hearing for a *crime investigation*' (emphasis added) – intelligence function hearings do *not* fall within the ambit of this provision and financial assistance applications appear to be unavailable to witnesses appearing before those hearings.

Applications are made to the Attorney-General and it is within the Attorney's discretion whether financial assistance is provided and, if so, the extent of that assistance.<sup>114</sup>

The Attorney-General will consider the particular circumstances of the matter and whether, without financial assistance, a person may suffer substantial hardship and draw upon these considerations to make the decision.<sup>115</sup>

The financial burden of any assistance granted by the Attorney-General is the responsibility of the CCC.<sup>116</sup>

The amendment to restrict a person's access to financial assistance is not inconsistent with the fundamental legislative principles set out in section 4(3)(b) of the *Legislative Standards Act 1992* (Qld) (the FLPs are silent on state-funded financial assistance towards legal representation). The amendment does not preclude a person from obtaining legal representation but, instead, removes their

ability to apply for financial assistance in certain types of hearing.

#### WHAT IS THE APPROACH IN OTHER JURISDICTIONS?

The NSW Crime Commission, Victorian IBAC, Western Australian Corruption and Crime Commission and the federal Australian Crime Commission each have a provision within their governing legislation to allow persons appearing before coercive hearings to receive either legal representation *or* financial assistance towards that representation.

The distinction between these states and Queensland is that the Queensland legislation only provides for an application for financial assistance for legal representation, not for the provision of legal assistance itself.

The schemes closest to Queensland are the federal and NSW systems – in those jurisdictions applications for assistance are made to the respective Attorneys-General<sup>117</sup> who may then grant legal or financial assistance if satisfied either that it would cause substantial hardship to the applicant to refuse the application, or if the special circumstances of the case otherwise warrant the assistance.<sup>118</sup>

The process in Victoria is analogous but the application is, instead, made for legal assistance<sup>119</sup> to a 'prescribed person' (defined as a person who can approve legal assistance as prescribed under a regulation to the legislation<sup>120</sup>). The Victorian legislation does not provide any criteria as to the matters to be taken into account when determining a person's application for assistance.

The Western Australian system works a little differently. Under the *Corruption and Crime Commission Act 2003* (WA), if the Commission is aware that a witness called before a coercive hearing will not have a legal representative present at the examination, the Commission may arrange for the person to be provided with a representative.<sup>121</sup> The Commission need only consider that it would be in the public interest for the witness to be

legally represented (of course, the witness is entitled to decline representation if they so wish<sup>122</sup>).

Queensland is, then, unique. In *no* other Australian jurisdiction are persons appearing before coercive hearings excluded from applying for financial and/or legal assistance, where it is available.

#### THE RIGHT TO LEGAL REPRESENTATION

The right to a fair trial, a central and immutable tenet of our criminal justice system, has already been mentioned.

The right to a lawyer is, it can be cogently argued, cognate to the right to a fair trial.

The ICCPR acknowledges this in providing that a defendant to a criminal charge must have the opportunity ‘...to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to *have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.*’<sup>123</sup> (emphasis added)

A lack of legal representation will impact upon the question whether an accused person has received a fair trial, as the High Court made clear in *Dietrich*:<sup>124</sup>

‘...Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial.’

The High Court has also made it clear that it is within judicial power to *stay* criminal proceedings which will result in an unfair trial. (To stay a proceeding is to delay, or indefinitely pause, further legal process until such a time as the court rules otherwise.)

*Dietrich* affirmed that this power to stay a proceeding ‘necessarily extends to a case in

which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence.’<sup>125</sup>

#### NO RIGHT TO A LAWYER AT THE STATE’S EXPENSE

This fundamental right to a lawyer was affirmed by the High Court.<sup>126</sup> But, as the court also said, there is an important distinction between the right to a lawyer and the right to a lawyer *at the expense of the state*. The High Court did not go so far as to guarantee the latter.<sup>127</sup>

While the ICCPR clearly intends to enshrine a right to state-funded legal representation, it does not *ipso facto* create an equivalent guarantee in Australian state law: it has not been specifically implemented by domestic legislation, nor is there any ambiguity in existing legislation which requires clarification by reference to it. The High Court has been careful not to ‘create a new quasi-constitutional right to state-funded counsel’.<sup>128</sup>

#### HOW DO THESE PRINCIPLES APPLY TO COERCIVE HEARINGS?

A logical comparison can be made in applying the logic and principles espoused by the High Court in *Dietrich* to coercive hearings conducted by the CCC.

Coercive hearings are, by their nature, very serious. Their subject matter is often important to matters of individual or community safety, or protection from crime.

The consequences for any non-compliance are severe. While a witness in a coercive hearing is not on trial for any criminal offence, they are still liable to face a term of imprisonment if they do not cooperate (for example, by refusing to take an oath or answer a question).

The relevant logical comparison is between the potential severity of an outcome for a witness at a coercive hearing, and an accused at a criminal trial.

The High Court has said, quite clearly, that the need for and the desirability of an accused person facing a serious charge being legally represented is so great that their trial should only proceed without legal representation in the most exceptional cases.<sup>129</sup> In cases of that kind, the power to delay proceedings should otherwise be exercised by the court to ensure the accused receives a fair trial.

It is compelling that a coercive hearing in the CCC reaches, or approaches, the same high level of seriousness – and, by the standard laid down by the High Court, that any hearing of that kind should be delayed until the subject of it is able to obtain legal representation; or, until financial assistance is granted by the Attorney-General to fund it.

#### DELAYING QUESTIONING UNDER THE POLICE POWERS AND RESPONSIBILITIES ACT 2000 (QLD)

Delaying questioning for a person to obtain legal representation is a process that occurs on a regular basis under the *Police Powers and Responsibilities Act 2000* (Qld).

Under section 418 of the PPRA, before a police officer begins any questioning of a person for an indictable offence the person *must* be informed that they have the right to telephone or speak to a lawyer *of their choice* and to *arrange for that lawyer to be present during questioning*.<sup>130</sup>

Questioning must be then delayed for a ‘reasonable time’ to allow for the lawyer’s attendance. What is a reasonable time is often dependent on geographic or other practical circumstances – the distance a person has to travel, the complexity of the matters under investigation, etc. – but a general time frame of two hours is considered reasonable unless special circumstances exist.<sup>131</sup>

It is important to remember, though, that a person facing police questioning retains the right to refuse to participate in the process without punishment. This same right is not available to witnesses before coercive hearings

in the CCC – the consequences of refusing to participate are considerably more severe and, in some cases, can result in mandatory terms of imprisonment.

#### WHAT IS THE JUSTIFICATION FOR RESTRICTING FINANCIAL ASSISTANCE?

Immediacy and urgency are offered as the primary justifications for summoning a person before a coercive hearing under the immediate response function.

The purpose of those hearings is to enable the CCC to respond to incidents which threaten public safety (or may threaten public safety).<sup>132</sup> It is this urgency which, it seems, is said to justify the removal of a person’s right to apply for financial assistance towards their legal representation at the hearing.

#### HOW LONG DOES AN APPLICATION FOR FINANCIAL ASSISTANCE TAKE TO BE PROCESSED?

Ordinarily where a witness advises the CCC that they intend to make an application to the Attorney-General for financial assistance for legal costs, the hearing before which they have been called is adjourned until that application can be determined and funding arrangements are secured.<sup>133</sup>

The CCC has advised the Taskforce that this application process generally takes between four and six weeks from commencement to finalisation.<sup>134</sup>

Legal Aid Queensland (LAQ) identified in its 2015 submission to the Parliamentary Crime and Corruption Committee that there are often matters where witnesses are summoned to criminal investigation hearings ‘at short notice and do not have time to apply for financial assistance or the application may not have been determined by the time of the hearing’.<sup>135</sup>

LAQ noted that in many cases, even though financial assistance has not been formally approved, ‘LAQ lawyers will still assist the person in the hearing, to ensure they

understand their legal position and obligations and the risks associated with the evidence they may give at the hearing'.<sup>136</sup>

It is not clear to the Taskforce whether the services of LAQ in these circumstances extend to full representation during a coercive hearing (raising objections, questioning witnesses, and all the usual incidents of legal representation) or whether it is limited to more basic, pre-hearing advice.

#### **DOES THE IMMEDIACY OF THE HEARINGS OUTWEIGH THE IMPORTANCE OF AFFORDING PERSONS AN OPPORTUNITY TO RETAIN LEGAL REPRESENTATION**

The Taskforce recognises that any potential delay to these hearings may weaken their effectiveness. The urgency of a situation which threatens public safety and is therefore said to necessitate an immediate response hearing suggests that undue delay, such as may be occasioned by awaiting the outcome of an application for financial assistance, may be problematic.

A delay in questioning a witness in these circumstances may, the Taskforce accepted, effect the ability of the CCC to fulfil its statutory obligations in the scenarios envisaged by the immediate response function.

The Taskforce was nevertheless concerned that, given the seriousness of the hearing and the significant impact any noncompliance can have on a witness, it is desirable that they should if possible be allowed access to legal representation; and, if they cannot personally afford it, that they be able to apply for financial assistance towards that representation.

The Taskforce was, on balance and in the face of the undeniable seriousness of these kinds of hearings, persuaded that it sets a dangerous precedent to deny a person access, *at the very least*, to the application process for state-funded legal assistance (in circumstances where it is clear that a witness will suffer

substantial hardship and severe consequences if they are without legal representation).

#### **TASKFORCE DISCUSSION**

All Taskforce members, with the exception of the Commissioned Officers' Union, ultimately concluded that the ability to apply for financial assistance for legal representation should be extended to *all persons* appearing before the CCC in a coercive hearing – including, when those hearings are conducted under the immediate response or intelligence functions.

The BAQ, QLS, PIM and the chair expressed concerns that it was an unfair and unwarranted abrogation of a citizen's rights to explicitly deny them access to the application process for financial assistance to fund legal representation in these serious cases.

The QPU felt that the provision of legal assistance to these witnesses was vital, not only because it guarantees some basic protections for the rights of an individual to a fair process, but because it may also provide additional safeguards against the misuse of immediate response or intelligence function hearings. The QPU went a step further, and submitted that the safeguard would help serve to ensure that the CCC only undertook those hearings when it is absolutely essential.

The Commissioned Officers' Union addressed what it saw as a benefit accruing to the CCC if witnesses are allowed access to legal representation (and, state-funded legal representation if necessary) – that legal advice, even just in the initial stages of the process (ie, pre-hearing), would go some way towards alleviating any concerns the witness may have about giving evidence.

While the Commissioned Officers' Union saw the utility in broadening the scope of section 205 of the CCA to apply to witnesses in all hearings before the CCC, it ultimately took a global position which was consistent with retaining the amendment in its current form.

The QPU signified that it acknowledged the practical concern of the CCC (that the

application process for financial assistance could cause undue delay of urgent hearings) and suggested that the concern could be addressed by allowing the Chair of the CCC to authorise immediate, limited funding for legal assistance in those urgent circumstances.

As noted earlier, it is the majority recommendation of the Taskforce that section 205 of the CCA be extended to allow financial assistance applications in *all* cases (regardless of the category of hearing). In that light, it did not pursue the QPU suggestion or attempt to resolve questions arising from administrative delays.

### ALLOWING THE USE OF INFORMATION GATHERED IN A CCC HEARING IN CONFISCATION PROCEEDINGS

#### AMENDMENTS CONTAINED IN THE FIRST TRANCHE OF THE 2013 SUITE

The *Criminal Law (Criminal Organisations Disruptions) Amendment Act 2013* (Qld) amended section 197 of the CCA to provide that information given or produced under the CCC's coercive powers is admissible against a person in confiscation proceedings under the CPCA. The amendment provided that the information would be admissible regardless whether the person had claimed self-incrimination privilege before providing the information to the Commission.<sup>137</sup>

The CPCA provides for both conviction<sup>138</sup> and non-conviction<sup>139</sup> based property confiscation and forfeiture schemes. Proceedings under the CPCA are *civil*<sup>140</sup> proceedings not *criminal* proceedings.

It is important to note that section 197(2) of the CCA still contains a general prohibition against compelled evidence being admissible against individuals in civil, criminal or administrative proceedings.

As this amendment was contained in the first tranche of the 2013 suite it was not subject to the scrutiny of a Parliamentary Committee.<sup>141</sup>

#### AMENDMENTS CONTAINED IN THE SECOND TRANCHE OF THE 2013 SUITE

The *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* inserted section 265 into the CPCA which provides that any information obtained under section 197 of the CCA can only be admitted with the leave of the court.<sup>142</sup>

Section 265 of the CPCA provides that:

- the court *may* give leave unless the court considers that the admission of the compelled evidence would cause unfairness to a person in a criminal proceeding that outweighs the probative value of the evidence confiscation proceedings<sup>143</sup>;
- in deciding on whether the evidence may cause unfairness to a person the court *must*<sup>144</sup> consider:
  - whether the use of the evidence may prejudice a person's trial for a criminal offence for which the person *has been* or *may be* charged<sup>145</sup>; and
  - whether there is any action the court could take to prevent or limit the unfairness (such as private hearings and publication restrictions).<sup>146</sup>

With respect to fairness in the CPCA proceedings it is noteworthy that the deliberate use of the word *may* in section 265(2) provides the Supreme Court with an absolute discretion as to the admission of the evidence. This discretion needs to be considered alongside the Supreme Court's inherent jurisdiction to stay any proceedings under the CPCA where practical unfairness occurs.<sup>147</sup>

The second tranche of the 2013 suite also contained further amendments to the CCA to provide that the new section 265 of the CPCA applied retrospectively to all information provided under section 197 of the CCA from

the commencement date of the first tranche of the 2013 legislation, ie, 17 October 2013.

The second tranche amendments were considered by the Legal Affairs and Community Safety Parliamentary Committee.<sup>148</sup>

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#### THE RIGHT TO SILENCE, THE PRIVILEGE AGAINST SELF INCRIMINATION AND THE FUNDAMENTAL LEGISLATIVE PRINCIPLES

The amendments made in the first and second tranches of the 2013 suite allows for information gathered under the CCC's coercive powers to be used against a person in proceedings under the CPCA and thus arguably breaches a persons right to silence and privilege against self-incrimination.

As noted earlier in this Report the right to silence and the privilege against self-incrimination is a common law right providing that a person is not obliged to answer questions posed by an investigator that may possibly incriminate the person.

The High Court of Australia has approved<sup>149</sup> the following explanation of the right:

*'a party cannot be compelled to discover that which if answered, would tend to subject him to any punishment penalty, forfeiture, or ecclesiastical censure'*<sup>150</sup>

It is thought that the right has its origins in the inquisitorial procedures of the *Star Chamber and Court of High Commission* in the seventeenth century, when citizens were compelled to testify to their own guilt; and, as a response to that remarkable and frightening state of affairs.<sup>151</sup>

The right is acknowledged as a fundamental human right at article 14(3)(g) of the ICCPR which provides that, in the determination of any *criminal charge, as a minimum guarantee* a person should be entitled not to be compelled to testify against themselves or confess guilt.<sup>152</sup>

As noted elsewhere in this report, Australia has ratified the ICCPR but its provisions are not legally binding on state legislatures.<sup>153</sup>

It is within the power of state legislatures to lawfully abrogate the privilege against self-incrimination – just as the Queensland Legislative Assembly has done by providing the CCC with its coercive powers.<sup>154</sup>

However, in Queensland if the legislature chooses to abrogate the privilege it must provide sufficient justification for the breach of section 4(3)(f) of the *Legislative Standards Act 1992* (Qld).

Section 197 of the CCA goes to the heart of one of the safeguards that justifies the abrogation of this FLP: that is, the prohibition on the use or derivate use of compelled information in subsequent proceedings.<sup>155</sup> The first tranche of the 2013 suite amendments arguably represent a significant weakening of that safeguard.

The Explanatory Notes to the introductory Bill for the amendments in the first tranche of the 2013 suite justify the weakening of the safeguard in the following terms:

*'The ability of the State to effectively combat crime is enhanced by the laws, allowing assets obtained from criminal activity to be targeted and thereby depriving criminals of the spoils of their illegal activity. Currently, a person may be compelled in an examination order proceeding in a court to answer questions (even though the answers may tend to incriminate the person) and the evidence obtained can be used in subsequent confiscation proceedings. The CMC submit that the amendments allowing for the use of compelled evidence from CMC investigations and hearings in later confiscation proceedings will enhance the CMC's ability to confiscate the assets of criminals and combat major crime.'*<sup>156</sup>

The amendments in the second tranche of the 2013 suite to section 265 of the CPCA do, arguably, ameliorate the weakening of the

protections in section 197 of the CCA, to some extent, by providing that the leave of the court must be obtained before the evidence can be used; and that the court must consider any unfairness that its admission may cause to a person in their criminal trial.

It is also noteworthy that the amendments provide for the use of the compelled information in *civil* nor criminal proceedings.

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### THE APPROACH OF OTHER AUSTRALIAN JURISDICTIONS

A comparison table showing the different approach of Australian jurisdictions to the subsequent use of compelled evidence is Attachment 10.

The Commonwealth, South Australia, the Northern Territory, Tasmania and the Australian Capital Territory allow for the use of compelled evidence in confiscation proceedings.

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### CONSTITUTIONAL ISSUES

The second tranche of the 2013 amendments post-dated the decision of the High Court of Australia in *X7 v Australian Crime Commission*<sup>157</sup> and *Lee v New South Wales Crime Commission*<sup>158</sup> but pre-dated the High Court's decisions in *Lee v The Queen*.<sup>159</sup>

These cases deal in short, with the principle of legality<sup>160</sup> and how that principle relates to a person's fundamental rights to a fair trial; and the role that the privilege against self-incrimination plays in a fair trial.

The COA Review observed that 'it remains to be seen how the evolving principles in *Lee v The Queen* and *X7 v Australian Crime Commission* intersect with the ability of the CCC to use self-incriminating evidence to confiscate property'.

The Taskforce noted the concerns of the COA Review but, despite them, was of the view that the amendments to section 265 of the CPCA in the second tranche of the 2013 suite provided

a sufficient safeguard for the fair criminal trial rights of a person facing concurrent criminal and confiscation proceedings, by providing the Supreme Court with a discretion as to the admissibility of the evidence, and directing the court *specifically* to the consideration of an accused's rights to a fair trial.

The Taskforce noted that the subsequent use of evidence compelled by Crime Commissions across Australia is currently a heavily litigated area of law and, as a consequence, the case law on the subject is rapidly evolving. The burden that these amendments place on the Government is that it will have to continue to closely monitor the legality of the provisions in section 197 of the CCA and section 265 of the CPCA, in light of evolving jurisprudence.

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### USE OF THE PROVISIONS BY THE CCC

In confidential briefings to the Taskforce the CCC advised that this amendment had been utilised on a single occasion since its introduction, to assist in supporting an argument about the effective control of property in proceedings under the CPCA.

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### TASKFORCE DISCUSSION

The unanimous view of the Taskforce was that section 265 of the CPCA should effectively safeguard a person's right to a fair criminal trial in circumstances where criminal and confiscation proceedings overlap.

The Taskforce also took a degree of comfort from the fact that allowing the use of the information in confiscation proceedings was consistent with legislation in several other Australian jurisdictions.

### ALLOWING CCC INVESTIGATIONS AND/OR HEARINGS TO COMMENCE OR CONTINUE DESPITE CHARGES HAVING BEEN LAID AGAINST THE PERSON

Section 331 of the CCA, permits the CCC to commence, continue, discontinue or complete

an investigation or hearing under the Act *despite* any proceeding that may be on foot before a court, tribunal, warden, coroner, magistrate, justice or other person – whether the proceeding commenced before *or after* the investigation began.<sup>161</sup>

The 2013 suite amended section 331 to include an important caveat:

If the proceeding (eg, a trial or sentence hearing) is a proceeding for an indictable offence (eg, murder, robbery, assault, extortion) and is conducted by or for the State (eg, by the Office of the Director of Public Prosecutions), the CCC must, *if failure to do so might prejudice the accused's right to a fair trial*, do the following:

- conduct any CCC hearing relating to an investigation as a closed hearing during the currency of the proceeding (ie, during the criminal trial or sentence hearing); and/or
- prohibit publication (under sections 180(3) and/or 202) during the currency of the proceedings.

This amendment was not specifically directed at OMCGs but, rather, was intended to clarify CCC powers in the wake of the High Court decision in *X7*.<sup>162</sup>

It appears the 2013 suite happened to present the next appropriate legislative vehicle to progress the clarifying amendment post- the *X7* ruling, which was delivered on 26 June 2013.

While *X7* related to provisions under the Australian Crime Commission legislation the decision had relevance to Queensland because of analogous provisions under the CCA.

There were a number of legal questions to be resolved in *X7* (including constitutional concerns): in particular, whether the provisions should be construed so that the right to silence enjoyed by an accused in a criminal proceeding impliedly restricted the

powers of the examiner (empowered to conduct an examination of a person charged with an indictable offence where the examination concerns the subject matter of the offence charged) in the absence of an express provision to the contrary.<sup>163</sup>

The CCC supports the retention of the section 331 amendment.

The Taskforce also supports its retention. The Taskforce acknowledges that the case of *X7* raises potential legal issues beyond the scope of its Terms of Reference: in particular, regarding longer term considerations and the ramifications of the use that can properly be made of compelled evidence in a proceeding beyond the coercive hearing. It is recognised that this is a complex and ever changing area of constitutional law (a point highlighted by a recent decision of the High Court in *R v Independent Broad-based Anti-corruption Commissioner*<sup>164</sup>).

#### RECOMMENDATION 42 (Chapter Twenty)

The expanded intelligence functions under Chapter 2, Part 4, Divisions 2A and 2B of the *Crime and Corruption Act 2001* (Qld) should be retained. (unanimous recommendation)

#### RECOMMENDATION 43 (Chapter Twenty)

It is recommended that amendment be made to the *Crime and Corruption Act 2001* (Qld) to incorporate an oversight mechanism in relation to an exercise of the immediate response function; perhaps by the Crime Reference Committee or Public Interest Monitor or Supreme Court Judge. (not preferred by the Commissioned Officers' Union)

#### RECOMMENDATION 44 (Chapter Twenty)

The fixed mandatory minimum sentencing regime in section 199(8A-B) of the *Crime and Corruption Act 2001* (Qld) should be repealed. (not preferred by the Commissioned Officers' Union)

#### RECOMMENDATION 45 (Chapter Twenty)

It is recommended that consideration be given to inserting an escalating, tiered *maximum penalty* scheme to punish for conduct amounting to contempt of the Crime and Corruption Commission (and including the notion that a person can purge their contempt). (not preferred by the Commissioned Officers' Union)

#### RECOMMENDATION 46 (Chapter Twenty)

The increased maximum penalties under sections 82, 183, 185, 188, 190 and 192 of the *Crime and Corruption Act 2001* (Qld) should be retained. (unanimous recommendation)

#### RECOMMENDATION 47 (Chapter Twenty)

The statutory exclusion of the fear of retribution as a reasonable excuse under sections 74, 82, 185 and 190 of the *Crime and Corruption Act 2001* (Qld) should be repealed. (not preferred by the Commissioned Officers' Union)

#### RECOMMENDATION 48 (Chapter Twenty)

The provisions enabling a Magistrate (instead of a Supreme Court Judge) to issue a warrant for the apprehension of a person who has been give an attendance notice under sections 167 and 168 of the *Crime and Corruption Act 2001* (Qld) should be retained. (unanimous recommendation)

#### RECOMMENDATION 49 (Chapter Twenty)

Section 197 of the *Crime and Corruption Act 2001* (Qld) does not require further amendment (in light of the consequential amendment made to section 265 of the *Criminal Proceeds Confiscation Act 2002* (Qld)). (unanimous recommendation)

#### RECOMMENDATION 50 (Chapter Twenty)

Section 201 of the *Crime and Corruption Act 2001* (Qld) should be amended to remove subsection (1A). (not preferred by the Commissioned Officers' Union)

#### RECOMMENDATION 51 (Chapter Twenty)

Section 200A of the *Crime and Corruption Act 2001* (Qld), which provides for the confidentiality of particular proceedings, should be retained without amendment. (unanimous recommendation)

#### RECOMMENDATION 52 (Chapter Twenty)

Section 205 of the *Crime and Corruption Act 2001* (Qld) should be amended to remove subsection (1A). (not preferred by the Commissioned Officers' Union)

#### RECOMMENDATION 53 (Chapter Twenty)

The amendments made to section 331 of the *Crime and Corruption Act 2001* (Qld) should be retained. (unanimous recommendation)

## ENDNOTES

- 1 *Crime and Corruption Act 2001* (Qld), section 4; the Act also facilitates the CCC's involvement in confiscation related investigations.
- 2 *Crime and Corruption Act 2001* (Qld), section 12 and Schedule 2: see also the definitions for – criminal paedophilia, organised crime and terrorism.
- 3 *Crime and Corruption Act 2001* (Qld), section 9.
- 4 *Crime and Corruption Act 2001* (Qld), section 10.
- 5 *Crime and Corruption Act 2001* (Qld), section 5.
- 6 *Crime and Corruption Act 2001* (Qld), section 5.
- 7 <<http://www.ccc.qld.gov.au/about-the-ccc>>
- 8 *Crime and Corruption Act 2001* (Qld), section 220.
- 9 In 2014 the Crime and Misconduct and Other Legislation Amendment Bill contained a number of amendments which changed the title of 'CMC Chairperson' to 'CCC Chairman' throughout the CCA and other associated legislation. No justification for the policy change was provided in the Explanatory Notes to the Bill. A number of submissions to the Legal Affairs and Community Safety Committee raised issue with this change, noting that for the preceding 20 years the gender-neutral term 'Chairperson' has been preferred and that the revert to Chairman was a 'needless, anachronistic step' that achieves nothing more than to aggravate a significant proportion of the community. See Legal Affairs and Community Safety Committee, Queensland Parliament, Report No.62, April 2014, 87.
- 10 *Crime and Corruption Act 2001* (Qld), section 224.
- 11 *Crime and Corruption Act 2001* (Qld), sections 228-229.
- 12 Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Final Report* (1989) (the Fitzgerald Inquiry).
- 13 <<http://www.ccc.qld.gov.au/about-the-ccc/the-fitzgerald-inquiry>>
- 14 Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Final Report* (1989) 308 (the Fitzgerald Inquiry).
- 15 Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Final Report* (1989) 10.1-10.5 (the Fitzgerald Inquiry).
- 16 *Crime and Corruption Act 2001* (Qld), Chapter 2, Part 1.
- 17 *Crime and Corruption Act 2001* (Qld), Chapter 2, Part 3.
- 18 *Crime and Corruption Act 2001* (Qld), Chapter 2, Part 4, Division 1.
- 19 *Crime and Corruption Act 2001* (Qld), Chapter 2, Part 4, Division 3.
- 20 *Crime and Corruption Act 2001* (Qld), Chapter 2, Part 4, Division 3; <<http://www.ccc.qld.gov.au/about-the-ccc/legislation>>
- 21 The Crime Reference Committee is comprised of the Chairman of the CCC, the Commissioner of the Queensland Police Service, the Chief Executive Officer of the Australian Crime Commission and two persons appointed as community representatives.
- 22 Ie, an investigation conducted by the CCC in the performance of its *crime function* – Crime and Corruption Act 2001 (Qld), Schedule 2.
- 23 <<http://www.ccc.qld.gov.au/about-the-ccc/powers>>
- 24 Independent Commission Against Corruption (ICAC) and the Police Integrity Commission, NSW; Independent Broad-based Anti-corruption Commission, Vic; and Corruption and Crime Commission, WA.
- 25 In summarising the 2013 suite, reliance was placed on a summary provided by the CCC in its confidential advice to the Taskforce.
- 26 (2013) 248 CLR 92.
- 27 *Crime and Corruption Act 2001* (Qld), section 85.
- 28 *Crime and Corruption Act 2001* (Qld), section 85.
- 29 *Re Colina; Ex parte Torney* (1999) 200 CLR 386, [109] (Hayne J) referred to in *O'Connor v Witness "G"* [2013] QSC 281.
- 30 *Re Colina; Ex parte Torney* (1999) 200 CLR 386, [109] (Hayne J) referred to in *O'Connor v Witness "G"* [2013] QSC 281.
- 31 *Crime and Corruption Act 2001* (Qld), section 198.
- 32 *Crime and Corruption Act 2001* (Qld), section 198(4).
- 33 Criminal Code, section 16.
- 34 *Crime and Corruption Act 2001* (Qld), section 200; Criminal Code, section 16.
- 35 *O'Connor v Witness "G"* [2013] QSC 281; and *Callanan v Attendee Z* [2013] QSC 342 – provide comprehensive practical examples of the process.

- <sup>36</sup> *Crime and Corruption Act 2001* (Qld), sections 198 and 199(2).
- <sup>37</sup> *Uniform Civil Procedure Rules 1999* (Qld), Chapter 20, Part 7, Division 3.
- <sup>38</sup> *Crime and Corruption Act 2001* (Qld), section 199(6); *Bakir v Doueih* [2002] QCS 19. The civil standard is ordinarily on the balance of probabilities and the criminal standard of proof is beyond reasonable doubt.
- <sup>39</sup> *Crime and Corruption Act 2001* (Qld), section 199(8).
- <sup>40</sup> *O'Connor v Witness I* [2014] QSC 82, [21].
- <sup>41</sup> *O'Connor v Witness "G"* [2013] QSC 281.
- <sup>42</sup> Bar Association of Queensland, Submission 6.1 to the Taskforce on Organised Crime Legislation, 9 September 2015.
- <sup>43</sup> *Crime and Corruption Act 2001* (Qld), section 199(8) and (8C).
- <sup>44</sup> *Crime and Corruption Act 2001* (Qld), section 199(8B).
- <sup>45</sup> *Re Colina; Ex parte Torney* (1999) 200 CLR 386, [109] (Hayne J) referred to in *O'Connor v Witness "G"* [2013] QSC 281
- <sup>46</sup> *O'Connor v Witness I* [2014] QSC 82; relying on *Wood v Staunton (No. 5)* (1996) 86 A Crim R 183, 185.
- <sup>47</sup> *O'Connor v Witness I* [2014] QSC 82, [52].
- <sup>48</sup> *Callanan v Pydde* No. 1399 of 2010, 6 May 2010 (Margaret Wilson J).
- <sup>49</sup> *O'Connor v Witness I* [2014] QSC 82, [21]; *Crime and Corruption Act 2001* (Qld), section 199(8D-F).
- <sup>50</sup> *Callanan v Attendee "Z"* [2013] QSC 342.
- <sup>51</sup> No. 1399 of 2010, 6 May 2010 (Margaret Wilson J).
- <sup>52</sup> No. 168 of 2009, 16 February 2010 (Byrne J).
- <sup>53</sup> [2013] QSC 281 (Margaret Wilson J).
- <sup>54</sup> [2014] QSC 82.
- <sup>55</sup> [2013] QSC 342.
- <sup>56</sup> [2013] QSC 340.
- <sup>57</sup> [2013] QSC 341.
- <sup>58</sup> [2015] QCA 285.
- <sup>59</sup> (2010) 239 CLR 531.
- <sup>60</sup> (1996) 189 CLR 51.
- <sup>61</sup> Bar Association of Queensland, Submission 6.1 to the Taskforce on Organised Crime Legislation, 9 September 2015, 2-3.
- <sup>62</sup> The notion of a crushing sentence is a reference to: '... an extremely long total sentence may be "crushing" upon the offender in the sense that it will induce a feeling of hopelessness and destroy any expectation of a useful life after release. This effect both increases the severity of the sentence to be served and also destroys such prospects as there may be of rehabilitation and reform. Of course, in many cases of multiple offending, the offender may not be entitled to the element of mercy entailed in adopting such a constraint.
- <sup>63</sup> Implementation of this recommendation may require the establishment of a new offence to capture conduct amounting to contempt of the commission because whether constitutionally it is permissible to simply amend section 199 of the CCA to insert a maximum penalty is an issue that will need to be resolved. Regard will also need to be had to how this new offence might sit in the context of the existing offence provisions of the CCA; and whether or not it is permissible to incorporate the 'purge' provisions into the offence provision or whether perhaps a consequential amendment might be needed to the Penalties and Sentences Act 1992 to allow the process. See – *Witness JA v Scott* [2015] QCA 285; The Law Reform Commission, *Contempt*, Report No 35 (1987).
- <sup>64</sup> Failure to comply with a notice to produce (section 74(5)); failure to attend as required by an attendance notice or to continue to attend until excused (section 82(5)); failure to produce a document or thing at a hearing under an attendance notice (section 185(1)); refusal to answer questions put to them at a hearing. (section (190)).
- <sup>65</sup> *Crime and Corruption Act 2001* (Qld), section 197.
- <sup>66</sup> *O'Connor v Witness "I"* [2014] QSC 82, [32].
- <sup>67</sup> *Crime and Corruption Act 2001* (Qld), 74(5A); 82(6); 185(3A); 190(4).
- <sup>68</sup> Explanatory Notes, *Criminal Law (Criminal Organisations Disruption Amendment Act 2013*, 6.
- <sup>69</sup> *O'Connor v Witness "I"* [2014] QSC 82, [36].
- <sup>70</sup> [2013] QCA 152. See also – *Taikato v The Queen* (1996) 186 CLR 454; *Z v New South Wales Crime Commission (No. 2)* [2005] NSWSC 1388; *Director of Public Prosecutions v Christian Bernard Debono* [2013] VSC 407.
- <sup>71</sup> *Crime and Corruption Act 2001* (Qld), Schedule 2.

- <sup>72</sup> The Taskforce acknowledges the availability of the witness protection regime, depending upon the circumstances of the matter.
- <sup>73</sup> *Crime and Corruption Act 2001* (Qld), sections 194 and 195.
- <sup>74</sup> *Crime and Corruption Act 2001* (Qld), Schedule 2.
- <sup>75</sup> *Crime and Corruption Act 2001* (Qld), section 4.
- <sup>76</sup> *Crime and Corruption Act 2001* (Qld), Schedule 2.
- <sup>77</sup> *Crime and Corruption Act 2001* (Qld), section 201.
- <sup>78</sup> *Crime and Corruption Act 2001* (Qld), section 201(4).
- <sup>79</sup> *Crime and Corruption Act 2001* (Qld), section 57.
- <sup>80</sup> Advice from the Crime and Corruption Commission Queensland to the Taskforce on Organised Crime Legislation, 25 September 2015 (in confidence).
- <sup>81</sup> *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic), section 48(1).
- <sup>82</sup> *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic), section 48(2).
- <sup>83</sup> *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic), section 46.
- <sup>84</sup> *Crime Commission Act 2012* (NSW), section 45(1).
- <sup>85</sup> *Crime Commission Act 2012* (NSW), section 45(4).
- <sup>86</sup> *Crime Commission Act 2012* (NSW), section 45(5).
- <sup>87</sup> *Lee v The Queen* (2014) 253 CLR 455.
- <sup>88</sup> Australian Crime Commission Act 2002 (Cth), section 25A; *Australian Crime Commission (South Australia) Act 2004* (SA), section 18; *Australian Crime Commission (Northern Territory) Act* (NT), section 18; *Australian Crime Commission (Tasmania) Act 2004* (Tas), section 18; *Australian Crime Commission (Australian Capital Territory) Act 2003* (ACT), section 18.
- <sup>89</sup> Tom Bingham, *The Rule of Law* (Penguin United Kingdom, 2011) ch 9.
- <sup>90</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 298-299 (Mason CJ and McHugh J).
- <sup>91</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 364 (Gaudron J).
- <sup>92</sup> *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.
- <sup>93</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015) 237.
- <sup>94</sup> *R v H* [2004] 2 AC 134, 147 (Lord Bingham).
- <sup>95</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015) 237.
- <sup>96</sup> *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [35] (Gleeson CJ, Gaudron and Gummow JJ).
- <sup>97</sup> *R v Spizziri* [2001] 2 Qd R 686.
- <sup>98</sup> Explanatory Notes, *Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013*, 7.
- <sup>99</sup> *Crime and Corruption Act 2001* (Qld), section 201(4).
- <sup>100</sup> *Lee v The Queen* (2014) 253 CLR 455, 466-467 [32].
- <sup>101</sup> *McKinney v The Queen* (1991) 171 CLR 468, 478; *Dietrich v The Queen* (1992) 177 CLR 292, 327-328 (Deane J); see also 301 (Mason CJ and McHugh J) and 353 (Toohey J).
- <sup>102</sup> *Lee v The Queen* (2014) 253 CLR 455, 466-467 (French CJ, Crennan, Kiefel, Bell and Keane JJ).
- <sup>103</sup> James Stellios, *Zines’s The High Court and The Constitution* (The Federation Press, 6<sup>th</sup> ed, 2015) 302.
- <sup>104</sup> *Crime and Corruption Act 2001* (Qld), ch 2, pt 2, div 2.
- <sup>105</sup> Advice from the Crime and Corruption Commission Queensland to the Taskforce on Organised Crime Legislation, 25 September 2015 (in confidence).
- <sup>106</sup> *Crime and Corruption Act 2001* (Qld), section 201(4).
- <sup>107</sup> Advice from the Crime and Corruption Commission Queensland to the Taskforce on Organised Crime Legislation, 25 September 2015 (in confidence).
- <sup>108</sup> Advice from the Crime and Corruption Commission Queensland to the Taskforce on Organised Crime Legislation, 25 September 2015 (in confidence).
- <sup>109</sup> Advice from the Crime and Corruption Commission Queensland to the Taskforce on Organised Crime Legislation, 25 September 2015 (in confidence).
- <sup>110</sup> Bar Association of Queensland, Submission 6.1 to the Taskforce on Organised Crime Legislation, 9 September 2015, 5.
- <sup>111</sup> *Crime and Corruption Act 2001* (Qld), section 205(1)(a).
- <sup>112</sup> *Crime and Corruption Act 2001* (Qld), section 205(1)(b).

- <sup>113</sup> *Crime and Corruption Act 2001* (Qld), section 205(1A).
- <sup>114</sup> *Crime and Corruption Act 2001* (Qld), sections 205(2) and 205(4).
- <sup>115</sup> *Crime and Corruption Act 2001* (Qld), section 205(3).
- <sup>116</sup> *Crime and Corruption Act 2001* (Qld), section 205(5).
- <sup>117</sup> *Crime Commission Act 2012* (NSW), section 42;  
*Australian Crime Commission Act 2002* (Cth), section 27.
- <sup>118</sup> *Crime Commission Act 2012* (NSW), section 42;  
*Australian Crime Commission Act 2002* (Cth), section 27.
- <sup>119</sup> Legal assistance is defined as ‘payment to an Australian legal practitioner or a prescribed person or body for legal advice and representation to a person appearing as a witness in an examination’: *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic), section 151(5).
- <sup>120</sup> *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic), section 196(m).
- <sup>121</sup> *Corruption and Crime Commission Act 2003* (WA), section 142(2).
- <sup>122</sup> *Corruption and Crime Commission Act 2003* (WA), section 142(3).
- <sup>123</sup> *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.
- <sup>124</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 311 (Mason CJ and McHugh J).
- <sup>125</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).
- <sup>126</sup> *Dietrich v The Queen* (1992) 177 CLR 292.
- <sup>127</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 311 (Mason CJ and McHugh J).
- <sup>128</sup> Paul Fairall, ‘Trial Without Counsel: *Dietrich v The Queen*’ (1992) 4(2) *Bond Law Review* 235, 239.
- <sup>129</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).
- <sup>130</sup> *Police Powers and Responsibilities Act 2000* (Qld), section 418(1).
- <sup>131</sup> *Police Powers and Responsibilities Act 2000* (Qld), section 418(3)-(6).
- <sup>132</sup> *Crime and Corruption Act 2001* (Qld), section 55D.
- <sup>133</sup> Advice from the Crime and Corruption Commission Queensland to the Taskforce on Organised Crime Legislation, 25 September 2015 (in confidence).
- <sup>134</sup> Advice from the Crime and Corruption Commission Queensland to the Taskforce on Organised Crime Legislation, 25 September 2015 (in confidence).
- <sup>135</sup> Legal Aid Queensland, Submission No 021 to Parliamentary Crime and Corruption Committee, *Review of Crime and Corruption Commission*, undated, 1.
- <sup>136</sup> Legal Aid Queensland, Submission No 021 to Parliamentary Crime and Corruption Committee, *Review of Crime and Corruption Commission*, undated, 1.
- <sup>137</sup> Explanatory Notes, Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013, 12.
- <sup>138</sup> *Criminal Proceeds Confiscation Act 2002* (Qld), Chapters 2A and 3.
- <sup>139</sup> *Criminal Proceeds Confiscation Act 2002* (Qld), Chapter 2.
- <sup>140</sup> *Criminal Proceeds Confiscation Act 2002*, section 8.
- <sup>141</sup> Background information on the passage of the first and second tranches of the 2013 suite through the Legislative Assembly is contained in Chapter X of the report.
- <sup>142</sup> *Criminal Proceeds Confiscation Act 2002 (Qld)*, section 265(1).
- <sup>143</sup> *Criminal Proceeds Confiscation Act 2002 (Qld)*, section 265(2).
- <sup>144</sup> *Criminal Proceeds Confiscation Act 2002 (Qld)*, section 265 (4) – the court is not limited to considering these issues alone.
- <sup>145</sup> *Criminal Proceeds Confiscation Act 2002 (Qld)*, section 265(3)(a).
- <sup>146</sup> *Criminal Proceeds Confiscation Act 2002 (Qld)*, section 265(3)(b).
- <sup>147</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38.
- <sup>148</sup> Legal Affairs and Community Safety Committee, Queensland Parliament, *Report No.46*, November 2013, 29.
- <sup>149</sup> Mirko Bagaric, Andrew Ligertwood, Stephen Odgers, *The privilege against self-incrimination or self-exposure comprises of four separate privilege*, *The Laws of Australia* (Online), (Thompson Reuters), 15 March 2012, TLA [16.7.800].

<sup>150</sup> *Pyneboard Pty Ltd v Trade Practices Commission* 152 CLR 328, 335.

<sup>151</sup> Queensland Government – Office of the Queensland Parliamentary Counsel, *Principles of good legislation: OQPC guide to FLPs – Self-incrimination*, 5.

<sup>152</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(3)(g).

<sup>153</sup> *Tajjour v New South Wales* (2014) 313 ALR 221.

<sup>154</sup> *Reid v Howard* (1995) 184 CLR 1, [15].

<sup>155</sup> Queensland Government – Office of the Queensland Parliamentary Counsel, *Principles of good legislation: OQPC guide to FLPs – Self-incrimination*, 11 – 12.

<sup>156</sup> Explanatory Notes, Criminal Law (Criminal Organisations Disruption) Amendment Bill 2013, 7.

<sup>157</sup> (2013) 248 CLR 92.

<sup>158</sup> (2013) 87 ALJR 1082.

<sup>159</sup> [2014] 308 ALR 252.

<sup>160</sup> The principle of legality is discussed in numerous cases, in short it provides that the that the legislature does not intend to depart from fundamental principles and rights without very clear words confirming such an intention and so a court will not construe an operation of a statute without those clear words being used.

<sup>161</sup> *Crime and Corruption Act 2001* (Qld), section 331(1).

<sup>162</sup> (2013) 248 CLR 92.

<sup>163</sup> <[www.law.uq.edu.au/.../cli.../CLI-17July2014-Peter-Davis-QC-paper](http://www.law.uq.edu.au/.../cli.../CLI-17July2014-Peter-Davis-QC-paper)>

<sup>164</sup> [2016] HCA 8 (10 March 2016).

## PART 5.4

# CHAPTER TWENTY-ONE

## OCCUPATIONAL AND INDUSTRY LICENCING

*One of the objectives of the 2013 suite was to prevent criminal organisations and their members from entering into, or operating through, lawful occupations and industries in Queensland.*

*Has the proper balance between the rights of an individual to obtain lawful employment, and the need to protect the community, been achieved?*

### THE 2013 SUITE SIGNIFICANTLY CHANGED THE OCCUPATIONAL AND INDUSTRY REGULATORY LANDSCAPE IN QUEENSLAND

Under its Terms of Reference the Taskforce was required to:

- analyse, and inquire into the necessity for, amendments to occupational licensing requirements made by the 2013 suite;<sup>1</sup> and
- note the Queensland Government's view that:
  - it is desirable to have a consistent multi-industry 'fit and proper' person test;
  - the legislation, and the test, should facilitate the prevention of industries being manipulated for criminal purposes; and
  - the legislation should ensure that individuals are not prohibited from holding an industry licence on the basis of mere association.<sup>2</sup>

### OVERVIEW OF THE STRICTER PROBITY REQUIREMENTS ENACTED BY THE 2013 SUITE

The 2013 suite<sup>3</sup> significantly affected the occupational licensing regulatory landscape in Queensland by increasing the regulation of occupational and industry licensing in industries considered to be at risk of being infiltrated by organised crime, and by providing stricter probity requirements in existing licensing regimes considered to be at similar risk.

These stricter probity requirements:

- ban individuals found to be participants in criminal organisations (and those organisations themselves)

from working in licensed occupations and industries;<sup>4</sup>

- assigns to the Commissioner of Police a determinative role in assessing whether an applicant is a fit and proper person to hold a licence and/or whether it would be contrary to the public interest for a licence to be granted;<sup>5</sup>
- authorises the Commissioner of Police to disclose a list of participants in criminal gangs to administering governmental departments or agencies;<sup>6</sup>
- enables the Chief Executives responsible for their specific licensing industries to use information (including criminal intelligence) concerning individuals and organisations provided by the Commissioner of Police to make specified licensing decisions;<sup>7</sup>
- maintains the confidentiality of criminal intelligence, where the Commissioner of Police provides information to the Chief Executive of the administering department;<sup>8</sup>
- prohibits the disclosure of criminal intelligence to an applicant for an occupational licence, including where the applicant is seeking a review of the refusal to grant a licence through the Queensland Civil and Administrative Tribunal (QCAT)<sup>9</sup>; and
- excludes the application of the *Judicial Review Act 1991* (Qld) to the Chief Executive's refusal to grant, or the decision to cancel, a licence in relation to criminal organisations or identified participants, except to the extent that the decision is affected by jurisdictional error.<sup>10</sup>

## THE TASKFORCE ASSESSMENT OF THE REGULATORY REGIMES IMPLEMENTED BY THE 2013 SUITE

The Taskforce's analysis of the 2013 suite and its impact on the occupational licensing regulatory regimes in Queensland involved consideration of legal and public policy principles which were complex and multi-faceted.

The challenge for the Taskforce was determining whether a person's membership of or affiliation with a criminal organisation of itself warranted exclusion from working in a particular industry; and whether the 2013 suite strikes the right balance between the rights of an individual to obtain lawful employment and the need to protect the community.

The Taskforce was assisted by the provision of a large number of submissions from a diverse range of organisations and individuals, including law enforcement agencies, various government departments which oversee the occupational licensing regimes; legal stakeholders; industry representatives; and individuals who had been affected by the 2013 suite.

The Taskforce also had regard to a number of QCAT decisions which concerned appeals by persons who had been refused an occupational licence on the basis that they were determined to be a 'participant in a criminal organisation' following the enactment of the 2013 suite.

The submissions and information considered enabled the Taskforce to:

- better understand the risk that organised crime posed to lawful industries and occupations;
- obtain an understanding of the effectiveness of the current laws in preventing and removing organised crime from particular industries; and

- identify the need for improvements in the current occupational licensing regulatory landscape.

## TASKFORCE CONSENSUS

During its deliberations the Taskforce was able to reach broad consensus with respect to a number of significant issues associated with regulatory occupational licensing.

The Taskforce resolved:

- People should not be refused a licence or have a licence cancelled *solely* on the basis that they are alleged to be a *participant in a criminal organisation*. Licences should only be refused or cancelled on the basis that there is evidence specific to an individual which demonstrates that the individual (and not those with whom they associate) is not a suitable person to hold a licence;
- A person's past or current involvement in criminal activity may be a factor relevant to whether a person is a 'fit and proper person'. What constitutes a 'fit and proper person' will differ significantly from industry to industry. Extensive consultation should occur within each industry to determine a 'fit and proper person' test which meets the needs of that industry;
- The requirement that Chief Executives refer every application for a licence to the Commissioner of Police requires a deployment of QPS and government resources which is disproportionate to the risk posed by the potential infiltration of organised crime groups to the respective industry, and to community safety. This requirement should be replaced with a mechanism which allows the Commissioner of Police to supply *relevant* information to the Chief Executive when a licensee comes to the attention of the QPS and, therefore, on a case-by-case basis only;

- Applicants or existing licensees who have their applications refused or licences cancelled on the basis that they are not, or are no longer, a suitable person should have the right to be given reasons for the decision and the opportunity to contest the allegation that they are not, or are no longer, a suitable person; and
- Appeal and review rights (including judicial review) regarding decisions to grant or cancel an occupational licence should be restored in all legislation.

## LACK OF APPROPRIATE SCRUTINY AND INDUSTRY CONSULTATION BEFORE THE INTRODUCTION OF THE 2013 SUITE

The Explanatory Notes accompanying the *Tattoo Parlours Act 2013* and the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* justified the lack of community consultation on the basis that the laws were:<sup>11</sup>

*'part of an urgent package of reforms developed by the Queensland Government to deal with recent, unacceptable incidents of violent, anti-social and criminal behaviour of members of criminal motor cycle gangs. As a result no community consultation has been undertaken on the Bill.'*

The government departments responsible for the administration of the various occupational licensing regimes in Queensland were not consulted.<sup>12</sup>

The 2013 suite and its effect on the occupational licensing regimes in Queensland drew criticism from legal stakeholders, industry representatives and individuals who worked in those industries.

The Bar Association of Queensland submitted:<sup>13</sup>

*'the devastating effect is that many individuals who have not committed a criminal offence and who possess the appropriate knowledge and skills to be competent in operating the licensed activities, may be forced out of their businesses and livelihoods, the determination of the licences being purely arbitrary.'*

The Taskforce received a number of submissions from individuals, who, upon the commencement of the stricter probity requirements, had their licence applications refused on the basis of their alleged association with criminal organisations.<sup>14</sup>

In its submission to the Taskforce, the Queensland Law Society (QLS) said that:

*'such limitations could ironically be counter-productive to the intent of the legislation by limiting the employment options of persons who might be otherwise be unskilled or be within a societal category which find employment difficult to obtain.'*<sup>15</sup>

#### WAS THERE ANY EVIDENCE OF ORGANISED CRIME IN LAWFUL INDUSTRIES AND OCCUPATIONS IN QUEENSLAND PRIOR TO THE 2013 SUITE?

The infiltration of lawful occupations and industries has been identified as a strategy used by organised crime to facilitate criminal conduct and to conceal proceeds of crime.<sup>16</sup> However, identifying the nature and the extent of infiltration can be a difficult task.

The clandestine operations of criminal organisations and the necessity to protect criminal intelligence sources utilised by law enforcement agencies have been identified as challenges to quantifying the level of infiltration by the Victorian Law Reform Commission, in its investigations in that state.<sup>17</sup>

Insofar as information is publicly available, claims of infiltration or suspected infiltration

come from a range of sources, including anecdotal evidence; media reports, non-protected law enforcement intelligence and, to a lesser extent, legal judgments.<sup>18</sup>

#### EVIDENCE OF ORGANISED CRIME IN THE TATTOO INDUSTRY PRIOR TO THE 2013 SUITE

Upon introducing the Tattoo Parlours Act into Parliament the Attorney-General said that this licensing scheme would:

*'be a vital tool in ensuring that the stranglehold criminal motorcycle gangs have over the tattoo industry in Queensland is broken.'*<sup>19</sup>

The Explanatory Notes to the Bill also referred to *'serious issues associated with the infiltration of the tattoo industry by criminal organisations'*.<sup>20</sup>

#### EVIDENCE OF ORGANISED CRIME IN OTHER OCCUPATIONS AND INDUSTRIES PRIOR TO THE 2013 SUITE

The Legal Affairs and Community Safety Committee (LACSC) examined the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013*. The LACSC's consideration included a public briefing from a number of senior legal policy staff attached to the Department of Justice and Attorney General.<sup>21</sup>

During the proceedings the LACSC was advised that the industries targeted by the 2013 suite had previously been highlighted during the implementation of the *Criminal Organisations Act 2009* (Qld) as being susceptible to organised criminal activity. The LACSC was also advised that police intelligence established links between criminal organisations and those licensed industries which were the subject of the stricter probity requirements.<sup>22</sup>

The LACSC was advised by the Department of Justice and Attorney-General that other enterprises which were known to be susceptible to manipulation by organised crime, namely prostitution and gaming, had

not been included in the suite of reforms on the basis that QPS considered that the pre-existing probity requirements were broad enough to prevent the infiltration of organised crime in those industries.<sup>23</sup>

The advice provided to the LACSC was supplemented by the Attorney-General during his Second Reading Speech with respect to the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act*, when he said:<sup>24</sup>

*'The amendments make sure Queenslanders can be confident that when they are engaging or dealing with a licensed person working in a range of occupations they are not dealing with a participant in a criminal organisation.'*

In the Attorney-General's speech in reply he appeared to indicate that the government had taken a pre-emptive approach in its selection of industries chosen for further regulation:<sup>25</sup>

*'In looking at the occupations and activities identified as being influenced by criminal motorcycle gangs, the Queensland government wants to take a broad and comprehensive approach to ensure that such gangs cannot take hold in licensed occupations. It may be the case that the net will need to be further widened or further adjusted to outmanoeuvre criminal gangs who will seek to take advantage of any unforeseen loopholes. The Queensland Police Service considers the building industry is attractive to criminal organisations and has determined that this industry should have protections under the new provisions.'*

#### EVIDENCE OF ORGANISED CRIME IN THE TATTOO INDUSTRY AFTER THE INTRODUCTION OF THE 2013 SUITE

In March 2014, the Crime and Corruption Commission (CCC) prepared a report detailing the influence of OMCGs in the tattoo industry in Queensland.<sup>26</sup>

According to the CCC report:

- OMCGs use tattoo parlours to facilitate criminal activities such as drug distribution and money laundering;
- OMCGs have been using threats and intimidation to extort money from tattoo parlour owners in exchange for allowing them to operate, and to 'protect' them from other CMGs. They have also been using threats and intimidation to force rival tattoo parlours to close and, in some cases, to prevent them from opening;
- threats, intimidation and acts of extortion by OCMGs are often not reported to law enforcement agencies, mainly due to fear of retribution; and
- investigating CMG infiltration of the tattoo industry increases the CCC's understanding of CMG involvement in organised crime in Queensland.<sup>27</sup>

#### THE REGULATORY BURDEN IS DISPROPORTIONATE TO THE RISK POSED TO THE COMMUNITY

The Taskforce received advice from various government departments and the QPS which indicated the 2013 suite has placed a significant regulatory burden on licence administrators.

The advice the Taskforce received from government departments was that the probity requirement for each individual has had a major impact on the timeliness and turn-around on individual applications (although the vast majority of applicants seeking a licence were legitimate).

The QPS advised the Taskforce that for the period between 1 July 2014 and 31 December 2015 they received 43,771 applications which took 11,140 hours to process. Out of the 43,771 applications, 13 applicants were deemed not to be suitable to hold a license.

The Taskforce concluded that the allocation of resources required to conduct these stricter probity requirements was disproportionate to the risk posed to the community by organised crime legislation.

### FEASIBILITY OF A STANDARDISED MULTI-INDUSTRY 'FIT AND PROPER PERSON' TEST

In Queensland 'fit and proper person' tests feature prominently in industries heavily regulated by occupational licensing and accreditation schemes.

A review of the industries and occupations affected by the 2013 suite, supplemented by the submissions received by the Taskforce, showed that whilst there are some similar aspects to occupational licensing frameworks, each framework remains unique in order to meet legislative objectives and maintain the integrity of the particular industry – in other words, while an individual or organisation may not be considered a 'fit and proper person' for one particular industry, that same individual may be a 'fit and proper person' for another.

The Taskforce concluded that a person's past or current involvement in criminal activity may be a factor relevant to whether a person is a 'fit and proper persons' – but, the type of criminal history which makes a person unsuitable may differ from industry to industry.

The Taskforce resolved that extensive consultation, which did not occur prior to the introduction of the 2013 suite, *must* occur on an industry by industry basis to determine a 'fit and proper person' test that meets the needs of each particular industry; and that there are better and fairer ways to determine the fitness of individuals to obtain licences rather than exclusion based solely on alleged association with a 'criminal organisation'.

### MODELS CONSIDERED BY THE TASKFORCE

The following models put forward by the BAQ were supported by the Taskforce:<sup>28</sup>

### PREVIOUS CRIMINAL CONVICTIONS

Under the current regimes introduced by the 2013 legislation it is a very real possibility that an individual who has not committed an offence may be barred from obtaining a license, whereas an individual who may have previous criminal convictions but who is not determined to be an identified participant may be granted a license. This would appear to be unfair. It is also counter-productive.

A conviction-based regime with a focus on an individual's criminal history, as opposed to an individual's association with others, could be used as a basis to refuse an individual a licence.

### BLUE CARD SYSTEM

In Queensland, individuals wishing to work with children are required to obtain a blue card. The blue card system was implemented in 2001 and is a prevention and monitoring system for individuals who work with children and young people.<sup>29</sup> When making a decision about an application, the welfare and best interests of the children are the paramount considerations.<sup>30</sup>

The blue card assessment is made on an individual basis and allows for procedural fairness by permitting submissions to be made to the Chief Executive.<sup>31</sup>

The BAQ submitted that it would be possible to develop a similar screening assessment for the regulation of licences and permits for the occupations currently subject to the regime implemented by the 2013 suite.

If the primary purpose of the licensing regime is to prevent particular industries and occupations from being manipulated for criminal purposes then consideration must be given to the offences usually committed by criminal organisations. These offences include:

- (a) drug offences – including supply, production, trafficking and possession;

- (b) offences of violence – including murder, torture, assault, grievous bodily harm;
- (c) property offences – including robbery, stealing and extortion; and
- (d) breaches of the peace – including rioting and affray.

If it appears that the licence or permit may be refused, the individual should be given an opportunity to provide submissions along the same lines as the blue card regime.

## TATTOO PARLOURS ACT 2013

### OBJECTIVES OF THE LEGISLATION

The Tattoo Parlours Act, was passed on 15 October 2013, received assent on 17 October 2013, and commenced 1 July 2014.

The Act establishes a regulatory scheme which requires the operators of tattoo parlours and tattoo artists to be licensed.

Prior to the introduction of the Tattoo Parlours Act, the body art tattoo industry was regulated, primarily<sup>32</sup> for public health and safety purposes by local governments.<sup>33</sup>

Upon the introduction of the Tattoo Parlours Act, the Attorney-General and Minister for Justice said:

*'The principal objective of the bill is to introduce a new occupational licensing and regulatory framework which eliminates and prevents infiltration of the Queensland tattoo industry by criminal organisations, including criminal motorcycle gangs and their associates. The act that will be created as a result of the Tattoo Parlours Bill is very similar to legislation that was recently passed in New South Wales after a number of drive-by shootings, fire bombings and violence that had occurred at tattoo parlours linked to criminal motorcycle gangs.'*<sup>34</sup>

The legislation aims to eliminate and prevent

criminal infiltration of the tattoo industry through a strict occupational licensing regime, employing rigorous probity-testing.

### ADMINISTRATION OF THE TATTOO PARLOURS ACT

The body art tattoo parlour licensing regime is administered by the Department of Justice and Attorney-General in partnership with the QPS.

QPS plays a critical role in assessing the suitability of licence applicants and licensees to hold a licence, and the enforcement of the Act.

### TYPES OF LICENCES

The Tattoo Parlours Act allows for two types of licences to be granted and held:

- (1) An operator licence<sup>35</sup>; and
- (2) A tattooist licence.<sup>36</sup>

An operator can also be a tattoo artist at their own premises and does not need to hold a separate tattooist licence.

A separate operator licence is required to be held by the operator of each premises.

Unlike other occupational licensing schemes in Queensland, the Act does not allow existing holders to renew their licence. Upon expiry, a tattooist or operator must submit a fresh application for a licence.

### REQUIREMENTS FOR LICENCE APPLICATIONS

Section 11 of the Tattoo Parlours Act contain the strict probity requirements that licence applicants must adhere to in making an application.

An application for a licence must be made to the Chief Executive and can only be made by an individual.<sup>37</sup>

An application for a licence may not be made by:

- (a) an individual who is under 18 years; or
- (b) an individual who is not an Australian citizen or Australian resident; or
- (c) an individual who is a controlled person.<sup>38</sup>

The application for a licence must be in the approved form; state whether the licence is sought for a term of 1 or 3 years; and state the identifying particulars of the applicant.<sup>39</sup>

Applications for licences must be accompanied by:

- (i) evidence of the applicant's identity that is satisfactory to the Chief Executive; and
- (ii) a statement recording the applicant's close associates;

In addition, applicants for an operator licence must state:

- (i) the address of the proposed licensed premises;
- (ii) the business name of the body art tattooing business carried on or proposed to be carried on at the proposed licensed premises;
- (iii) the name and residential address of each staff member employed, or proposed to be employed at the proposed licensed premises;
- (iv) if the business to which the application relates is owned or operated by or on behalf of a corporation, partnership or trust – be accompanied by evidence that the applicant has been nominated to be the premises manager.<sup>40</sup>

An application for a tattooist licence must be accompanied by evidence indicating previous, existing or impending employment as a body art tattooist.<sup>41</sup>

#### FINGERPRINTING AND PALM PRINTING OF APPLICANTS

All applicants for a licence under the Tattoo Parlour Act must consent to having their finger and palm prints taken by the Commissioner of Police for the purpose of confirming the applicant's identity.<sup>42</sup>

Should an applicant refuse to provide their finger and palm prints the Chief Executive *must* refuse their application.

The Commissioner of Police may use an applicant's finger and palm prints for the purpose of providing information about the applicant's identity to the Chief Executive or for performing a function of the police service.<sup>43</sup>

#### OFFENCES RELATING TO UNLICENSED BODY ART TATTOOING

Part 2 of the Tattoo Parlours Act prescribes the offences relating to unlicensed body art tattooing.

It is an offence for a person to either carry on a *body tattooing business*<sup>44</sup>, work as a *body art tattooist*<sup>45</sup>, or employ a body art tattooist<sup>46</sup> unless they are the holder of the appropriate licence.

The maximum penalties vary depending upon whether or not it is the first offence (500 penalty units)<sup>47</sup>, second offence (700 penalty units<sup>48</sup> or third (or subsequent) offence (1000 penalty units or 18 months imprisonment).<sup>49</sup>

#### CHIEF EXECUTIVE'S ROLE IN ASSESSMENT OF LICENCE APPLICATION

Section 15 of the Tattoo Parlours Act sets out the procedure upon the reception of a licence application by the Chief Executive.

Upon receiving an application the Chief Executive may carry out investigations and inquiries that he/she considers necessary<sup>50</sup>, but *must* refer any licence application to the Commissioner of Police.<sup>51</sup>

**THE ROLE OF THE COMMISSIONER OF POLICE**

The Commissioner of Police plays a critical and determinative role in any licence application under the Tattoo Parlours Act.

The Commissioner of Police must determine whether the applicant is a 'fit and proper person' to be granted the licence and/or 'whether it would be contrary to the public interest for the licence to be granted'.<sup>52</sup>

Section 20(3) provides that in making this determination 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 application 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
- (b) demonstrates 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 of Police not to have confidence improper conduct will not occur if the applicant is granted the licence or the licensee continues to hold the licence.

When the Commissioner of Police determines that the applicant is not a 'fit and proper person' and/or 'whether it would be contrary to the public interest for the licence to be granted' these determinations are referred to as an *adverse security determination*.

Upon receipt of the *adverse security determination* from the Commissioner of Police, the Chief Executive must refuse the applicant's licence application.<sup>53</sup>

**RIGHT OF APPEAL**

Section 56 of the Tattoo Parlours Act prescribes that an individual, other than a

controlled person, may apply to QCAT for a review of a decision of the Chief Executive. The grounds of review include the Chief Executive's decision to refuse to grant a licence to a person.

Section 57 of the Act makes provision for a review by QCAT of the adverse security determination.

Section 57(3)(b) provides for confidentiality of criminal intelligence in proceedings if a person is seeking to review a refusal to grant a licence on the grounds of an adverse security determination by the Commissioner of Police.

In the review the Commissioner automatically becomes a party to proceedings and must give QCAT or the Supreme Court a statement of reasons concerning the identification of a person or the person's associate as an identified participant in a criminal organisation.<sup>54</sup>

If QCAT or the Supreme Court reviews the Commissioner's statement of reasons it may, as it considers appropriate to protect the confidentiality of criminal intelligence,<sup>55</sup> receive evidence and hear arguments about the criminal intelligence in the absence of parties to the proceedings and their representatives and take evidence consisting of criminal intelligence by way of an affidavit from a police officer of at least the rank of superintendent.<sup>56</sup>

If QCAT or the Supreme Court considers information has been incorrectly categorised by the Commissioner of Police as criminal intelligence, the Commissioner may withdraw the information from consideration by QCAT or the Supreme Court. That information *must* not be disclosed to any person or taken into consideration by the Tribunal or the Supreme Court.<sup>57</sup>

The Supreme Court's review jurisdiction for all errors by the Chief Executive and QCAT is legislatively excluded except for 'jurisdictional error'.<sup>58</sup>

**PERMITS RELATING TO UNLICENSED BODY ART TATTOOING**

Part 4 of the Act covers permits for unlicensed body art tattooing, for example, of people who are not Australian citizens or residents who wish to participate in an exhibition or show.

**ENFORCEMENT PROVISIONS**

Part 5 of the Act contains the enforcement provisions which provide the Commissioner of Police with a broad range of powers with respect to the policing of body art tattooing premises.

If the Commissioner of Police is satisfied a body art tattooing business is unlicensed or reasonably suspects that serious criminal offences are being committed at the premises then he/she may order that the business be closed (interim closure order) for no more than 72 hours.<sup>59</sup>

The Commissioner of Police may apply to a Magistrate for a long term closure order seeking that the premises be closed for a stated period.<sup>60</sup>

A person must not carry on body art tattooing whilst the closure order is in force.<sup>61</sup>

Sections 50 to 55 of the Act outline the rights and obligations of authorised officers (which includes police officers) in entering licensed premises or other premises which the authorised officer reasonably suspects are being used to perform tattooing procedures.

**ADDITIONAL POLICE POWERS**

The Tattoo Parlours Act amended the *Police Powers and Responsibilities Act 2000* (Qld) and now enable a police officer, without a warrant, to:

- use a drug detection dog to carry out drug detection with respect to a person who is about to enter, is in, or is leaving, a tattoo parlour;<sup>62</sup> or

- use an explosives detection dog to carry out explosives detection in relation to a person who is about to enter, is in, or is leaving, a tattoo parlour; or, a thing in a tattoo parlour, whether it is in the physical possession of a person or not.<sup>63</sup>

In exercising this power a police officer is *not* required to have a reasonable suspicion that an individual has engaged in criminal activity before conducting the search with the detection dog.

In carrying out these functions the police dog handler and any other police officer may enter and remain at the tattoo parlour.<sup>64</sup>

**STATISTICAL INFORMATION**

The Tattoo Parlours Act licensing scheme commenced on 1 July 2014.

Between 1 July 2014 and 30 June 2015, 1,179 tattoo licences were issued by the Office of Fair Trading.

153 new licence applications were received between 30 June 2015 and 31 January 2016.

As a consequence of the 2013 amendments 7 tattooists' licence and 4 operators' licence applications were refused on the basis of an individual's alleged association with criminal organisations.

**INDUSTRY FEEDBACK**

The Taskforce received a number of submissions from individuals who had been affected by the enactment of the Tattoo Parlours Act.

These submitters highlighted their experiences with the Act and alleged that, despite having worked in the industry for significant periods, their licence applications had been refused on the basis that they were associated with criminal organisations.<sup>65</sup>

Despite allegedly having minimal or no criminal convictions, some individuals claimed

they were forced to leave the industry either because of their membership of, or association with members of, OMCs.

The Australian Tattooists Guild, an industry representative body, provided the Taskforce with a large number of submissions from practising tattooists and operators which emphasised that the Tattoo Parlours Act focused on an individual's history and did not regulate the skills and proficiencies required for tattooists – which, they claimed, had detrimentally impacted the industry in Queensland.<sup>66</sup>

The Department of Justice and Attorney-General provided the Taskforce with a summary of stakeholder issues specifically relating to the Tattoo Parlours Act. The issues raised included that:

- the legislation should be renamed the 'Tattoo Industry Act';
- an existing licence should be allowed to continue, when an application for a new licence has been made before the expiry of the existing licence;
- the Act does not appropriately provide for visiting tattooists;
- the Act does not appropriately provide for mobile tattooists;
- the requirement for applicants to provide finger and palm prints should be removed; and
- licence holders under the Act should have to possess requisite Occupational Health and Safety certifications and be duly qualified.<sup>67</sup>

The submissions supported the Taskforce's resolution that extensive consultation with industry stakeholders and individual operators is necessary.

## APPROACHES IN OTHER JURISDICTIONS

### NEW SOUTH WALES

New South Wales has legislation aimed at removing organised crime from the tattoo industry.

In 2012, New South Wales introduced the *Tattoo Parlours Act 2012* (NSW), on which the Queensland equivalent is directly modelled.

The Act establishes a licensing scheme for the proprietors and employees of tattoo parlours. Part 2 of the Act makes it an offence for a person to either carry on a body tattooing business or work as a 'body art tattooist' unless they are the holder of the appropriate licence.

### SOUTH AUSTRALIA

South Australia recently passed the *Tattoo Industry Control Act 2015* (SA) which, like the Queensland and NSW equivalent legislation, regulates the tattooing industry with the objective of preventing criminal infiltration by automatically disqualifying persons who are members or close associates with members of criminal organisations.

Criminal intelligence can be utilised by the SA Commissioner for Consumer Affairs in determining an applicant's suitability for a licence. The legislation has not yet commenced.

### VICTORIA

In October 2014, the Victorian Government asked the Victoria Law Reform Commission to review the use of regulatory regimes to prevent organised crime and criminal organisations infiltrating lawful occupations and industries.

The VLRC's Final Report was due on 29 February, 2016, with the Victorian Attorney-General required to table the report within 14

sitting days. At the time of printing that Report has not yet been made public.

## 2013 AMENDMENTS TO OTHER STATUTORY LICENSING SCHEMES IN QUEENSLAND

The 2013 suite made significant amendments to pre-existing legislation aimed at preventing identified participants in criminal organisations, and criminal organisations, from obtaining a licence, permit, or other authority in particular industries. The following Queensland legislation amended was:

- *Electrical Safety Act 2002*;
- *Liquor Act 1992*;
- *Queensland Building and Construction Commission Act 1991* (previously *Queensland Building Services Authority Act 1991*);
- *Racing Act 2002*;
- *Second-hand Dealers and Pawnbrokers Act 2003*;
- *Security Providers Act 1993*;
- *Tow Truck Act 1973*;
- *Work Health and Safety Act 2011*; and
- *Weapons Act 1990*.

It is noteworthy that there is a different approach to who can review decisions under the Tattoo Parlours Act (which was in the first tranche of the 2013 suite) and all other licensing legislation (which was in the second tranche) contained in the Criminal Law (Criminal Organisations and Disruption) and Other Legislation Amendment Act.

The Tattoo Parlours Act provides that *only* QCAT can review whether the Commissioner of Police made the ‘correct and preferable’ decision about the adverse security determination, but all the other licensing

legislation provides that QCAT *or the Supreme Court* can review the Commissioner’s determination that the relevant person is an identified participant.

In broad terms these amendments disqualify an individual or, where applicable, an organisation from holding a licence, permit or certificate (or whatever the case may be) if and while the individual is an *identified participant* in a criminal organisation (as defined under section 60A of the Criminal Code).

The amendments to the Work Health and Safety Act, Electrical Safety Act and Queensland Building and Construction Commission Act have not yet commenced and will take effect on 1 July 2016.

This section provides an overview of the 2013 amendments made to this occupational industry and licensing legislation in Queensland.

## LIQUOR ACT 1992

The Liquor Act regulates the sale and supply of liquor and the provision of adult entertainment.<sup>68</sup>

The administration of the Liquor Act is the responsibility of the Office of Liquor and Gaming Regulation. The OLGR is a ‘co-enforcer’ together with the Queensland Police Service.

The Act aims to provide appropriate licensing arrangements for the sale of liquor to facilitate the development of the tourism, liquor and hospitality industries.<sup>69</sup>

To obtain a licence, an applicant (an individual or corporation) must apply to the Commissioner for Liquor and Gaming (CLG).

There are multiple liquor licence and permit types. For example there are separate licence types for hotels, community clubs, nightclubs, restaurants, producers and wholesalers, with each licence type having different authorisations under the Liquor Act.

Licencees are also subject to conditions on the licence, which are imposed by the CLG and will address aspects specific to each licensed venue and business.

Depending on the licence type applied for, the application is required under the Act to contain particular information.

The CLG will consider the application and make a decision based on information provided and other information, including the applicant's criminal history.

### EFFECT OF THE AMENDMENTS

The 2013 amendments to the Liquor Act commenced on 1 July 2014 and enable the CLG to refuse applications for licences, permits or approvals, or to cancel existing licences, permits and approvals based on the applicant's or licence holder's participation in a declared criminal organisation.

The CLG may grant an application for a licence, permit or approval only if satisfied that the applicant is not a *disqualified person* and is a fit and proper person to hold the licence or permit that is the subject of the application.

A 'disqualified person' is defined as<sup>70</sup>:

- an individual who is an *identified participant* in a criminal organisation (as defined under section 60A of the Criminal Code);<sup>71</sup> and/or
- a corporation that is a criminal organisation.<sup>72</sup>

In determining a new licence, permit or approval the CLG *must* ask the Commissioner of Police whether the applicant is an identified participant in a criminal organisation, or a criminal organisation.<sup>73</sup> The Commissioner of Police must comply with the CLG's request.<sup>74</sup>

Upon the Commissioner of Police determining that a person is a participant in a criminal organisation, or an unsuitable person, the CLG must refuse an application or cancel an existing licence.

The Commissioner's decision to refuse an application for a licence, permit or approval is referred to as a *section 228B decision*.<sup>75</sup>

The CLG can have regard to criminal intelligence provided by the Commissioner of Police in making a section 228B decision.<sup>76</sup>

The CLG is *not* required to give reasons for determining a matter under s 228B if the reasons would disclose the existence or content of criminal intelligence.<sup>77</sup>

### RIGHT OF APPEAL

A person may seek a review of a section 228B decision to either QCAT or the Supreme Court.<sup>78</sup>

The Commissioner of Police automatically becomes a party to the review proceedings<sup>79</sup> and must give QCAT or the Supreme Court a statement of reasons for identifying the applicant as an identified participant in a criminal organisation.<sup>80</sup> If those reasons contain criminal intelligence then QCAT or the Supreme Court may, as it considers appropriate to protect the confidentiality of the criminal intelligence, receive evidence and hear arguments about it in the absence of the affected party and their legal representatives.<sup>81</sup>

If QCAT or the Supreme Court considers information has been incorrectly categorised by the Commissioner of Police as criminal intelligence, the Commissioner may withdraw the information from consideration,<sup>82</sup> but that information *must* not be disclosed to any person or taken into consideration by QCAT or the Supreme Court.<sup>83</sup>

The Supreme Court's review jurisdiction does not apply to a section 228B decision unless the decision is affected by 'jurisdictional error'.<sup>84</sup>

### STATISTICAL INFORMATION

The 2013 amendments preventing participants in criminal organisations from obtaining liquor licences commenced on 1 July 2014.

Prior to the commencement of the amendments 5,910 liquor licence applications were submitted and processed between 1 July 2013 and 30 June 2014.

Between 1 July 2014 and 30 June 2015 a total of 5,769 licence applications were received.

Between 1 July 2015 and 31 January 2016, 3,241 applications were received.

The Taskforce was advised that between 1 July 2014 and 31 January 2016 no liquor licence applications had been refused because of the 2013 amendments.

## ELECTRICAL SAFETY ACT 2002

The Electrical Safety Act regulates all electrical work conducted by licensed electricians and electrical contractors in Queensland.

The purpose of the Act is to establish a legislative framework for preventing persons from being killed or injured, and preventing property from being destroyed or damaged, by electricity<sup>85</sup> and amongst other measures, *'providing for the safety of all persons through licensing and discipline of person who perform electrical work'*.<sup>86</sup>

Under the Act, two types of licences are issued which enable a licensee to undertake electrical work: an electrical work licence, and an electrical contractor licence.

Under section 55 of the Electrical Safety Act an individual must not perform or supervise any electrical work unless they hold an *electrical work licence*.

Under section 56 of the Act individual must not conduct a business or undertaking that includes the performance of electrical work unless the person is the holder of an *electrical contractor licence*.

Any individual who performs unlicensed electrical work or who fails to comply with all conditions and restrictions included in the licence is liable to significant monetary penalties.

## EFFECT OF THE 2013 AMENDMENTS

The amendments to this Act have not yet commenced.

The proposed effect of the 2013 provisions and rights of appeal under the Act are very much the same as the Liquor Act.

## STATISTICAL INFORMATION

The 2013 amendments to the Electrical Safety Act are not due to commence until 1 July 2016.

Currently there are 52,680 electrical work licences and 10,043 electrical contractor licences in Queensland.

In 2013 there were a total of 5,643 new licence applications; 5,662 in 2014; and 5,499 in 2015.

## MOTOR DEALERS AND CHATTEL AUCTIONEERS ACT 2014

The Motor Dealers and Chattel Auctioneers Act and the Motor Dealers and Chattel Auctioneers Regulation 2014 commenced operation on 1 December 2014.

Prior to the commencement of the Act, motor dealing and chattel auctioneering was regulated under the *Property Agents and Motor Dealers Act 2000* (Qld).

The 'identified participant in a criminal organisation' provisions contained in the Motor Dealers and Chattel Auctioneers Act were not part of the 2013 suite but were modelled directly on the 'identified participant' provisions inserted in the other occupational licensing legislation by the 2013 suite.

The effect of the 2013 provisions and rights of appeal in the Act are very much the same as in the Liquor Act.

The primary objective of the Motor Dealers and Chattel Auctioneers Act is to provide a

system for licensing and regulating persons as motor dealers and chattel auctioneers and for registering and regulating persons as motor salespersons that achieves an appropriate balance between the need to regulate for the protection of consumers; and; the need to promote freedom of enterprise in the market place.<sup>87</sup>

This objective is achieved, amongst other measures, by ensuring that only suitable persons with appropriate qualifications are licensed or registered.<sup>88</sup>

The Act requires that a person must hold a licence, when carrying on a business of motor dealing, to:

- acquire, primarily for resale, used motor vehicles (whether or not as complete units or parts); and
- sell used motor vehicles (on consignment as an agent for others for reward, to the lessee under the terms of the lease, or as parts); and
- negotiate, under a consultancy arrangement, for a person who is not a motor dealer or chattel auctioneer for the purchase or sale of a used motor vehicle for the person.

Generally individuals or corporations are not suitable to hold a licence if, among other things, they are: insolvent or under administration; convicted of a serious offence; or, disqualified from holding a licence or registration certificate.<sup>89</sup> In addition, the Act prescribes that an individual who is identified as participant in a criminal organisation<sup>90</sup>; or a corporation (whose executive officer is an identified participant in a criminal organisation)<sup>91</sup>, is not suitable to hold a motor dealer licence.

#### STATISTICAL INFORMATION

The Motor Dealers and Chattel Auctioneers Act commenced on 1 December 2014.

Prior to the commencement of the of the Act 4518 licence applications were made in the 2012/2013 financial year. 4980 applications were made in the 2013/2014 financial year under the licensing regime governed by the Property Agents and Motor Dealers Act.

After the commencement of the provisions there were 4838 applications in the 2014/2015 financial year and 2737 applications from 1 July 2015 to 31 January 2016.

Between 1 July 2014 and 31 January 2016, only one licence application was refused because of the provisions modelled on the 2013 suite. This individual did not seek a review by QCAT or otherwise.

No existing licence was cancelled because of an individual's alleged links to organised crime between 1 July 2014 and 31 January 2016.

#### QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION ACT 1991

The Queensland Building and Construction Commission Act (QBCCA) regulates the occupational licensing regime for builders, trade contractors, plumbers, drainers and fire protection contractors.

The Queensland Building and Construction Commission is a statutory body which oversees the licensing regime.

The following licences are issued under the QBCCA:

- (1) contractor's licence;<sup>92</sup>
- (2) nominee supervisor's licence;<sup>93</sup>
- (3) site supervisor's licence;<sup>94</sup> and
- (4) fire protection occupational licence.<sup>95</sup>

### EFFECT OF 2013 AMENDMENTS

The 2013 occupational licensing amendments to the Act are not due to commence on 1 July 2016.

The effect of the 2013 provisions and rights of appeal in the Act are very much the same as the Liquor Act.

### STATISTICAL INFORMATION

The 2013 amendments to the licensing scheme administered under the QBCCA are not due to commence until 1 July 2016.

The total number of existing licences as at 31 January 2016 is 85,928.

8,488 licence applications were made in the 2014/2015 financial year.

### RACING ACT 2002

The Racing Act regulates the racing industry in Queensland.

The main purposes of the Act are:

- to maintain public confidence in the racing of animals in Queensland for betting that is lawful;
- to ensure the integrity of all persons involved with racing or betting under the Act; and
- to safeguard the welfare of all animals involved in racing under the Act.<sup>96</sup>

These are achieved, amongst a number of measures, by requiring the licensing of racing bookmakers.<sup>97</sup>

The relevant licensing legislation for racing bookmakers is found in Chapter 6 of the Racing Act.

Part 1 creates a variety of offences in relation to unlawful bookmaking, and requirements for licensed bookmaking. For example, section

194 makes it an offence to carry on bookmaking at a licensed venue at any time unless the person is a racing bookmaker whose licence was granted by the control body exercising control at the licensed venue at that time.

Part 2 contains provisions in relation to the licensing of persons as racing bookmakers.

Part 3 contains provisions relating to eligibility certificates for licensed bookmakers. The decision as to whether to grant an eligibility certificate is made following a decision about whether a person is a suitable person to hold an eligibility certificate.

Part 3A contains the provisions relating to off course approvals for racing bookmakers.

Parts 4 and 5 contain other provisions, including miscellaneous provisions, about racing bookmakers.

Applications for the grant of an eligibility certificate are made to the Gaming Executive, which is delegated to the Office of Liquor and Gaming Regulation within the Department of Justice and Attorney-General.<sup>98</sup>

Applications for racing bookmaker licences are made to the control body for racing, which is the statutory body, Racing Queensland.<sup>99</sup>

### EFFECT OF THE 2013 AMENDMENTS

The 2013 amendments commenced on 1 July 2014.

The effect of the 2013 provisions and rights of appeal in the Act are, again, very much the same as the Liquor Act.

### STATISTICAL INFORMATION

The 2013 amendments to the Racing Act commenced on 1 July 2014.

Prior to the commencement of the amendments in the 2013/2014 financial year there were two eligibility certificate applications.

The total number of eligibility certificate applications received after the commencement of the 2013 amendments was six.

The Taskforce was advised that between 1 July 2014 and 31 January 2016 there were no applications refused, or licences cancelled, because of the 2013 amendments.

## SECOND-HAND DEALERS AND PAWNBROKERS ACT 2003

The Second-hand Dealers and Pawnbrokers Act<sup>100</sup> requires that a person must not carry on a business of a second-hand dealer or pawnbroker in Queensland without a licence.<sup>101</sup>

The main objectives of this Act are to regulate the activities of second-hand dealers and pawnbrokers and deter crime in the second-hand property market and help protect consumers from purchasing stolen property.<sup>102</sup>

The licensing regime is administered by the QPS and the Office of Fair Trading (OFT). QPS are principally responsible for enforcement, while OFT is responsible for licensing.<sup>103</sup>

A person can apply for licence as an individual, a partnership, or any other type of corporate entity. A person can also apply for a combined licence as a second-hand dealer and pawnbroker.<sup>104</sup>

A second-hand dealer licence lets a person trade in second-hand goods by acquiring them; selling them; disposing of them; and giving exchanges on them. This might or might not be on commission. A pawnbroker licence allows a person to take security of an item (known as a pawn or pledge) from a person, and lend them a sum of money for profit in return.

To be eligible for either licence a person must be at least 18 years old and have at least one place of business in Queensland.

To be suitable a person must not among other things, be insolvent or under administration;

be an externally administered body corporate; or, have been convicted of a disqualifying offence in the last 5 years.<sup>105</sup>

Associates must also satisfy this criteria. An associate is a person who represents the licensee in the business and is regularly in charge of the business.<sup>106</sup> There are no training requirements for these licences.

## EFFECT OF AMENDMENTS

The 2013 amendments commenced on 1 July 2014.

The effect of the 2013 provisions and rights of appeal in the Act are again very much the same as the Liquor Act.

## STATISTICAL INFORMATION

The OFT received 1,100 licence applications between 1 July 2013 and 30 June 2014; 1,007 licence applications between 1 July 2014 and 30 June 2015; and 566 licence applications between 1 July 2015 and 31 January 2016.

The Taskforce was advised that no applications were refused between 1 July 2014 and 31 January 2016 because of to the 2013 amendments.

## SECURITY PROVIDERS ACT 1993

The Security Providers Act (with the *Security Providers Regulation 2008*, as well as a number of occupation-specific Codes of Practice)<sup>107</sup> requires that persons performing the functions of bodyguard, crowd controller, private, investigator, security adviser; security equipment installer, security officer, or security firm, as defined in the Act, must hold an appropriate licence.<sup>108</sup>

The Act is administered and enforced by the OFT.<sup>109</sup>

The Act aims to:

- rigorously regulate security providers;

- reduce the number of security providers who are poorly trained;
- “clean up” the industry; and
- reduce the incidence of violence at public places’.<sup>110</sup>

Under the Act an ‘entitlement’ to a licence is based on a person being an ‘appropriate person’ which, among other things, bars dealings of dishonesty, a lack of integrity or using harassing tactics, associating with criminals indicating involvement in unlawful activity, bankruptcy, a criminal conviction, being a risk to public safety, or a licence grant being contrary to the public interest.<sup>111</sup>

More specifically, persons must be fingerprinted upon applying for,<sup>112</sup> or renewing<sup>113</sup> a licence and cannot hold a security licence if they commit a disqualifying offence for which a conviction was recorded within 10 years of their licence application.<sup>114</sup> Additionally, bodyguards and crowd controllers must meet certain training courses (which are repeated every 3 years), and wear venue-issued identification while on duty.

#### EFFECT OF 2013 AMENDMENTS

The 2013 amendments to the Security Providers Act commenced on 1 July 2014.

The effect of the 2013 provisions and rights of appeal in the Act are much the same as the Liquor Act.

#### STATISTICAL INFORMATION

Prior to the commencement of the amendments there were 21519 licence applications in 2013 – 2014.

The number of applications after the commencement of the 2013 amendments was 22,537 in 2014/2015, and 12,267 between 1 July 2015 and 31 January 2016.

The Taskforce was advised that three applicants were denied or cancelled because of alleged links to organised crime.

#### TOW TRUCK ACT 1973

The Tow Truck Act and the *Tow Truck Regulation 2009* is the governing legislation in Queensland which regulates accidents and incidents which necessitate the use of tow trucks and police seizures of vehicles in ‘regulated areas’ and mandates that all tow truck operators must be licensed.<sup>115</sup>

Licences depend on whether a person operates a tow truck is employed on or in connection with the use of a tow truck, or travels in a tow truck going to the scene of an incident or seizure of a motor vehicle. A person must hold either a driver’s certificate, an assistant’s certificate, or a temporary permit.<sup>116</sup>

These three types of licence are collectively referred to in the Act as an ‘authority’.<sup>117</sup>

The Department of Transport and Main Roads is responsible for the administration of the legislation, working in conjunction with the QPS in enforcing the legislation.

The Tow Truck industry consists of vehicle breakdowns, trade tows, removing illegally parked vehicles from private property, and accident and police seizure towing.<sup>118</sup>

Accident and police seizure towing is the only form of towing that comes under the auspices of the Tow Truck Act.

The Tow Truck Act prescribes the standards of conduct which must be adhered to by individuals who are involved in the towing of vehicles from the scene of a crash or police seizure in regulated areas: areas are primarily limited to higher population areas, including South-East Queensland, and urban local government centres along the east coast.<sup>119</sup>

The Chief Executive must consider a broad range of criteria in assessing the suitability of a licence application or licence holder.<sup>120</sup>

## EFFECT OF THE AMENDMENTS

The 2013 suite amendments to the Tow Truck Act commenced on 1 July 2014.

The effect of the 2013 provisions and rights of appeal in the Act are similar to the Liquor Act.

## STATISTICAL INFORMATION

850 tow truck licence applications were received in the 2013/2014 financial year by the Department of Transport; in the 2014/2015 financial year, 868 applications were received; and between 1 July 2015 and 31 January 2016, 515 applications were received.

The Taskforce was advised that there were no applications refused between 1 July 2014 and 31 January 2016 because of the 2013 amendments.

## WORK HEALTH AND SAFETY ACT 2011

The Work Health and Safety Act establishes occupational licensing schemes as a regulatory tool to control activities which are of such high risk that they require demonstrated competency or a specific standard of safety for a person to perform the activity, and where the licensing scheme will have a defined and achievable safety benefit.<sup>121</sup>

The licensing regime under the Act is administered by Workplace Health and Safety Queensland.

Under section 43(1) of the Act a person must not carry out work at a workplace if the WHS Regulation requires that the person be authorised to do the specified work, and they are not.

Section 43(2) of the Act provides that a person conducting a business or undertaking must not direct or permit an unlicensed person to carry out work if the person is required to be licensed under the regulation to perform that work. The term 'authorised' is defined in section 40 to mean authorised by a licence,

permit, registration or authority (however described) under a regulation.

The Work Health and Safety Regulation 2011 sets out the specific requirements for work licences, and requires people carrying out a number of different functions to be licensed.

## 2013 AMENDMENTS

The amendments to this Act are not due to commence until 1 July 2016.

The Office of Queensland Treasury and the Office of Industrial Relations have previously advised the Taskforce that the Work Health and Safety Regulations that will be aimed at preventing participants in obtaining licence have been partially drafted<sup>122</sup> and, upon commencement, will operate in the same manner as set out in the Liquor Act.

## WEAPONS ACT 1990

The Weapons Act regulates the lawful use and sale of weapons, including firearms, in Queensland.

Unlike the other industries targeted by the 2013 suite, where administration and enforcement is shared between the relevant government agencies and the QPS, the oversight and enforcement of the Act is the sole responsibility of the QPS.

The licensing scheme under the Act is different to occupational licensing schemes in Queensland. The scheme restricts the privilege of weapons ownership by reason of participation in a criminal organisation.

This privilege was already restricted prior to the 2013 suite.

The principles underlying the Weapons Act are:

- weapons possession and use are subordinate to the need to ensure public and individual safety,<sup>123</sup> and

- public and individual safety is improved by imposing strict controls on the possession of weapons, and by requiring the safe and secure storage and carriage of them.<sup>124</sup>

The object of the Act is to prevent the misuse of weapons which is achieved by:

- prohibiting the possession and use of all automatic and self-loading rifles and automatic and self-loading shotguns, except in special circumstances;
- establishing an integrated licensing and registration scheme for all firearms;
- requiring each person who wishes to possess a firearm under a licence to demonstrate a genuine reason for possessing the firearm;
- providing strict requirements that must be satisfied for:
  - licences authorising possession of firearms; and
  - the acquisition and sale of firearms; and
- ensuring that firearms are stored and carried in a safe and secure way.<sup>125</sup>

#### EFFECT OF THE 2013 AMENDMENTS

The amendments to the Weapons Act commenced on 1 July 2014.

The effect of the 2013 provisions and rights of appeal in the Weapons Act are, again, very much the same as the Liquor Act.

#### STATISTICAL INFORMATION

For the period 1 July 2014 to 31 December 2015 a total of 158,205 weapon licence applications were submitted and considered by QPS. These applications were in the form of

new licences, permits to acquire, licence renewals, and statements of eligibility.

The Taskforce was advised that 12 individuals were considered unsuitable on the basis of the applicant allegedly being a participant in a criminal organisation.<sup>126</sup>

#### BREACHES OF THE FUNDAMENTAL LEGISLATIVE PRINCIPLES

Legislation in Queensland must, again, have sufficient regard to the fundamental legislative principles (FLPs) set out in the *Legislative Standards Act 1992* (QLD) (LSA).

The Tattoo Parlours Act was contained in the first tranche of the 2013 suite and its compliance with the FLPs was not scrutinised by a Parliamentary Committee.

All other occupational and industry licensing amendments were contained in the second tranche of the 2013 suite and were scrutinised by the Legal Affairs and Community Safety Committee (LACSC).<sup>127</sup>

Many of the FLP breaches identified by the LACSC with respect to the occupational and industry licensing amendments in the second tranche of the 2013 suite apply, equally, to the amendments contained in the Tattoo Parlours Act.

#### SUFFICIENT REGARD TO RIGHTS AND LIBERTIES

Section 4(2)(a) of the LSA requires legislation to have sufficient regard to the rights and liberties of individuals.

Section 4(3) of the LSA provides specific matters which will indicate whether legislation has sufficient regard to rights and liberties, although the Office of the Queensland Parliamentary Counsel (OQPC) FLP Notebook notes that this list is not exhaustive.<sup>128</sup>

## THE RIGHT TO WORK

The LACSC identified the prohibition on identified participants in criminal organisations working in licensed occupations as an interference with a person's right to gainful employment, and brought that issue to the attention of the Legislative Assembly<sup>129</sup>.

Further critics of the 2013 suite have also argued that the strict licensing regime may breach a right, enshrined in Article 6 of the *International Covenant on Economic, Social and Cultural Rights*<sup>130</sup> to which Australia is a signatory. Article 6 provides:

*The State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

## THE RIGHT TO PRIVACY

The requirement in the Tattoo Parlours Act for licence applications to provide their finger and palm prints is, arguably, a breach of a person's right to privacy.<sup>131</sup>

The OQPC FLP Notebook records that the former Parliamentary Scrutiny Committee acknowledged the right to privacy as coming within the ambit of the rights and liberties which should be considered pursuant to section 4(2) of the LSA.

The justification for the requirement that tattoo licence applicants provide their finger and palm prints in the Explanatory Notes is that it is considered to be an appropriate safeguard for the community. The Security Provides Act contains similar requirements.<sup>132</sup>

The Taskforce was told that in the 2014/2015 financial year, 77 tattoo licence applications, which had been submitted were subsequently withdrawn for a variety of reasons. Of those 77 applications, 9 tattoo licence applications were withdrawn as a result of failing to provide finger and palm prints as part of the application.<sup>133</sup>

## RIGHTS, OBLIGATIONS AND LIBERTIES OF INDIVIDUALS DEPENDENT ON ADMINISTRATIVE POWER

Section 4(3)(a) of the LSA provides that, where legislation makes a person's rights dependant on administrative power, the administrative power should be properly defined and, also, made subject to review.

The LACSC identified and brought to the attention of the Legislative Assembly the following arguable breaches of this FLP:

- limitations on persons having access to information about the reasons that their occupational or industry licence had been refused or cancelled<sup>134</sup>;
- the lack of provision for a show cause process before licences are cancelled;<sup>135</sup>
- the fact that cancellation of a licence is not stayed during an appeal process (thus preventing a person earning a living during that period);<sup>136</sup>
- the removal of mechanisms for any internal review of the decision about a licence or certificate;<sup>137</sup> and
- the removal of external review rights under the *Judicial Review Act 1991* (Qld).<sup>138</sup>

## APPROPRIATE DELEGATION OF ADMINISTRATIVE POWER

Section 4(3)(c) of the LSA provides that legislation should only delegate administrative power in appropriate cases to appropriate persons.

The LACSC brought to the attention of the Legislative Assembly that the Commissioner of Police is given responsibility for identifying whether a person is a 'participant in a criminal organisation' but only limited statutory

guidance is provided to the Commissioner of Police in that task.<sup>139</sup>

#### SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT

Section 4(2)(b) of the LSA requires legislation to have sufficient regard to the institution of Parliament. Section 4(4)(a) of the LSA provides that the question of whether legislation does have sufficient regard to the institution of Parliament depends on whether it allows the delegation of legislative power only in appropriate cases, and to appropriate persons.

The LACSC noted that the amendments to the Workplace Health and Safety Act placed provisions preventing participants in criminal organisation undertaking certain activities into a Regulation, not an Act.

A regulation is a statutory instrument<sup>140</sup> and not primary legislation and, thus, is not subject to the same parliamentary scrutiny.

#### CONSISTENCY WITH THE PRINCIPLES OF NATURAL JUSTICE AND PROCEDURAL FAIRNESS

Section 4(3)(b) of the LSA provides that the question whether legislation has sufficient regard to individual rights and liberties is dependent on whether it is consistent with the principles of natural justice.

The LACSC identified a breach of natural justice with respect to the use of criminal intelligence within occupational and industry licensing, and in an amendment to the Tattoo Parlours Act which was contained in the second tranche of the 2013 suite. This FLP breach has been discussed in greater detail at Chapter 10 of the report.

#### POWER TO ENTER PREMISES WITHOUT A WARRANT

Section 4(3)(e) of the LSA provides that the question of whether legislation has sufficient regard to rights and liberties of individuals depends on whether it confers power to enter

a premises *only* with a warrant issued by a judge or other judicial officer.

Police powers to search persons who are entering, who is in, or who is leaving a tattoo parlour are of broad application and enable a police officer with a detection dog to search customers who are attending the premises.

A police officer who conducts a search pursuant to section 35(d) of the *Police Powers and Responsibilities Act 2000* (Qld) is not required to have a reasonable suspicion that a person has engaged in criminal activity (this search power was previously confined to licenced premises and the Act extended it to include Tattoo Parlours).<sup>141</sup>

This breach of the FLP was not identified in the Explanatory Notes to the Bill, despite it representing a significant abrogation of a person's rights and liberties.<sup>142</sup>

The ability of a police officer (with the use of a detection dog) without a warrant, and without a requisite belief that a person entering or who is in, or who is leaving a tattoo premises, has engaged in criminal activity is, arguably, disproportionate and unreasonable.

### RECOMMENDATION 54 (Chapter Twenty-One)

The *Tattoo Parlours Act 2013* (Qld) should remain. (unanimous recommendation)

### RECOMMENDATION 55 (Chapter Twenty-One)

Consideration could be given to renaming the *Tattoo Parlours Act 2013* (Qld) to remove and replace the reference to the word 'parlour'. (unanimous recommendation)

### RECOMMENDATION 56 (Chapter Twenty-One)

Persons should not be refused a licence (or permit or approval or certificate) or have a licence (or permit or approval or certificate) cancelled solely on the basis that they are alleged to be a participant in a criminal organisation. Licences etc. should only be refused or cancelled on the basis that there is evidence specific to the individual which demonstrates that the individual (and not those with whom they associate with) is not a suitable person to hold a licence etc. (unanimous recommendation)

### RECOMMENDATION 57 (Chapter Twenty-One)

Extensive consultation must occur on an industry-by-industry basis to determine how best to frame the 'fit and proper person' test applicable to each of the respective industries in recognition that what constitutes a 'fit and proper person' may differ significantly from industry to industry. (unanimous recommendation)

### RECOMMENDATION 58 (Chapter Twenty-One)

The requirement under each legislative scheme in the 2013 suite (with the exception of that relating to weapons) that Chief Executives refer every application for a licence etc. to the Commissioner of Police should be repealed and replaced with a mechanism which allows the Commissioner of Police to supply relevant information to the Chief Executives on a case-by-case basis (noting, however, the recommendations in Chapter 10). (unanimous recommendation)

### RECOMMENDATION 59 (Chapter Twenty-One)

Applicants or existing licensees who have their application refused or licence etc. cancelled on the basis that they are not, or are no longer, a suitable person must have the right to be given reasons for the decision and an opportunity to contest the allegation. Appeal and review rights (including judicial review) regarding decisions to grant or cancel a licence etc. must be restored. (unanimous recommendation)

## ENDNOTES

- 1 Terms of Reference, Taskforce on Organised Crime Legislation, cl 3.
- 2 Terms of Reference, Taskforce on Organised Crime Legislation, cl 4.
- 3 See *Tattoo Parlours Act 2013* (Qld); *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld).
- 4 Explanatory Notes, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2014* (Qld), 2, [5].
- 5 Explanatory Notes, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2014* (Qld), 2, [5].
- 6 Explanatory Notes, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2014* (Qld), 3, [1].
- 7 Explanatory Notes, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2014* (Qld), 7-8.
- 8 Explanatory Notes, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2014* (Qld), 3,[1] and 7,[2]-[3].
- 9 Explanatory Notes, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2014* (Qld).
- 10 Explanatory Notes, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2014* (Qld), 3[1].
- 11 Explanatory Notes, *Tattoo Parlours Bill 2013* (Qld) 4 [5].
- 12 Advice to Taskforce on Organised Crime Legislation from: Department of Transport and Main Roads (in confidence); Department of Housing and Public Works (in confidence); Office of Industrial Relations (Queensland Treasury) (in confidence); Department of Justice and Attorney-General (Office of Regulatory Policy and Office of Liquor and Gaming) (in confidence); Department of National Parks, Sport and Racing (in confidence).
- 13 Bar Association of Queensland, Submission 1.8 to Taskforce on Organised Crime Legislation, 31 July 2015, 21.
- 14 See Submissions 3.5; 3.6; 3.10; 3.11; 3.18; 3.19(1)-(5) to Taskforce on Organised Crime Legislation.
- 15 Queensland Law Society, Submission 3.20 to Taskforce on Organised Crime Legislation, 5 August 2015, 1.
- 16 Victorian Law Reform Commission, *Use of Regulatory Regimes in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries*, Consultation Paper, June 2015, 14 [3.2].
- 14 Victorian Law Reform Commission, *Use of Regulatory Regimes in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries*, Consultation Paper, June 2015 14.
- 18 Victorian Law Reform Commission, *Use of Regulatory Regimes in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries*, Consultation Paper, June 2015, 14, [3.2].
- 19 Queensland, Parliamentary Debates, Legislative Assembly, 15 October 2013, 3156.
- 20 Explanatory Notes, *Tattoo Parlours Bill 2013* (Qld) 3.
- 21 Legal Affairs and Community Safety Committee, Public Briefing – Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013 – Transcript of Proceedings, 20 November 2013.
- 22 Legal Affairs and Community Safety Committee, Public Briefing – Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013 – Transcript of Proceedings, 20 November 2013, 5. See also Explanatory Notes, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2014* (Qld), 2, [7].
- 23 Legal Affairs and Community Safety Committee, *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013 – Report No. 46* November 2013 6.
- 24 Queensland, Parliamentary Debates, Legislative Assembly, 21 November 2013, 4199-4200.
- 25 Queensland, Parliamentary Debates, Legislative Assembly, 21 November 2013, 21 November 2013, 4253-4254.
- 26 Crime and Misconduct Commission, *CMG infiltration into the Queensland tattoo industry*, March 2014.
- 18 Crime and Misconduct Commission, *CMG infiltration into the Queensland tattoo industry*, March 2014, 1.
- 28 Bar Association of Queensland, submission 1.8 to the Taskforce on Organised Crime Legislation 31 July 2015, 21.
- 29 *Working with Children (Risk Management and Screening) Act 2000* (Qld).

- <sup>30</sup> *Working with Children (Risk Management and Screening) Act 2000* (Qld), section 6.
- <sup>31</sup> *Working with Children (Risk Management and Screening) Act 2000* (Qld), section 229.
- <sup>32</sup> Prohibitions on underage tattooing are contained in the *Summary Offences Act 2005* (Qld).
- <sup>33</sup> Under the *Public Health (Infection Control for Personal Appearance Services) Act 2003* (Qld).
- <sup>34</sup> Queensland, Parliamentary Debates, Legislative Assembly, 15 October 2013, 3155 (Jarrod Bleijie, Attorney-General and Minister for Justice).
- <sup>35</sup> *Tattoo Parlours Act 2013* (Qld), section 9(1)(a).
- <sup>36</sup> *Tattoo Parlours Act 2013* (Qld), section 9(1)(b).
- <sup>37</sup> *Tattoo Parlours Act 2013* (Qld), section 11(1),(2),(3).
- <sup>38</sup> *Tattoo Parlours Act 2013* (Qld) section 11(4). The definition of controlled person in schedule 1 of the *Tattoo Parlours Act* states “see the *Criminal Organisation Act 2009* schedule 2”. Schedule 2 of the *Criminal Organisation Act 2009* defines controlled person as “a person who is subject to a control order or a registered corresponding control order”, while control order is defined as meaning ‘a control order made under section 18 [of the *Criminal Organisation Act 2009*] and, in relation to a control order that is in force, includes an interim control order’.
- <sup>39</sup> *Tattoo Parlours Act 2013* (Qld), section 11(5).
- <sup>40</sup> *Tattoo Parlours Act 2013* (Qld), section 11(5)(e).
- <sup>41</sup> *Tattoo Parlours Act 2013* (Qld), section 11(5)(f).
- <sup>42</sup> *Tattoo Parlours Act 2013* (Qld), section 13(1).
- <sup>43</sup> The *Tattoo Parlours Act* does not define what a function of the police service may include. Conceivably this provision would allow the QPS to conduct comparisons between an applicant’s finger and palm prints with prints previously obtained. A mirror provision authorising the use by the Commissioner of Police of licence applicant’s fingerprints for performing a function of the police service is found in the *Security Providers Act 1993* (Qld), section 30.
- <sup>44</sup> *Tattoo Parlours Act 2013* (Qld), section 6.
- <sup>45</sup> *Tattoo Parlours Act 2013* (Qld), section 7.
- <sup>46</sup> *Tattoo Parlours Act 2013* (Qld), section 8.
- <sup>47</sup> *Tattoo Parlour Act 2013* (Qld), sections 6(1)(a),7(1)(a), 8(1)(a).
- <sup>48</sup> *Tattoo Parlour Act 2013* (Qld), sections 6(1)(b), 7(1)(b), 8(1)(b).
- <sup>49</sup> *Tattoo Parlours Act 2013* (Qld), sections 6(1)(c), 7(1)(c), 8(1)(c).
- <sup>50</sup> *Tattoo Parlours Act 2013* (Qld), section 15(a).
- <sup>51</sup> *Tattoo Parlours Act 2013* (Qld), section 15(b).
- <sup>52</sup> *Tattoo Parlours Act 2013* (Qld), section 15(b).
- <sup>53</sup> *Tattoo Parlours Act 2013* (Qld), section 17.
- <sup>54</sup> *Tattoo Parlours Act 2013* (Qld), section 57(2).
- <sup>55</sup> What those steps might include was considered in the matter of *DT & Anor v Department of Justice & Attorney-General, Industry Licensing Unit & Anor [2014] QCAT 694* where the Tribunal considered that it would not extend to allowing disclosure of criminal intelligence to an applicant’s legal representatives but it would extend to the appointment of an independent monitor or *amicus curiae* to review the criminal intelligence.
- <sup>56</sup> *Tattoo Parlours Act 2013* (Qld), section 57(3)(i)-(ii).
- <sup>57</sup> *Tattoo Parlours Act 2013* (Qld), section 57(5).
- <sup>58</sup> *Tattoo Parlours Act 2013* (Qld), section 58.
- <sup>59</sup> *Tattoo Parlours Act 2013* (Qld), section 46.
- <sup>60</sup> *Tattoo Parlours Act 2013* (Qld), section 47.
- <sup>61</sup> *Tattoo Parlours Act 2013* (Qld), section 48.
- <sup>62</sup> *Police Powers and Responsibilities Act 2000* (Qld), section 35(1), as amended by *Tattoo Parlours Act 2013* (Qld), section 79.
- <sup>63</sup> *Police Powers and Responsibilities Act 2000* (Qld), section 35(2), as amended by *Tattoo Parlours Act 2013* (Qld), section 80.
- <sup>64</sup> *Police Powers and Responsibilities Act 2000* (Qld), section 36, as amended by *Tattoo Parlours Act 2013* (Qld), section 80.
- <sup>65</sup> See submissions 3.5, 3.6, 3.10, 3.11, 3.18, 3.19(1)-(5) to the Taskforce on Organised Crime Legislation.
- <sup>66</sup> Australian Tattooists Guild, Submission 3.17 (parts 1-3) to the Taskforce on Organised Crime Legislation.
- <sup>67</sup> Advice from Office of the Deputy Director-General, Liquor, Gaming and Fair Trading, Department of Justice and Attorney General to the Taskforce on Organised Crime Legislation (undated) (in-confidence).
- <sup>68</sup> *Liquor Act 1992* (Qld), part 1.

- <sup>69</sup> *Liquor Act 1992* (Qld), section 3.
- <sup>70</sup> *Liquor Act 1992* (Qld), section 228B.
- <sup>71</sup> *Liquor Act 1992* (Qld), section 228B(1).
- <sup>72</sup> *Liquor Act 1992* (Qld), section 228B(2).
- <sup>73</sup> *Liquor Act 1992* (Qld), section 47B.
- <sup>74</sup> *Liquor Act 1992* (Qld), section 47B(2).
- <sup>75</sup> *Liquor Act 1992* (Qld), section 36(2).
- <sup>76</sup> *Liquor Act 1992* (Qld), section 47C.
- <sup>77</sup> *Liquor Act 1992* (Qld), section 47C.
- <sup>78</sup> *Liquor Act 1992* (Qld), sections 21, 36.
- <sup>79</sup> *Liquor Act 1992* (Qld), section 37(1)(a).
- <sup>80</sup> *Liquor Act 1992* (Qld), section 37(1)(b).
- <sup>81</sup> *Liquor Act 1992* (Qld), section 37((2).
- <sup>82</sup> *Liquor Act 1992* (Qld), section 37(3).
- <sup>83</sup> *Liquor Act 1992* (Qld), section 37(4).
- <sup>84</sup> *Liquor Act 1992* (Qld), section 38.
- <sup>85</sup> *Electrical Safety Act 2002* (Qld), section 4.
- <sup>86</sup> *Electrical Safety Act 2002* (Qld), section 5(d).
- <sup>87</sup> *Motor Dealers and Chattel Auctioneers Act 2014* (Qld), section 8(1).
- <sup>88</sup> *Motor Dealers and Chattel Auctioneers Act 2014* (Qld), section 8(2).
- <sup>89</sup> *Motor Dealers and Chattel Auctioneers Act 2014* (Qld), sections 21, 22.
- <sup>90</sup> *Motor Dealers and Chattel Auctioneers Act 2014* (Qld), section 21(1)(e).
- <sup>91</sup> *Motor Dealers and Chattel Auctioneers Act 2014* (Qld), section 21(2)(e).
- <sup>92</sup> *Queensland Building Services Authority Act 1991* (Qld), section 30.
- <sup>93</sup> *Queensland Building Services Authority Act 1991* (Qld), section 30A.
- <sup>94</sup> *Queensland Building Services Authority Act 1991* (Qld), section 30B.
- <sup>95</sup> *Queensland Building Services Authority Act 1991* (Qld), section 30C.
- <sup>96</sup> *Racing Act 2002* (Qld), section 4.
- <sup>97</sup> *Racing Act 2002* (Qld), section 4(2)(j).
- <sup>98</sup> *Racing Act 2002* (Qld), section 259.
- <sup>99</sup> Advice from Department of National Parks, Sport and Racing to Taskforce on Organised Crime Legislation (insert date) (in confidence).
- <sup>100</sup> See also *Second-hand Dealers and Pawnbrokers Regulation 2004* (Qld).
- <sup>101</sup> *Second-hand Dealers and Pawnbrokers Act 2003* (Qld), section 6.
- <sup>102</sup> *Second-hand Dealers and Pawnbrokers Act 2003* (Qld), section 3.
- <sup>103</sup> Advice from Department of Justice and Attorney-General (Office of Fair Trading and Office of Regulatory Policy) to Taskforce on Organised Crime Legislation (undated) (in confidence).
- <sup>104</sup> Advice from Department of Justice and Attorney-General (Office of Fair Trading and Office of Regulatory Policy) to Taskforce on Organised Crime Legislation (undated) (in confidence).
- <sup>105</sup> *Second-hand Dealers and Pawnbrokers Act 2003* (Qld), section 7(1)(a)-(d). A disqualifying offence is any serious offence punishable by 3 or more years in prison, which includes: offences that relate to administering justice or public authority; violent offences (including threats to use violence); fraud and dishonesty; drug trafficking; extortion; arson; unlawful stalking; any offence of a sexual nature – see Schedule 1.
- <sup>106</sup> *Second-hand Dealers and Pawnbrokers Act 2003* (Qld), section 8.
- <sup>107</sup> Namely: *Security Providers (Crowd Controller Code of Practice) Regulation 2008*; *Security Providers (Security Firm Code of Practice) Regulation 2008*; and, *Security Providers (Security Officer—Licensed Premises—Code of Practice) Regulation 2008*.
- <sup>108</sup> *Security Providers Act 1993* (Qld), section 10(4).
- <sup>109</sup> Advice from Department of Justice and Attorney-General (Office of Fair Trading) to Taskforce on Organised Crime Legislation (undated) (in confidence).
- <sup>110</sup> Advice from Department of Justice and Attorney-General (Office of Fair Trading) to Taskforce on Organised Crime Legislation (undated) (in confidence).
- <sup>111</sup> *Security Providers Act 1993* (Qld), section 11(4).

<sup>112</sup> *Security Providers Act 1993* (Qld), section 10(8).

<sup>113</sup> An application for a renewal of an unrestricted licence must require the provision of the applicant's fingerprints, *Security Providers Act 1993* (Qld), section 20(7).

<sup>114</sup> *Security Providers Act 1993* (Qld), section 11(5).

<sup>115</sup> *Tow Trucks Act 1973* (Qld), sections 5, 13.

<sup>116</sup> *Tow Truck Act 1973* (Qld), section 13.

<sup>117</sup> *Tow Truck Act 1973* (Qld), section 20.

<sup>118</sup> Advice from Department of Transport and Main Roads to Taskforce on Organised Crime Legislation, (undated) (in-confidence).

<sup>119</sup> Advice from Department of Transport and Main Roads to Taskforce on Organised Crime Legislation, (undated) (in-confidence).

<sup>120</sup> *Tow Truck Act 1973* (Qld), section 4C.

<sup>121</sup> Advice from Queensland Treasury (Office of Industrial Relations) to Taskforce on Organised Crime Legislation (undated) (in-confidence).

<sup>122</sup> Advice from Queensland Treasury (Office of Industrial Relations) to Taskforce on Organised Crime Legislation (undated) (in-confidence).

<sup>123</sup> *Weapons Act 1990* (Qld), section 3(1)(a).

<sup>124</sup> *Weapons Act 1990* (Qld), section 3(1)(b).

<sup>125</sup> *Weapons Act 1990* (Qld), section 4.

<sup>126</sup> Queensland Police Service, Submission to Taskforce on Organised Crime Legislation (undated) (in confidence).

<sup>127</sup> Legal Affairs and Community Safety Committee, Queensland Parliament, Report No.46, November 2013.

<sup>128</sup> Office of the Queensland Parliamentary Counsel, Queensland Government, *Fundamental Legislative Principles: The OQPC Notebook*, January 2008, 95.

<sup>129</sup> Legal Affairs and Community Safety Committee, Queensland Parliament, Report No. 46, November 2013, 24.

<sup>130</sup> International Covenant on Economic, Social and Cultural Rights, opened for signature on 16 December 1966, UNTS 933 (entered into force 3 January 1976) art 6.

<sup>131</sup> *Tattoo Parlours Act 2013* (Qld), section 13.

<sup>132</sup> Explanatory Notes, Tattoo Parlours Bill 2013 (Qld) 3.

<sup>133</sup> Advice from Department of Justice and Attorney-General (Office of Regulatory Policy and Office of Liquor and Gaming), (undated) (in confidence).

<sup>134</sup> Legal Affairs and Community Safety Committee, Queensland Parliament, Report No. 46, November 2013, 24.

<sup>135</sup> Legal Affairs and Community Safety Committee, Queensland Parliament, Report No. 46, November 2013, 25.

<sup>136</sup> Legal Affairs and Community Safety Committee, Queensland Parliament, Report No. 46, November 2013, 26.

<sup>137</sup> Legal Affairs and Community Safety Committee, Queensland Parliament, Report No. 46, November 2013, 26.

<sup>138</sup> Legal Affairs and Community Safety Committee, Queensland Parliament, Report No. 46, November 2013, 26.

<sup>139</sup> Legal Affairs and Community Safety Committee, Queensland Parliament, Report No. 46, November 2013, 27.

<sup>140</sup> *Statutory Instruments Act 1992* (Qld).

<sup>141</sup> *Police Powers and Responsibilities Act 2000* (Qld), section 35(d).

<sup>142</sup> Explanatory Notes, Tattoo Parlours Bill 2013 (Qld).

## PART 6

# CHAPTER TWENTY-TWO

## SHOULD QUEENSLAND LEGISLATE FOR A NEW ‘SERIOUS ORGANISED CRIME’ OFFENCE?

*The Taskforce concluded that a suggested new stand-alone serious organised crime offence is not demonstrably necessary, and should not be part of the legislative armoury for tackling organised crime in Queensland.*

*Instead the Taskforce drew on the professional expertise of its members to independently develop an alternative model which, in its view, meets the policy ideals.*

*The Taskforce believes its new model is a proportionate and fair way forward but one which remains appropriately robust in the fight against organised crime.*

The Taskforce was required under its Terms of Reference to note the Queensland Government’s intention that there would be a new *serious organised crime offence*, which would carry a maximum penalty of life imprisonment and a mandatory minimum sentence – 80% of the term of imprisonment imposed or 15 years imprisonment, whichever is the *greater*.

The Taskforce has come to the conclusion that this proposed change should not be carried into effect. A similar conclusion was reached last year by the Commission of Inquiry into Organised Crime in Queensland (the Byrne Report).<sup>1</sup>

The Taskforce was also required, under its Terms of Reference, to take effective cognisance of the Byrne Report. It has done so but has, quite independently and of its own volition, reached the same conclusion. This Chapter explains why.

### THE BYRNE REPORT

This Report, handed down in 30 October 2015, involved (among many other things) a comprehensive analysis of the advantages and disadvantages of a discrete serious organised crime offence in Queensland<sup>2</sup> and, ultimately, questioned both the need for it, and its utility.<sup>3</sup>

Chapter 8 of the Byrne Report discusses the question. The Commission noted that:

*‘...the enactment of an organised crime offence will more likely than not result in an offence that will be much more difficult to prove than the wide range of offences currently available in the Criminal Code. Accordingly the Commission queries the utility of enacting such an offence’.*<sup>4</sup>

(emphasis added)

This conclusion was reached after a thorough examination of ‘participation offences’ across other jurisdictions, an exercise which led the Commission to decide that:<sup>5</sup>

- settling on a definition of ‘criminal organisation’ that is sufficiently flexible but appropriately targeted is problematic;
- proving that a group of persons share the same objective, beyond reasonable doubt, is difficult;
- the existing ‘party provisions’ under Queensland’s Criminal Code (sections 7, 8 and 9) are sufficient to prove cases against individuals involved in organised crime; and
- section 9 of the *Penalties and Sentences Act 1992* (Qld) is sufficient to provide flexible sentencing options which can appropriately reflect the seriousness of organised criminal activity.

These views, the Byrne Report noted, have support at the highest levels.

The former Director of Public Prosecutions Mr AW Moynihan QC (as his Honour then was) told the Commission that in his view the present Criminal Code provisions operated effectively to catch persons who commit offences jointly or following an agreement.

Mr Moynihan QC also pointed out that the operation of these provisions is now very well understood by police and lawyers through decided cases, which have enabled a settled understanding of their effective use, and reach.<sup>6</sup>

#### THE TASKFORCE INDEPENDENTLY ASSESSED THE UTILITY OF A NEW SERIOUS ORGANISED CRIME OFFENCE

The Taskforce met and considered the question in detail two weeks after Mr Byrne QC handed down his report on 30 October 2015.

The Taskforce concluded, in short, that more effective methods of combating organised crime are available and all members believe

that an approach based upon the proposed *Organised Crime Framework* avoids the problems identified in the Byrne Report, while building on the existing structure of our criminal law in a logical way.

Its reasons for those conclusions, reached independently of the Byrne Report, are set out in detail later. That said, Taskforce members took comfort that Mr Byrne QC (also independently) had also reached the same conclusion.

#### AUSTRALIA’S INTERNATIONAL OBLIGATIONS TO LEGISLATE AGAINST ORGANISED CRIME

Article 5(1) of the United Nations *Convention against Transnational Organised Crime* commits State Parties to introducing legislation which criminalises participation in an organised crime group:<sup>7</sup>

*(1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:*

*(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;*

*(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:*

- a. *Criminal activities of the organized criminal group;*
- b. *Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;*

*(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.*

Australia ratified this Convention on 27 May 2004.<sup>8</sup> Although the Commonwealth Government has signed the treaty, there is no legal obligation upon a state parliament to enact legislation which conforms to it.<sup>9</sup>

Several other Australian states have, however, introduced participation offences into their legislation which satisfy the treaty (see Chapter 3).

#### APPROACH IN OTHER JURISDICTIONS

Chapter 3 of this Report shows that New South Wales, Western Australia and South Australia have specific offences relating to *participation in a criminal organisation*, and contains information about their legislation. The approach in other countries (the United States of America, United Kingdom, Canada and New Zealand) is also discussed there.

The Byrne Report noted a problem with what the Commission categorised as ‘participation’ offences – ie, offences which require proof that an alleged group (a ‘criminal organisation’) has as one of its objectives or aims the commission of criminal offences. The Report noted:<sup>10</sup>

*Proving that at least two – or in most cases three – people share the same objective is extraordinarily difficult.*

(emphasis added)

Chapter 3 shows that these kinds of participation offences have not proven useful in practice; the results are not encouraging, and do not promise success.

A separate stand-alone *serious organised crime offence* within our Criminal Code appears to carry the same disadvantages – complexity, lack of immediate utility, and superfluity.

#### SUBMISSIONS RECEIVED BY THE TASKFORCE

The Taskforce received a number of submissions about the proposal.

The Crime and Corruption Commission expressed no final view but suggested that, if a new serious organised crime offence is to be created, it should be directed at organised criminal groups rather than *ad hoc* formations of opportunistic criminal enterprises.<sup>11</sup>

The Queensland Council for Civil Liberties submission echoed that view while contending that, if the Taskforce did consider that the creation of a new serious organised crime offence was necessary, it is important that it be targeted at serious criminal offences such as money laundering, drug trafficking and child sex offences rather than objectively less serious offending such as wounding, or affray.<sup>12</sup>

The Bar Association of Queensland (BAQ) took a clear, opposed line. Its submission questioned the need for the new offence (and, in any event, was strongly against the suggested mandatory sentencing component). The BAQ submission is crystallised in this passage:<sup>13</sup>

*[BAQ is]... puzzled as to what, if any, benefit might be sought to be obtained from creation of the suggested offence.*

*The problem with organised crime is that it frequently involves the commission of serious crimes, such as murder, abduction, torture and drug production and trafficking. Serious offences of that kind carry onerous penalties.*

*That the offence was carried out as part of an organisation is a matter of aggravation that the courts can take into account in the sentencing process. For example, drug trafficking will frequently carry, on a plea of guilty, a sentence of 12 years imprisonment or above of which 80% must be served in prison.*

*If such a penalty failed to deter many would-be drug traffickers, it is unlikely that the new offence, even with its mandatory punishment, would achieve a different effect’.*

The BAQ also argued that the proposal carried potentially serious drawbacks – eg, that a serious organised crime offence would ‘achieve many more very long trials in the superior courts of Queensland eating up resources’; and, that ‘a person at a high level in a criminal organisation may be properly charged, under the parties provisions in the Criminal Code, with offences committed by her minions’.<sup>14</sup>

These propositions were supported by the Queensland Law Society and the Public Interest Monitor in Taskforce discussions.

The Electrical Trades Union of Employees of Queensland indicated a qualified non-opposition to the introduction of a serious organised offence (subject to the form and application of the offence) but, like BAQ and QLS, was strongly opposed to a mandatory sentence.<sup>15</sup>

#### EXISTING LAWS TARGETING ORGANISED CRIME IN QUEENSLAND

Under the Queensland Criminal Code there is no offence *specifically* directed at proscribing acts or omissions designated to further the interests or objectives of a criminal group.<sup>16</sup>

There are, however, a number of Code provisions which, in concert or various combinations, are seen by many (eg, Mr Moynihan QC (as his Honour then was) and Mr Byrne QC, *supra*) as sufficient for purpose.

#### CRIMINAL CODE ‘PARTY’ PROVISIONS

Prior to the 2013 suite the ‘party provisions’ in the Criminal Code were the primary tools used to prosecute organised crime criminal offending.<sup>17</sup>

Section 7 of the Code extends criminal responsibility to a person who is a party to an offence (indictable or simple). That is:

- (a) every person who actually does the act or omission which constitutes the offence;
- (b) every person who does or omits to any act for the purpose of enabling or aiding another person to commit the offence;
- (c) every person who aids another person in committing the offence; and
- (d) any person who counsels or procures any other person to commit the offence.<sup>18</sup>

The ‘scheme’ inherent within this provision generally encompasses the traditional common law categories of *principal in the first degree*, *principal in the second degree* and *accessory after the fact*.<sup>19</sup>

Section 8 provides that, when two or more persons pursue a common unlawful purpose and in the course of that pursuit a further offence (indictable or simple) is committed, of such a nature that its commission was a probable consequence of the common unlawful purpose, each person is deemed to have committed the offence.<sup>20</sup>

Section 9 provides that if a person ‘counsels’ another to commit an offence they are criminally liable for any other offence that is committed, provided that it was a ‘probable consequence’ of carrying out the counselled course.<sup>21</sup>

The offence of being an ‘accessory after the fact’ is set out in section 10. It provides that a

person commits an offence if they knowingly assist a person to escape punishment.

Other relevant Code provisions mean that a person who is a party to an offence may be charged in the same indictment with another party, and they may be tried together.<sup>22</sup> Alternative verdicts are available on an indictment for procuring the commission of an offence.<sup>23</sup>

### THE VLAD CIRCUMSTANCE OF AGGRAVATION

The VLAD Act created a circumstance of aggravation which is attached to a number of declared offences, so that persons deemed *vicious lawless associates* are exposed to severe mandatory penalties ranging between 15 and 25 years imprisonment (unless they provide cooperation that is considered to be of significant use by law enforcement agencies).

Chapter 13 of this Report contains a detailed discussion of the operation of the VLAD Act.

### A NEW CRIMINAL CODE OFFENCE; OR SOME OTHER MEANS OF ACHIEVING THE POLICY PURPOSE?

In fulfilling its Terms of Reference, the Taskforce critically analysed and examined the Government's proposal to establish a new Serious Organised Crime offence.

The Taskforce did so with the same level of scrutiny it applied to its examination of the 2013 suite – in particular, the VLAD Act regime.

The merits of a new offence punishable by a maximum penalty of life imprisonment with a mandatory 80% minimum standard non-parole period regime or a fixed 15 years imprisonment (*whichever is the greater*) were assessed and debated from many perspectives: theoretical and academic viewpoints, the legal ramifications, operational considerations, and the impacts upon the fundamental rights and liberties of citizens.

What crystallised for Taskforce members as it undertook this analysis is the existence of some crucial points of commonality (and, of course, distinction) across the VLAD Act regime introduced by the previous Government, and the present Government's proposal.

The Taskforce observed the emergence of some key policy ideals underpinning each government's initiatives, and their intended legislative purpose in this regard.

It would appear, at least to the Taskforce, that at the core of both initiatives (despite each coming from different sides of the political divide) are the following notions – that:

- organised crime warrants a special and particular legislative response to confront (and combat) its presence within, and impact upon, our community;
- a regime is needed that not only deters and punishes those involved in serious organised crime but which will operate to 'crack' the bonds and code of silence which often solidifies these groups, so as to assist in the investigation and prosecution of these serious matters;
- a strong sanction is warranted for this type of offending; (but, perhaps, one that can be avoided if cooperation of substantial importance is provided to law enforcement); and
- a clear message must be sent to organised criminals that their conduct will not be tolerated or accepted in Queensland.

With this understanding members of the Taskforce nevertheless concluded that the creation of a stand-alone Serious Organised Crime offence was neither necessary, nor desirable.

The majority of members were satisfied that the offences contained in Queensland's existing legislative armoury were already

sufficient for tackling the various types of criminal activities commonly engaged in by criminal organisations – and, had the added advantage that their effective use is well understood by the police and prosecuting authorities in proving cases against individuals who commit crime (including, as part of organised criminal activity).

The Taskforce, aided by hindsight and its membership composition (drawn from across the spectrum of the criminal justice system, with a considerable depth of experience and diversity of perspectives about the criminal law) had a number of significant concerns regarding the VLAD Act; but similarly, some equally powerful concerns about the Government’s proposed new offence.

Chapter 13 comprehensively analyses the VLAD Act regime, including a discussion about its strengths and shortcomings. Ultimately, as explained there, the Taskforce resolved to recommend its repeal.

An analysis of the Government’s stand-alone offence is undertaken in more detail later in this Chapter.

While both initiatives raised matters of concern for the Taskforce, members also accepted that both have core features (some overlapping, and some distinct) that the Taskforce considered useful in developing a renewed model to successfully confront serious organised crime in Queensland.

This exercise, the process of examination and analysis undertaken by the Taskforce, has led it to proffer an alternative model for change which its members believe draws on the merits of each proposal but overcomes what they have concluded are their unworkable or disproportionate and/or unfair features.

The result is the development by the Taskforce of a *renewed Organised Crime Framework*.

It is a Framework which, members believe, offers a robust response (as both governments strongly advocated) but which is objectively more practicable and fairer and, importantly,

more likely to secure convictions under the criminal justice system.

The renewed Framework is underscored by traditional criminal law approaches; well-proven methods of crime detection and prosecution; and, a focus on groups of *individual* criminals based on conduct as opposed to mere association.

A cornerstones of the renewed Framework is the establishment of a *Serious Organised Crime circumstance of aggravation* to be inserted into Queensland’s Criminal Code. This initiative is discussed in detail in Chapter 13.

The circumstance of aggravation would incorporate the new definitions of ‘participant’ and ‘criminal organisation’, detailed in Chapter 11.

It will be punishable by a *targeted sentencing regime*, specific to the Serious Organised Crime circumstance of aggravation, which includes a mandatory *Organised Crime Control Order* (a further cornerstone feature of the renewed Framework).

Like the VLAD Act (although with necessary modifications), but unlike the Government’s proposal, this new *targeted sentencing regime* can be avoided in circumstances where the person provides significant cooperation with law enforcement agencies about an investigation or proceeding regarding a serious criminal offence.

*All members of the Taskforce consider the establishment of the Serious Organised Crime circumstance of aggravation to be a better approach to confronting organised crime.*

The renewed Organised Crime Framework will replace the VLAD Act, which the majority of Taskforce members have recommended should be repealed in its entirety; and, will replace the Government’s proposal for a new stand-alone offence.

The Taskforce, respectfully, identified three principal limitations of establishing a stand-alone offence.

First, while there may be the political will to create a new offence there is presently, in truth, no gap in Queensland's criminal laws regarding the criminalisation of organised crime behaviour.

Queensland's Criminal Code provisions already operate effectively to catch persons who commit offences jointly or following an agreement; and, the operation of these provisions is well understood by police and lawyers through decided cases, which have enabled a settled understanding of their effective use, and reach. The Criminal Code offences carry substantial penalties.

To create a new offence, being mindful not to duplicate existing Criminal Code offences, means the enactment of a *participation offence*.

It is acknowledged that to do so is not inconsistent with the approach of some other jurisdictions (detailed in Chapter 3). However, the experience of those other jurisdictions is that discrete participation offences have *not* proven to be particularly successful. This lack of success is also confirmed by the Byrne Report.

In those circumstances it is counter-intuitive to establish a new offence.

A *participation offence* focuses on the commission of offences by a person on behalf of/for a criminal organisation. Participation in the organisation is the basis of criminality; as compared to individual criminality, which may also have been undertaken in association with or for the benefit of a criminal organisation.

A participation offence injects an unnecessary and undesirable level of complexity, and difficulty, into the criminal trial process because it necessitates proof beyond reasonable doubt that a group of people share the same criminal purpose or objective. In the absence of such evidence, the charge may fail.

Secondly (and this follows on from the first concern) there is a risk, in framing an

indictment to include a participation offence (whether as the only charge on the indictment or alongside a series of related but discrete existing Criminal Code offences, which together help establish the participation offence) that the complexity of the trial will result in a lost opportunity for conviction.

Objectively, criminal trials are already complicated in the eyes of a jury.

To indict the participation offence might mean that the focus of the trial becomes so heavily directed at proving the elements of the new offence that it comes at the expense of proving the elements of the other long-standing but serious offences giving rise to the risk that the jury's attention is, as a consequence, diverted away from the other offences.

The additional dimension and complexity added to the trial process by a participation offence potentially places the success of the entire trial in jeopardy.

The jury may be left in doubt as to the guilt of the person regarding their participation *at law* in a criminal organisation; a shadow of doubt that may then wash over to its consideration of the other offences. The risk therefore is that the jury may return a verdict of not guilty on the entire indictment. The person is acquitted and escapes conviction completely for reasons other than that they are not guilty.

The Taskforce is concerned that this may even be so in cases where, but for the participation offence, the allegations and evidence is relatively straightforward and convictions for the well-established criminal offences is likely in ordinary circumstances.

This is clearly inconsistent with the policy intention of the Government and potentially detrimental to the safety of the community. It also sends the wrong message to would-be participants in organised crime groups.

Thirdly, the mandatory minimum sentence applicable to the Government's proposal is, in

the view of the Taskforce, potentially excessive and disproportionate.

Mandatory sentencing is addressed in detail in Chapter 13, in the context of the analysis of the VLAD Act regime.

The penalty proposed by the Government for its serious organised crime offence is in the same vicinity as the VLAD Act regime, but arguably tougher because it offers *no mechanism* for a convicted person to ‘opt out’ of the mandatory scheme through the provision of significant cooperation.

A consistent criticism levelled at the VLAD Act is that, unlike other sentencing regimes, it prescribes strict mandatory cumulative terms of imprisonment of such length that, objectively, the overall penalty is quite detached from any consideration of proportionality with the nature and seriousness of the offence committed.

The sanction under the VLAD Act amounts to one that is *crushing at law* (a term explained in Chapter 13).

The Taskforce respectfully considers that the same criticism can be levelled at the Government’s proposed stand-alone offence.

All members of the Taskforce believe that the proposed sentence – 15 years, at least – is disproportionately excessive to the gravity of offending in many cases, and many of the members (including the chair) do not consider this to be essential to encouraging cooperation. The ability to opt out at all is considered incentive enough to most.

With these concerns and limitations in mind what the Taskforce did is to consider the Government’s proposal, and assess it alongside the VLAD Act; and, then, assess both in the context of the Byrne Report and the COA Review (which neither government had the benefit of at the time), and develop what its members believe is an enhanced alternative model to effectively combat organised crime in Queensland.

The strengths of the renewed approach are, the Taskforce believes:

- traditional criminal offences contained in the Criminal Code and other legislation including the *Drugs Misuse Act 1986* (Qld) already adequately capture the criminal activities of individuals and groups involved in serious organised crime;
- the legal principles underpinning the elements and evidential requirements of those traditional criminal offences are well understood by law enforcement agencies, the prosecution and the courts;
- the advantage of prosecuting a traditional criminal offence (as opposed to a new serious organised crime offence) is, therefore, that it increases the probability of securing a conviction;
- attaching a Serious Organised Crime circumstance of aggravation to a traditional criminal offence, rather than a separate substantive offence, by operation of section 575 of the Criminal Code would mean that the jury could return a verdict of guilt in respect of the predicate offence if not satisfied that the circumstance of aggravation is made out (the entire charge is not lost); and
- upon conviction, and following their release from imprisonment, the post-conviction Control Order regime will mitigate the risk of re-offending by prohibiting an individual from associating with members of, or partaking in activities associated with, criminal organisations;

The Taskforce concludes that these advantages lead to a *legally and operationally* superior approach to criminalising serious organised crime.

A criminal law regime which does not meet the challenges of *all* stages of the criminal justice system is not a successful approach to

actually confronting the organised crime threat.

The renewed Organised Crime Framework provides this all-inclusive platform. It is a cohesive and workable model which provides a strong yet proportionate response, and meets the criticisms of the 2013 suite,<sup>24</sup> and potential criticisms of the Government's proposal.

### RECOMMENDATION 60 (Chapter Twenty-Two)

A stand-alone Serious Organised Crime offence, with a fixed mandatory minimum penalty, should not be introduced in Queensland.

Instead, it is recommended that a Serious Organised crime circumstance of aggravation, with a targeted sentencing regime that includes a conviction-based control order regime, be introduced. Details of this proposed renewed Organised Crime Framework appear in Chapter 7. (unanimous recommendation)

## ENDNOTES

- <sup>1</sup> Terms of Reference, Taskforce on Organised Crime Legislation, cl 8.
- <sup>2</sup> Queensland, Commission of Inquiry into Organised Crime, *Final Report* (2015) 539-553 (the Byrne Report).
- <sup>3</sup> Queensland, Commission of Inquiry into Organised Crime, *Final Report* (2015) 540 (the Byrne Report).
- <sup>4</sup> Queensland, Commission of Inquiry into Organised Crime, *Final Report* (2015) 550 (the Byrne Report).
- <sup>5</sup> Queensland, Commission of Inquiry into Organised Crime, *Final Report* (2015) 549 (the Byrne Report).
- <sup>6</sup> Queensland, Commission of Inquiry into Organised Crime, *Final Report* (2015) 550 (the Byrne Report).
- <sup>7</sup> *United Nations Convention Against Transnational Organized Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003) art 5(1).
- <sup>8</sup> United Nations, *United Nations Treaty Collection*, UNTC <<https://treaties.un.org>>.
- <sup>9</sup> *Tajjour v State of New South Wales* (2014) 254 CLR 508.
- <sup>10</sup> Queensland, Commission of Inquiry into Organised Crime, *Final Report* (2015) 549 (the Byrne Report).
- <sup>11</sup> Crime and Corruption Commission, Submission to Taskforce on Organised Crime Legislation, October 2015, (in confidence).
- <sup>12</sup> Queensland Council for Civil Liberties, Submission 9.2 to Taskforce on Organised Crime Legislation, 28 October 2015.
- <sup>13</sup> Bar Association of Queensland, Submission 9.1 to the Taskforce on Organised Crime Legislation, 12 October 2015.
- <sup>14</sup> Bar Association of Queensland, Submission 9.1 to the Taskforce on Organised Crime Legislation, 12 October 2015.
- <sup>15</sup> Electrical Trades Union of Employees (Qld), Submission 3.21 to the Taskforce on Organised Crime Legislation, (undated).
- <sup>16</sup> Queensland, Commission of Inquiry into Organised Crime, *Final Report* (2015) 540 (the Byrne Report).
- <sup>17</sup> These provisions are found in chapter 2, sections 7-10A of the *Criminal Code* (Qld).
- <sup>18</sup> *Criminal Code* (Qld), sections 7(a)-(d)
- <sup>19</sup> Carter's Criminal Law of Queensland [s.7.1] 1263
- <sup>20</sup> *Criminal Code* (Qld), section 8.
- <sup>21</sup> *Criminal Code* (Qld), section 9.
- <sup>22</sup> *Criminal Code* (Qld), see sections 568(5), 568(6) and 569.
- <sup>23</sup> *Criminal Code* (Qld), see sections 582 and 583
- <sup>24</sup> Queensland, Statutory Review of the *Criminal Organisation Act 2009*, *Final Report* (2015) 226 – 229.

# PART 6

## CHAPTER

### TWENTY-THREE

## CONCLUSION

*Alan Wilson, Taskforce chair*

#### WHAT THE TASKFORCE STROVE TO ACHIEVE: FIRM BUT FAIR LAWS TO DEAL WITH ORGANISED CRIME, INCLUDING OMCGS

The work of the Taskforce has been difficult and demanding, and not without its tensions.

They arose because its work required it to balance public perceptions about OMCGs with just and effective laws to control any criminal activity they (or any other group which might venture into organised crime) might be involved in.

As this report has uncontentiously noted, OMCGs have a bad name. That is in the major part the product of intermittent incidents of publicly alarming, unrestrained inter-gang (or intra-gang) violence of which the Broadbeach incident was another example. But other perceived OMCG criminal activity plays a part, too.

In the result, any group of men riding motorcycles (particularly if they are wearing OMCG colours) tends to attract a degree of public suspicion and sometimes alarm.

But a public focus on bikies as actual or potential criminals is not new. It explains the many various pieces of legislation introduced to curb OMCGs in other Australian States, and overseas. It also explains a legislative effort by an earlier Queensland government in 2009, fully detailed in the COA Review.

Taskforce members recognised the importance of maintaining balance, and objectivity, in their reaction to these events and factors.

While they disagreed in some respects about the nature and extent of an appropriate legislative reaction to OMCG member crime, they remained alert to the risk of over-reaction – an unsubstantiated and unreasoning condemnation of all bikies, and the consequential belief that intermittent confrontational OMCG behaviour both

necessitated, and justified, extreme measures against them.

Any response to the threat presented by OMCG crime should, the Taskforce believes, be balanced and proportionate. While the threat is real, it is not so high as to require or justify legislation which is so extreme in its effects as to drive all OMCG members, criminals or not, out of Queensland.

It is not so high, either, as to warrant the creation (unusual for our system of government and criminal justice) of laws which are directed *solely* against one group of persons in our society.

The Taskforce was largely comprised of people who had worked closely with the world of crime and, also, had experience of special interactions with bikies – as serving police officers, or as their legal representatives.

Taskforce members brought this specialised expertise to its work. They applied it in a way which reflected their experience, their concerns and their aspirations.

Through an exercise of gathering, exchanging and weighing information, and then debating a wide range of appropriate legislative responses they have developed the renewed *Organised Crime Framework*.

It is the product of compromise in several respects, apparent from earlier Chapters.

But all members agree that it represents an appropriate balance of sometimes competing views and one which they recommend to the government of Queensland.

In particular, it removes what all members came to accept were unnecessary, excessive and disproportionate elements of the 2013 suite while maintaining a strong legislative response to organised crime in all its forms, including OMCG crime.

## ACKNOWLEDGMENT – TASKFORCE MEMBERS

The application and devotion of Taskforce members to its work was impressive and gratifying.

There was a wide range of issues to be considered and great deal of material to read.

It was apparent that the importance of those matters attracted, in the members, an earnest resolve to give of their very best.

Those qualities were never more apparent than on occasions where divergent views arose.

The calm nature of the discussion, the respect paid to opposing opinions, and the good humour which permeated Taskforce meetings ensured that the seas on which it sailed, even when rough, did not threaten the quality of its work.

It is greatly to the credit of members from outside government that they gave their time voluntarily and at their own expense.

That is not to ignore the fact that those members from within government institutions also gave up private time in the sense that the extensive demands of Taskforce work inevitably impinged upon their day jobs, as it were.

## ACKNOWLEDGMENT – TASKFORCE SECRETARIAT

Taskforce members received invaluable support from the Secretariat, comprised of four lawyers and an executive assistant:

**Director Ms Carolyn McAnally** LLB (Hons II),  
B Bus (Distinction)

**Principal Legal Officer Ms Sarah Kay** B Bus, LLB,  
Grad Dip (Laws), Grad Cert (Laws)

**Senior Legal Officer Mr Carson Lloyd** LLB

**Legal Officer Ms Brenna Booth-Mowat** LLB  
(Hons), B Gov&IntRel

**Ms Bridget Thomas and Ms Kirsty Sheridan,**  
Executive Assistants

Taskforce has been exemplary: dedicated, enthusiastic, and reflective of the highest and best traditions of an educated and informed, but properly neutral, public service.

#### CROWN LAW LIBRARIANS

The chair and the Secretariat express their gratitude to the staff at the Crown Law Library who often, and with haste, assisted with research and obtained sometimes hard-to-find texts, cases and articles.

Their combined experience with legislation and matters of strategic policy informed and edified the quality of Taskforce deliberations.

The Secretariat initially analysed the Terms of Reference and identified a program of issues to be addressed at meetings. It proved useful and highly effective.

Before each meeting Secretariat officers researched and prepared discussion papers for members and, again, these were a valuable tool for defining topics for discussion and, of equal importance, providing a range of options and responses available to the Taskforce.

All of this was done with thoughtfulness, intelligence and subtlety: at no point did Taskforce members have any reason to think other than that their individual opinions on any topic were respected and fully researched, analysed and presented in these preparatory papers.

The work of the initial drafting of this Report also fell, in large measure, upon the Secretariat. It was then settled through a process of final consultation with Taskforce members.

That work was done under all the pressure which will necessarily arise when an attempt is made to distil sometimes divergent views into a cohesive report – and heavy time constraints, too.

Their work on this drafting and all the myriad tasks they were called upon to perform throughout the nine months' life of the

## SUMMARY OF RECOMMENDATIONS

### RECOMMENDATION 1 (Chapter Four)

The Queensland Government should establish an independent statistical research body to collect and publish regular analysis of Queensland crime data, and, once established, that body should prioritise the collection and analysis of data relevant to organised crime in Queensland. (unanimous recommendation)

### RECOMMENDATION 2 (Chapter Five)

The 2013 amendments which facilitate the use of audio visual links should be retained. (unanimous recommendation)

### RECOMMENDATION 3 (Chapter Five)

The 2013 amendments to the *Transport Planning and Co-ordination Act 1994* (Qld) should be further considered by the Government to determine whether the current provision provides adequate transparency and oversight for the sharing of information between the Department of Transport and Main Roads and the Australian Security Intelligence Organisation. (unanimous recommendation)

### RECOMMENDATION 4 (Chapter Seven)

A new sentencing guideline should be added to section 9 of the *Penalties and Sentences Act 1992* (Qld) to provide that a court is required when structuring the appropriate sentence to have express regard to whether the offence was committed as part of a criminal organisation. (unanimous recommendation)

### RECOMMENDATION 5 (Chapter Seven)

The offence of money laundering currently under section 250 of the *Criminal Proceeds Confiscation Act 2002* (Qld) should be transferred into the Criminal Code and, in doing so, the requirement for the Attorney-General's consent to a proceeding for money laundering should be omitted. (unanimous recommendation)

**RECOMMENDATION 6 (Chapter Eight)**

A single, uniform definition of the terms *criminal organisation* and *participant* is required and should be applied consistently across the statute books when dealing with organised crime. (unanimous recommendation)

**RECOMMENDATION 7 (Chapter Eight)**

The definition of criminal organisation under section 1, and of *participant* under section 60A(3), of the Criminal Code require substantial amendment. (unanimous recommendation)

**RECOMMENDATION 8 (Chapter Eight)**

**Limb 1** of the section 1 Criminal Code definition of *criminal organisation* should be retained but with modification as set out in the discussion in Chapter 8 of this Report. (unanimous recommendation)

**RECOMMENDATION 9 (Chapter Eight)**

**Limb 2** of the section 1 Criminal Code definition of *criminal organisation* is beyond the scope of the Terms of Reference. (unanimous recommendation)

**RECOMMENDATION 10 (Chapter Eight)**

**Limb 3** of the section 1 Criminal Code definition of *criminal organisation* (and consequentially, section 708A) should be repealed; the inclusion of safeguards cannot overcome the inherent flaws of the provisions. (majority recommendation – not preferred by the Commissioned Officers' Union or the Queensland Police Union)

**RECOMMENDATION 11 (Chapter Eight)**

The definition of *participant* under section 60A(3) of the Criminal Code should be amended as set out in the discussion in Chapter 8 of this Report; and should be relocated to section 1 of the Criminal Code. (unanimous recommendation)

**RECOMMENDATION 12 (Chapter Nine)**

The 2013 amendments to the *Bail Act 1980* (Qld) (with the exception of amendments which assist in the use of audio-visual technology as they related to bail hearings) should be repealed. (unanimous recommendation)

**RECOMMENDATION 13 (Chapter Ten)**

The Commissioner of Police should retain an ability to provide *criminal intelligence* to Chief Executive Officers and the prohibition on criminal intelligence being disclosed to an applicant should be maintained. (majority recommendation – not preferred by the Bar Association of Queensland)

**RECOMMENDATION 14 (Chapter Ten)**

The term *criminal intelligence* should be defined to include the elements from section 59 of the *Criminal Organisation Act 2009* (Qld) and that definition should be applied consistently across the statutes. (majority recommendation – not preferred by the Bar Association of Queensland)

**RECOMMENDATION 15 (Chapter Ten)**

The requirements that the Chief Executive Officers refuse or cancel licence applications solely on the basis of *criminal intelligence* information should be repealed. (unanimous recommendation)

**RECOMMENDATION 16 (Chapter Ten)**

A requirement modelled on section 74A of the *Police Act 1998* (SA) should be introduced, providing that the Commissioner of Police must keep detailed records of all criminal intelligence provided to Chief Executive Officer and that those records are to be annually reviewed by the President or Deputy President of the Queensland Civil and Administrative Tribunal. (majority recommendation – not preferred by Bar Association of Queensland)

### RECOMMENDATION 17 (Chapter Ten)

The Attorney-General should be required to table the annual reviews in Parliament within 14 sitting days. (majority recommendation – not preferred by the Bar Association of Queensland)

### RECOMMENDATION 18 (Chapter Eleven)

Section 60A of the Criminal Code should be repealed and replaced with a consorting offence per the consensus model in Chapter 11. (majority recommendation – not preferred by the Commissioned Officers' Union and the Queensland Police Union)

### RECOMMENDATION 19 (Chapter Eleven)

Section 60B of the Criminal Code should be repealed and replaced with a scheme per the consensus model in Chapter 11. (majority recommendation – not preferred by the Commissioned Officers' Union and the Queensland Police Union)

### RECOMMENDATION 20 (Chapter Eleven)

Section 60C of the Criminal Code should be repealed and replaced with the recruitment offence that is currently under section 100 of the *Criminal Organisation Act 2009* (Qld). (majority recommendation – not preferred by the Commissioned Officers' Union and the Queensland Police Union)

### RECOMMENDATION 21 (Chapter Twelve)

All of the circumstances of aggravation created by the 2013 suite should be repealed and replaced with the new circumstance of aggravation that is part of the renewed Organised Crime Framework. (unanimous recommendation)

### RECOMMENDATION 22 (Chapter Thirteen)

A new Serious Organised Crime circumstance of aggravation should be established under the Criminal Code. (unanimous recommendation)

**RECOMMENDATION 23 (Chapter Thirteen)**

The Serious Organised Crime circumstance of aggravation should apply to a prescribed list of serious offences and should not be framed as a ‘floating’ circumstance of aggravation. (unanimous recommendation)

**RECOMMENDATION 24 (Chapter Thirteen)**

The Serious Organised Crime circumstance of aggravation relies on the new definitions for *participant* and *criminal organisation*, as discussed in Chapter 8. (unanimous recommendation)

**RECOMMENDATION 25 (Chapter Thirteen)**

The Serious Organised Crime circumstance of aggravation must proceed by way of indictment and needs the consent of the Director of Public Prosecutions to indict. (unanimous recommendation)

**RECOMMENDATION 26 (Chapter Thirteen)**

The effect of the Serious Organised Crime circumstance of aggravation is not to increase the prevailing maximum penalty for each of the prescribed offences; instead it is to enliven a new targeted sentencing regime to be inserted into the *Penalties and Sentences Act 1992* (Qld), which cannot be mitigated or varied except as provided for in recommendation 28 of this Report. (unanimous recommendation)

## RECOMMENDATION 27 (Chapter Thirteen)

The new targeted sentencing regime should provide that the convicted person:

- must be sentenced to mandatory *Control Order*, as discussed in Chapter 14 (the Bar Association of Queensland supports a discretionary control order); and
- Either:
  - *Option 1*: must be sentenced to a term of imprisonment for the prescribed offence, of a duration determined by the sentencing court; with a mandatory minimum standard non-parole period to apply.

(A percentage MSNPP scheme is the preferred option of the chair and the Public Interest Monitor; and also the Bar Association of Queensland and Queensland Law Society (should the Government commit to introducing some form of mandatory sentencing in this context)); or

- *Option 2*: must be sentenced to a term of imprisonment for the prescribed offence, of a duration determined by the sentencing court; and is required to serve the entire period in actual prison without parole release; or
- *Option 3*: must serve a cumulative fixed mandatory penalty *in addition* to the term of imprisonment for the prescribed offence.

(This is the preferred option of the Commissioned Officers' Union and Queensland Police Union.)

## RECOMMENDATION 28 (Chapter Thirteen)

The convicted person can avoid the targeted sentencing regime if they provide cooperation of significant use to a law enforcement agency in the *investigation of or in a proceeding for a serious criminal offence* (as defined under the *Criminal Organisation Act 2009* (Qld)); and the utility of the cooperation is to be determined by the sentencing judge (consistent with the prevailing approach under section 13A of the *Penalties and Sentences Act 1992* (Qld)). (unanimous recommendation)

## RECOMMENDATION 29 (Chapter Thirteen)

The *Vicious Lawless Association Disestablishment Act 2013* (Qld) should be repealed. (unanimous recommendation)

### RECOMMENDATION 30 (Chapter Fourteen)

The *Penalties and Sentences Act 1992* (Qld) should be amended to insert a new sentencing order which creates a conviction-based control order regime targeting organised crime. (unanimous recommendation)

### RECOMMENDATION 31 (Chapter Fourteen)

In developing the new sentencing order, regard should be had to the conviction-based preventative civil order regime operating in the United Kingdom under the *Serious Crime Act 2007* (Serious Crime Prevention Orders). (unanimous recommendation)

### RECOMMENDATION 32 (Chapter Fourteen)

The Queensland Police Service should be allocated the necessary resources to monitor and enforce the new sentencing order. (unanimous recommendation)

### RECOMMENDATION 33 (Chapter Fifteen)

The 2013 amendments to the *Corrective Services Act 2006* (Qld) should be repealed in their entirety. (unanimous recommendation)

### RECOMMENDATION 34 (Chapter Sixteen)

The 2013 amendments to the *Police Service Administration Act 1990* (Qld) should be repealed. (majority recommendation – not preferred by the Queensland Police Union; no position was taken by the Commissioned Officers' Union).

### RECOMMENDATION 35 (Chapter Seventeen)

Section 173EB of the *Liquor Act 1992* (Qld) should be retained, but amended to afford protections to licensees and their staff, namely that:

- a person to whom section 173EB applies will not commit an offence where they have taken reasonable action or steps to exclude or remove a person wearing or carrying a prohibited item; and
- a person to whom section 173EB applies will not commit an offence where they have reasonable grounds to believe that their personal safety may be endangered or where it is not reasonably practical or safe for them to refuse entry or remove or exclude a person.

(majority recommendation – not preferred by the Commissioned Officers' Union or the Queensland Police Union)

### RECOMMENDATION 36 (Chapter Seventeen)

Section 173EC of the *Liquor Act 1992* (Qld) should be retained but the maximum penalties reduced and the tiered punishment regime for repeat offences removed.

(majority recommendation – not preferred by the Commissioned Officers' Union or the Queensland Police Union)

### RECOMMENDATION 37 (Chapter Seventeen)

Section 173ED of the *Liquor Act 1992* (Qld) should be retained but the maximum penalties reduced and the tiered punishment regime for repeat offences removed.

(majority recommendation – not preferred by the Commissioned Officers' Union or the Queensland Police Union)

### RECOMMENDATION 38 (Chapter Eighteen)

Section 187(2) of the *Penalties and Sentences Act 1992* (Qld) should be repealed.

(majority recommendation – not preferred by the Commissioned Officers' Union or the Queensland Police Union)

**RECOMMENDATION 39 (Chapter Nineteen)**

An amendment should be made to the ‘prescribed offences’ under the Chapter 4A scheme for Motor Vehicle Impoundment under the *Police Powers and Responsibilities Act 2000* (Qld) to provide that it only applies to offences involving the use of a motor vehicle where, at sentence, the Judge or Magistrate is satisfied on the balance of probabilities that the person was a participant in a criminal organisation (using the new definition of *participant* and *criminal organisation* under the renewed Organised Crime Framework). (majority recommendation – not preferred by the Commissioned Officers’ Union or the Queensland Police Union)

**RECOMMENDATION 40 (Chapter Nineteen)**

The amendments to the *Police Powers and Responsibilities Act 2000* (Qld) under the 2013 suite that expanded the police powers to stop, search and detain, and require identification information on the basis of a reasonable suspicion that person is a participant in a criminal organisation, should be repealed. (majority recommendation – not preferred by the Commissioned Officers’ Union or the Queensland Police Union)

**RECOMMENDATION 41 (Chapter Nineteen)**

The circumstance of aggravation added by the 2013 suite to the ‘evade police’ offence under section 754 of the *Police Powers and Responsibilities Act 2000* (Qld) should be repealed. (majority recommendation – not preferred by the Commissioned Officers’ Union or the Queensland Police Union)

**RECOMMENDATION 42 (Chapter Twenty)**

The expanded intelligence functions under Chapter 2, Part 4, Divisions 2A and 2B of the *Crime and Corruption Act 2001* (Qld) should be retained. (unanimous recommendation)

**RECOMMENDATION 43 (Chapter Twenty)**

It is recommended that amendment should be made to the *Crime and Corruption Act 2001* (Qld) to incorporate an oversight mechanism in relation to an exercise of the immediate response function; perhaps by the Crime Reference Committee or Public Interest Monitor or Supreme Court Judge. (majority recommendation – not preferred by the Commissioned Officers’ Union)

**RECOMMENDATION 44 (Chapter Twenty)**

The fixed mandatory minimum sentencing regime in section 199(8A-B) of the *Crime and Corruption Act 2001* (Qld) should be repealed. (majority recommendation – not preferred by the Commissioned Officers’ Union)

**RECOMMENDATION 45 (Chapter Twenty)**

It is recommended that consideration be given to inserting an escalating, tiered *maximum penalty* scheme to punish for conduct amounting to contempt of the Crime and Corruption Commission (and including the notion that a person can purge their contempt). (majority recommendation – not preferred by the Commissioned Officers’ Union)

**RECOMMENDATION 46 (Chapter Twenty)**

The increased maximum penalties under sections 82, 183, 185, 188, 190 and 192 of the *Crime and Corruption Act 2001* (Qld) should be retained. (unanimous recommendation)

**RECOMMENDATION 47 (Chapter Twenty)**

The statutory exclusion of the fear of retribution as a reasonable excuse under sections 74, 82, 185 and 190 of the *Crime and Corruption Act 2001* (Qld) should be repealed. (majority recommendation – not preferred by the Commissioned Officers’ Union)

**RECOMMENDATION 48 (Chapter Twenty)**

The provisions enabling a Magistrate (instead of a Supreme Court Judge) to issue a warrant for the apprehension of a person who has been give an attendance notice under sections 167 and 168 of the *Crime and Corruption Act 2001* (Qld) should be retained. (unanimous recommendation)

### RECOMMENDATION 49 (Chapter Twenty)

Section 197 of the *Crime and Corruption Act 2001* (Qld) does not require further amendment (in light of the consequential amendment made to section 265 of the *Criminal Proceeds Confiscation Act 2002* (Qld)). (unanimous recommendation)

### RECOMMENDATION 50 (Chapter Twenty)

Section 201 of the *Crime and Corruption Act 2001* (Qld) should be amended to remove subsection (1A). (majority recommendation – not preferred by the Commissioned Officers' Union)

### RECOMMENDATION 51 (Chapter Twenty)

Section 200A of the *Crime and Corruption Act 2001* (Qld), which provides for the confidentiality of particular proceedings, should be retained without amendment. (unanimous recommendation)

### RECOMMENDATION 52 (Chapter Twenty)

Section 205 of the *Crime and Corruption Act 2001* (Qld) should be amended to remove subsection (1A). (majority recommendation – not preferred by the Commissioned Officers' Union)

### RECOMMENDATION 53 (Chapter Twenty)

The amendments made to section 331 of the *Crime and Corruption Act 2001* (Qld) should be retained. (unanimous recommendation)

**RECOMMENDATION 54 (Chapter Twenty-One)**

The *Tattoo Parlours Act 2013* (Qld) should be retained. (unanimous recommendation)

**RECOMMENDATION 55 (Chapter Twenty-One)**

Consideration could be given to renaming the *Tattoo Parlours Act 2013* (Qld) to remove and replace the reference to the word 'parlour'. (unanimous recommendation)

**RECOMMENDATION 56 (Chapter Twenty-One)**

Persons should not be refused a licence (or permit or approval or certificate) or have a licence (or permit or approval or certificate) cancelled solely on the basis that they are alleged to be a participant in a criminal organisation. Licences etc. should only be refused or cancelled on the basis that there is evidence specific to the individual which demonstrates that the individual (and not those with whom they associate with) is not a suitable person to hold a licence etc. (unanimous recommendation)

**RECOMMENDATION 57 (Chapter Twenty-One)**

Extensive consultation must occur on an industry-by-industry basis to determine how best to frame the 'fit and proper person' test applicable to each of the respective industries in recognition that what constitutes a 'fit and proper person' may differ significantly from industry to industry. (unanimous recommendation)

**RECOMMENDATION 58 (Chapter Twenty-One)**

The requirement under each legislative scheme in the 2013 suite (with the exception of that relating to weapons) that Chief Executives refer every application for a licence etc. to the Commissioner of Police should be repealed and replaced with a mechanism which allows the Commissioner of Police to supply relevant information to the Chief Executives on a case-by-case basis (noting, however, the recommendations in Chapter 10). (unanimous recommendation)

**RECOMMENDATION 59 (Chapter Twenty-One)**

Applicants or existing licensees who have their application refused or licence etc. cancelled on the basis that they are not, or are no longer, a suitable person must have the right to be given reasons for the decision and an opportunity to contest the allegation. Appeal and review rights (including judicial review) regarding decisions to grant or cancel a licence etc. must be restored. (unanimous recommendation)

**RECOMMENDATION 60 (Chapter Twenty-Two)**

A stand-alone Serious Organised Crime offence, with a fixed mandatory minimum penalty, should not be introduced in Queensland.

Instead, it is recommended that a Serious Organised Crime circumstance of aggravation, with a targeted sentencing regime that includes a conviction-based control order regime, be introduced. Details of this proposed renewed Organised Crime Framework appear in Chapter 7. (unanimous recommendation)

## Amended Terms of Reference

### Taskforce on Organised Crime Legislation

I, YVETTE D'ATH, Attorney-General and Minister for Justice and Minister for Training and Skills, have established a Taskforce on Organised Crime legislation (the Taskforce) to review the legislative provisions, introduced and passed in the Queensland Legislative Assembly in 2013 targeting organised crime (the 2013 legislation).

The Taskforce will note the Queensland Government's intention to repeal, and replace the 2013 legislation, whether by substantial amendment and/or new legislation, and will advise:

- if provisions in the 2013 legislation are effectively facilitating the successful detection, investigation, prevention and deterrence of organised crime;
- if provisions in the 2013 legislation are effectively facilitating the successful prosecution of individuals;
- if the 2013 legislation strikes an appropriate balance between ensuring the safety, welfare and good order of the community and protecting individual civil liberties, including in relation to the anti-association provisions in the 2013 legislation; and
- how best to replace or amend the 2013 legislation, in accordance with the Queensland Government's election commitments.

The membership of the Taskforce consists of senior representatives from the Department of Justice and Attorney-General, the Queensland Police Service, the Department of the Premier and Cabinet, the Queensland Police Union, the Queensland Police Commissioned Officers' Union of Employees, the Queensland Law Society, the Bar Association of Queensland and the Public Interest Monitor. The Taskforce is to be convened and chaired by Mr Alan Muir Wilson.

The Taskforce is also to develop a new offence of 'serious organised crime', having regard to these terms of reference.

In undertaking this reference, the Taskforce will:

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*.
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.
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); and
  4. with regards to paragraph 3 above, note the Queensland Government's view that it is desirable: to have a consistent multi-industry 'fit and proper person' test; that facilitates the prevention of industries being manipulated for criminal purposes; and ensures individuals are not prohibited from holding an industry licence on the basis of mere association.
  5. with regards to paragraph 3 above, inquire into the number of individuals refused a licence, permit or authority as a result of the 'identified participant' provisions of the 2013 legislation.
  6. inquire into whether the introduction of the 2013 legislation has had any impact on crime rates and community safety in Queensland.
  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.
  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.
  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.
  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.
  11. have regard to the fundamental legislative principles contained in section 4 of the *Legislative Standards Act 1992*.
  12. have regard to legislation in other jurisdictions that targets organised crime.

The Taskforce shall invite or receive submissions or information from external sources where it is relevant to these Terms of Reference, including but not limited to:

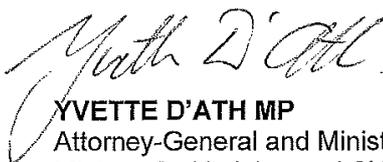
- academics who have expertise in organised crime, particularly with reference to Queensland and who have current knowledge of domestic and international research on the efficacy of legislative efforts to combat organised crime;
- any persons holding expertise in matters relevant to these Terms of Reference;
- any law enforcement, intelligence or prosecution agencies;
- any Government department or agency; and
- any individual, business, group, association or other entity that has been (or claims to have been) effected by the 2013 legislation.

Without limiting the scope of any recommendations the Taskforce may make, the recommendations should:

- advise how best to repeal, or replace by substantial amendment, the 2013 legislation;
- provide details of the form any proposed amendments should take and whether such amendment/s should have retrospective effect;
- determine if new legislation or amending legislation is required to effectively fight organised crime in Queensland; and
- determine the elements of the new 'serious organised crime' offence, including whether any defences or evidentiary provisions, specific to the new offence are required.

The Taskforce will provide its final report to the Attorney-General and Minister for Justice and Minister for Training and Skills on or before **31 March 2016**.

Dated the second day of October 2015



**YVETTE D'ATH MP**  
Attorney-General and Minister for Justice  
Minister for Training and Skills

**ATTACHMENT 2: TASKFORCE MEMBERS & RECORD OF MEETINGS**

| <b>Organisation</b>  | <b>Representative</b>                  | <b>Date/s of Attendance</b>   | <b>Total number of meetings attended</b> |
|--|--|---|--|
| <b>Taskforce on Organised Crime Legislation</b>                    | Alan Wilson, Chair                     | 22 June 2015; 24 July 2015; 7 August 2015; 28 August 2015; 11 September 2015; 2 October 2015; 23 October 2015; 13 November 2015; 4 December 2015; 29 January 2016 | 10                                       |
| <b>10Bar Association of Queensland</b>                             | Mr Tony Glynn QC                       | 22 June 2015; 24 July 2015; 28 August 2015; 13 November 2015; 4 December 2015; 29 January 2016  | 6  |
|  | Ms Elizabeth Wilson QC                 | 2 October 2015; 23 October 2015; 29 January 2016  | 3  |
|  | Mr Ralph Devlin QC                     | 22 June 2015; 24 July 2015; 7 August 2015   | 3  |
| <b>Queensland Law Society</b>                                      | Mr Glen Cranny                         | 22 June 2015; 24 July 2015; 28 August 2015; 11 September 2015; 2 October 2015; 4 December 2015  | 6  |
|  | Mr Leigh Rollason                      | 2 October 2015; 13 November 2015; 4 December 2015; 29 January 2016  | 4  |
| <b>Public Interest Monitor</b>                                     | Mr Peter Lyons                         | 22 June 2015; 24 July 2015; 7 August 2015; 28 August 2015; 11 September 2015; 2 October 2015; 23 October 2015; 13 November 2015; 4 December 2015; 29 January 2016 | 10                                       |
| <b>Queensland Police Service</b>                                   | Deputy Commissioner Ross Barnett       | 22 June 2015; 7 August 2015; 11 September; 2 October 2015; 23 October 2015; 4 December 2015; 29 January 2016  | 7  |
|  | Assistant Commissioner Bob Gee         | 22 June 2015; 24 July 2015; 7 August 2015; 28 August 2015; 11 September 2015; 23 October 2015; 4 December 2015; 29 January 2016                                   | 8  |
|  | Assistant Commissioner Maurice Carless | 13 November 2015  | 1  |
|  | Inspector Simon James                  | 13 November 2015  | 1  |
| <b>Queensland Police Commissioned Officers' Union of Employees</b> | Mr Brian Wilkins                       | 22 June 2015; 28 August 2015; 11 September 2015; 2 October 2015; 23 October 2015; 13 November 2015; 4 December 2015; 29 January 2016                              | 8  |

|   |                      |  |   |
|---|----------------------|--|---|
| <b>Queensland Police Union</b>                    | Mr Ian Leavers       | 22 June 2015; 24 July 2015   | 2 |
|   | Mr Simon Tutt        | 22 June 2015; 7 August 2015; 2 October 2015; 23 October 2015; 13 November 2015; 4 December 2015; 29 January 2016 | 7 |
|   | Mr Troy Schmidt      | 28 August 2015; 11 September 2015; 2 October 2015  | 3 |
| <b>Department of Justice and Attorney-General</b> | Ms Natalie Parker    | 24 July 2015; 7 August 2015; 28 August 2015; 2 October 2015; 23 October 2015; 13 November 2015                   | 6 |
|   | Ms Imelda Bradley    | 4 December 2015; 29 January 2016   | 2 |
|   | Ms Leanne Robertson  | 22 June 2015   | 1 |
|   | Ms Julie Rylko       | 11 September 2015  | 1 |
| <b>Department of the Premier and Cabinet</b>      | Ms Christine Castley | 22 June 2015; 24 July 2015; 28 August 2015; 13 November 2015; 29 January 2016                                    | 5 |
|   | Ms Rebecca McGarrity | 2 October 2015; 4 December 2015  | 2 |
|   | Ms Kyla Hayden       | 7 August 2015; 23 October 2015   | 2 |

## ATTACHMENT 3: SUMMARY OF THE POSITION OF THE QUEENSLAND POLICE SERVICE

The QPS has always pointed out that policy decisions are a matter for government. The QPS position expressed throughout Taskforce deliberations has therefore been to point out the operational implications of various potential options considered by the Taskforce.

The QPS has provided its operational experience in using the 2013 suite of legislation and in other areas of investigating organised crime to assist decision makers to assess the effectiveness or otherwise of the 2013 suite of legislation and to inform considerations as to how to best repeal, or replace by substantial amendment, the 2013 suite of legislation.

The Terms of Reference require the Taskforce to examine in particular two fundamental issues:

6. *inquire into whether the introduction of the 2013 legislation has had any impact on the crime rates and community safety in Queensland;*
11. *have regard to fundamental legislative principles contained in section 4 of the Legislative Standards Act 1992.*

The QPS is of the view that the current suite of legislation and associated policy measures taken as a whole have been operationally effective to date. Many matters however, are still before the courts. The observations and experience of front-line officers suggests that there has been a significant and positive impact on community confidence and feelings of safety, particularly on the Gold Coast. The QPS has provided information to the Taskforce in support of this view. Intelligence information (from both the QPS and CCC) also suggests that a repeal of the existing 2013 suite of legislation, in the absence of an equivalent operationally effective scheme, carries with it significant public safety risks.

In considering whether the right balance has been achieved between the effectiveness of the 2013 suite and the impact to individual civil liberties, the QPS is mindful to ensure that community confidence in its Police Service and the State is maintained. The consequence of reduced enforcement and disruption capability could lead to an erosion of the current high levels of community confidence that Queensland is a safe place to live, conduct business, visit and potentially negatively impact the state through a loss in business and tourism.

Just as importantly however, the QPS knows it must carry out its responsibilities in a way which is appropriate and acceptable to the community. This includes the use of balanced legislation in support of policing operations. A legislative scheme which does not have sufficient regard to the rights and liberties of individuals has the potential to impact public confidence in, and consequently, ongoing community support for the legitimate role of police in using and enforcing that legislation.

The QPS has acknowledged a number of circumstances where, in relation to the current 2013 suite of legislation, a better balance could be achieved between the need for effective public safety legislation and ensuring the protection of individual freedoms to ensure that the current high level of community support being experienced in relation to policing operations continues.

The QPS views the restrictions imposed by the 2013 suite of laws to be a significant step in the use of the powers of the State. In keeping with the need to ensure public confidence in, and the ongoing legitimacy of policing operations, the QPS considers that their continued use in whatever form the Government determines, should be the subject of scrutiny and review by an independent suitably qualified research body. Options may include but not necessarily be limited to the use of specific references to the Crime and Corruption Commission.

There are many complex issues before the Taskforce. In coming to its advice, the QPS considers that the following key outcomes for public safety are necessary:

1. continued capability to respond to overt criminal groups including OMCG;
2. new capability to respond to 'loose fitting' criminal networks;
3. deterring persons from participating in organised crime networks and offending;
4. encouraging persons to assist law enforcement in disrupting, dismantling and defeating criminal networks; and
5. promoting public confidence in Queensland as a safe place to live and invest in.

ATTACHMENT 4: QUEENSLAND POLICE SERVICE STATISTICS

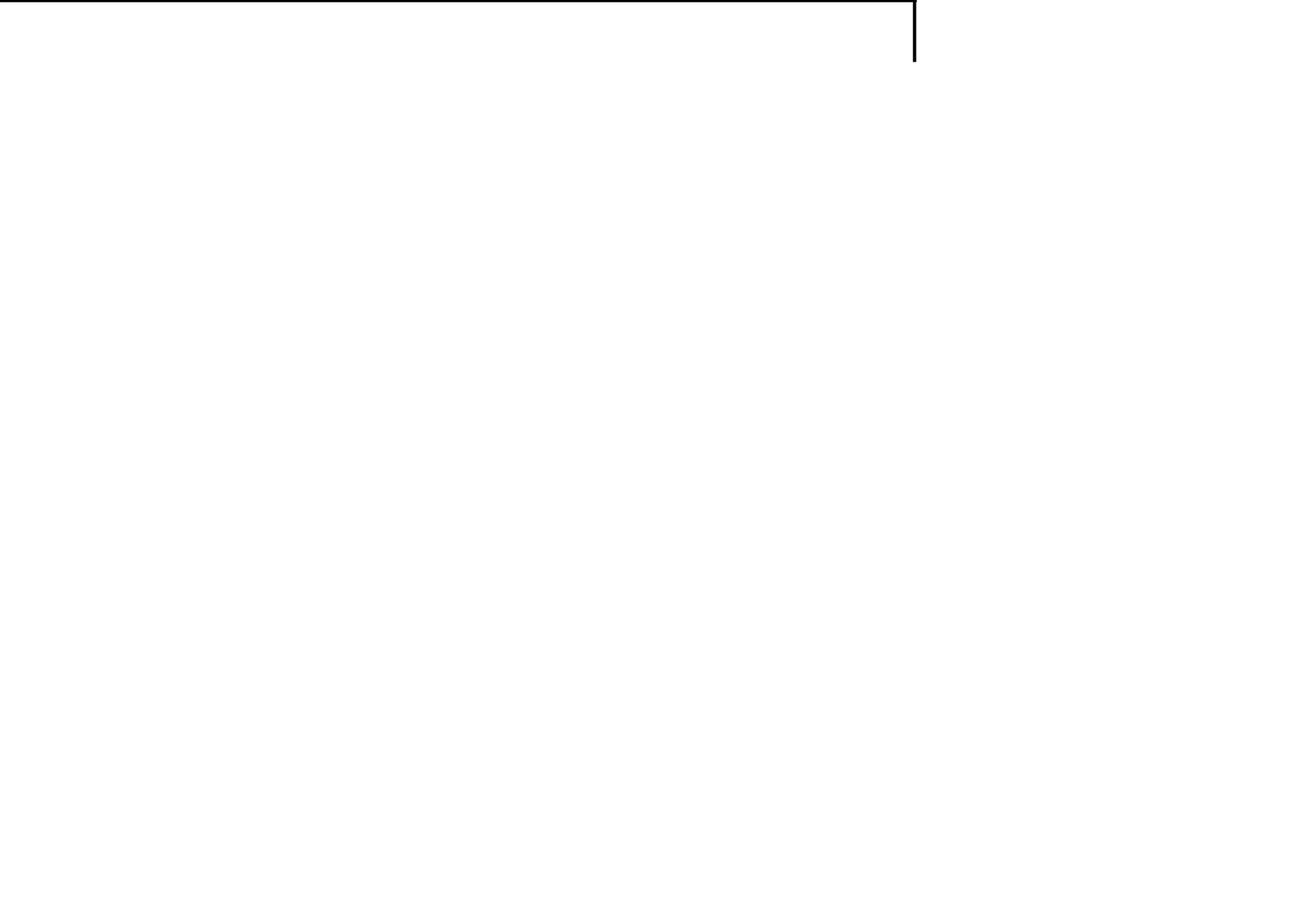
PERSONS CHARGED WITH THE CIRCUMSTANCE OF AGGRAVATION UNDER THE *VICIOUS LAWLESS ASSOCIATION DISESTABLISHMENT ACT 2013* BETWEEN 17 OCTOBER 2013 AND 31 DECEMBER 2015

| SECTION                      | CHARGE NAME   | TOTAL NUMBER OF UNIQUE PERSONS | TOTAL NUMBER OF CHARGES |
|------------------------------|---|--------------------------------|-------------------------|
| <b>CRIMINAL CODE</b>         |   |                                |                         |
| Section 119B                 | Retaliation against or intimidation of judicial officer, juror, witness etc. as a vicious lawless associate | 8                              | 8                       |
| Section 228C                 | Distributing child exploitation material as a vicious lawless associate                                     | 1                              | 1                       |
| Section 320                  | Grievous bodily harm as a vicious lawless associate   | 1                              | 1                       |
| Section 320A                 | Torture as a vicious lawless associate  | 5                              | 5                       |
| Section 339                  | Assault occasioning bodily harm as a vicious lawless associate  | 5                              | 5                       |
| Section 354                  | Kidnapping as a vicious lawless associate   | 5                              | 5                       |
| Section 354A                 | Kidnapping for ransom as a vicious lawless associate  | 2                              | 2                       |
| Section 259E                 | Unlawful stalking as a vicious lawless associate  | 2                              | 5                       |
| Section 411                  | Robbery as a vicious lawless associate  | 10                             | 10                      |
| Section 415                  | Extortion as a vicious lawless associate  | 2                              | 2                       |
| Section 419                  | Burglary as a vicious lawless associate   | 4                              | 4                       |
| <b>DRUGS MISUSE ACT 1986</b> |   |                                |                         |
| Section 5                    | Trafficking in a dangerous drug as a vicious lawless associate  | 98                             | 121                     |
| Section 6                    | Supplying a dangerous drug as a vicious lawless associate   | 13                             | 879                     |
| Section 7                    | Receiving or possessing property obtained from trafficking or supplying as a vicious lawless associate      | 9                              | 10                      |
| Section 9                    | Possessing dangerous drugs as a vicious lawless associate   | 32                             | 44                      |

| <b>WEAPONS ACT 1990</b> |  |   |   |
|-------------------------|--|---|---|
| Section 50              | Unlawful possession of a weapon as a vicious lawless associate | 5 | 6 |

**PERSONS CHARGED WITH OFFENCES UNDER THE *CRIMINAL LAW (CRIMINAL ORGANISATIONS DISRUPTION) AND OTHER LEGISLATION AMENDMENT ACT BETWEEN 17 OCTOBER 2013 AND 31 DECEMBER 2015***

| SECTION  | CHARGE  | TOTAL NUMBER OF UNIQUE PERSONS | TOTAL NUMBER OF CHARGES |
|--|---|--------------------------------|-------------------------|
| <b>CRIMINAL CODE</b>                               |   |                                |                         |
| Section 60A  | Participants in a criminal organisation being knowingly present in public places                    | 36                             | 51                      |
| Section 60B  | Participants in a criminal organisation entering prescribed places and attending prescribed events  | 5                              | 6                       |
| Section 60C  | Participants in criminal organisation recruiting persons to become participants in the organisation | 5                              | 6                       |
| Section 72(2)                                      | Affray as a participant in a criminal organisation  | 1                              | 1                       |
| Section 408D(1AA)                                  | Obtaining or dealing with identification information as a participant in a criminal organisation    | 4                              | 5                       |
| <b>LIQUOR ACT 1992</b>                             |   |                                |                         |
| Section 173EC                                      | Entering and remaining in licensed premises when wearing or carrying a prohibited item              | 14                             | 15                      |
| <b>POLICE POWERS AND RESPONSIBILITIES ACT 2000</b> |   |                                |                         |
| Section 123ZL                                      | Failure to comply with requirement to produce motor vehicle   | 2                              | 2                       |
| Section 123ZM                                      | Offence to operate vehicle to which number plate confiscation notice attached                       | 27                             | 27                      |
| Section 123ZN                                      | Offence to remove, tamper with or modify number plate confiscation notice                           | 39                             | 39                      |
| Section 123ZQ                                      | Offence to breach condition made on release of motor vehicle  | 1                              | 1                       |
| <b>TATTOO PARLOURS ACT 2013</b>                    |   |                                |                         |
| Section 7  | Body art tattooists to be licenced  | 2                              | 6                       |



## ATTACHMENT 5: EXCERPTS FROM COMMUNITY SURVEYS PROVIDED BY THE QUEENSLAND POLICE SERVICE

### NATIONAL POLICE SURVEY OF COMMUNITY CONFIDENCE IN POLICE

The National Police Survey of Community Confidence in Policing indicates satisfaction in the way police have responded to OMCG has increased from 64.9% in December 2013 to 67.8% in March 2015, with 85.7% of the community no longer concerned about their personal safety as a result of criminal motorcycle gangs (as at March 2015).

### SURVEY OF BUSINESS OWNERS AT THE GOLD COAST (DEPARTMENT OF JUSTICE & ATTORNEY-GENERAL)

A survey of Gold Coast restaurant, café and business owners in April 2014 by the Department of the Premier and Cabinet highlighted the following:

How has the recent Criminal Motorcycle Gangs (CMG) crackdown effected your business?

Increased – 22%      Decreased – 9%      No effect – 55%

Do you feel safer since the CMG crackdown?

Safer – 66%      Less safe – 0%      No different – 32%

Have you noticed any change in overt drug dealing since the CMG crackdown started?

Less dealing – 15%      More dealing – 2%      No different – 36%

Have you noticed any change on other types of crime since the CMG crackdown started?

Less crime – 30%      More crime – 1%      No different – 40%

Have you experienced any crime/crime by CMGs/Standover tactics by CMGs before and after the crackdown (the following was responses were received in the areas of '% indicating not very often, sometimes, or frequently)

| <i>Category</i>   | <i>Before crackdown</i> | <i>After crackdown</i> |
|-------------------|-------------------------|------------------------|
| Crime generally   | 55%                     | 25%                    |
| Crime by CMGs     | 26%                     | 7%                     |
| Standover by CMGs | 22%                     | 6%                     |

### PUBLIC ATTITUDES SURVEY – QUEENSLAND (DEPARTMENT OF PREMIER & CABINET)

*Level of support of all measures taken by the Queensland Government to target organised crime committed by CMGs – including the new laws.*

| Survey        | Strong or very strong support (Rating 4 or 5) | Moderate support (Rating 3) | Do not support (Rating 1 or 2) |
|---------------|---|-----------------------------|--------------------------------|
| December 2013 | 47.7%   | 24.7%                       | 27.6%                          |
| June 2014     | 57.1% (up)                                    | 21.8%                       | 21.1% (down)                   |

*Level of support for club houses being declared illegal under the law.*

| Survey | Strong or very strong support (Rating 4 or 5) | Moderate support (Rating 3) | Do not support (Rating 1 or 2) |
|--------|---|-----------------------------|--------------------------------|
|        |   |                             |                                |

|               |           |       |              |
|---------------|-----------|-------|--------------|
| December 2013 | 47.4%     | 21.7% | 30.9%        |
| June 2014     | 58.2 (up) | 21.0% | 20.8% (down) |

*Level of support CMGs being declared illegal organisations.*

|               |   |                             |                                |
|---------------|---|-----------------------------|--------------------------------|
| Survey        | Strong or very strong support (Rating 4 or 5) | Moderate support (Rating 3) | Do not support (Rating 1 or 2) |
| December 2013 | 51.5%   | 23.2%                       | 25.3%                          |
| June 2014     | 59.5% (up)                                    | 21.4%                       | 19.1% (down)                   |

*Level of support on the introduction of laws to prohibit CMG members from owning certain types of businesses such as tattoo parlours, liquor outlets and pawnbrokers.*

|               |   |                             |                                |
|---------------|---|-----------------------------|--------------------------------|
| Survey        | Strong or very strong support (Rating 4 or 5) | Moderate support (Rating 3) | Do not support (Rating 1 or 2) |
| December 2013 | 46.3%   | 21.9%                       | 31.8%                          |
| June 2014     | 53.0% (up)                                    | 20.7%                       | 26.3% (down)                   |

*Level of support for new laws that prevent members of CMGs from associating in public in groups of 3 or more gang members.*

|               |   |                             |                                |
|---------------|---|-----------------------------|--------------------------------|
| Survey        | Strong or very strong support (Rating 4 or 5) | Moderate support (Rating 3) | Do not support (Rating 1 or 2) |
| December 2013 | 38.7%   | 23.8%                       | 37.5%                          |
| June 2014     | 44.6% (up)                                    | 22.2%                       | 33.2% (down)                   |

## CRIME STOPPERS REPORTS

Crime Stoppers OCMG Reports:

| <i>Period</i>                   | <i>Number of Months</i> | <i>Number of Reports</i> | <i>Average Reports per Month</i> |
|---------------------------------|-------------------------|--------------------------|----------------------------------|
| <i>01/07/2010 to 30/09/2013</i> | <i>39</i>               | <i>672</i>               | <i>17</i>                        |
| <i>01/10/2013 to 25/06/2015</i> | <i>21</i>               | <i>1796</i>              | <i>85</i>                        |

## ATTACHMENT 6: DEFINITIONS OF 'CRIMINAL ORGANISATION' AND 'PARTICIPANT' THROUGHOUT AUSTRALIA

### DEFINITIONS OF 'CRIMINAL ORGANISATION'

#### NEW SOUTH WALES

Section 3 of the *Crimes (Criminal Organisations Control) Act 2012* (NSW) defines an organisation as a 'criminal organisation' following a declaration by the Supreme Court, having found that the organisation has engaged in serious criminal activity.

The *Crimes Act 1900* (NSW), section 93S(1), defines a criminal group as a group of 3 or more people who have as their objective or one of their objectives:

- (a) obtaining material benefits from conduct that constitutes a serious indictable offence, or
- (b) obtaining material benefits from conduct engaged in outside New South Wales (including outside Australia) that, if it occurred in New South Wales, would constitute a serious indictable offence, or
- (c) committing serious violence offences, or
- (d) engaging in conduct outside New South Wales (including outside Australia) that, if it occurred in New South Wales, would constitute a serious violence offence.

"*serious violence offence*" means an offence punishable by imprisonment for life or for a term of 10 years or more, where the conduct constituting the offence involves:

- (a) loss of a person's life or serious risk of loss of a person's life, or
- (b) serious injury to a person or serious risk of serious injury to a person, or
- (c) serious damage to property in circumstances endangering the safety of any person, or
- (d) perverting the course of justice (within the meaning of Part 7) in relation to any conduct that, if proved, would constitute a serious violence offence as referred to in paragraph (a), (b) or (c).

Section 93S(2) provides that a group of people is capable of being a criminal group whether or not:

- (a) any of them are subordinates or employees of others, or
- (b) only some of the people involved in the group are involved in planning, organising or carrying out any particular activity, or
- (c) its membership changes from time to time.

#### VICTORIA

Section 3 of the *Criminal Organisation Control Act 2012* (Vic) provides that:

"declared organisation" means an organisation to which a declaration applies.

A declaration is made under section 19 of the *Criminal Organisation Control Act 2012* (Vic) which provides that:

- (1) The Court, on an application under section 14, may make a declaration—
  - (a) in the case of an organisation the subject of the application—that the organisation is a declared organisation;
  - (b) in the case of an individual the subject of the application—that the individual is a declared individual.
- (2) The Court may make a declaration under subsection (1)(a) if the Court is satisfied that—
  - (a) either—
    - (i) the organisation—
      - (A) has engaged in, organised, facilitated or supported serious criminal activity; or
      - (B) is engaging in, organising, facilitating or supporting serious criminal activity; or
    - (ii) any 2 or more members, former members or prospective members of the organisation have used or are using—
      - (A) the organisation; or
      - (B) their relationship with that organisation or with that organisation's members, former members or prospective members—for a criminal purpose; and
  - (b) the activities of the organisation pose a serious threat to public safety and order.
- (3) The Court may make a declaration under subsection (1)(b) if the Court is satisfied that—
  - (a) the individual is a member, former member or prospective member of an organisation; and
  - (b) that individual and at least one other member, former member or prospective member of that organisation have used or are using—
    - (i) that organisation; or
    - (ii) their relationship with that organisation or with that organisation's members—for a criminal purpose; and

- (c) the activities of that individual and the member, former member or prospective member pose a serious threat to public safety and order.
- (4) The Court may decide that it is satisfied as required by subsection (2) or (3) only if it is satisfied by acceptable, cogent evidence that is of sufficient weight to justify the making of a declaration.
- (5) For the purposes of subsections (2)(a)(ii) and (3)(b), 2 or more members, former members or prospective members are using or have used an organisation or their relationship with the organisation for a criminal purpose if they are or were—
  - (a) associating for that purpose on land owned or occupied by the organisation; or
  - (b) associating for that purpose at premises (other than premises on land referred to in paragraph (a) at which members commonly associate for meetings or other activities of the organisation; or
  - (c) using property owned or possessed by the organisation for that purpose; or
  - (d) in the case of an organisation that is an unincorporated body or association, using property made available by any person for use by any member of the organisation in their capacity as a member for that purpose; or
  - (e) associating at a meeting or event of the organisation for that purpose; or
  - (f) associating for that purpose while—
    - (i) wearing any of the organisation's patches or insignia; or
    - (ii) identifying themselves as members, former members or prospective members of the organisation;
  - (g) using, for that purpose, information, contacts or access to persons or other opportunities which are or were available to them because of their membership of the organisation.
- (6) Subsection (5) does not limit what may constitute using an organisation or a relationship with an organisation for a criminal purpose for the purposes of subsections (2)(a)(ii) and (3)(b).

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## NORTHERN TERRITORY

Section 7 of the *Serious Crime Control Act 2009* (NT) provides that:

A declared organisation is an organisation in relation to which a declaration under section 18 is in force.

A declaration is made under section 18 of the *Serious Crime Control Act 2009* (NT) which provides that:

- (1) This section applies if a declaration application is made to an eligible judge in relation to an organisation, whether or not a hearing is held for the application.

- (2) The eligible judge may make a declaration that the organisation is a declared organisation for this Act if satisfied:
- (a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and
  - (b) the organisation represents a risk to public safety and order.
- (3) In considering whether or not to make a declaration, the eligible judge may have regard to any of the following:
- (a) whether the organisation is a declared organisation under a corresponding law;
  - (b) any information suggesting a link exists between the organisation and serious criminal activity;
  - (c) any convictions recorded in relation to current or former members of the organisation;
  - (d) any 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 has resulted in any convictions);
  - (e) any information suggesting members of an interstate or overseas chapter or branch of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity;
  - (f) any submissions made in relation to the declaration application by the Attorney-General or under section 15 ;
  - (g) any other matter the eligible judge considers relevant.
- (4) To avoid doubt, if a hearing is held for the declaration application, a declaration may be made whether or not persons mentioned in section 15 (2) and (3) are present or make submissions.
- (5) For subsection (2)(a), the eligible judge may be satisfied members of an organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity:
- (a) whether or not all the members associate for that purpose or only some of the members provided that, if the eligible judge is satisfied only some of the members associate for that purpose, the eligible judge must be satisfied those members constitute a significant group within the organisation, either in terms of their numbers or in terms of their capacity to influence the organisation or its members; and
  - (b) whether or not members associate for the purpose of organising, planning, facilitating, supporting or engaging in the same serious criminal activities or different ones; and
  - (c) whether or not the members also associate for other purposes.

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## SOUTH AUSTRALIA

Section 3 of the *Serious and Organised Crime (Control) Act 2008* (SA) provides that:

"declared organisation" means an organisation subject to a declaration under Part 2.

A declaration is made under section 11 of the *Serious and Organised Crime (Control) Act 2008* (SA) which provides that:

- (1) The Court may make a declaration on an application made under this Part in relation to an organisation if satisfied that—
  - (a) members of the organisation **associate** for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and
  - (b) the organisation represents a risk to public safety and order in this State.
- (2) In considering whether or not to make a declaration, the Court may have regard to the following:
  - (a) information suggesting that a link exists between the organisation and serious criminal activity;
  - (b) any convictions recorded against—
    - (i) current or former members of the organisation; or
    - (ii) persons who associate, or have associated, with members of the organisation;
  - (c) information suggesting that—
    - (i) current or former members of the organisation; or
    - (ii) persons who associate, or have associated, with 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;
  - (d) information suggesting that members of an interstate or overseas chapter or branch of the organisation (however described) associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity;
  - (e) anything else the Court considers relevant.
- (3) A declaration may be made whether or not any of the persons who are entitled to make or provide submissions in relation to the application take advantage of that opportunity.
- (4) Members of an organisation may "associate" for the purposes of this section in any manner including merely by being members of the organisation.

(5) The Court may, for the purposes of making the declaration, be satisfied that members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity—

- (a) whether all the members **associate** for that purpose or only some of the members; and
- (b) whether members **associate** for that purpose in relation to the same serious criminal activity or different serious criminal activity; and
- (c) whether or not the members also **associate** for other purposes.

Section 83GA of the *Criminal Law Consolidation Act 1935* (SA) (which applies to Part 3B, Division 2: Public Places: prescribed places and prescribed events) defines a criminal organisation as:

- (a) an organisation of 3 or more persons—
  - (i) who have as their purpose, or 1 of their purposes, engaging in, organising, planning, facilitating, supporting, or otherwise conspiring to engage in, serious criminal activity; and
  - (ii) who, by their association, represent an unacceptable risk to the safety, welfare or order of the community; or
- (b) a declared organisation within the meaning of the *Serious and Organised Crime (Control) Act 2008*; or
- (c) an entity declared by regulation to be a criminal organisation;

Section 83D of the *Criminal Law Consolidation Act 1935* (SA) (which applies to the participation in a criminal organisation offence under Part 3B, Division 1: Participation in Criminal Organisation) defines a criminal group as:

"criminal group"—a group consisting of 2 or more persons is a criminal group if—

- (a) an aim or activity of the group includes engaging in conduct, or facilitating engagement in conduct, constituting a serious offence of violence (or conduct that would, if engaged in within this State, constitute such an offence); or
- (b) an aim or activity of the group includes engaging in conduct, or facilitating engagement in conduct, constituting a serious offence (or conduct that would, if engaged in within this State, constitute such an offence) that is intended to benefit the group, persons who participate in the group or their associates;

"criminal organisation" means—

- (a) a criminal group; or
- (b) a declared organisation;

"declared organisation" has the same meaning as in the *Serious and Organised Crime (Control) Act 2008*

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## WESTERN AUSTRALIA

Section 221D of the *Criminal Organisations Control Act 2012* (WA) defines criminal organisation as:

- (1) For the purposes of this Chapter, an entity is a criminal organisation if —
  - (a) the entity is a declared criminal organisation; or
  - (b) all of the following apply to the entity —
    - (i) the entity is an organisation;
    - (ii) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity;
    - (iii) the organisation represents a risk to public safety and order in this State.
- (2) In determining whether an entity is a criminal organisation for the purposes of subsection (1)(b) —
  - (a) a court may have regard to any of the matters that a designated authority is entitled to have regard to under the COC Act section 13(2) (other than paragraph (e)) in considering whether or not to make a declaration under that Act; and
  - (b) section 13(3) of that Act applies with all necessary changes for the purposes of the court satisfying itself that subsection (1)(b)(ii) of this section applies to the entity.

## DEFINITIONS OF 'PARTICIPANT'

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## NEW SOUTH WALES

Section 3 of the *Crimes (Criminal Organisations Control) Act 2012* (NSW) defines 'member' of a criminal organisation as:

"member" of an organisation includes:

- (a) in the case of an organisation that is a body corporate—a director or an officer of the body corporate, and
- (b) in any case:
  - (i) an associate member or prospective member (however described) of the organisation, and
  - (ii) a person who identifies himself or herself, in some way, as belonging to the organisation, and
  - (iii) a person who is treated by the organisation or persons who belong to the organisation, in some way, as if he or she belonged to the organisation

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## VICTORIA

Section 3 of the *Criminal Organisations Control Act 2012* defines 'member' of a criminal organisation as:

"member", of an organisation, includes—

- (a) an individual who is a current member of the organisation because the individual—
  - (i) has paid a membership fee to be a member of the organisation; or
  - (ii) has been accepted as a member of the organisation through another process set by the organisation; or
- (b) an honorary member of the organisation; or
- (c) an individual who identifies himself or herself as belonging to the organisation, including an individual who wears or displays the patches or insignia (if any) of the organisation; or
- (d) an individual whose conduct in relation to the organisation would reasonably lead another person to consider the individual to be a member of the organisation; or
- (e) an office holder of the organisation;

Section 8 of the *Criminal Organisations Control Act 2012* (Vic) defines 'prospective member' of a criminal organisation as:

- (1) For the purposes of this Act, a prospective member of an organisation is an individual who has commenced but not completed the process of becoming a member of the organisation.
- (2) For the purposes of this Act, a "prospective member" of an organisation includes—
  - (a) an individual who members of the organisation describe as a "prospect" or "nominee" of the organisation;
  - (b) an individual nominated or sponsored by a member of the organisation for the purpose of that individual becoming a member of the organisation;
  - (c) an individual who wears or displays— some, or an incomplete version, of the organisation's patches or insignia; or
  - (d) a specific identifier in the place of some or all of the organisation's patches or insignia which identifies the individual as a prospective member;
  - (e) an individual undertaking a period of probationary membership with the organisation.

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## NORTHERN TERRITORY

Section 6 of the *Serious Crime Control Act* (NT) defines 'member' of an organisation as:

“member” of an organisation, includes:-

- (f) an associate member or prospective member (however described) of the organisation; and
- (g) a person who identifies himself or herself, in any way, as belonging to the organisation; and
- (h) a person who is treated by the organisation or members of the organisations as if he or she belongs to the organisation; and
- (i) if the organisation is a body corporate- a director for an officer of the body corporate, as defined in section 9 of the Corporations Act 2001

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## **SOUTH AUSTRALIA**

Section 83G of the *Criminal Law Consolidation Act 1935* (SA) defines ‘member’ and ‘participant’ of an organisation as:

“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 or 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.

Section 3 of the *Criminal Law Consolidation Act 1935* (SA) defines ‘member’ of an organisation as:

“member”, in relation to an organisation, includes—

- (a) in the case of an organisation that is a body corporate—a director or an officer of the body corporate; and
- (b) in any case—
  - (i) an associate member or prospective member (however described) of the organisation; and

- (ii) a person who identifies himself or herself, in some way, as belonging to the organisation

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## WESTERN AUSTRALIA

Section 3 of the *Criminal Organisations Control Act 2012* (WA) defines 'member' of an organisation as:

member , in relation to an organisation, includes —

- (a) in the case of an in the case of an organisation that is a body corporate—a director or an officer of the body corporate; and
- (b) in any case—
  - (i) an associate member or prospective member (however described) of the organisation; and
  - (ii) a person who identifies himself or herself, in some way, as belonging to the organisation

**ATTACHMENT 7: EXECUTIVE DECLARATIONS OF CRIMINAL ORGANISATIONS IN QUEENSLAND AND SOUTH AUSTRALIA**

|  | <b>South Australia</b>  | <b>Queensland</b>   |
|--|---|---|
| <b>In which statute is the declaratory power located?</b>  | <i>Criminal Law Consolidation Act 1935</i>  | <i>Criminal Code (Qld)</i>  |
| <b>Who may make the regulation?</b>  | The Governor on the recommendation of the Minister  | The Governor-in-Council on the recommendation of the Minister.  |
| <b>When can the Minister make a recommendation?</b>  | After the Crime and Public Integrity Committee (CPIC) has provided the Minister a report in relation to an organisation;<br>or<br>After the passage of 10 days after the Minister had referred a proposal about declaring an organisation.  | No special circumstances stated.  |
| <b>What is the ordinary process for making a regulation or statutory instrument in the jurisdiction?</b> | <p>All regulations are published in the Government Gazette on the day on which they are made in Executive Council.</p> <p>Section 10 of the <i>Statutory Instruments Act 1978 (SA)</i> provides that regulations must be laid before each House of Parliament within 6 sitting days of that House after the regulation has been made.</p> <p>Section 10A of the <i>Statutory Instruments Act 1978 (SA)</i> requires that after a regulation is laid before each House of Parliament, it is referred to the Legislative Review Committee which enquires into and considers the regulation. The Committee must report its opinion and the grounds for its opinion to both Houses of Parliament before the end of the period within which any motion for disallowance of the regulations may be moved.</p> <p>There is a period of 14 sitting days (which need not fall within the same session of</p> | <p>Subordinate legislation must be published on the legislation website.</p> <p>Section 49 of the <i>Statutory Instruments Act 1992 (SIA)</i> provides that subordinate legislation must be tabled in the legislative assembly within fourteen sitting days after it is notified on the legislation website.</p> <p>Section 50 of the <i>Parliament of Queensland Act 2001</i> provides a parliamentary portfolio committee can directly oppose an objectionable provision in sub-ordinate legislation by asking the Legislative Assembly to support a motion to disallow the provision under the SIA.</p> <p>Section 50 of the SIA provides that the Legislative Assembly may pass a resolution disallowing subordinate legislation tabled in the Assembly if notice of that motion is given by a member within 14 sitting days after tabling.</p> |

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|  | <p>Parliament) within which a Member of Parliament may give a notice of motion for the disallowance of the regulation.</p> <p>If a regulation is not laid before each House within the required time, the disallowance motion must be given within 6 sitting days of a report on the failure being made by the Committee.</p>   |  |
| <p>Is there an extraordinary process in place for the making a declaration of a criminal organisation by way of declaration?</p> | <p>Yes</p> <p>Section 10A of the <i>Subordinate Legislation Act 1978</i> (SA) does not apply to a regulation to declare a criminal organisation.</p> <p>Each regulation of this kind must be laid before each House of parliament in accordance with the <i>Subordinate Legislation Act 1978</i> (SA) and can only relate to 1 entity, 1 event or 1 place.</p> <p>The Minister can refer a <i>proposal</i> to declare an organisation to the CPIPC.</p> <p>Once the CPIPC has received the proposal it must seek a report from the Commissioner of Police regarding the proposal and report to the Minister as to whether the Committee is of the opinion that the organisation should be declared a criminal organisation.</p> | <p>No</p>  |
| <p>What information must/may the Minister consider before making a recommendation to the Governor/Governor-in-Council</p>        | <p>The Minister <i>may</i> have regard to:-</p> <ul style="list-style-type: none"> <li>• if the Minister has received a report of the Committee in relation to the entity—the report of the Committee;</li> <li>• any information suggesting a link exists between the entity and</li> </ul>  | <p>The Minister <i>may</i> have regard to:-</p> <ul style="list-style-type: none"> <li>• any information suggesting a link exists between the entity and serious criminal activity;</li> <li>• any convictions recorded in relation to—</li> </ul> |

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|   | <p>serious criminal activity;</p> <ul style="list-style-type: none"> <li>• any convictions recorded in relation to— <ul style="list-style-type: none"> <li>○ current or former participants in the entity; or</li> <li>○ persons who associate, or have associated, with participants in the entity;</li> </ul> </li> <li>• 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);</li> <li>• 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;</li> <li>• any other matter the Minister considers relevant.</li> </ul> | <ul style="list-style-type: none"> <li>○ current or former participants in the entity; or</li> <li>○ persons who associate, or have associated, with participants in the entity;</li> </ul> <ul style="list-style-type: none"> <li>• 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);</li> <li>• 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;</li> <li>• any other matter the Minister considers relevant.</li> </ul> |
| <p><b>What is the nature of the Parliamentary Committee that scrutinises the relevant statutory instrument?</b></p> | <p>Crime and Public Integrity Policy Committee (CPIPC)</p> <p>The CPIPC examines the effectiveness of serious and organised crime legislation in disrupting and restricting the activities of organisations involved in serious crime and</p>   | <p>Legal Affairs and Community Safety Committee (LACSC).</p> <p>The LACSC is a portfolio committee with responsibility for the following areas:</p> <ul style="list-style-type: none"> <li>• Justice and Attorney-General, Training and Skills; and</li> </ul>   |

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|   | <p>protecting members of the public from violence associated with such organisations.</p> <p>It is made up of three members from the South Australian House of Assembly and three members from the South Australian Legislative Council.</p> <p>Currently, three members are from the Government, two from the opposition and one is from the Family First Party.</p> | <ul style="list-style-type: none"> <li>• Police, Fire and Emergency Service.</li> </ul> <p>It is currently made up of three Government and three opposition members of the Queensland Legislative Assembly</p> <p>Section 93 of the <i>Parliament of Queensland Act 2001</i> provides that portfolio committee examine subordinate legislation in their portfolio and consider:</p> <ul style="list-style-type: none"> <li>• The policy to be given effect by the legislation;</li> <li>• The application of fundamental legislative principles;</li> <li>• The lawfulness of the legislation;</li> <li>• Compliance with the requirement that the responsible department prepare explanatory notes; and</li> <li>• Compliance with the guidelines approved by the Treasures about regulatory impact statements.</li> </ul> |
| <p><b>Is the regulation required to be reviewed periodically?</b></p> | <p>Under Part 3A of the <i>Subordinate Legislation Act 1978</i> (SA) provides that regulations expire on 1 September of the year following the year in which the 10th anniversary of the day on which the regulations were made falls.</p>  | <p>Section 54 of the SIA provides that subordinate legislation expires on 1 September first occurring after the tenth anniversary of its making.</p> <p>Therefore, the Criminal Code (Criminal Organisations) Regulation 2013 will expire on 1 September 2024.</p>  |

## ATTACHMENT 8: DECISIONS UNDER THE 2013 'SHOW CAUSE' PROVISIONS OF THE BAIL ACT 1980

### *NEALE, RE AN APPLICATION FOR BAIL [2013] QSC 310*

Date of judgment: 7 November 2013.

Charge: Section 60B(1) of the Criminal Code – 2 counts of entering a prescribed place as a participant in a criminal organisation.

Ruling: Bail granted.

Facts: It was alleged that the applicant was a member of the Rebels OMCG and had entered the Rebels clubhouse on two occasions on 18 and 25 October 2013.

Because of the applicant's alleged membership of the Rebels OMCG he was in a show cause position as prescribed by section 163A of the Bail Act and was required to persuade the Court why his continued detention was not justified.

In granting bail, the Court determined that having regard to his full time employment and his lack of criminal history, he did not present an unacceptable risk of, failing to appear, or surrender into custody if released on bail.

### *DA SILVA V DIRECTOR OF PUBLIC PROSECUTIONS; DA SILVA V DIRECTOR OF PUBLIC PROSECUTIONS; SPENCE V DIRECTOR OF PUBLIC PROSECUTIONS [2013] QSC 316 (*

Date of judgment: 8 November 2013.

Charge: Trafficking in amphetamines from 26 June 2012 to 20 October 2013.

Ruling: None of the applicants were ruled a participants in a criminal organisation within the meaning of section 16(3A). Bail granted.

Section 16(3A) inserted by the Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld) commenced operation on 17 October 2013.

It relevantly provided that 'if the defendant is 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'.

In construing subsection (3A), the Court determined that it was expressed in the present tense and on its plain meaning it referred to someone being such a participant in a criminal organisation at the time of the bail application.

Although association with a criminal organisation at the time of offending may, by section 16(2), be relevant to the assessment of risk under section 16(1) that is a different question from the one that was before the Court, which was; whether the applicants were in a show cause position.

Facts: The argument related to the time at which an applicant must be a participant in a criminal organisation if the show cause provision in section 16(3A) of the *Bail Act* was to apply. The applicants had resigned as members of the Hells Angels motorcycle club prior to that section commencing on 17 October 2013.

*VAN TONGEREN V ODPP [2013] QMC 16*

Date of judgment: 14 November 2013.

Charge: 1 count of disorderly behaviour and 1 count of affray.

Ruling: Bail refused

Facts: The applicant, whilst being in company with another man, allegedly attacked a defenceless hotel patron in Toowoomba. The applicant subsequently engaged in a physical altercation in the hotel carpark where punches were exchanged.

The applicant was an alleged member of the Bandidos OMCG. As a consequence of the 2013 suite this placed the applicant in a show cause position pursuant to section 16(3A) of the Bail Act. If convicted, the applicant would be sentenced to no less than six (6) months imprisonment.

The applicant disavowed his membership of the Bandidos OMCG through an affidavit that was presented to the Court. This evidence was not accepted by the Court.

The Court concluded that the applicant's continued pre-trial detention was justified in consideration of 'the likelihood and mandatory consequences of conviction, the applicant's connections with the Bandidos plus a finding of unacceptable risk of flight, interference with witnesses and offending'.

*JOSHUA SHANE CAREW V THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS [2014] QSC 1*

Date of judgment: 14 January 2014.

Charge: Section 60A(1) of the Criminal Code – Being a participant in a criminal organisation knowingly present in a public place on 1 November 2013.

Order: Bail granted.

Facts: The applicant was in the company of Paul Landsdowne and Steven Smith – men known to him to be members of the Rebels OMCG. Mr Landsdowne was the applicant's employer and Mr Smith was his brother-in-law. The applicant claimed to never have been a member of the Rebels, nor had he sought to join the Rebels or attended any Rebels meetings, functions or rides. He claimed he had been in the Rebels Maroochydore clubhouse on previous occasions in a work capacity; as a builder.

The applicant had a relevant criminal history which disclosed previous involvement with a Rebels' drug operation in 2010 and an affiliation with members of the Rebels in their criminal activities in 2012 and 2013.

The Court observed that the men had significant personal connections that were unrelated to their Rebels membership.

The prosecution case was that the applicant was a "participant" because he was seeking to be "associated with" the Rebels on 1 November 2013. The case relied significantly on the applicant's dealings in dangerous drugs on previous occasions. The applicant allegedly acted as a banker, book-keeper and in a warehouse in a Rebels-centric methylamphetamine distribution enterprise. That alleged drug trafficking had ceased on 4 July 2013. Consequently, at the bail hearing, the prosecution

was required to establish that the applicant had associated with the “criminal organisation” on 1 November 2013.

The Court was of the view that there was not an unacceptable risk that the applicant would fail to appear. However, given his history, there was a risk that the application would commit a serious drug offence if released on bail.

The trial was to take place within 10 weeks. The applicant’s anxiety not to return to solitary confinement was also viewed as a substantial incentive to not commit any offences. Ultimately it was decided that while the risk of reoffending was real, it was not unacceptable.

The strength of the prosecution case was also material to deciding whether the applicant had shown cause. The Court determined that where the prosecution case is not irresistible, the burden, though substantial, was less difficult to satisfy.

#### **PAUL JEFFREY LANDSDOWNE V THE DIRECTOR OF PUBLIC PROSECUTIONS [2014] QSC 2**

Date of judgment: 15 January 2014.

Charge: Section 60A(1) of the Criminal Code – Being a participant in a criminal organisation knowingly present in a public place on 1 November 2013.

Order: Bail granted (with conditions).

Facts: Related to the decision of *Carew* (above).

There was evidence to show that the applicant was a “patched” Rebels member. He had not taken any steps to resign from the “organisation” out of fear that such an action would constitute an admission that he was a member which could be used against him in the future.

He had complied with previous grants of bail. His ties to the Sunshine Coast, surrendering his passport and various bail conditions imposed on him meant that there was not an unacceptable risk of reoffending or failing to appear.

There was only 10 weeks until the trial so the likelihood of re-offending during this time was mitigated and his anxiety to not return to solitary confinement was a substantial incentive not to commit an offence.

#### **RE ALAJBEGOVIC [2014] QSC 6**

Date of judgment: 23 January 2014.

Charges: Two offences against section 60A(1) of the Criminal Code – Being a participant in a criminal organisation knowingly present in a public place on 3 and 4 January 2014 respectively.

Order: Bail granted.

Facts: It was alleged that the applicant and his four male associates, with whom the applicant was in company with when he was arrested, were members of various OMCs. The applicant conceded that he was a member of the Comancheros but resigned his membership in August 2013 and had not associated with the club since then. Other members of the applicant’s group also claimed to have disassociated themselves prior to the offence dates.

The first alleged offence (3 January, 2013) was alleged to have taken place on Elkhorn Ave, Surfers Paradise. The second alleged offence (4 January, 2013) took place in a hotel room. For that reason, the second offence raised an issue as to whether a hotel room fell within the definition of a public place so it was conceded by the Prosecution that the case on that charge was not a strong one.

The applicant was on bail for drug and violent offences in Victoria at the time of the alleged offences.

The issue at the trial was to be; whether the applicant was at the relevant times a participant “in a criminal organisation”. The evidence was in the form of intelligence reports suggesting membership or association by all men with either the Hells Angels or Comancheros at least in 2012 and 2013.

The respondent accepted that resignation or dissociation from a criminal organisation, like any demonstrated act of rehabilitation, may give rise to cause being shown and the court being satisfied that the person has shown they are not an unacceptable risk.

The observation in *R v Carew* (see discussion above) was also referred to, namely that; the applicant’s anxiety not to return to solitary confinement was a substantial incentive for him not to commit offences.

The risk of reoffending was viewed as not unacceptable in light of the imposition of bail conditions as to residency, reporting and non-contact. Therefore the burden in section 16(3A) was discharged.

#### **RE HALILOVIC [2014] QSC 5**

Date of judgment: 23 January 2014.

Charge: 2 counts of (as a participant in a criminal organisation) being knowingly present in a public place with two or more others who were participants in a criminal organisation: section 60A(1) – Criminal Code.

Order: Bail granted (with conditions).

Facts: Related to the decision of *Alajbegovic* (above).

The applicant was an alleged nominee of the Comancheros OMCG and was in a show cause position pursuant to section 16(3A) of the Bail Act. At the time of his arrest the applicant was on bail with respect to trafficking in a dangerous drug and recklessly causing serious injury.

The circumstances of the first alleged offence were that the applicant was in company with 4 other males who were alleged to be members of various OMCGS on Elkhorn Avenue, Surfers Paradise.

The circumstance of the second alleged offence were that the applicant was in the company with two other OMCG members in a hotel room located in Orchid Avenue.

The Court found that there was no evidence to suggest that any witness would be at risk of interference, nor was there a risk of flight, if the applicant was granted bail.

Whilst the applicant was on bail for serious offences the risk of reoffending was ameliorated by the applicant’s anxiety not to return to solitary confinement (an observation cited in *R v Carew* (above) and that appropriate bail conditions would further mitigate this risk.

The Court ruled that the applicant had discharged the burden imposed by section 16(3A).

**RE: BLOOMFIELD [2014] QSC 115**

Date of judgment: 30 May 2014.

Charges: 1 x Being a participant in a criminal organisation knowingly present in a public place (section 60A – Criminal Code); 1 x Extortion, 1 X Assault occasioning bodily harm and 1 x theft. The offences were allegedly committed between 20 October 2013 and 14 May 2014.

Order: Bail granted.

Facts: Related to the decision of *Van Rooijen* (below).

The applicant was in a show cause position for two reasons; he was alleged to have threatened to use a firearm and he was alleged to be or have been a member of the Hells Angels. He claimed to have renounced his association in October 2013.

The charges had their genesis in a drug sale and an unpaid debt. The complainant was assaulted by the applicant and another. The extortion was based on a threat sent via text message to kill members of the complainant's family unless the debt was paid.

The applicant had a minor criminal history, strong family support and good employment prospects upon release.

The prosecution case relied primarily on the evidence of a single witness whose credibility was likely to be strongly challenged. The key issue on the charge was whether or not he was a 'participant' in a criminal organisation. The offence was alleged to have been committed at a gym in Robina.

If the applicant was found to have been a 'vicious lawless associate' he would face a 15 year mandatory term. The Court stated that "it cannot be said that the prosecution is assured of success... it can only be said that the case presents as fairly arguable".

Nothing in the applicant's history supported the conclusion that he was an unacceptable risk of failing to appear.

The prosecution submitted that the applicant posed a risk of interfering with witnesses based on the offence before the Court. However the Court held that there can't be said to be a risk of that kind where there is no history of it.

An examination of the factors set out in section 16(2) did not point with any compulsion to the existence of an unacceptable risk.

**RE: VAN ROOIJEN [2014] QSC 116**

Date of judgment: 30 May 2014.

Charges: Five charges involving drugs, extortion, violence and being a participant in a criminal organisation.

Order: Bail granted.

Facts: Related to the decision of *Bloomfield* (above).

The applicant had four convictions as a child between 2005 and 2009, none of which included the recording of a conviction. In 2010 he was convicted of robbery with violence and sentenced to 30 months imprisonment. He had the support of his family and was expecting his first child to be born within the following week. He had good employment prospects and his parents offered a surety of \$50,000.

Nothing in his criminal history suggested any propensity for breaching bail. An examination of the relevant factors points to the conclusion that the applicant was not an unacceptable risk. A relevant factor is that a refusal of bail would prevent him from being involved in the birth of his first child which would lead to hardship on the part of his partner.

**RE: TESIC [2015] QSC 205**

Date of judgment: 6 May 2015.

Charges: Trafficking in a dangerous drug (methamphetamine) and supplying in a dangerous drug (methamphetamine).

Order: Bail granted.

Facts: The applicant, was charged with respect to trafficking and possessing methamphetamine and was alleged to be part of a drug distribution network.

It was further alleged that the applicant was a vicious lawless associate and officer bearer of a relevant association pursuant to the *Vicious Lawless Association Disestablishment Act 2013*. Upon conviction the applicant was liable to a minimum 25 years imprisonment.

A previous application for Bail in the Supreme Court was refused on 18 September 2014 on the basis that there was an unacceptable risk that the applicant may interfere with a Crown witness.

The Crown alleged that the applicant was in a show cause position having regard to section 163A of the Bail Act on the basis that he and others were members of a criminal organisation as defined in section 1 (limb 1) of the Criminal Code and that he had previously been a member of the Fink OMCG and had been a member of other OMCGs in Queensland.

It was accepted by the Court that the applicant was in a show cause position.

The Court commented that the evidence establishing the applicant's association with OMCGs was tenuous and that in future the Crown would be required to adduce more substantial and robust evidence of association with an OMCG in order to persuade the Court that a defendant was a participant in a criminal organisation.

The Court ruled that the applicant's continued detention was not justified and granted bail on strict conditions.

## ATTACHMENT 9: AUSTRALIAN ANTI-CONSORTING OFFENCES & WARNING PROVISIONS

### ANTI-CONSORTING OFFENCES (AND RELEVANT DEFENCES)

#### NEW SOUTH WALES

Section 93X of the *Crimes Act 1900* (NSW) provides the offence of consorting as follows:

- (1) A person who:
  - (a) habitually consorts with convicted offenders, and
  - (b) consorts with those convicted offenders after having been given an official warning in relation to each of those convicted offendersIs guilty of an offence.

*Maximum penalty: 3 years imprisonment and/or a fine of 150 penalty units.*

- (2) A person does not "habitually consort" with convicted offenders unless:
  - (a) the person consorts with at least 2 convicted offenders (whether on the same or separate occasions), and
  - (b) the person consorts with each convicted offender on at least 2 occasions.
- (3) An "official warning" is a warning given by a police officer (orally or in writing) that:
  - (a) a convicted offender is a convicted offender, and
  - (b) consorting with a convicted offender is an offence.

Section 93Y of the *Crimes Act 1900* (NSW) provides the defences to the consorting offence as follows:

The following forms of consorting are to be disregarded for the purposes of section 93X if the defendant satisfies the court that the consorting was reasonable in the circumstances:

- (a) consorting with family members,
- (b) consorting that occurs in the course of lawful employment or the lawful operation of a business,
- (c) consorting that occurs in the course of training or education,
- (d) consorting that occurs in the course of the provision of a health service,
- (e) consorting that occurs in the course of the provision of legal advice,
- (f) consorting that occurs in lawful custody or in the course of complying with a court order.

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## SOUTH AUSTRALIA

Section 13 of the *Summary Offences Act 1953* (SA) provides the offence of consorting as follows (the defences are contained at subsection (3)):

(1) A person who—

(a) habitually consorts with convicted offenders (whether in this State or elsewhere); and

(b) consorts in this State with those convicted offenders after having been given an official warning in relation to each of those convicted offenders,

is guilty of an offence.

*Maximum penalty: Imprisonment for 2 years.*

(2) A person does not habitually consort with convicted offenders for the purposes of this section unless—

(a) the person consorts with at least 2 convicted offenders (whether on the same or separate occasions); and

(b) the person consorts with each convicted offender on at least 2 occasions.

(3) The following forms of consorting are to be disregarded for the purposes of this section if the defendant satisfies the court that the consorting was reasonable in the circumstances:

(a) consorting with family members;

(b) consorting that occurs in the course of lawful employment or the lawful operation of a business;

(c) consorting that occurs in the course of training or education;

(d) consorting that occurs in the course of the provision of a health service;

(e) consorting that occurs in the course of the provision of legal advice;

(f) consorting that occurs in lawful custody or in the course of complying with a court order.

(4) In this section—

"consort" means consort in person or by any other means, including by electronic or other form of communication;

"convicted offender" means a person who has been convicted of an indictable offence;

"corresponding law" means a law of the Commonwealth, another State, or a Territory that is prescribed by regulation for the purposes of this definition;

"official warning" means—

- (a) a warning given by a police officer (orally or in writing) that—
  - (i) a convicted offender is a convicted offender; and
  - (ii) consorting with a convicted offender is an offence; or
- (b) a warning or other notification given under a corresponding law.

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## VICTORIA

Section 49F of the *Summary Offences Act 1966* (Vic) provides the offence of consorting as follows (the defence is contained at subsection (2)):

- (1) A person must not, without reasonable excuse, habitually consort with a person who has been found guilty of, or who is reasonably suspected of having committed, an organised crime offence.

*Penalty:* 2 years imprisonment.

- (2) The accused bears the burden of proving reasonable excuse for habitual consorting to which a charge of an offence against subsection (1) relates.

(3) In this section— "organised crime offence" means an indictable offence against the law of Victoria, irrespective of when the offence was or is suspected to have been committed, that is punishable by level 5 imprisonment (10 years maximum) or more and that—

- (a) involves 2 or more offenders; and
- (b) involves substantial planning and organisation; and
- (c) forms part of systemic and continuing criminal activity; and
- (d) has a purpose of obtaining profit, gain, power or influence.

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## TASMANIA

Section 6 of the *Police Offences Act 1935* (Tas) provides the offence of consorting as follows (the defence is contained at subsection (2)):

- (1) A person shall not habitually consort with reputed thieves.

(1A) A person who contravenes subsection (1) is guilty of an offence and is liable on summary conviction to imprisonment for a term not exceeding 6 months.

(2) A person shall not be convicted of an offence against this section if he proves to the satisfaction of the court that he has sufficient lawful means of support and that he had good and sufficient reasons for consorting with the persons with whom he is charged with having consorted.

(3) No proceedings under this section shall be taken by any person other than a police officer.

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## NORTHERN TERRITORY

Section 6 of the *Summary Offences Act* (NT) provides the offence of consorting as follows (the defences are contained at subsection (2)):

(1) A person is guilty of an offence if:

(a) the Commissioner gives a written notice to the person under this section prohibiting the person, for a specified period not exceeding 12 months, from one or both of the following as specified in the notice:

(i) being in company with one or more specified persons;

(ii) communicating in any way (including by post, fax, phone and other electronic means, and whether directly or indirectly) with one or more specified persons; and

(b) the person contravenes the notice.

*Maximum penalty: Imprisonment for 2 years.*

(2) It is a defence for an offence against subsection (1) if the defendant proves that:

(a) the defendant has a reasonable excuse; or

(b) the defendant, having unintentionally associated with a person specified in the notice, terminated the association immediately.

(3) In subsection (2), a reference to an association with the specified person is a reference to being in company, or communicating, with the specified person in contravention of the notice.

(4) The Commissioner may give a notice to a person (the notified person) under subsection (1) only if:

(a) the notified person and each person specified in the notice (a specified person) have each been found guilty of a prescribed offence; and

(b) the Commissioner reasonably believes that giving the notice is likely to prevent the commission of a prescribed offence involving:

(i) 2 or more offenders; and

(ii) substantial planning and organisation.

(5) The notice must specify:

(a) the notified person's obligations under the notice; and

(b) the consequences of contravening the notice.

(6) The Commissioner must ensure all reasonable steps are taken to explain to the notified person (in language the notified person can readily understand) the matters mentioned in subsection (5)(a) and (b).

(7) In addition, the Commissioner must give each specified person a notice under subsection (1) imposing similar obligations in relation to prohibiting the specified person from one or both of the following:

(a) being in company with the notified person and each of the other specified persons;

(b) communicating with the notified person and each of the other specified persons.

(8) However, the Commissioner may disregard subsection (7) in exceptional circumstances.

(9) A notice under subsection (1) is not invalidated by a failure to comply with subsections (6) to (8).

(10) A reference to a prescribed offence in subsection (4) is a reference to an offence:

(a) prescribed by regulation; and

(b) the maximum penalty for which is imprisonment for 10 years or more.

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## WESTERN AUSTRALIA

Section 557J of the *Criminal Code 1913* (WA) provides the offence of consorting with declared drug traffickers as follows (the defences are contained at subsection (3)):

(1) In this section, unless the contrary intention appears —

“consort” includes to communicate in any manner;

“declared drug trafficker” means a person who is declared to be a drug trafficker under section 32A(1) of the Misuse of Drugs Act 1981.

(2) A person who is a declared drug trafficker and who, having been warned by a police officer —

(a) that another person is also a declared drug trafficker; and

(b) that consorting with the other person may lead to the person being charged with an offence under this section, habitually consorts with the other person is guilty of an offence and is liable to imprisonment for 2 years and a fine of \$24 000.

(3) It is a defence to a charge of an offence under subsection (2) to prove that the accused person —

(a) was the spouse or de facto partner of the other person; or

(b) was a de facto child or a lineal relative (as those terms are defined in section 329(1)) of the other person.

Section 557K of the *Criminal Code 1913* (WA) provides the offence of consorting with child sex offenders as follows (the defences are contained at subsection (5)):

(1) In this section, unless the contrary intention appears —

“child” means a person under 18 years of age;

“child sex offender” means a person who has been convicted of —

(a) an offence under any of these Chapters of this Code that was committed against, in respect of, or in the sight of, a child —

(i) Chapter XXII — Offences against morality;

(ii) Chapter XXXI — Sexual offences;

(iii) Chapter XXXIII — Offences against liberty;

(b) an offence under Chapter XXXIIIB that was committed against or in respect of a child;

(c) an offence under any of these repealed enactments of this Code that was committed against a child —

(i) section 315 (Indecent assault on males);

(ii) Chapter XXXIA — Sexual assaults;

(iii) Chapter XXXII — Assaults on females: Abduction;

(d) an offence under section 59 of the Censorship Act 1996 that was committed in circumstances in which an indecent or obscene article was sold, supplied or offered to a child;

(e) an offence under section 60 of the Censorship Act 1996;

(f) an offence under section 101 of the Censorship Act 1996 that was committed in circumstances in which —

(i) objectionable material was transmitted or demonstrated to a child; or

(ii) the objectionable material was child pornography;

(g) an offence under section 102 of the Censorship Act 1996;

(h) an offence committed under section 5(1), 6(1), 15, 16, 17 or 18 of the Prostitution Act 2000 committed against or in respect of a child;

(i) an offence under this section;

(j) an offence under the repealed section 66(11) of the Police Act 1892 committed in the sight of a child; or

(k) an offence against a law of a jurisdiction other than Western Australia that is substantially similar to an offence referred to in any of paragraphs (a) to (j);

“consort” includes to communicate in any manner.

(2) A reference in paragraph (a) or (b) of the definition of “child sex offender” in subsection (1) to a Chapter of this Code includes a reference to the Chapter as enacted at any time.

(3) A reference in paragraph (c) of the definition of “child sex offender” in subsection (1) to an enactment of this Code includes a reference to the enactment as enacted at any time before it was repealed.

(4) A person who is a child sex offender and who, having been warned by a police officer —

(a) that another person is also a child sex offender; and

(b) that consorting with the other person may lead to the person being charged with an offence under this section,

habitually consorts with the other person is guilty of an offence and is liable to imprisonment for 2 years and a fine of \$24 000.

(5) It is a defence to a charge of an offence under subsection (4) to prove that the accused person —

(a) was the spouse or de facto partner of the other person; or

(b) was a de facto child or a lineal relative (as those terms are defined in section 329(1)) of the other person.

(6) A child sex offender who, without reasonable excuse, is in or near a place that is —

(a) a school, kindergarten or child care centre; or

(b) a public place where children are regularly present, and where children are at the time is guilty of an offence and is liable to imprisonment for 2 years and a fine of \$24 000.

## WARNING PROVISIONS (PROHIBITION NOTICES)

### NEW SOUTH WALES

Under the *Crimes Act 1900* (NSW) there is no provision governing the issuing of a consorting prohibition notice.

### SOUTH AUSTRALIA

Section 66A of the *Summary Offences Act 1953* (SA) provides the following terms for the issuing of a consorting prohibition notice:

(1) A senior police officer may issue a notice prohibiting a person (the "recipient") from consorting with a specified person or specified persons if the officer is satisfied that—

- (a) the specified person or each specified person—
  - (i) has, within the preceding period of 3 years, been found guilty of 1 or more prescribed offences; or
  - (ii) is reasonably suspected of having committed 1 or more prescribed offences within the preceding period of 3 years; and
- (b) the recipient has been habitually consorting with the specified person or specified persons; and
- (c) the issuing of the notice is appropriate in the circumstances.

"prescribed offence" means—

- (a) an offence against Part 5 Division 2 of the *Controlled Substances Act 1984* or a corresponding offence against a previous enactment; or
- (b) an indictable offence against the *Firearms Act 1977*; or
- (c) an indictable offence of violence; or
- (d) a serious and organised crime offence; or
- (e) an offence involving extortion or money laundering; or
- (f) any attempt to commit, or assault with intent to commit, any of the foregoing offences; or
- (g) an offence against the law of another jurisdiction that would, if committed in this State, constitute any of the foregoing offences;

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## **VICTORIA**

Under the *Summary Offences Act 1966* (Vic) there is no provision governing the issuing of a consorting prohibition notice.

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## **TASMANIA**

Under the *Police Offences Act 1935* (Tas) there is no provision governing the issuing of a consorting prohibition notice.

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## **NORTHERN TERRITORY**

Under the *Summary Offences Act* (NT) the issuing of a consorting prohibition notice is set out in section 55A (as outline above).

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## **WESTERN AUSTRALIA**

Under the *Criminal Code 1913* (WA) there is no provision governing the issuing of a consorting prohibition notice.

## ATTACHMENT 10: USE OF COERCED EVIDENCE IN OTHER AUSTRALIAN JURISDICTIONS

### NEW SOUTH WALES

Section 39 of the *Crime Commission Act 2012* (NSW) deals with privilege concerning answers and documents given at a coercive hearing:

- (1) A witness summoned to attend or appearing before the Commission at a hearing is not (except as provided by section 40) excused from answering any question or producing any document or thing on the ground that the answer or production may on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.
- (2) An answer made, or document or thing produced, by a witness at a hearing before the Commission is not (except as otherwise provided in this section) admissible in evidence against the person in any civil or criminal proceedings (other than a proceeding for the falsity of evidence given by the witness) or in any disciplinary proceedings.
- (3) Nothing in this section makes inadmissible:
  - (a) any answer, document or thing in proceedings for an offence against this Act or in proceedings for contempt under this Act, or
  - (b) any answer, document or thing in any civil or criminal proceedings or in any disciplinary proceedings if the witness does not object to giving the answer or producing the document or other thing irrespective of the provisions of subsection (1), or
  - (c) any document in any civil proceedings for or in respect of any right or liability conferred or imposed by the document, or
  - (d) any answer made, or document or thing produced, by a corporation at a hearing before the Commission.

Section 39A of the *Crime Commission Act 2012* (NSW) deals derivative evidence:

- (1) Any further information, evidence, document or thing (the derivative evidence) obtained as a result of:
  - (a) the questioning under section 24 of a witness at a hearing before the Commission, or
  - (b) the production under section 24 or 29 of a document or thing, (the original evidence) is not inadmissible in any civil or criminal proceeding or in any disciplinary proceeding.
- (2) Without limiting subsection (1), the derivative evidence is not inadmissible on the ground:
  - (a) that the original evidence had to be given or produced, or
  - (b) that the original evidence might incriminate the witness, or

- (c) that the witness was questioned (or required to produce the document or thing) in relation to the subject matter of the offence for which the witness was charged before the charge was laid, or
  - (d) that the original evidence was obtained at a hearing when the witness was questioned (or required to produce the document or thing) pursuant to leave granted for the purposes of section 35A in relation to a particular offence and the original evidence related to another offence, being an offence with which the witness was not yet charged.
- (3) The derivative evidence is not admissible against the witness where the witness was questioned (or required to produce the document or thing) pursuant to leave granted for the purposes of section 35A in relation to the subject matter of the offence for which the witness was charged.
- (4) However, an exception under subsection (3) does not apply if the derivative evidence could have been obtained (or its significance understood) without the testimony of the witness.
- (5) Nothing in this section affects the operation of section 39.

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## VICTORIA

Section 144 of the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) deals with the privilege against self-incrimination at a coercive hearing:

- (1) A person is not excused from answering a question or giving information or from producing a document or other thing in accordance with a witness summons, on the ground that the answer to the question, the information, or the production of the document or other thing, might tend to incriminate the person or make the person liable to a penalty.
- (2) Any answer, information, document or thing that might tend to incriminate the person or make the person liable to a penalty is not admissible in evidence against the person before any court or person acting judicially, except in proceedings for—
  - (a) perjury or giving false information; or
  - (b) an offence against this Act; or
  - (c) an offence against the Victorian Inspectorate Act 2011; or
  - (d) an offence against section 72 or 73 of the Protected Disclosure Act 2012; or
  - (e) contempt of the IBAC under this Act; or
  - (f) a disciplinary process or action.

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## WESTERN AUSTRALIA

Section 145 of the *Corruption and Crime Act 2003* (WA) deals with the use of statements of witnesses against them:

- (1) A statement made by a witness in answer to a question that the Commission requires the witness to answer is not admissible in evidence against the person making the statement in —
- (a) any criminal proceedings; or
  - (b) proceedings for the imposition of a penalty other than —
    - (i) contempt proceedings; or
    - (ii) proceedings for an offence against this Act; or
    - (iii) disciplinary action.
- (2) Despite subsection (1), the witness may, in any civil or criminal proceedings, be asked about the statement under section 21 of the Evidence Act 1906.

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## **SOUTH AUSTRALIA**

Section 23(5) of the *Australian Crime Commission (South Australia) Act 2004 (SA)* deals with the use that can be made of evidence given at a coercive hearing:

- (1) A person served, as prescribed, with a summons to appear as a witness at an examination before an examiner must not—
- (a) fail to attend as required by the summons; or
  - (b) fail to attend from day to day unless excused, or released from further attendance, by the examiner.
- (2) A person appearing as a witness at an examination before an examiner must not—
- (a) when required pursuant to section 19 either to take an oath or make an affirmation—refuse or fail to comply with the requirement; or
  - (b) refuse or fail to answer a question that he or she is required to answer by the examiner; or
  - (c) refuse or fail to produce a document or thing that he or she was required to produce by a summons under this Act served on him or her as prescribed.
- (3) Where—
- (a) a legal practitioner is required to answer a question or produce a document at an examination before an examiner; and
  - (b) the answer to the question would disclose, or the document contains, a privileged communication made by or to the legal practitioner in his or her capacity as a legal practitioner, the legal practitioner is entitled to refuse to comply with the requirement unless the person to whom or by whom the communication was made agrees to the legal practitioner complying with the requirement but, where the legal practitioner refuses to comply with the requirement, he or she must, if so required by

the examiner, give the examiner the name and address of the person to whom or by whom the communication was made.

(4) Subsection (5) limits the use that can be made of any answers given at an examination before an examiner, or documents or things produced at an examination before an examiner. That subsection only applies if—

- (a) a person appearing as a witness at an examination before an examiner—
  - (i) answers a question that he or she is required to answer by the examiner; or
  - (ii) produces a document or thing that he or she was required to produce by a summons under this Act served on him or her as prescribed; and
- (b) in the case of the production of a document that is, or forms part of, a record of an existing or past business—the document sets out details of earnings received by the person in respect of his or her employment and does not set out any other information; and
- (c) before answering the question or producing the document or thing, the person claims that the answer, or the production of the document or thing, might tend to incriminate the person or make the person liable to a penalty.

(5) The answer, or the document or thing, is not admissible in evidence against the person in—

- (a) a criminal proceeding; or
- (b) a proceeding for the imposition of a penalty, other than—
- (c) confiscation proceedings; or
- (d) a proceeding in respect of—
  - (i) in the case of an answer—the falsity of the answer; or
  - (ii) in the case of the production of a document—the falsity of any statement contained in the document.

(6) A person who contravenes subsection (1), (2) or (3) is guilty of an offence.

*Maximum penalty:* \$22 000 or imprisonment for 5 years.

(7) Subsection (3) does not affect the law relating to legal professional privilege.

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## NORTHERN TERRITORY

Section 23(8) of the *Australian Crime Commission (Northern Territory) Act* (NT) deals with the use that can be made of evidence given at a coercive hearing:

- (1) A person served, as prescribed, with a summons to appear as a witness at an examination must not:
  - (a) fail to attend as required by the summons; or

- (b) fail to attend from day-to-day unless excused, or released from further attendance, by the examiner.
- (2) A person appearing as a witness at an examination must not:
  - (a) when required pursuant to section 19 to take an oath – refuse or fail to comply with the requirement; or
  - (b) refuse or fail to answer a question that he or she is required to answer by the examiner; or
  - (c) refuse or fail to produce a document or thing that he or she was required to produce by a summons under this Act served on him or her as prescribed.
- (3) Subsection (4) applies if:
  - (a) a legal practitioner is required to answer a question or produce a document at an examination; and
  - (b) the answer to the question would disclose, or the document contains, a privileged communication made by or to the legal practitioner in his or her capacity as a legal practitioner.
- (4) The legal practitioner is entitled to refuse to comply with the requirement unless the person to whom or by whom the communication was made agrees to the legal practitioner complying with the requirement.
- (5) If the legal practitioner refuses to comply with the requirement, he or she must, if so required by the examiner, give the examiner the name and address of the person to whom or by whom the communication was made.
- (6) Subsection (8) limits the use that can be made of any answers given, or documents or things produced, at an examination.
- (7) Subsection (8) only applies if:
  - (a) a person appearing as a witness at an examination:
    - (i) answers a question that he or she is required to answer by the examiner; or
    - (ii) produces a document or thing that he or she was required to produce by a summons under this Act served on him or her as prescribed; and
  - (b) for the production of a document that is, or forms part of, a record of an existing or past business – the document sets out details of earnings received by the person in respect of his or her employment and does not set out any other information; and
  - (c) before answering the question or producing the document or thing, the person claims that the answer, or the production of the document or thing, might tend to incriminate the person or make the person liable to a penalty.
- (8) The answer, or the document or thing, is not admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty, other than:

- (a) confiscation proceedings; or
- (b) a proceeding in relation to:
  - (i) in the case of an answer – the falsity of the answer; or
  - (ii) in the case of the production of a document – the falsity of any statement contained in the document.

(9) A person who contravenes subsection (1), (2) or (5) is guilty of a crime.

*Maximum penalty:* 500 penalty units or imprisonment for 5 years.

*Summary conviction penalty:* 100 penalty units or imprisonment for 12 months.

(10) Subsection (4) does not affect the law relating to client legal privilege.

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## TASMANIA

Section 23(5) of the *Australian Crime Commission (Tasmania) Act 2004* (Tas) deals with the use that can be made of evidence given at a coercive hearing:

- (1) A person served, as prescribed, with a summons to appear as a witness at an examination before an examiner must not –
  - (a) fail to attend as required by the summons; or
  - (b) fail to attend from day to day unless excused, or released from further attendance, by the examiner.
- (2) A person appearing as a witness at an examination before an examiner must not –
  - (a) when required pursuant to section 19 either to take an oath or make an affirmation, refuse or fail to comply with the requirement; or
  - (b) refuse or fail to answer a question that he or she is required to answer by the examiner; or
  - (c) refuse or fail to produce a document or thing that he or she was required to produce by a summons under this Act served on him or her as prescribed.
- (3) Where –
  - (a) a legal practitioner is required to answer a question or produce a document at an examination before an examiner; and
  - (b) the answer to the question would disclose, or the document contains, a privileged communication made by or to the legal practitioner in his or her capacity as a legal practitioner –

the legal practitioner is entitled to refuse to comply with the requirement unless the person to whom or by whom the communication was made agrees to the legal practitioner complying with the requirement but, where the legal practitioner refuses to

comply with the requirement, he or she must, if so required by the examiner, give the examiner the name and address of the person to whom or by whom the communication was made.

(4) Subsection (5) limits the use that can be made of any answers given at an examination before an examiner, or documents or things produced at an examination before an examiner.

(4A) Subsection (5) only applies if –

(a) a person appearing as a witness at an examination before an examiner –

(i) answers a question that he or she is required to answer by the examiner;  
or

(ii) produces a document or thing that he or she was required to produce by a summons under this Act served on him or her as prescribed; and

(b) in the case of the production of a document that is, or forms part of, a record of an existing or past business, the document sets out details of earnings received by the person in respect of his or her employment and does not set out any other information; and

(c) before answering the question or producing the document or thing, the person claims that the answer, or the production of the document or thing, might tend to incriminate the person or make the person liable to a penalty.

(5) The answer, or the document or thing, is not admissible in evidence against the person in –

(a) a criminal proceeding; or

(b) a proceeding for the imposition of a penalty –

other than –

(c) confiscation proceedings; or

(d) a proceeding in respect of –

(i) in the case of an answer, the falsity of the answer; or

(ii) in the case of the production of a document, the falsity of any statement contained in the document.

(6) A person who contravenes subsection (1), (2) or (3) is guilty of an indictable offence that, subject to this section, is punishable, upon conviction, by a fine not exceeding 200 penalty units or imprisonment for a term not exceeding 5 years.

(7) Despite an offence against subsection (1), (2) or (3) being an indictable offence, a court of summary jurisdiction may hear and determine proceedings in respect of the offence if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent.

(8) Where, in accordance with subsection (7), a court of summary jurisdiction convicts a person of an offence against subsection (1), (2) or (3), the penalty that the court may impose is a fine not exceeding 20 penalty units or imprisonment for a term not exceeding one year.

(9) Subsection (3) does not affect the law relating to legal professional privilege.

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## AUSTRALIAN CAPITAL TERRITORY

Section 26 of the *Australian Crime Commission (Australian Capital Territory) Act 2004* (ACT) deals with the use that can be made of evidence given at a coercive hearing:

(1) A person commits an offence if—

(a) the person is served, as prescribed under the regulations, with a summons to appear as a witness at an examination before an examiner; and

(b) the person intentionally—

(i) fails to attend as required by the summons; or

(ii) fails to attend from day-to-day.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

(2) Subsection (1) (b) (ii) does not apply if the examiner has excused or released the person from attending on a day or part of a day.

(3) A person commits an offence if—

(a) the person appears as a witness at an examination before an examiner; and

(b) the examiner requires the person—

(i) to either take an oath or make an affirmation in accordance with section 22 (Power to summon witnesses and take evidence); or

(ii) to answer a question that the examiner is entitled to require the person to answer under this Act; or

(iii) to produce a document or thing that the person is required to produce by a summons under this Act served on the person as prescribed under the regulations; and

(c) the person intentionally fails—

(i) to either take the oath or make the affirmation; or

(ii) to answer the question; or

(iii) to produce the document or thing

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

- (4) Subsection (3) does not apply if—
- (a) a legal practitioner refuses to comply with a requirement to answer a question or produce a document or thing at an examination before an examiner; and
  - (b) the answer to the question would disclose, or the document contains, a privileged communication made by or to the legal practitioner in his or her capacity as a legal practitioner; and
  - (c) the person to whom or by whom the communication was made has not agreed to the legal practitioner complying with the requirement.
- (5) If, under subsection (4), a legal practitioner refuses to comply with a requirement, the legal practitioner commits an offence if—
- (a) the examiner requires the legal practitioner to tell the examiner the name and address of the person to or by whom the communication was made; and
  - (b) the legal practitioner intentionally fails to tell the examiner the name and address.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

- (6) Subsection (8) limits the use that can be made of any answers given at an examination before an examiner, or documents or things produced at an examination before an examiner.
- (7) Subsection (8) applies only if—
- (a) a person appearing as a witness at an examination before an examiner—
    - (i) answers a question that the person is required to answer by the examiner; or
    - (ii) produces a document or thing that the person was required to produce by a summons under this Act served on the person as prescribed; and
  - (b) for the production of a document that is, or forms part of, a record of an existing or past business—the document sets out details of earnings received by the person in relation to the person's employment and does not set out any other information; and
  - (c) before answering the question or producing the document or thing, the person claims that the answer, or the production of the document or thing, might tend to incriminate the person or make the person liable to a penalty.
- (8) The answer, or the document or thing, is not admissible in evidence against the person in—
- (a) a criminal proceeding; or
  - (b) a proceeding for the imposition of a penalty; other than—

- (c) confiscation proceedings; or
- (d) a proceeding in relation to—
  - (i) for an answer—the falsity of the answer; or
  - (ii) for the production of a document—the falsity of any statement contained in the document.

(9) Subsection (4) does not affect the law relating to legal professional privilege.

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## COMMONWEALTH

Section 30(4) of the *Australian Crime Commission Act 2002* (Cth) deals with the use that can be made of evidence given at a coercive hearing:

- (1) A person served, as prescribed, with a summons to appear as a witness at an examination before an examiner shall not:
  - (a) fail to attend as required by the summons; or
  - (b) fail to attend from day to day unless excused, or released from further attendance, by the examiner.
- (2) A person appearing as a witness at an examination before an examiner shall not:
  - (a) when required pursuant to section 28 either to take an oath or make an affirmation—refuse or fail to comply with the requirement;
  - (b) refuse or fail to answer a question that he or she is required to answer by the examiner; or
  - (c) refuse or fail to produce a document or thing that he or she was required to produce by a summons under this Act served on him or her as prescribed.
- (3) Where:
  - (a) a legal practitioner is required to answer a question or produce a document at an examination before an examiner; and
  - (b) the answer to the question would disclose, or the document contains, a privileged communication made by or to the legal practitioner in his or her capacity as a legal practitioner; the legal practitioner is entitled to refuse to comply with the requirement unless the person to whom or by whom the communication was made agrees to the legal practitioner complying with the requirement but, where the legal practitioner refuses to comply with the requirement, he or she shall, if so required by the examiner, give the examiner the name and address of the person to whom or by whom the communication was made.
- (4) Subsection (5) limits the use that can be made of any answers given at an examination before an examiner, or documents or things produced at an examination before an examiner. Subsections (5) and (5A) only apply if:

- (a) a person appearing as a witness at an examination before an examiner:
  - (i) answers a question that he or she is required to answer by the examiner; or
  - (ii) produces a document or thing that he or she was required to produce by a summons under this Act; or
  - (iii) produces a document or thing that he or she was required to produce under subsection 28(4); and
- (b) in the case of the production of a document that is, or forms part of, a record of an existing or past business--the document sets out details of earnings received by the person in respect of his or her employment and does not set out any other information; and
- (c) before answering the question or producing the document or thing, the person claims that the answer, or the production of the document or thing, might tend to incriminate the person or make the person liable to a penalty.

(5) The answer, document or thing is not admissible in evidence against the person in:

- (a) a criminal proceeding; or
- (b) a proceeding for the imposition of a penalty; or
- (c) a confiscation proceeding.

(5A) Subsection (5) does not affect whether the answer, document or thing is admissible in evidence against the person in:

- (a) a confiscation proceeding, if the answer was given, or the document or thing was produced, at the examination at a time when the proceeding had not commenced and is not imminent; or
- (b) a proceeding about:
  - (i) in the case of an answer--the falsity of the answer; or
  - (ii) in the case of the production of a document--the falsity of any statement contained in the document.

Note: For paragraph (a), the court may order otherwise (see subsection 25H(4)).

(5B) Subsection (5A) does not, by implication, affect the admissibility or relevance of the answer, document or thing for any other purpose.

(6) A person who contravenes subsection (1), (2) or (3) is guilty of an indictable offence that, subject to this section, is punishable, upon conviction, by a fine not exceeding 200 penalty units or imprisonment for a period not exceeding 5 years.

(7) Notwithstanding that an offence against subsection (1), (2) or (3) is an indictable offence, a court of summary jurisdiction may hear and determine proceedings in respect of such

an offence if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent.

- (8) Where, in accordance with subsection (7), a court of summary jurisdiction convicts a person of an offence against subsection (1), (2) or (3), the penalty that the court may impose is a fine not exceeding 20 penalty units or imprisonment for a period not exceeding 1 year.
- (9) Subsection (3) does not affect the law relating to legal professional privilege.