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The Honourable Justice Alan Wilson, Chairperson
Taskforce into Organised Crime Legislation 2015

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Dear Justice Wilson

Please find **attached** my submission to the Taskforce on Organised Crime Legislation, **Inquiry Area Five**. This submission concerns paragraph 1 of the Taskforce Terms of Reference and focuses on the *Vicious Lawless Association Disestablishment Act 2013*.

I would also like to draw the Taskforce's attention to my previous submission on Inquiry Area One. The articles attached to that submission dealt with various amendments to the *Criminal Code* and are therefore relevant to paragraph 1 of the Taskforce Terms of Reference. In summary, those articles argue that, despite certain amendments to the *Criminal Code* being upheld by the High Court, those provisions: represent a risk to the separation of powers, undermine fair process and constitutional values, and have been enacted and maintained despite an absence of demonstrated effectiveness.

I would welcome the opportunity to discuss these issues further with the Taskforce at your convenience.

Yours Sincerely,

Rebecca Ananian-Welsh
Lecturer

...inspiration, innovation, impact.

Submission: Inquiry Area Five

The *Vicious Lawless Association Disestablishment Act 2013*

I. Introduction

This submission to the Taskforce on Organised Crime Legislation, Inquiry Area Five, concerns the *Vicious Lawless Association Disestablishment Act 2013* ('*VLAD Act*'). It recommends the wholesale repeal of that Act.

II. The Operation of the *VLAD Act*

In essence, the *VLAD Act* imposes an additional, mandatory, non-parole sentence on persons who meet three qualifications. First, the person must have committed a declared offence, as listed in the schedule to the *VLAD Act*.[1] These offences include murder, rape, child sex offences, wounding, drug trafficking, supply and possession, robbery, acts intended to cause grievous bodily harm, affray, and so on. The second qualification is that the offence must have been committed in a group of three or more.[2] Third, the person must be unable to prove that the group did not have a purpose of committing declared offences.[3] If these three qualifications are met the person will not only be sentenced for the offence, but will face an additional mandatory sentence of 15 years imprisonment without parole.[4] If the person is a leader or authority figure within the group – a ringleader in a group that deals in drugs for example, or an office-holder in a motorcycle gang – then he or she will be sentenced for the offence, plus an additional mandatory sentence of 25 years imprisonment without parole.[5]

Parole may be granted only at the (unreviewable) discretion of the Police Commissioner if the person cooperates with police and the Commissioner is satisfied that his or her cooperation is of significant use in a proceeding about a declared offence.[6] In this way the purpose of the *VLAD Act* does not appear to be the punishment or deterrence of the commission of declared offences. Rather its role appears to be to encourage cooperation with the Police Commissioner in the context of proceedings about declared offences.

III. Concerns

The *VLAD Act* has attracted considerable controversy since its enactment. I draw the Taskforce's attention to three related concerns with this legislation and conclude that the legislation should be repealed.

A. Constitutional Validity

In the case of *Kuczborski v Queensland ('Kuczborski')*,[7] Stefan Kuczborski argued that the provisions of the *VLAD Act* were constitutionally invalid. Specifically, Mr Kuczborski argued that

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1 *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 5(1)(a).
2 Ibid ss 3 (definition of 'association'), 5(1)(b)-(c).
3 Ibid s 5(2).
4 Ibid ss 7(1)(a)-(b).
5 Ibid ss 7(1)(a)-(c).
6 Ibid s 9.
7 (2014) 89 ALJR 59.

the *VLAD Act* violated the separation of judicial power implied from Chapter III of the Commonwealth *Constitution*, by:[8]

- Requiring Queensland courts to perform their sentencing role in a manner repugnant to judicial process.

- Requiring Queensland courts to depart from the essential notion of equal justice by imposing sentences on certain offenders by reason of who they associate with.

- Enlisting Queensland courts to do the bidding of the legislative and executive arms of government.

The High Court unanimously held that Mr Kuczborski lacked standing to challenge the *VLAD Act* as he was not charged with a relevant offence, nor did he express any intention to commit a relevant offence in the future. Accordingly the Court did not address the constitutional validity of the *VLAD Act*.

It follows that the validity of the *VLAD Act* remains open. There is every chance that a further constitutional challenge may be launched to the *VLAD Act* questioning its consistency with Chapter III of the *Constitution*.

Whilst the High Court has upheld provisions that allow for mandatory sentencing[9] and for the imposition of harsh penalties in the form of asset forfeiture orders[10] and preventive detention,[11] there are cogent arguments that would support a finding that the *VLAD Act* is constitutionally invalid.

The *VLAD Act* removes a key sentencing decision from the court and places it in the hands of the Police Commissioner. In this way a court undertakes the exclusively judicial function of determining the guilt and innocence of the accused, and then proceeds to the task of sentencing. Whilst the court undertakes the usual sentencing process, the sentence determined by the court may reflect only a fraction of the *actual* sentence that will be served by the person. It will be up to the Police Commissioner to determine whether the person will serve an additional term of 15 or 25 years' imprisonment under the *VLAD Act*.

It is clear in actuality and in perception that an important decision as to sentence will be determined solely at the discretion of the Police Commissioner based on his or her unreviewable determination that the person's cooperation has been of significant use in a proceeding about a declared offence.[12] Thus there are two sentencing decisions taking place. 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 submissions 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 negative phrasing of this discretion (that the commissioner determines whether to waive the additional sentence rather than whether to seek it) does nothing to change its substantive impact or nature. The unreviewable nature of the Police Commissioner's determination underscores its complete departure from rules of procedural fairness, and its fundamental distinction from the traditional

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[8] See, the submissions of the plaintiff, available at: http://www.hcourt.gov.au/assets/cases/b14-2014/Kuczborski_Plf.pdf

[9] *Magaming v The Queen* (2013) 252 CLR 381

[10] *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522

[11] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Pollentine v Bleijie* (2014) 88 ALJR 796.

[12] Ibid s 9.

sentencing role of the court. It is therefore arguable that the *VLAD Act* allows the Police Commissioner to engage in an important sentencing determination, thereby usurping judicial power. Moreover, this scenario arguably undermines the integrity of the judicial institution as a key role in sentencing appears to have been transferred from the court to the Police Commissioner.

The issue bears some analogy to the case of *South Australia v Totani*.[13] In *Totani*, a key aspect of the court's independent discretion, namely, the determination of whether an organisation was a criminal organisation thus enlivening the Supreme Court's jurisdiction to issue an organised crime control order, was placed in the hands of the Attorney-General. The Supreme Court had no choice but to accept the Attorney-General's classification and was obliged to issue control orders over persons pending its independent determination that the individual was a 'member' of the identified organisation. In this case, the Police Commissioner controls a key aspect of the sentencing hearing. An unreviewable and opaque exercise of the Police Commissioner's discretion effectively obliges the court to add, or not add, a sentence of 15 or 25 years imprisonment to its orders following a finding of criminal guilt.

The cases of *Assistant Commissioner Condon v Pompano*,[14] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*[15] and *K-Generation Pty Ltd v Liquor Licensing Court*[16] may be distinguished from the present circumstance. In those three cases the High Court upheld provisions allowing the executive government to identify certain information as criminal intelligence information to be withheld from the other party to court proceedings. Constitutional validity rested upon the court's capacity to independently review the classification of the information and determine how to use that secret (and hence untested) information in the context of judicial proceedings. The unreviewable nature of the Police Commissioner's determination under the *VLAD Act* means that the court lacks this independent capacity to review and question the Commissioner's assertion that the person is, or is not, to serve the additional sentence of 15 or 25 years in prison.

These arguments are by no means foregone conclusions. This area of law is notoriously flexible. As mentioned above, the High Court has upheld mandatory sentencing provisions in earlier cases and it would be open to the court to apply those cases in upholding the *VLAD Act*. However, there are live constitutional questions that arise with respect to the *VLAD Act*. It is clear that the *VLAD Act* compromises the relationship between the executive and judicial arms of government and poses a real risk to the integrity of judicial proceedings. This risk is an actual risk – insofar as the Police Commissioner is in fact undertaking a sentencing role that arguably encroaches on an exclusively judicial power. It is also a risk to public confidence in the integrity of the justice system. 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 concerns addressed below further demonstrate the *VLAD Act*'s incongruence with fundamental constitutional principles.

B. Proportionality

The additional sentences capable of being imposed under the *VLAD Act* have the potential to be grossly disproportionate to the act committed. Mandatory sentences stand at odds with basic rule of law principles such as equal justice and proportionate sentencing. For this reason the practice of mandatory sentencing is traditionally avoided in the criminal justice sphere. Some jurisdictions eschew the practice entirely, but in those jurisdictions that adopt mandatory sentences the practice is best viewed as exceptional and extreme. The *VLAD Act* takes the unique step of imposing mandatory sentences not as a means of identifying a single heinous

[13] (2010) 242 CLR 1.
[14] (2013) 252 CLR 38.
[15] (2008) 234 CLR 532.
[16] (2009) 237 CLR 501

offence for public condemnation, but by identifying a vast set of offences ranging from very serious to not very serious, and applying a particularly high mandatory non-parole term of imprisonment in respect of all of those offences. The list of offences may be amended simply by regulation, thus allowing for the extension of that already lengthy list without public or parliamentary scrutiny.

As a person who commits a declared offence will be sentenced for that offence under usual sentencing principles, it follows that any *additional* sentence applied under the *VLAD Act* will:

- Be excessive as measured against usual sentencing principles.
- Be disproportionate to the offence committed as viewed in all the circumstances.

The group-based nature of the offence, the severity and nature of the offence, the individual's role in the group, and other relevant factors are likely to have already been taken account of as the court determines the proper sentence for the commission of the offence. Accordingly, it cannot be said that the additional sentence imposed under the *VLAD Act* is designed to address these aims or purposes. This underscores the real aim of the *VLAD Act* as being to provide the Police Commissioner with a means to encourage cooperation – and punish non-cooperation – in the investigation of declared offences.

C. Overreach

As the High Court identified in *Kuczborski*, the *VLAD Act* extends its reach well beyond vicious or lawless associates. Chief Justice French observed:

> 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 "association" in the VLAD Act is defined as meaning any of a corporation, an unincorporated association, a club or league and any group of three or more persons by whatever name called, whether associated formally or informally and whether the group is legal or illegal. Only a tiny minority of the range of the bodies or groups covered by the definition of "association" could conceivably attract the description "vicious" or "lawless". The term "vicious lawless association", 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.[17]

Whilst the Act was politically targeted at outlaw motorcycle gangs, it clearly reaches well beyond that group to encompass all persons who commit one of a vast list of declared offences in groups of three of more. For some of these offences, this will mean that the *VLAD Act* is usually invoked (for example, drug trafficking and dealing will regularly involve a group of individuals and therefore attract *VLAD Act* additional sentences). It follows that this Act is not targeted at assisting the Police Commissioner in the investigation of high level or serious organised crime. Nor is it targeted at 'vicious' offences as the title suggests. Rather the *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.

By way of illustration, if a young person is found guilty of committing the offence of affray, and he convinced two friends to join him in the commission of the affray, then he will face the intimidating prospect of an extended term of 25 years' imprisonment (in addition to the standard sentence for the offence) unless he provides the Police Commissioner with valuable information

[17] 89 ALJR 59, 68 [13]-[14].

to assist the investigation of a declared offence. If this was a one-time offence and the person had no history of or tendency towards criminal behaviour, then there is a serious likelihood that he would be unable to provide relevant assistance to the Commissioner. The Police Commissioner's unreviewable discretion as to whether to pursue the additional *VLAD Act* sentence would be exercised according to uncertain standards, absent procedural fairness or the traditional trappings of sentencing processes. However, the impact on this person's future is undeniably severe.

This scenario stands at odds with the fundamental underpinnings of the criminal justice system, including:

- Proportionality and appropriateness of punishment.
- Due process before the law.
- Rehabilitation of the offender.

The broad scope of the *VLAD Act* means that this impact has the potential to resonate throughout the Queensland criminal justice system.

IV. Summary and Recommendation

These comments reflect but a few key concerns arising from the operation of the *VLAD Act*. To summarise, the *VLAD Act*:

- Undermines the separation of powers and risks constitutional invalidity on Chapter III grounds.
- Imposes disproportionate sentences on offenders, undermining the integrity and role of the criminal justice system in sentencing.
- Does not achieve legitimate aims that align with the role, purposes or values of the criminal justice system.
- Improperly places an unreviewable discretion in the hands of the Police Commissioner, undermining the integrity, values and role of the criminal justice system.
- Has an extremely broad reach, which is particularly inappropriate in the context of mandatory sentencing.

For these reasons I would support the wholesale repeal of the Act.