AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

PO Box A147
Sydney South
NSW 1235
info@alhr.org.au
www.alhr.org.au

24 July 2015

Justice A. Wilson
Chairperson
Taskforce on Organised Crime Legislation
Department of Justice and Attorney-General
PO Box 13554
George Street Brisbane
QLD 4003

By email:

Dear Justice Wilson,

Submission on Organised Crime Legislation – Inquiry Area Four

Australian Lawyers for Human Rights ("ALHR") thanks the Taskforce into Organised Crime Legislation for the opportunity to comment on Inquiry Area Four (all amendments in the 2013 legislation which relate to Bail, Remand and Corrective Services).

Background

ALHR was established in 1993 and is a network of legal professionals active in practising and promoting awareness of international human rights. ALHR has a national membership of over 2,600 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law and human rights law in Australia.

Summary

1. The 'show cause' provision in subsection 16(3A) of the *Bail Act 1980 (Qld),* as introduced by the *Criminal Law (Criminal Organisations Disruption) Amendment Act* 2013, is unreasonable and disproportionate to the risk posed to the community by participants in criminal organisations. ALHR recommends the amendments so introduced be repealed in their entirety.

2. The amendments to the *Corrective Services Act 2006 (Qld)* introduced by the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act* 2013 enable the cruel and degrading punishment of prisoners in the form of solitary confinement. Other than in exceptional circumstances, solitary confinement should have no place in Queensland prisons. ALHR recommends that Division 6A also be repealed.

(1) Amendments to the Bail Act 1980

The *Criminal Law (Criminal Organisations Disruption) Amendment Act* 2013 came into effect in October 2013 and amended the *Bail Act* 1980 (Qld) by inserting subsections 16(3A), (3B), (3C) and (3D).

The new section 16(3A) relevantly read:

> "(3A) 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 ..."

Whether a person is a "participant in a criminal organisation" is determined by reference to the definition of "criminal organisation" provided in s 1 of the *Criminal Code*. In November 2013, a further amendment was made to the Act to clarify that an applicant fits the definition of a participant if he or she has "at any time" been a participant of a criminal organisation.[1]

The effect of the amendment is to displace the general presumption in favour of bail, placing the accused in a "show cause" position and requiring them to establish that their ongoing detention is not justified.

<u>Human rights implications of the amendments</u>

The Explanatory Notes to the Bill explain that the purpose of the amendments was to "target those individuals who offend while enjoying the support and encouragement of the criminal group" and that the amendments "strike at the illegal conduct of the criminal gang participant; communicate the wrongful and cowardly nature of their offending; and promote community safety and protection from such offenders".[2]

While the function of the bail system is to balance the protection of the community with the rights of an accused person, ALHR is concerned that the amendments unduly privilege the former at the expense of the latter.

Underpinning the concept of bail is the recognition that an accused person is presumed innocent until proven guilty by the prosecution beyond a reasonable doubt. The presumption of innocence is a founding principle of the criminal justice system, and is recognised in Article 9 of the International

---

1 Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013, s 7. This amendment was made in response to the decision of her Honour Justice Margaret Wilson in *Da Silva v Director of Public Prosecutions; Da Silva v Director of Public Prosecutions; Spence v Director of Public Prosecutions* [2013] QSC 316

2 At page 5.

Covenant on Civil and Political Rights (ICCPR), to which Australia is a party. The Article provides that "everyone has the right to liberty and security of person" and "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 ...".

On their face, the amendments infringe upon this right by displacing the presumption of innocence and requiring an applicant to prove why their detention is not justified.

"Show cause" decisions

While ALHR has not obtained data concerning the number of decisions granting or refusing bail pursuant to s 16(3A), it is able to make some general comments based on the published jurisprudence.[3]

Magistrates Court decisions

In November 2013, the Magistrates Court issued Practice Direction 21 of 2013 which directed that all contested bail applications under s 16(3A) were to be heard by the Chief Magistrate.[4] Three published decisions of Chief Magistrate Carmody (as his Honour then was) demonstrate the approach taken by the Magistrates Court in accordance with the Practice Direction.[5] In all three decisions bail was refused, with the Court placing emphasis on the policy reasons behind the amendments. In *Van Tongeren v Office of the Director of Public Prosecution (Qld)*[6] Carmody J stated that:

> "Section 16(3A) seems to express a clear legislative intent that regardless of the offence actually charged and despite their level of future dangerousness assessed on an individual level by reference to the risk assessment factors in s 16(2), participants in criminal organisations are now regarded by the law to be unacceptable threats to community welfare solely by virtue of their association (cf s 1 of the Criminal Code) and for that reason alone should "normally-or ordinarily-be refused bail" (*DPP –v- Germakian* [2006] NSWCA 275)."

Supreme Court decisions

The published decisions of the Supreme Court on s 16(3A) did not refer to the reasoning of Carmody J, but plainly did not adopt the approach that participants were to be "regarded by the law to be unacceptable threats to community welfare solely by virtue of their association" and should "normally or ordinarily be refused bail."[7]

---

3 ALHR has received advice from the Department of Justice and Attorney General that there are no publicly available statistics regarding judicial decisions pursuant to the Bail Act 1980. For more detailed commentary on "show cause" decisions, please see the analysis prepared by the Law and Justice Institute (Qld) Inc available at http://ljiq.asn.au/2014/02/17/recent-decisions-dealing-with-show-cause-applications-brought-under-the-amended-bail-act/

4 The Practice Direction was later amended in April and November 2014 and no longer stipulates that the applications are to be heard by the Chief Magistrate.

5 *Van Tongeren v Office of the Director of Public Prosecution (Qld)* [2013] QMC 016; *Spence v Queensland Police Service* [2013] QMC 014; and *Lansdowne v ODPP* [2013] QMC 019

6 [2013] QMC 16

7 ALHR notes that all of the published judgments decided in favour of granting bail to the applicant:

In *Neale, Re an Application for Bail*,[8] North J held that the relevant considerations in show cause applications under s16(3A) were the matters set out in s 16(1) and "other relevant discretionary factors such as the strength of the prosecution case and the time that might elapse between the application for bail and when the accused might stand trial."

In *Carew v The Office of the Director of Public Prosecutions*[9], Byrne SJA held that the burden imposed by s 16(3A) was "substantial" but was less difficult to satisfy where the prosecution case was not strong.[10] His Honour found that there was a risk that the applicant would offend while on bail, but the imminence of the trial meant that there was not much time in which to offend. His Honour also noted that "the applicant's anxiety not to return to solitary confinement is a substantial incentive not to commit offences".[11]

The decision in *Lansdowne v The Director of Public Prosecutions*[12] identified a difficulty posed by s 16(3A), namely that if an applicant puts evidence before the court that he has resigned from the criminal organisation, this may constitute an admission that he was "at any time" a member and be used against him in subsequent proceedings. As Byrne SJA noted, "any conduct of his that constitutes an admission of Rebels membership could prejudice his liberty for years to come."[13]

Recommendations

While the published Supreme Court decisions demonstrate that the Court will still take into account a number of ordinary and discretionary matters in determining bail applications under s 16(3A), ALHR still holds concerns that the provision has the potential to catch accused persons who do not pose a significant risk to the public. This is because the show cause provision applies regardless of the type or seriousness of offending or whether the offending is linked to the alleged participation in the criminal organisation. It is also blind to the time at which the person is alleged to have been a participant in a criminal organisation.[14]

ALHR submits that the show cause provision is unnecessary and disproportionate to the stated goal of promoting community safety and protection from offenders. The existing bail provisions allowed the Court to refuse bail where an applicant posed an "unacceptable risk" to the community.[15] The *Criminal Law (Criminal Organisations Disruption) Amendment Act* 2013 was passed without any consultation outside of government, and was a disproportionate response to a perceived "bikie problem" rather than a response to an identified deficiency in the existing legislation.

---

8 [2013] QSC 310

9 [2014] QSC 001

10 At [51]

11 At [48]. This was also a relevant consideration in the subsequent cases of *Re Halilovic* [2014] QSC 5 and *Re Alajbegovic* [2014] QSC 6.

12 [2014] QSC 002

13 At [14]

14 See s 16(3C).

15 Section 16(1) *Bail Act* 1980.

ALHR further holds concerns that, as at 30 June 2014, the rates of imprisonment in Queensland were the highest in ten years. Nearly a quarter of the adult prisoner population is unsentenced.[16] In addition to concerns about the crimonogenic effects of custody, which are well documented, the cost of keeping accused persons on remand should be borne in mind. Where an accused person does not pose a significant risk to the community, ALHR submits that the cost and strain on the corrective services system is not justified.

In conclusion, the show cause provision is unreasonable and disproportionate to the risk posed to the community by participants in criminal organisations. ALHR recommends the amendments be repealed in their entirety.

(2) Amendments to the Corrective Services Act 2006

The *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act* 2013 amended the *Corrective Services Act* 2006 by introducing a new Division 6A: Criminal organisation segregation orders into Part 2 of the Act. The new provisions enable Queensland Corrective Services to segregate a remand or sentenced prisoner who is a participant in a criminal organisation. The provisions allow for the making of "criminal organisation segregation orders" which restrict the privileges of prisoners.[17]

The relevant departmental policy was in evidence in *Callanan v Attendee X.*[18] It provided that persons identified as Criminal Motorcycle Gang (CMG) members by the Queensland Police Service were to be managed in accordance with a Restricted Management Regime. The Restricted Management Regime provided for a series of restrictions, the most serious of which was the limiting of out of cell time to at least two daylight hours a day, with the remainder of the time spent in solitary confinement.

Sentenced and sentenced-remand CMG members were to be placed in the Restricted Management Unit at Woodford Correctional Centre, while remand only CMG prisoners were in most instances to remain at their centre of origin.

Human rights implications of the amendments

In *Callanan v Attendee X* Applegarth J comprehensively discussed the human rights implications of solitary confinement. His Honour's analysis is worth citing at length:

> "[36] The adverse health effects of solitary confinement have been well-established. The potentially damaging effects of solitary confinement have been recognised by international instruments and by respectable bodies which view it as "an extreme prison practice which should only be used as a last resort and then only for short periods of time." In 1990 the United Nations went as far as to call for its abolition.

---

16 Available at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2014~Main%20Features~Queensland~10017 > accessed 23 July 2015.

17 See ss 65A and 65B *Corrective Services Act* 2006.

18 [2013] QSC 340

> [37] Research findings in relation to the health effects of solitary confinement began in the nineteenth century and by the early twentieth century numerous reports identified solitary confinement as the central factor in the development of psychotic illness among prisoners. More recent studies have reaffirmed that solitary confinement has a profound, adverse impact on the health of prisoners. Research indicates that many who have been subject to solitary confinement are at a risk of long-term psychological damage. The extent of psychological damage varies and will depend on individual factors, such as an individual's background and pre-existing mental state, environmental factors, prison regime (including the time out of cell and degree of human contact), the context of isolation (e.g. punishment, own protection, involuntary) and its duration. The most widely reported effects of solitary confinement are its psychological effects."

His Honour further observed that

> "[40] International instruments and bodies which administer them view solitary confinement as an undesirable prison practice which can only be justified in extreme cases and which, in certain circumstances, may be in violation of international law. The United Nations Human Rights Committee stated that:
>
> > "solitary confinement is a harsh penalty with serious psychological consequences and is justifiable only in case of urgent need; the use of solitary confinement other than in exceptional circumstances and for limited periods is inconsistent with article 10, paragraph 1, of the Covenant."
>
> [41] The International Covenant on Civil and Political Rights ("ICCPR") came into force in 1976. Australia is a signatory to it. Article 7 of the ICCPR states that:
>
> > "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment ..."
>
> Article 10 states:
>
> > "(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."

ALHR endorses the observations of Applegarth J. The amendments introduced by the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act* 2013 enable the cruel and degrading punishment of prisoners in the form of solitary confinement. Other than in exceptional circumstances, solitary confinement should have no place in Queensland prisons. ALHR recommends that Division 6A introduced by the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act* 2013 be repealed.

If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au.

Yours faithfully

Nathan Kennedy

President
Australian Lawyers for Human Rights