



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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Taskforce on Organised Crime Legislation

By Email: [REDACTED]

Inquiry Area Nine.

General Concerns:

Research:

Similarly to our earlier submission on inquiry five, we submit that the Taskforce should consider whether a new separate offence for 'serious organised crime' is necessary, or whether this offence is simply a more severe restatement of serious offences already contained in the *Criminal Code 1899* (Qld).¹ If the offence would add significant additional benefit to tackling organised crime in the community, QCCL believes that that the new offence should adequately and appropriately balance the civil rights of citizens charged with this offence with the need for community protection.

Serious organised Crime offence

Serious Crime

Although the actual content of the proposed serious organised crime offence is still under discussion, it will evidently 'crack down' on criminal organisations, which commit serious offences.² The Premier Ms Palaszczuk stated that this offence would deal specifically with crimes such as 'money laundering, internet fraud, drug trafficking and child sex offences'.³

One of the main problems with the *Vicious Lawless Association Disestablishment Act 2013* (Qld), was that some of the 'declared offences' were actually relatively minor when compared

¹ Queensland Council for Civil Liberties, 'Submission to Taskforce on Inquiry Area Five,' (2015) 1; Michael Cope, 'Queensland anti-bikie laws: we're all criminals now,' *Independent Australia* 17 October 2013 <http://independentaustralia.net/politics/politics-display/queensland-anti-bikie-laws-were-all-criminals-now,5822>.

² Matt Eaton, 'Queensland election 2015: Labour vows to set up organised crime inquiry and review anti-bikie laws,' *Australian Broadcasting Corporation News* (29 Jan 2015) <http://www.abc.net.au/news/2015-01-29/queensland-election-labor-to-set-up-organised-crime-inquiry/6054864>.

³ Matt Eaton, *above n5*.

Watching them while they are watching you!

with the extreme penalties and lengthy mandatory sentences imposed by this legislation.⁴ This means that people who have been condemned on a relatively insignificant crimes face excessive sentences, which judges have no discretion to reduce.⁵

For example, the offence of 'wounding,' which is a declared offence under the Act, only involves breaking 'the true skin' of another.⁶ Involvement in a scuffle also is a declared offence.⁷ If either of these offences were committed by an individual who was also found to be a member of a 'criminal organisation' they would be subjected to fifteen years in addition to their original sentence.⁸

If a proposed serious organised crime offence is to go ahead, QCCL stresses that it is essential that the offences are actually *serious*. Further, the penalties attracted by the offence must be reasonably proportionate to *all* the offences listed covered by the law. As will be discussed later, experience shows that mandatory sentencing does not result in fair and reasonable sentences.

Participant:

Obviously, in order for a person to be accused of a 'serious organised crime', there would have to be some criteria for deciding whether a person was a participant in that criminal organisation.

The previous laws, particularly the VLAD Act defined 'participant' extremely 'broadly'.⁹ Under that definition people, for example, who attended two 'meetings or gatherings' of the organisation or whose conduct suggested that they sought to become a member is caught under such provisions.¹⁰ The extensive scope of this provision means that people who are only loosely related to the organisation are deemed 'participants' and face the same extreme penalties.¹¹

In our view guilt is personal and can only be justified in the case of membership of an association by establishing a relationship between the status of the member of an organisation and criminal activity that justifies personal guilt. That relationship is proven knowledge of the illegal activity and active support of that activity or commitment to undertake such activities.

It is essential that any attempt to define a 'participant' in the proposed serious organised crime offence, confines the definition to persons who meet those criteria.

⁴ *Vicious Lawless Association Disestablishment Act 2013* (Qld) s3, Schedule 1; Gray, *above n2*, 57; Morrissey, *above n2*, 30; Natalie Graeff, 'Legislative rush impacts the rights of all Queenslanders,' *Queensland Law Society*, 17 October 2013 http://www.qls.com.au/About_QLS/News_media/Media_releases/Legislative_rush_impacts_the_rights_of_all_Queenslanders

⁵ *Vicious Lawless Association Disestablishment Act 2013* (Qld) s7; Gray, *above n2*, 57; Graeff, *above n7*; Cope, *above n1*.

⁶ Cope *above n1*; Graeff, *above n7*.

⁷ *Vicious Lawless Association Disestablishment Act 2013* (Qld) s3, Schedule 1. Cope, *above n1*.

⁸ *Vicious Lawless Association Disestablishment Act 2013* (Qld) s3, Schedule 1. Cope, *above n1*; Graeff, *above n7*; Gray, *above n2*, 57.

⁹ *Vicious Lawless Association Disestablishment Act 2013* (Qld) s4; Gray, *above n2*, 57; Queensland Law Society, 'VLAD Tidings,' (2013) *Proctor*, 24.

¹⁰ *Vicious Lawless Association Disestablishment's Act 2013* (Qld) s5, s4; Gray *above n2*, 57;

¹¹ *Vicious Lawless Association Disestablishment's Act 2013* (Qld) s7; Gray *above n2*, 57; Queensland Law society, *above n12*, 24.

Criminal organisation

The QCCL endorse the view that 'being in a gang' is not the issue.¹² The issue is when certain 'gang members...commit offences.'¹³ We submit that the offences in the criminal code are effective and sufficient to deal the perpetrator or perpetrators who engage in such activities, rather than condemn all participants of that gang simply because they are a member.¹⁴

Nevertheless, any new serious organised crime offence will require a definition of 'criminal organisation.' We submit that any definition and means of categorising an organisation as criminal **must not** be arbitrary. It is essential that this categorisation process be subject to adequate levels of scrutiny and accountability. If members of criminal organisations could face serious penalties, it must be ensured that the organisations are, in fact, engaging or conspiring in criminal activity on a regular and routine basis.

We submit that none of the current legislation contains adequate mechanisms and that the current definitions of 'criminal organisation' are arbitrary, final and dangerously broad.¹⁵

While *The Criminal Organisation Act 2009 (Qld)*¹⁶ at least requires that a court to decide whether an organisation is a criminal organisation based on criteria in section 10(1) 'the respondent was an organisation; members of the organisation associate for the purpose of engaging in (or conspiring to engage in) serious criminal activity; and the organisation present an unacceptable risk to the community.'¹⁷ However, this Act has never been used in practice.¹⁸

Instead the legislature uses the *The Criminal Law (Criminal Organisation Disruption) Amendment Act 2013 (Qld)* which simply lists 26 criminal organisations chosen by the legislature without explanation as to why or how they were selected.¹⁹ We restate here our categorical opposition to this form of proscription and urge that this Act be repealed.

Even more dangerous is the broad definition of 'association' under the VLAD Act which includes 'a corporation, an unincorporated association; a club or league; 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.'²⁰

¹² Cope, *above n1*.

¹³ Cope, *above n1*.

¹⁴ Cope, *above n1*.

¹⁵ Anthony Trotter and Harry Hobbs, 'The Great Leap Backward: Criminal Law Reform with the Hon Jarrod Bleije,' 36 (2013) *Sydney Law Review*, 4.

¹⁶ The QCCL has concerns about this Act which were made public at the time. In this context we recall that the Criminal Organisation Bill contained an association offence which was removed by the Government of the day which made the Act much less obnoxious.

¹⁷ *The Criminal Organisation Act 2009 (Qld)* s10(1); Gray, *above n2*, 52-53.

¹⁸ Gray, *above n2*, 54-55.

¹⁹ *The Criminal Law (Criminal Organisation Disruption) Amendment Act 2013 (Qld)*; Gray, *above n2*, 54,55; Andrew Trotter and Harry Hobbs, 'How Far have we really come? Civil and Political Rights in Queensland,' 25 (2013) *Bond Law Review*, 12.

²⁰ *Vicious Lawless Association Disestablishment's Act 2013 (Qld)* s3.

Under this definition innocent groups, such as a bowls club, could constitute an 'association' for the purpose of the Act.²¹ Thus, it is easy to see how innocent people could be convicted and subjected to the extreme sentences imposed in section 7 for being part of 'associations,' which are not even participating in criminal activity in the first place.²² Further, any person charged under this Act bears the onus of proof in discharging that their association does not have 'as one of its purposes, the purpose of engaging in, or conspiracy to engage in, declared offences.'²³

Any proposed serious organised crime offence should use this legislation as an example of what not to do. Instead, any attempted definition requires clear criteria of what constitutes a 'criminal organisation'. Such criteria should not be too broad. Similarly to the *Criminal Organisation Act 2009* (Qld) the decision of whether an organisation is a criminal organisation should be reached by a court on a case by case basis, using these definite criteria. Additionally, this process must also be subject to appeal, and appropriate accountability mechanisms.

An additional factor which the Taskforce should consider if they are formulating a serious organised crime offence is that most criminal organisations are actually not 'centrally controlled' gangs but comprised of 'small groups of individuals' who evade the current laws by continuing criminal activities 'underground.'²⁴ Consequently the existing anti-bikie laws are completely ineffective at dealing with the root of the issue.²⁵ The proposed serious organised crime offence requires mechanisms for dealing with both larger organisations and smaller criminal groups if they are to have any real impact.

Mandatory sentencing:

The QCCL objects strongly to the proposed 'mandatory minimum non-parole period 80% of their term of imprisonment or 15 years imprisonment, whichever is the greater.'²⁶ Imposing mandatory sentences prevents the court from exercising their judicial discretion and does not allow them to tailor the sentence according to the individual facts and circumstances of each case.²⁷ This was the point stressed by the Queensland Law Society President, Ms Bradfield and she noted the inherent danger of the 'Executive Government' becoming 'the judge, jury and executioner in certain cases.'²⁸

This is particularly pertinent given the severity of these sentences. Considering that the maximum penalty for this offence is life imprisonment, the greater of a mandatory minimum non parole period of 80% of an accused's term of imprisonment or fifteen years has particularly unfair and harsh ramifications.

²¹ Cope, *above n1*.

²² Cope, *above n1*; Gray, *above n2* 57; Queensland Law Society, *above n12*, 24; Trotter and Hobbs, *above n17*, 20.

²³ *Vicious Lawless Association Disestablishment's Act 2013* (Qld) s5(2).

²⁴ Cope, *above n1*.

²⁵ Cope, *above n1*.

²⁶ Taskforce on Organised Crime, 'Terms of Reference,' (2015) 2.

²⁷ Law Society of South Australia, 'Mandatory Sentencing,' 35 (2013) *Bulletin*, 14.

²⁸ Graeff, *above n7*;

It is well known that mandatory sentencing is ineffective, unjust and has 'been repeatedly and categorically demonstrated not to have the desired deterrent effect.'²⁹ Relatively recent attempts to use mandatory sentencing in Western Australia and the Northern Territory both produced 'arbitrary' and severely unjust sentences.³⁰ As Neil Morgan notes this results in a black and white approach to sentencing where there is 'no proper gradation of penalties to reflect the seriousness of the offence.'³¹

The QCCL contends that judicial discretion in sentencing would produce a much fairer and effective outcome and should be the only choice that the Taskforce considers when formulating a serious organised crime offence.

Recommendations:

- Ensure that the serious crime offence, is actually necessary and will be useful in addition other crimes contained in the *Criminal Code 1899* (Qld).
- Ensure that this offence pertains to criminal organisations broadly – not just a social minority.
- Ensure that any declared offences are in fact 'serious' and are proportionate to the penalties imposed by the serious crime offence.
- Ensure that any definition of a 'participant' in the proposed offence confines the definition to an individual actually taking an active role in the organisation and criminal activity – rather than just being part of an organisation.
- Ensure that any definition or categorisation of 'criminal organisation' under the offence is not selected arbitrarily but is classified by a court using definite criteria and that there is a mechanism for disputing this classification or appeal.
- Remove the provisions imposing mandatory sentences.

Yours faithfully



Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
28 October 2015

²⁹ Trotter and Hobbs, *above n 17*, 3, 12; Neil Morgan, 'Mandatory Sentences in Australia: Where have we been and Where are We Going?' 24 (2000) *Criminal Law Journal*, 172.

³⁰ Trotter and Hobbs, *above n 17*, 13.

³¹ Morgan, *above n 30*, 176.