10 October 2016

Legal Affairs & Community Safety Committee
Parliament House
George Street
Brisbane QLD 4000

By Email: lasc@parliament.qld.gov.au

Dear Research Director

Serious and Organised Crime Legislation Amendment Bill 2016

The Law & Justice Institue (Qld) Inc. (the Institute) appreciates the opportunity to comment on the Serious and Organised Crime Legislation Amendment Bill 2016 (the Bill). The institute is an association committed to raising the level of public debate on law and justice issues in Queensland. The Institute's objects include, inter alia, to:

- Consider and respond to changes or proposed changes that might or will affect the administration of justice in Queensland; and
- Foster and advocate law reform consistent with the rule of law, the Common Law, independent and principled reasoning, empirical data and the separation of powers, in particular, the preservation of judicial independence and discretion.

Although there are aspects of this Bill which are supported by the Institute. However, the Institute is concerned that this Bill introduces powers and offences which have not been appropriately scrutinised and are not justified appropriately by the Explanatory Notes.

Consorting Offence

The Bill replaces the 2013 anti-association offence with a new offence of consorting.[1] The proposed consorting offence has the capacity to criminalise interactions which are not otherwise unlawful.

The definition of consort[2] does not require that the interaction between the relevant persons be related to a criminal activity. Although it is accepted that there are laws which are used to prevent criminal activity in the future, for example domestic violence orders, the proposed offence is distinguishable because it does not require an application to a Court, evidence or a reasonable suspicion of intended criminal activity before the warning is given.

The proposed consorting offence provides Police with a large discretion to limit the freedom of individuals to associate. Before a Police officer issues a warning they are not

[1] Explanatory Memorandum, p9.
[2] Bill, clause 141.

required to reasonably suspect or believe that the criminal association is intent upon some criminal activity. The officer need only be reasonably satisfied that the person has consorted or is consorting and have considered the legislative object of "disrupting and preventing criminal activity by deterring recognised offenders" before a warning is issued. There is no standard to which an officer must consider those objects before issuing the warning.

In the case of *Tajjour v New South Wales*[3] Chief Justice French, in dissent, noted the potential of the New South Wales consorting law (in similar terms to the Queensland law) to apply 'to entirely innocent habitual consorting.' His Honour went on to say that while the 'actual application may be limited by the sensible exercise of the police discretion to issue an official warning' the consorting provision 'does not discriminate between cases in which the purpose of impeding criminal networks may be served and cases in which patently it is not.' There are not sufficient safeguards within the proposed legislation to ensure that the consorting offence will be used in the appropriate exercise of discretion to prevent criminal activity.

The definition of recognized offender includes that the penalty for a previous offence be one with a maximum of more than 5 years. The Taskforce considered that is was important that the definition be limited so not to apply to those convicted with 'objectively low-level' offences that qualify as consorting simply by virtue of their penalty.[4] Given the object of disrupting serious criminal activity, we submit that, if the offence is to be maintained, the definition of recognised offender be amended to reflect that only serious offences be caught by it for example those offences punishable by 15 years imprisonment or more.

The Bill's reverse onus defences are limited to specific situations. The Taskforce recommended that a general defence should be included within the provision for those situations that, although reasonable, may not fall into a specific category.[5] Despite such a recommendation, a general defence of reasonable excuse is not included in the proposed provision. We are of the view that if the offence is to be maintained, a general defence would be an appropriate safeguard.

Mandatory sentencing for serious organised crime

The mandatory sentencing option adopted by the Bill creates a cumulative fixed mandatory penalty together with the mandatory control order. The Taskforce recognised that there were risks with this option as it exposed people to injustices "which have historically been shown to attach to cumulative mandatory penalty regimes."[6]

Despite the appearance of repealing the VLAD Act and its 2013 raft of 'reforms' this amendment is reminiscent of the VLAD Act's mandatory minimums. Although 7 years is less than 15 years, the imposition of that mandatory component is entirely unjustified.

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[3] *Tajjour v NSW* (2014) 313 ALR 221.
[4] Wilson Report, p196.
[5] Wilson Report, p198.
[6] Wilson Report, p243.

The provision asks the Court to exercise its discretion to determine an appropriate penalty. It then demands that the Court add a minimum of 7 years to that person's sentence. This cannot be ameliorated unless the defendant gives significant cooperation to the Police in the form of an induced statement.

Not only does this provision strip away judicial discretion, it induces statements from defendants without any consideration being given to the truth or reliability of the statement.

The Institute is opposed to mandatory sentences. There is a lack of evidence to suggest that mandatory minimum sentences achieve effective deterrence, denunciation and consistency. Instead, these regimes often produce unjust results with significant economic and social costs. Mandatory sentencing regimes undermine community confidence in the judicial system for judges to fairly administer justice.

A case-blind stance of being 'tough on crime' by requiring an offender to serve 7 years imprisonment for a particular type of offence is a costly scheme with insufficient evidence to suggest an equivalent reduction in criminal activity. The Bill's mandatory sentencing regime should be rejected.

The avoidance of the mandatory regime through the giving of induced evidence is another reason why these mandatory sentences should be removed. There is inherent unreliability in asking a defendant to provide an induced statement and where that statement is to provide such a significant benefit as avoid a mandatory sentence, the Taskforce recognised that it provided an opportunity to provide false information.

There are concerns where a person is so low in the chain of an organisation that their evidence, whilst useful is not particularly relevant to a large scale criminal organisation such that what evidence they can produce is not sufficient to ameliorate their sentence once provided to the QPS.

In circumstances where this information is received as part of the sentence pursuant to section 13A and 13B of the Penalties and Sentence Act 1992, in closed Court circumstances, the Institute is concerned about the level of accountability which can be occasioned to the information and transparency involved in sentencing these serious offenders.

If the mandatory regime is to be maintained, it would be more appropriate and produce more just results for the Bill to reflect a presumed higher minimum non-parole period for serious offenders who have committed these particular offences. A percentage mandatory minimum non-parole period is preferred as it allows for individualised justice while still advancing the aims of the legislation.

Control Orders

The Bill proposes that a mandatory control order be obtained upon conviction under the new Serious Organised Crime circumstance or aggravation. The court retains discretion

in relation to the conditions of the order.[7] Discretionary control orders can also be sought by the prosecution for any indictable offence.[8]

The conviction based Control Orders are a different method to those deployed in other jurisdictions. Although it is acknowledged that these conviction based control orders would be specific to offenders rather than a blanket control order in relation to an association, and to that extent are more evidence based, no consideration is given to a person's change in circumstances and associations. As the orders are mandatory, if a person comes for sentence at a time well after the person has ended their associations that individual still cannot avoid the mandatory regime.

The Institute is concerned about the effect these control orders will have on an individual's capacity to work, particularly in circumstances where an individual may have changed their position and associations. It appears from the Explanatory Memorandum that control orders 'are intended to become relevant in the assessment of a person's suitability for a licence, permit, certificate or other authority under the affected occupational licensing Acts.'[9]

An individual's right to work will be infringed as a result of these orders for a lengthy period of time. No consideration is given to the individual circumstances of the offender and although a discretion is retained in relation to conditions, judicial discretion is removed because of the mandatory nature of the regime. If this control orders system is to be adopted, both the nature of the conditions whether the order should be imposed at all should be at the discretion of the sentencing judge.

Police Powers

The Institute is concerned by the broadening of unreviewable and unauthorised powers given to Queensland Police Officers as a result of amendments to the Peace & Good Behaviour Act and their powers to search restricted premises without warrant.

The amendments allow QPS to make application to the Magistrates Court to have a premises declared 'restricted' where there are reasonable grounds to suspect that 'disorderly activity' is occurring on those premises.[10] The definition of 'disorderly activity'[11] is extremely broad including behaviour that is anti-social and criminal. The definition also captures a recognised offender's presence at premises for the purposes of a restricted premises order.

Once a restricted premises order is made, lasting up to two years, Police can search those premises without warrant.

This amendment represents a profound shift in police powers in Queensland. Members of the Taskforce raised the significant risks to individual's rights and liberties if police are permanently empowered to stop, search, detain and obtain identifying particulars from

[7] Explanatory Memorandum, p20; 39.
[8] Explanatory Memorandum, p21.
[9] Explanatory Memorandum, p30.
[10] Explanatory Memorandum, p16.
[11] See Explanatory Memorandum, p17.

individuals not on the basis of a reasonable suspicion of unlawful activity but entirely as a result of their historical associations.[12]

The Institute is concerned that these powers are open to abuse by Police. In circumstances where a restricted premises order may be applied for on a reasonable belief of vaguely defined 'disorderly conduct' and where the operation of the order has the consequence that it will significantly affect the rights of individuals within the community without safeguard, these amendments should not be passed. If however, the amendments are proposed to be passed, at the very least, a search warrant should be obtained on each occasion before premises are search in line with existing principles of appropriate policing.

Yours faithfully

SAUL HOLT QC

[12] Wilson Report, p317.