



Griffith Journal
of Law & Human Dignity

GRIFFITH JOURNAL
OF LAW & HUMAN DIGNITY

Editor-in-Chief
Kelli Lemass

Managing Editors
Jessica Armao
Daniel Marcantelli

IT Administrator & Editor
Neerav Gorasia

SPECIAL ISSUE

Special Issue Editor
Jessica Armao

Deputy Editors
Michelle Gunawan
Felicia Lal

Shane Berkery
Georgia Danks-Brown
Tasnova Chowdhury
Mignote Hannaford
Beau Hanson

Editors

GENERAL ISSUE

General Issue Editor
Kelli Lemass

Deputy Editor
Danielle Warren

Eleesa Panton
Lana Ristic
Michelle St. Ange
Josephine Vernon

Consulting & Executive Editor
Dr Allan Ardill

Volume 2(1) 2014

Published in May 2014, Gold Coast, Australia by the *Griffith Journal of Law & Human Dignity*

ISSN: 2203-3114

CONTENTS

SPECIAL ISSUE

JESSICA ARMAO	<i>EDITORIAL</i>	1
DR ADRIAN HOWE	<i>FATAL LOVE</i>	4
ANONYMOUS	<i>DOMESTIC VIOLENCE: TODAY I SPEAK OUT</i>	25
DR BIANCA FILEBORN	<i>ONLINE ACTIVISM AND STREET HARASSMENT: DIGITAL JUSTICE OR SHOUTING INTO THE ETHER?</i>	32
JANE CULLEN	<i>WA'S 'ONE PUNCH' LAW: SOLUTION TO A COMPLEX SOCIAL PROBLEM OR EASY WAY OUT FOR PERPETRATORS OF DOMESTIC VIOLENCE</i>	52
FELICITY GERRY QC	<i>LET'S TALK ABOUT VAGINAS ... FEMALE GENITAL MUTILATION: THE FAILURE OF INTERNATIONAL OBLIGATIONS AND HOW TO END AN ABUSIVE CULTURAL TRADITION</i>	78

GENERAL ISSUE

ANNA CAPPELLANO	<i>QUEENSLAND'S NEW LEGAL REALITY: FOUR WAYS IN WHICH WE ARE NO LONGER EQUAL UNDER THE LAW</i>	109
WILLIAM ISDALE & DR GRAEME ORR	<i>PATHOLOGIES IN QUEENSLAND LAW-MAKING: REPAIRING POLITICAL CONSTITUTIONALISM</i>	126
FIONA MCLEOD SC	<i>HUMAN TRAFFICKING AND MODERN DAY SLAVERY – AN AFFRONT TO HUMAN DIGNITY</i>	144
DR TERRY GOLDSWORTHY & MATTHEW RAJ	<i>STOPPING THE STALKER: VICTIM RESPONSES TO STALKING</i>	174
SUSAN ARBON & ZACH DUNCALFE	<i>FOOD, ANIMALS, AND THE LAW: DO WE HAVE A MORAL OBLIGATION TO PROTECT THEM FROM THE SUFFERING THAT THE LAW DOES NOT?</i>	199
ADELE DE MESNARD	<i>ENVIRONMENTAL MIGRATIONS: RETHINKING THE NEED TO TAKE INTO ACCOUNT LOCAL CONTEXTS IN LEGAL AND POLICY RESPONSES</i>	221

QUEENSLAND'S NEW LEGAL REALITY: FOUR WAYS IN WHICH WE ARE NO LONGER EQUAL UNDER THE LAW

ANNA CAPPELLANO*

The Queensland Government recently amended and enacted legislation directed at criminalising membership in a number of motorcycle clubs. These changes are critically examined to determine the impact on civil liberties in Queensland; the ways in which people may no longer be equal before the law at the discretion of the Queensland Government, including selective mandatory sentencing and exclusion from particular lawful occupations; the criminalisation of behaviours which would otherwise be unobjectionable; and how the amendments have potential for a far-reaching and damaging impact on people for whom the laws were not necessarily intended.

CONTENTS

I	INTRODUCTION.....	110
II	NEW CRIMINAL CONDUCT: SECTIONS 60A–60C OF THE CRIMINAL CODE.....	111
	<i>A But First, Who Qualifies as a Participant in a Criminal Organisation?</i>	111
	<i>B What Conduct Is Now Unlawful ... For Some?.....</i>	113
III	BAIL RESTRICTIONS.....	114
IV	SELECTIVE MANDATORY SENTENCING.....	116
V	OCCUPATION RESTRICTIONS AND PROHIBITIONS.....	120
VI	CONCLUSION.....	122

*Anna Cappellano LLB (Hons), BA is a graduate of The University of Queensland and is currently a Barrister practicing at the Queensland Bar.

I INTRODUCTION

It is a fundamental tenet of Australia's legal system that the law applies equally to all citizens. Our international obligations under art 14 of the *International Covenant on Civil and Political Rights* ('ICCPR') guarantee the right to equality before the law.¹ The raft of so-called "anti-bikie legislation", which was passed in late 2013 by Queensland's Liberal National Party Government, led by Premier Campbell Newman ('the Newman Amendments'),² fundamentally changes this basic premise. The new reality in Queensland is that the law applies differently to different members of the community. The behaviour that constitutes a criminal offence, entitlements to bail, the applicable minimum and maximum penalties, and even available employment opportunities are now different for certain members of the community. One example of how this new legal landscape operates in practice is that, for some members of the Queensland population, eating and drinking in a hotel with friends and family is a legitimate and legal pastime, while, for others, it is now a criminal offence punishable by a mandatory minimum of six months in custody. Whether or not people's rights are restricted under the Newman Amendments is not dependent on proof of any particular wrongful conduct. Instead, people are punished on the basis of their associations, some of which were in the distant past. In Queensland, your rights are now dependent not on what you do but on who you are.

This paper looks at the way in which four particular aspects of the Newman Amendments violate the basic right to be treated equally before the law. The particular aspects to be discussed are: the new criminal offences contained in ss 60A–60C of the *Criminal Code Act 1899* (Qld) ('*Criminal Code*'); the amendments to the *Bail Act 1980* (Qld) ('*Bail Act*'); the changes to established sentencing laws; and the restrictions on the rights of qualified workers to carry out their lawful occupations. Each of these areas will be examined in turn.³

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

² See generally *Vicious Lawless Association Disestablishment Act 2013* (Qld) ('VLAD Act'); *Tattoo Parlours Act 2013* (Qld); *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) ('CODA Act'); *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld) ('CODOLA Act').

³ This is by no means a complete analysis of all the potential inequities contained within the Newman Amendments. The amendments to the *Corrective Services Act 2006* (Qld) which impose extremely harsh prison conditions on people who are identified as participants in a criminal organisation are just one further example: see *CODOLA Act* ss 10–19.

II NEW CRIMINAL CONDUCT: SECTIONS 60A–60C OF THE *CRIMINAL CODE*

As foreshadowed above, one of the starkest examples of the inequalities in Queensland's new legal landscape is the creation of criminal offences which punish people who are defined as 'participants in a criminal organisation' for otherwise unobjectionable behaviour; that is, behaviour which is entirely lawful for the rest of the population. The relevant offences were introduced by the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) ('the *CODA Act*'),⁴ which inserts ss 60A–60C into the *Criminal Code*.

A But First, Who Qualifies as a Participant in a Criminal Organisation?

The concept of a participant in a criminal organisation was first introduced into Queensland's criminal law by the previous Labor government with the advent of the *Criminal Organisation Act 2009* (Qld), which inserted the definition of a criminal organisation into s 1 of the *Criminal Code*.⁵ Section 41 of the *CODA Act* has now extended this concept by inserting a new definition of criminal organisation into s 1 of the *Criminal Code*. There are now three ways in which an entity may fall under the definition of a criminal organisation.

Firstly, an entity will be a criminal organisation if it is declared by a Court to be one, under the previously existing scheme contained in the 2009 Act. This Act establishes a scheme through which the Police Commissioner can apply to the Court for a declaration that an entity is a criminal organisation.⁶ The Police Commissioner is required to place evidence before the Court;⁷ the accused entity has a right to respond to the application;⁸ and the Court can only make the declaration if it is satisfied that the entity is an organisation whose members associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity, and that the organisation is an unacceptable risk to the safety, welfare, or order of the community.⁹ This process has itself been the subject of criticism and (an ultimately unsuccessful) constitutional challenge in the High Court. It was argued that the legislation denied accused organisations procedural fairness and,

⁴ *CODA Act* s 42.

⁵ *Criminal Organisation Act 2009* (Qld) s 145(1).

⁶ *Ibid* s 8.

⁷ *Ibid* s 9.

⁸ *Ibid*.

⁹ *Ibid* s 10.

in doing so, impaired the institutional integrity of the Supreme Court and, thereby, infringed Chapter III of the *Constitution*.¹⁰

Although this scheme is still in place, due to the extended definition introduced by the *CODA Act*, police will no longer need to satisfy a court through admissible evidence that an entity is a criminal organisation. The extended definition provides that an entity will be deemed a criminal organisation if it is simply declared to be one under a regulation.¹¹ To date, 26 motorcycle clubs have been declared to be criminal organisations under the *Criminal Law (Criminal Organisation) Regulation 2013 (Qld)*.¹² This process requires no evidence to be produced; no right of response for the relevant organisation; and no court to be satisfied to the requisite legal standard. The new reality is that an entity can be listed as a criminal organisation, at the discretion of the government, without any procedural safeguards.

The third and final definition of a criminal organisation is also very broad.¹³ A criminal organisation can consist of as little as three people if the group has as one of its purposes the carrying out of 'serious criminal activity' and is seen to represent an unacceptable risk to the safety,¹⁴ welfare, or order of the community.¹⁵ The definition of serious criminal activity is broader than might be thought. It includes any indictable offence where the maximum penalty is seven years imprisonment or more.¹⁶ This definition would capture almost any drug offence, including the possession of small amounts of cannabis. The concept of representing an unacceptable risk to the community is not further defined within the legislation, and prosecuting authorities would be required to produce evidence to prove this element.

¹⁰ *Assistant Commissioner Michael James Condon v Pompano Pty Ltd & Anor* [2013] HCA 7 (14 March 2013).

¹¹ *Criminal Code Act 1899 (Qld)* s 1 (definition of 'criminal organisation' para (c)) ('*Criminal Code*'); *CODA Act* s 41.

¹² The regulation was passed as sch 1 of the *CODA Act*. The declared motorcycle clubs are the Bandidos, Black Uhlands, Coffin Cheaters, Comancheros, Finks, Fourth Reich, Gladiators, Gypsy Jokers, Hells Angels, Highway 61, Iron Horsemen, Life and Death, Lone Wolf, Mobshitters, Mongols, Muslim Brotherhood Movement, Nomads, Notorious, Odins Warriors, Outcasts, Outlaws, Phoenix, Rebels, Red Devils, Renegades, and Scorpions.

¹³ *Criminal Code* s 1 (definition of 'criminal organisation' para (a)); *CODA Act* s 41(a).

¹⁴ The previous definition of 'criminal organisation' introduced by the *Criminal Organisation Act 2009 (Qld)*, contained a similar definition, but it required proof that the organisation of three or more persons *predominately associated* for the purpose of carrying out serious criminal activity as well as representing an unacceptable risk to the community: *Criminal Organisation Act 2009 (Qld)* s 145.

¹⁵ *Criminal Code* ss 1(a)(i)-(ii).

¹⁶ *Criminal Organisation Act 2009 (Qld)* s 7(1)(a).

The term 'participant' in a criminal organisation (in the context of the new offences) is defined in s 60A(3) of the *Criminal Code*. This definition goes well beyond catching fully patched or card holding members of alleged criminal organisations. A person is deemed to be a participant of a criminal organisation if they do as little as take part in the affairs of the relevant organisation in any way, or even attend two gatherings of people who participate in any way in the affairs of the relevant organisation.¹⁷

B What Conduct Is Now Unlawful ... For Some?

Three new offences are created in ss 60A–60C of the *Criminal Code*. For people who are deemed to be participants in a criminal organisation, it is now illegal to be present in a public place with two or more other participants;¹⁸ to enter a prescribed place or attend a prescribed event;¹⁹ or to recruit or attempt to recruit anyone to be a participant.²⁰ Once a person is convicted of an offence under these sections, the sentencing judge has no choice but to impose a sentence of at least six months imprisonment to be served wholly in a correctional facility.²¹

As has been demonstrated by the arrests under these new offences in late 2013 and early 2014, otherwise unlawful behaviour, or the risk of unlawful behaviour, is not required to enliven these offences. On 12 December 2013, five men, who have become known as the "Yandina five",²² were arrested and charged under s 60A of the *Criminal Code* for doing nothing more than having a casual drink and pizza together at the Yandina Hotel on 1 November 2013. On 13 February 2014, another two men were arrested in relation to the incident.²³ The allegation against the men is that they were participants in, or members of, the Rebels Motorcycle Club (one of the 26 motorcycle clubs which have been declared criminal organisations by the government) and that

¹⁷ *Criminal Code* ss 60A(3)(d)–(e).

¹⁸ *Ibid* s 60A.

¹⁹ *Ibid* s 60B. Currently 41 places have been declared to be 'prescribed places' for the purpose of s 60B: *Criminal Code (Criminal Organisations) Regulation 2013* (Qld) s 3. As yet there have been no declarations in relation to prescribed events.

²⁰ *Criminal Code* s 60C.

²¹ *Ibid* ss 60A(1), 60B(1), 60C(1). The maximum penalty is three years imprisonment.

²² Joshua Carew, Paul Landsdowne, Steven Smith, Scott Conly, and Dan Whale.

²³ Cameron Artfield, 'Two more arrested over Yandina 'bikie' meeting', *Brisbane Times* (online), 14 February 2014 <<http://www.brisbanetimes.com.au/queensland/two-more-arrested-over-yandina-bikie-meeting-20140213-32mqr.html>>.

they were present together in a public place.²⁴ Similarly, on 5 January 2014, five Victorian men,²⁵ who were holidaying together on the Gold Coast, were arrested under s 60A after buying ice-creams with their families on a Gold Coast street.²⁶

The inherent inequality of ss 60A–60C is demonstrated by these early cases. By dining together in public on 1 November 2013, one table of patrons at the Yandina Hotel is alleged to have committed an offence punishable by spending at least six months in jail, while, for all other patrons at the hotel, the very same conduct was completely lawful. From a legal perspective, not only do these new offences offend the right to equality under the law,²⁷ they arguably violate the right to freedom of association with others,²⁸ and the concept that men and women have equal right to the enjoyment of all civil and political rights.²⁹ The inequality that flows from these new offences is exacerbated by another aspect of the legislative amendments, namely, the changes to the *Bail Act*.

III BAIL RESTRICTIONS

In late 2013, the combination of the *CODA Act* and the *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld) (*CODOLA Act*) introduced ss 16(3A)–(3D) into the *Bail Act*. The effect of s 16(3A) is to place an accused person who is, or at any time has been, a participant in a criminal organisation in a '[show] cause' position when applying for bail.³⁰ Being placed in a show cause position means that, unlike most people charged with a criminal offence, the onus is on the charged individual to prove to a court that their detention in custody is not justified. The section also requires that, if a person is granted bail, they must surrender their passport.³¹

Aside from the inequality inherent in this section, there are a number of troubling aspects of the amendment. Firstly, the bail restrictions apply to anyone who is deemed

²⁴ Natalie Bochenski and Marissa Calligeros, "Where's Daddy?": Yandina Five wife's anguish', *Brisbane Times* (online), 8 January 2014 <<http://www.brisbanetimes.com.au/queensland/wheres-daddy-yandina-five-wifes-anguish-20140107-30fhu.html>>.

²⁵ Daniel Lovett, Kresimir Basic, Darren Hayley, Bane Ajajbegovic, and Dario Halolovic.

²⁶ Leah Fineran, 'Gold Coast holiday ends in jail for alleged tourist bikies', *Gold Coast Bulletin* (online), 6 January 2014 <<http://www.goldcoastbulletin.com.au/news/gold-coast/gold-coast-holiday-ends-in-jail-for-alleged-tourist-bikies/story-fnj94idh-1226795709978>>.

²⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 179 (entered into force 23 March 1976) art 15.

²⁸ ICCPR, art 22.

²⁹ ICCPR, art 3.

³⁰ *Bail Act 1980* (Qld) s 16(3A)(a).

³¹ *Ibid* s 16(3A)(b).

to have been a participant in a criminal organisation *at any time*.³² The legislation goes on to specifically state that the restrictions will apply even if the person was not a participant in a criminal organisation when the alleged offence occurred.³³ There is no requirement for the prosecution to provide evidence that the person is or was a member of a criminal organisation, or for the court to make a positive finding to that effect. The section is enlivened if it is simply *alleged* that this is the case.³⁴ The seriousness of the alleged offence is irrelevant. The legislation specifically provides that the bail restrictions will apply whether a person is charged with an indictable, simple, or regulatory offence.³⁵ The legislation also specifically states that there does not need to be any connection, whatsoever, between the alleged participation in a criminal organisation and the offence that has been charged.³⁶

In applying the new section, the Chief Magistrate Judge Carmody has ruled that, because of the 'clear legislative intent' and regardless of the offence charged:

[P]articipants in criminal organisations are now regarded by the law to be unacceptable threats to community welfare solely by virtue of their association ... and for that reason alone should 'normally' — or ordinarily — be refused bail.³⁷

For example, the amendments to the *Bail Act* mean that a 40-year-old man who is arrested in relation to a drink-driving offence will be refused bail unless he can show cause why his detention in custody is not justified, purely on the basis that police alleged that, when he was in his early 20s, he associated with people in one of the 26 declared motorcycle clubs. This will apply regardless of the fact that the man is married with three young children, has owned and operated his own business for 10 years, and has no criminal history.

The result of the Newman Amendments is that, for a particular group of the community, bail is more difficult to obtain.³⁸ Once again, this unequal application of the law is

³² Ibid s 16(3A)(a).

³³ Ibid s 16(3C)(b).

³⁴ Ibid s 16(3A)(a).

³⁵ Ibid s 16(3C)(a).

³⁶ Ibid s 16(3C)(c).

³⁷ *Van Tongeren v Office of the Director of public Prosecutions (Qld)* [2013] QMC 16 (14 November 2013) [115].

³⁸ The bail decisions which have been decided so far under s 16(3A) are discussed in the following article: Patrick Wilson, *Recent decisions dealing with "show cause" applications brought under the amended Bail Act*

dependent on a person's current or former associations, rather than any specific allegation of wrongdoing on the part of the accused. As well as breaching the human rights provisions, which require equality before the law and freedom of association, these bail amendments potentially violate art 9 of the *ICCPR*, which enshrines the right against arbitrary detention.

IV SELECTIVE MANDATORY SENTENCING

The third way in which the recent amendments unjustly affect certain members of society is through the introduction of selective mandatory sentencing. Once again, whether a person will be subject to compulsory higher sentences is not dependent on whether a person has engaged in any additional wrongful or unlawful conduct. It instead depends on with whom a person is deemed to have associated. This selective mandatory sentencing was introduced in two different ways. Firstly, the *CODA Act* amended various provisions of the *Criminal Code* to impose mandatory minimum sentences and higher maximum sentences in relation to certain offences for people who are deemed to be participants in a criminal organisation.³⁹ Prior to the *CODA Act*, s 72 of the *Criminal Code* provided that the maximum penalty for the offence of affray (fighting in public) was 12 months imprisonment and no minimum sentence applied.⁴⁰ Section 43 of the *CODA Act* amended the *Code* to provide that, if a person is convicted of the offence of affray and falls within the definition of a participant in a criminal organisation, they must be sentenced to a minimum six months imprisonment, to be served wholly in jail. The maximum penalty in these circumstances is increased to seven years imprisonment.⁴¹ The court has absolutely no discretion in respect of imposing the minimum sentence. The person's age, employment history, family situation, and lack of criminal history are immaterial. There is no requirement that there be a connection between the offence and the person's participation in the criminal organisation. If a person falls within the definition of a participant in a criminal organisation, they must spend at least six months in jail.

(17 February 2014) Law and Justice Institute (Qld) Inc <<http://ljiq.asn.au/2014/02/17/recent-decisions-dealing-with-show-cause-applications-brought-under-the-amended-bail-act/>>.

³⁹ The definitions in ss 1, 60A of the *Criminal Code* apply in this context.

⁴⁰ *Criminal Code* s 72(1).

⁴¹ *Ibid* s 72(2).

Mandatory minimum and/or higher maximum sentences have also been imposed for the offences of misconduct in relation to public office,⁴² grievous bodily harm,⁴³ serious assault,⁴⁴ and obtaining or dealing with identification information by amendments effected by ss 43–47 of the *CODA Act*.⁴⁵ The *CODA Act* has also amended s 187 of the *Penalties and Sentences Act 1992* (Qld) to provide that, if a person is convicted of affray or one of the anti-association offences in ss 60A–60C of the *Criminal Code*, and is deemed to be a participant in a criminal organisation, the court must disqualify that person's driver's licence for at least three months, even if the offence was in no way connected with the driving of a motor vehicle.

Mandatory sentencing such as this leads to absurd and unjust situations. Take, for example, a situation where two 19-year-olds are charged and plead guilty to the offence of affray after being arrested in Fortitude Valley in the early hours of the morning for being part of a group of young men who got into a fight in a taxi line. The fight was consensual and no one sustained any serious injury. Both men work full-time and have no criminal history. In the usual course of events, both men would likely be fined and have no conviction recorded. However, if one of the young men, had, on two previous occasions attended parties held by people on the fringes of a declared motorcycle club, he must spend a minimum of six months in jail and will lose his licence for at least three months. On the other hand, his co-offender will be fined and have no conviction recorded.

The second major change to Queensland's sentencing laws is the introduction of an unprecedented mandatory sentencing regime contained in the *Vicious Lawless Association Disestablishment Act 2013* (Qld) ('*VLAD Act*'). The *VLAD Act* provides that people who are defined as 'vicious lawless associates' will automatically have to serve 15 years in prison in addition to any sentence that would otherwise have been imposed.⁴⁶ If they are found to be an office bearer, they will automatically be required to serve an additional 25 years in custody.⁴⁷ Unless a person becomes an informer, they are

⁴² *Ibid* s 92A.

⁴³ *Ibid* s 320.

⁴⁴ *Ibid* s 340.

⁴⁵ *Ibid* s 408D.

⁴⁶ *VLAD Act* s 7(1)(b).

⁴⁷ *Ibid* s 7(1)(c).

not eligible for parole during the additional sentence and, accordingly, they will have to serve the entire 15 or 25 years in custody.⁴⁸

The definition of a vicious lawless associate is even broader than the definition of a participant in a criminal organisation. It is, in no way, limited to members or associates of the 26 declared motorcycle clubs. Section 5 of the *VLAD Act* provides that a person is a prima facie vicious lawless associate if the following three conditions are satisfied. Firstly, the person commits a declared offence. The declared offences are listed in Schedule 1 of the *VLAD Act*. They include serious offences such as murder and various sexual offences, but also include the offences of affray, assault, dangerous operation of a motor vehicle, receiving tainted property, and possessing dangerous drugs. For these latter offences, it is not unusual for people with limited or no criminal history to be fined or sentenced to community-based orders, such as probation or community service, rather than be imprisoned. The second condition is that the person was a 'participant' in the affairs of a 'relevant association' when the offence was committed. A relevant association under the *VLAD Act* is a much broader concept than the definition of a criminal organisation in the *Criminal Code*. It is any corporation, unincorporated association, club or league, or group of three or more persons.⁴⁹ The definition of a relevant association does not contain any requirement that the group, corporation, club, or three persons, as the case may be, engage in illegal activity. Groups such as school P&Cs, swimming clubs, and RSLs are all relevant associations under the *VLAD Act*. The term participant is defined in s 4 of the *VLAD Act* and has the same broad meaning as in s 60A of the *Criminal Code*. The final condition is that the offence was committed in the course of participating in the affairs of the relevant association.

If these conditions are satisfied, a person is deemed to be a vicious lawless associate unless *they* can prove that, while engaging in declared offences, the association does not have as one of its purposes the purpose of engaging in declared offences.⁵⁰ The frighteningly broad application of this regime is illustrated by the recent arrest and initial prosecution of a Gold Coast man in relation to the charge of receiving tainted property. In the early hours of the morning on 12 February 2014, detectives raided the home of 27-year-old Gold Coast man, John-Rae Ross Todd, and confiscated a Tweed

⁴⁸ Ibid ss 8–9.

⁴⁹ Ibid s 3 (definition of 'association').

⁵⁰ Ibid s 5(2).

Shire Council street sign for “Todd Road”. Mr Todd told the police that the sign had been gifted to him by his father who passed away 15 years ago. He was charged with receiving tainted property and was taken to the watch-house where he spent the night. Police initially alleged that Mr Todd was connected to “the Mongols” (one of the 26 declared motorcycle clubs) and indicated that the provisions of the *VLAD Act* may be enlivened.⁵¹ This, as a result, could have exposed Mr Todd to the mandatory 15-year jail sentence. Mr Todd’s solicitor disputed the “bikie” allegations and, after some negotiations, police withdrew those allegations and, with them, the threat of mandatory sentencing under the *VLAD Act*. The matter could then be finalised; Mr Todd pleaded guilty to the charge of receiving tainted property and was sentenced under the usual sentencing regime. He received a fine of \$100.⁵²

The High Court has recently confirmed that mandatory sentencing in itself is not unlawful and, in particular, is not inconsistent with Chapter III of the *Constitution*.⁵³ However, the sentencing regimes introduced by the *CODA* and *VLAD Acts* are radically different to the mandatory sentencing provisions which have been considered by the High Court. In particular, the imposition of mandatory sentences under the Newman Amendments does not apply to all members of society who commit a specified offence. They are triggered because a person belongs to a particular group in society rather than because of any wrongful conduct on behalf of the accused person. Accordingly, it is arguable that the recent High Court rulings in relation to mandatory sentences would not apply in respect of this legislation.

It is also difficult to see how these regimes can be consistent with Australia’s international human rights obligations relating to the right to equality before the law and the freedom to associate with others. Given the potential for the disproportion between criminal conduct and the additional 15 or 25-years mandatory prison terms, it is also arguable that the regime under the *VLAD Act* is inconsistent with art 7 of the *ICCPR*, which guarantees that no one shall be subject to torture or to cruel, inhuman, or degrading treatment or punishment.

⁵¹ If the prosecution did proceed under the *VLAD Act* it would have ultimately been dealt with in the Supreme Court, rather than have been finalised in the Magistrates Court.

⁵² Leah Fineran, ‘Alleged Mongol nearly got 15 years after police raided his home and confiscated street sign’, *Gold Coast Bulletin* (online), 13 February 2014 <<http://www.theaustralian.com.au/news/alleged-mongol-nearly-got-15-years-after-police-raided-his-home-and-confiscated-street-sign/story-e6frg6n6-1226827051814>>.

⁵³ *Magaming v R* [2013] HCA 40 (11 October 2013).

V OCCUPATION RESTRICTIONS AND PROHIBITIONS

The fourth aspect of the Newman Amendments which impinges on Queenslanders' rights and civil liberties and, in particular, the right to equality before the law, is the restrictions placed on workers to carry out their chosen, lawful occupations. The occupation restrictions began with the introduction of the *Tattoo Parlours Act 2013* (Qld), which was part of the initial wave of the Newman Amendments in October 2013. The Act introduced a licensing scheme to the tattooing industry. The scheme provides that both tattooing businesses and individual tattoo artists cannot operate in Queensland unless they are granted a license under the Act.⁵⁴ As part of the application process, business owners and employees are required to provide personal and financial details of any 'close associates',⁵⁵ as well as have their finger and palm prints taken by the police.⁵⁶ The legislation mandates that every application must be referred to the police commissioner for an investigation and determination as to 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.⁵⁷

With the introduction of the *CODOLA Act* in late November 2013, changes were made to the existing regulatory schemes in numerous mainstream industries. The amendments affected by the *CODOLA Act* prohibit people, who may never have been accused of any wrongful conduct, from commencing or continuing to carry out their lawful occupations on the basis of their alleged associations. The industries that are now subject to occupational prohibitions are the electrical industry, liquor industry, the building industry, the racing industry, second-hand dealers and pawnbrokers, security providers, and tow-truck operators.⁵⁸

Although the different regulatory schemes operate in slightly different ways, the basic effect of the amendments introduced by the *CODOLA Act* is that the regulatory bodies must refuse or cancel a worker's licence if the worker is defined as an identified

⁵⁴ *Tattoo Parlours Act 2013* (Qld) ss 6–7.

⁵⁵ *Ibid* ss 11–12, 4 (definition of 'close associate').

⁵⁶ *Ibid* s 13.

⁵⁷ *Ibid* s 15.

⁵⁸ *Electrical Safety Act 2002* (Qld), as amended by *CODOLA Act* ss 56–71; *Liquor Act 1992* (Qld), as amended by *CODOLA Act* ss 86–115; *Building Services Authority Act 1991* (Qld), as amended by *CODOLA Act* ss 127–137; *Racing Act 2002* (Qld), as amended by *CODOLA Act* ss 138–157; *Second-hand Dealers and Pawnbrokers Act 2003* (Qld), as amended by *CODOLA Act* ss 158–169; *Security Providers Act 1993* (Qld), as amended by *CODOLA Act* ss 170–182; *Tow Truck Act 1973* (Qld), as amended by *CODOLA Act* ss 188–211.

participant in a criminal organisation. The definition of an identified participant in a criminal organisation in this context largely reflects the definitions contained in ss 1 and 60A(3) of the *Criminal Code*. The significant difference between the definitions under the *CODOLA Act* and the *Criminal Code* is that, under the *CODOLA Act*, a lesser standard of evidence is required to establish that a person is an identified participant in a criminal organisation. Under the *CODOLA Act*, all that is required to establish that a person is an identified participant in a criminal organisation is that the police commissioner identifies the person as falling within the relevant definitions. In contrast to the operation of the Newman Amendments in the *Criminal Code*, there is no requirement that a court be satisfied, based on admissible evidence, that a person falls within the definition of participant in a criminal organisation before they are prohibited from working in their chosen occupation. The police commissioner is not even required to provide reasons for the classification of an individual as a participant in a criminal organisation at first instance.⁵⁹

The application of the occupational prohibitions is both mandatory and wide reaching. The Electrical Trades Union has estimated that 200 electricians could lose their licence to practice under the new laws.⁶⁰ Regulatory bodies have no discretion in relation to the refusal or cancellation of licences once a person is identified by the police to be a participant in a criminal organisation.

Having regard to amendments to the *Police Service Administration Act 1990 (Qld)*, which enables the Police Commissioner to disclose the criminal history of a person who has, at any time in the past, been a participant in a criminal organisation.⁶¹ It seems likely that a person may be identified by the police as a relevant participant based on their past activities or associations. The practical effect of these new laws is that people who have spent their entire adult lives studying, training, and then working in their chosen occupation can be excluded from this occupation without ever having been accused of any wrongdoing. Instead, they will be excluded on the basis of who they have associated with, either currently or in the distant past. A further practical concern that has been articulated by commentators is that legislation which bars people from lawful

⁵⁹ See, eg, *Electrical Safety Act 2002 (Qld)* s 64, as amended by *CODOLA Act* s 61.

⁶⁰ Donna Field, 'Queensland anti-bikie laws threaten work licences of 200 electricians, union says' *ABC News* (online), 10 January 2014 <<http://www.abc.net.au/news/2014-01-10/tradies-could-lose-licences-under-queensland-anti-bikie-laws/5195116>>.

⁶¹ *CODOLA Act* ss 122–126.

employment creates a situation where those affected will have little alternative other than to embark on a life of crime.⁶²

From a human rights perspective, these occupational prohibitions not only offend the previously discussed right to be treated equally under the law and right to freely associate, they violate the right to work, which is contained in art 6 of the *International Covenant on Economic, Social and Cultural Rights*.⁶³ Article 6 provides for the right to work, which includes the right of everyone to have the opportunity to gain a living by work, which one freely chooses or accepts.

VI CONCLUSION

This paper has sought to demonstrate four ways in which the spate of legislation introduced by Queensland's Newman Government under the guise of a "war on bikies" has radically changed Queensland's legal landscape. It is apparent from this analysis that the ramifications of the Newman Amendments on the human rights and civil liberties of Queenslanders extend well beyond patched members of the now declared criminal motorcycle organisations. This new legal reality has already created practical situations that are inherently unjust and breach Australia's international human rights obligations in a number of different ways. It cannot be doubted that such situations will occur with increasing regularity, as the broadly drafted legislation touches upon a whole host of unforeseen scenarios thrown up in the normal course of human interaction.

⁶² Bridget Armstrong and Stephen Keim, *The Path to Hell is Paved with Simplistic Policies* (5 February 2014), Independent Australian <<http://www.independentaustralia.net/life/life-display1/the-newman-government-the-path-to-hell-is-paved-with-simplistic-policies,6136>>.

⁶³ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

REFERENCE LIST

A Cases

Assistant Commissioner Michael James Condon v Pompano Pty Ltd & Anor [2013] HCA 7
(14 March 2013)

Callanan v Attendee Z [2013] QSC 342

Magaming v R [2013] HCA 40 (11 October 2013)

Van Tongeren v Office of the Director of Public Prosecutions (Qld) [2013] QMC 16 (14
November 2013)

B Legislation

Australian Constitution

Bail Act 1980 (Qld)

Building Services Authority Act 1991 (Qld)

Criminal Code Act 1899 (Qld)

Criminal Code (Criminal Organisations) Regulation 2013 (Qld)

Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld)

*Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act
2013* (Qld)

Criminal Organisation Act 2009 (Qld)

Corrective Services Act 2006 (Qld)

Electrical Safety Act 2002 (Qld)

Liquor Act 1992 (Qld)

Racing Act 2002 (Qld)

Second-hand Dealers and Pawnbrokers Act 2003 (Qld)

Security Providers Act 1993 (Qld)

Tattoo Parlours Act 2013 (Qld)

Tow Truck Act 1973 (Qld)

Vicious Lawless Association Disestablishment Act 2013 (Qld)

C Treaties

International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force generally 23 March 1976)

E Other

Armstrong, Bridget and Stephen Keim, *The Path to Hell is Paved with Simplistic Policies*, (5 February 2014), Independent Australian
<<http://www.independentaustralia.net/life/life-display/the-newman-government-the-path-to-hell-is-paved-with-simplistic-policies,6136>>

Artfield, Cameron, 'Two more arrested over Yandina 'bikie' meeting', *Brisbane Times* (online), 14 February 2014 <<http://www.brisbanetimes.com.au/queensland/two-more-arrested-over-yandina-bikie-meeting-20140213-32mqr.html>>

Bochenski, Natalie and Marissa Calligeros, 'Where's Daddy': Yandina Five wife's anguish', *Brisbane Times* (online), 8 January 2014 <<http://www.brisbanetimes.com.au/queensland/wheres-daddy-yandina-five-wifes-anguish-20140107-30fhu.html>>

Field, Donna, 'Queensland anti-bikie laws threaten work licences of 200 electricians, union says' *ABC News* (online), 10 January 2014 <<http://www.abc.net.au/news/2014-01-10/tradies-could-lose-licences-under-queensland-anti-bikie-laws/5195116>>

Fineran, Leah, 'Gold Coast holiday ends in jail for alleged tourist bikies', *Gold Coast Bulletin* (online), 6 January 2014 <<http://www.goldcoastbulletin.com.au/news/gold-coast/gold-coast-holiday-ends-in-jail-for-alleged-tourist-bikies/story-fnj94idh-1226795709978>>

Fineran, Leah, 'Alleged Mongol nearly got 15 years after police raided his home and confiscated street sign', *Gold Coast Bulletin* (online), 13 February 2014
<<http://www.theaustralian.com.au/news/alleged-mongol-nearly-got-15-years-after-police-raided-his-home-and-confiscated-street-sign/story-e6frg6n6-1226827051814>>

Wilson, Patrick, '*Recent decisions dealing with "show cause" applications brought under the amended Bail Act*' (17 February 2014) Law and Justice Institute (Qld) Inc
<<http://ljiq.asn.au/2014/02/17/recent-decisions-dealing-with-show-cause-applications-brought-under-the-amended-bail-act/>>