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Lincoln, RA; Gubbins, Lucy

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When Criminal Laws affects Business Enterprises: A Case Study of the Tattoo Parlours Act in Queensland, Australia

Robyn Lincoln

Assistant Professor
Faculty of Society and Design
Bond University
Gold Coast, Queensland, Australia

Lucy Gubbins

Legal and Criminological Scholar
Faculty of Society and Design
Bond University
Gold Coast, Queensland, Australia

Abstract

Several Australian states have embarked on legislative reform aimed at curbing motorcycle club members' involvement in criminal activities. These reforms extended into the sphere of legitimate business enterprises with the creation or amendment of occupational licensing regulations. This article examines one such example — the Tattoo Parlours Act 2013 in Queensland — with a particular focus on its use of criminal intelligence evidence, its non-disclosure provisions, and how these impact on fairness, equality, and the right to conduct business. This review sets out the background to the Act, explains the processes of application and appeal, and critiques the consequences of such licensing laws. The paper canvasses three main issues: that these laws constitute “hyperlegislation” that is characterised by political expediency, haste, and poor drafting; that the criminal law, especially that which deals with associations, can impact on legitimate enterprise; and that such laws lead to the stigmatisation of individuals giving few avenues for legal recourse. With this tranche of laws having been recently reviewed and revised, it is anticipated that many of these criticisms have been addressed. However, it is doubtful that all problematic aspects of the laws will be reversed, and it is unclear what opportunities for redress will be open to those individuals and businesses who were subjected to the laws in their previous form.

Keywords: criminal association laws, occupational licensing, criminal intelligence evidence, non-disclosure provisions, outlaw motorcycle clubs

1. Background on Criminal Organisation Laws

Successive governments in the state of Queensland have passed legislation over the last five years to address crime and public safety issues related to “outlaw motorcycle gangs” (OMCGs). Such laws are not limited to Queensland, as other Australian jurisdictions have enacted related forms of “criminal association” or “anti-biker” legislation (Morgan, Dagistanli, & Martin, 2010), designed to enlarge police powers, create new offences, and increase penalties (Loughnan, 2009). Similar kinds of “anti-gang” laws have operated internationally, for example, in Canada, New Zealand, The Netherlands, the UK, and in various states of the USA (Cash, 2012). The impetus for these extensive new laws often derives from isolated incidents of public violence involving motorcycle club members, but also from perceptions about their participation in criminal activities such as drugs, money laundering, or weapons use (Loughnan, 2009).

There was such a galvanising public incident in this case, that coalesced a legal, media, and political maelstrom. On 27 September 2013, there was a melee in a popular restaurant precinct on the Gold Coast (AAP, 2013). It was a busy Friday evening in the tourist area and a large contingent of members from one well-known motorcycle club assaulted two males associated with another. The fighting escalated, despite uniformed police officers being present in significant numbers, and extended to riots at the police watch-house where the arrested club members had been taken into custody (AAP, 2013).

This incident was then used as a catalyst to intensify legal responses, with the introduction of even more draconian anti-gang laws, in addition to the criminal association laws that were already in place (Ayling, 2011; 2013). The aims of such legislation are generally threefold: to declare a specific organisation as “criminal”; to impose control orders that thwart the consorting of members; and to exercise enhanced powers to confiscate unexplained wealth (Morgan et al., 2010). There are many criticisms of the laws, both in Australia and internationally (Ayling, 2011; Katz, 2011). Indeed, it has been suggested that they signal a fundamental shift in the balance of power toward the state (Barns, 2008), which in turn creates greater burdens on the justice system that can lead to the impinging of human rights (Ayling, 2013). Yet, for any legislation to be effective it must be practical and well-considered from a policy perspective, and laws that fail to meet this test can result in counterproductive outcomes in their intended area of use (Ayling, 2011).

In the state of Queensland one such legislative addition was the *Criminal Law Act of 2009* designed to restrict the activities of members and associates of “declared” criminal groups (Section 41 of *CODA Act 2013*). There followed a series of amendments in late 2013 including the *Criminal Law (Criminal Organisations Disruption) Amendment Act (CODA) (No. 45 of 2013)*. At the same time the *Vicious Lawless Association Disestablishment Act 2013 (Qld) No 47* was assented, with its primary objective being “to disestablish associations that encourage, foster or support persons who commit serious offences” by denying them “the assistance and support gained from association” with other participants (VLAD EM, 2013). The tranche of laws also included amendments to the Criminal Code (Criminal Organisations) Regulation 2013, and the Police Powers and Responsibilities and Another Regulation Amendment Regulation (No. 1) 2013.

As part of this suite of laws, the *Tattoo Parlours Act 2013 (Qld) (TPA) No. 46* commenced on 1 July 2014. The TPA aimed to provide “occupational licensing” and a “regulatory framework” for tattoo businesses and tattooists (Tattoo Parlours Bill, 2013, p. 1). Its underlying purpose was to “address serious community concern about recent incidents of violent, intimidating and criminal behaviour of members of criminal motor cycle gangs” and specifically to disrupt the “infiltration of criminal organisations into particular business operations especially tattoo parlours” (Tattoo Parlours Bill, 2013, p. 1). As with its allied laws, this Bill was hastened through the parliamentary process. While the expedited passing of a law is not necessarily problematic, it underscores the potential for poor drafting, an absence of oversight in application, and a lack of resources to support such legislative changes (Loughnan, 2009). These outcomes are even more likely when there is “no community consultation” with industry or occupational groups, as acknowledged in the Explanatory Notes to the Bill that stated it was “part of an urgent package of reforms” (Tattoo Parlours Bill, 2013, p. 4).

The TPA had the remit to restrict individuals from working as body art tattooists, and the consequences for unlicensed trading could result in significant fines, or up to 18 months imprisonment (Office of Fair Trading, 2017). Anyone who operated a tattoo studio or was a practitioner had to apply for a licence from the Chief Executive of the Office of Fair Trading (OFT) (Section 6) who had discretion to grant a licence, provide a conditional one, or refuse it (Sections 17 & 34). All applications were referred to the Commissioner of Police to confirm whether the applicant was “fit and proper” or “whether it would be contrary to public interest for the licence to be granted” (Section 20). Included in the process was the requirement to submit finger and palm prints, and of note is that any “close associates” deemed to have influence over the operations of a tattoo studio were likewise required to be licensed (Sections 4, 11, & 13). For the purpose of the Act, tattooing was defined broadly to include cosmetic tattooing procedures, those conducted for medical reasons, as well that which related to club affiliations (see TOCL, 2016, p. 374).

Another piece of legislation ensured that there were wider impacts beyond the tattoo industry. The *Criminal Law (Criminal Organisations Disruption) and other Legislation Amendment Act 2013 (Qld) (CODLA)* meant that aspects of these compulsory licensing arrangements extended to the liquor, electrical, and building industries (Keim, 2014). This had consequences for pubs, clubs, bars, restaurants, and casinos; as well as for the construction sector where hundreds of thousands of plumbers, electricians, bricklayers, and building contractors potentially could have been affected (Keim, 2014). They expanded to include occupations in the motor trade, racing, gambling and tow-truck sectors as well (ETU, 2015). Under CODLA the commissioner could nominate an “identified participant” as someone who may have links to a “criminal organisation”, based on non-disclosed secret information and a licence could have been revoked or never granted (Keim, 2014).

This meant that those “who may never have been accused of a criminal offence”, those who have acquitted any past criminal dispositions, or those suspected of having links to criminal organisations, however tenuous, could be “stripped of their livelihood” (Keim, 2014, p. 4).

These laws contravened international treaties such as the ICCPR (Article 22) and the ILO Convention 1948 (No. 87) that are ratified by Australia. Fortunately, these amendments originally intended to commence from 1 July 2016 were postponed and never came “into force” (ETU, 2015, p. 5). Instead, a review of the tranche of organised crime legislation in Queensland was commissioned and one of its aims was to improve the clarity, administration and operation of the occupational and industry licensing Acts as a whole (TOCL, 2016). In light of the re-appraisal of these laws, this article examines the original legislation and its consequences (potential and actual), and then canvasses the changes that have been purported. In the next section, we discuss the non-disclosure of secret intelligence information that was designed to underpin decisions to grant licences. In the subsequent section, we canvass the consequences of the laws to individuals and businesses, and deliberate on the proposed changes recommended by the review Taskforce. Thus this paper seeks to highlight the consequences for business enterprises when they are swept into the net of criminal association laws.

2. Non-Disclosure Provisions in the TPA

Of most concern is that under the regulations any evidence gleaned from secret police intelligence was an exception to the usual disclosure rules. In principle, the non-disclosure provisions are intended to offer protections to police operations, and are “considered justified as an appropriate and effective way of dealing with serious [crime] issues” (TPA Bill, 2013). The determination about the suitability of an applicant resided exclusively with the police commissioner who was not required to give reasons for a determination if it “would disclose the existence or content of a criminal intelligence report” (Section 22).

Within the application process there was no pathway to allow potential licensees to address their prior behaviours or past convictions, or permit their history to be placed into some kind of explanatory context. An applicant had the right to apply for a review, but where the decision was based on a negative security appraisal, the court could protect the confidentiality of a criminal intelligence report or withdraw it. When an individual sought a review and the decision was made on the ground of such an “adverse security determination”, that information could be disclosed to the Queensland Civil and Administrative Tribunal or the Supreme Court (TPA, 2013, Section 57), but never to the applicant. Either way, the report itself was quarantined from public scrutiny and the applicant unable to interrogate the “secret information” which remained confidential (TPA, 2013, Section 20[3]), with all actors protected from liability (TPA, 2013, Section 63[1]).

In allowing the use of such evidence the then Queensland Parliament allowed public interest and political expediency to override fairness (see Martin, 2014, p. 501). Basic rights, in accordance with Article 10 of the Universal Declaration of Human Rights, of being entitled to “a fair and public hearing by an independent and impartial tribunal” such as an administrative appeals tribunal, were set aside. Further, the procedures undermined the “equality of arms” principle where the opportunity ought to be afforded to “all parties to a proceeding” to present “their case under conditions that do not disadvantage them” (Attorney General, 2015; see also *Dietrich v The Queen* 1992). Even the former government conceded that the Act breached rights required by “section 4(2)(a) of the *Legislative Standards Act 1992*”, yet justified their disregard on the grounds of public safety and needing to maintain the integrity of criminal intelligence (Attorney General, 2015; see also TOCL, 2016, p. 104).

Of course, this is not the only legislation in Australia to contain such non-disclosure provisions because of public safety or national security, where the withholding of information takes precedence over an applicant’s right to know (see, for example, the *National Security Information (Criminal and Civil Proceedings) Act 2004* or the *Tattoo Parlours Act 2012* and *Tattoo Parlours Regulation 2013 NSW*). These laws have, and will continue to, undergo legal challenge. The first appeal under the tattoo industry legislation in New South Wales partially addressed the issue of “secret intelligence” (*Zahra v Commissioner of Police*, 2014), but the decision was nevertheless upheld. Similarly, in the case of *Smith v Commissioner of Police* in 2014, the adverse outcome was based on recent criminal history, where it was deemed too soon after the applicant’s drug charges to be convinced that he was suitable to hold a licence and as such it was contrary to public interest. Further there was an attempt to challenge in Queensland in November 2014, albeit unsuccessfully (*Kuczborski v The State of Queensland*, 2014; see also Kampmark, 2014). The earlier case of *Kable v Director of Public Prosecutions* in 1996 outlined the need to ensure the courts were, in essence, “independent of the executive government of the State”.

The refined principle in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* found that “legislation which purports to direct the courts” might impair their independence and impartiality. The clarification of the *Kable* principle in *South Australia v Totani* in 2010 questioned the “use of intelligence-based evidence in courts” (Guy, 2013, p. 285) where the introduction of such material incriminates defendants yet they are unable to cross-examine it. While that judgement did not invalidate the laws, according to the High Court of Australia decision, some of the justices did note that the term “association” was not adequately defined (TOCL, 2016, p. 109). By contrast, in the 2013 case of *Pompano*, the High Court ruled that reliance on “criminal intelligence” was not deemed a limitation because it is regarded as a separate “species of secret evidence” (Martin, 2013, p. 119). With respect to tattoo licensing, it may seem that the High Court had resolved issues surrounding secret evidence, yet the definition of criminal intelligence was omitted from the TPA of 2013 (TOCL, 2016, p. 155).

We can turn to Canada, the UK, and the USA to learn that “without a Bill of Rights requirement, Australian courts can be legislatively ordered to delete natural justice ... to be replaced by curial administration of fairness” (Churches, 2010, p. 20). The courts can follow the legislation and disclose only the information deemed non-criminal intelligence, hence rendering such Acts valid. Additionally, as determined in *Dietrich v The Queen*, the courts merely have to notify the type of intelligence information, not the specific content. Yet, the European Court of Human Rights has upheld that “sufficient information about the allegations” ought to be provided (Churches, 2010, p. 20). Nevertheless, within this fraught legal landscape lies a significant gap that allowed the non-disclosure principles to exist unchallenged, or unsuccessfully challenged. It remains that using secret evidence as a basis for a decision inhibits and impairs the ability and opportunity for the decision-maker (or a reviewing tribunal or court) to afford procedural fairness to the affected person (TOCL, 2016, p. 161).

3. Consequences of the TPA

It is not known precisely how many tattoo businesses operated in Queensland during the relevant period, but it is in the order of 300 to 400 (Mackander, 2014). Within six months of the TPA coming into force, it was suggested that up to one-fifth of tattoo studios had closed, and while any direct causal link cannot be claimed, it is implied that this was because the new licensing arrangements were deemed difficult, and so many owners and artists had failed to apply for a permit (Doorley, 2014). The TPA had no “grandfather” element and so those who had been in business for years still had to seek a licence, as did any new entrant (Keim, 2014). While statistics are difficult to obtain, it is suggested that for the financial year to 30 June 2015, over one thousand tattoo studio licences had been dispensed by the Office of Fair Trading and over 150 new ones had been submitted from then until the end of January 2016 (TOCL, 2016). It is claimed that only seven artists and four operators “were refused on the basis of an individual’s alleged association with criminal organisations” in the initial round of applications (TOCL, 2016, p. 372; Skene, 2016).

One case was of a studio owner who had been operating for more than three decades. He received a “close order” as he was deemed a security risk, despite not having any criminal convictions. At the time he was said to be one of “13 other tattooists who were refused licences out of almost 44,000 applicants as of the end of 2015” (Robertson, 2016, p. 1). Media reports imply that his business closure affected others that supported or relied on his trade, highlighting the wider ramifications for commerce (Snowdon, 2016). In another case, according to media articles, a woman was not granted a licence by the Office of Fair Trading and closed her business immediately. She had no prior criminal convictions and felt her name had been “tarnished”, that she had been branded as “guilty”, and “discriminated against” (Edwards, 2015). Partly as result of similar media attention and some public concern about the laws, the Taskforce on Organised Crime Legislation (TOCL) was given the remit to review the suite of laws on 7 June 2015, with an extended submission date of 31 March 2016 to the Attorney-General and Minister for Justice in Queensland. The Taskforce largely comprised police, legal, and justice representatives. Its report observed that “persons caught by the legislation were inhibited in their work and employment choices and pursuits under the suite’s new vocational licensing laws” (TOCL, 2016, p. 11).

The Australian Tattooists Guild (ATG) — a not-for-profit body founded in 2013 in response to the legislation — made a submission to the Taskforce based on surveys and community consultation (ATG, 2016, pp. 3-4). The ATG concluded that the legislation did not offer sound protections for consumers and was deleterious to the industry as a whole. They argued that the word “parlour” is outdated; that the legislation was “invasive” and “intrusive”; and created problems for both professional tattooists and the general public alike (ATG, 2016, pp. 4-5).

Their critique of the laws was manifold but underscored the absence of industry and community consultation; that members were disadvantaged as they would have to apply for separate licences to work across jurisdictions; that checks were onerous such as finger or palm printing in addition to police background checks; and that the application process was haphazard with considerable delays and confusion. There were attendant problems in discerning exactly who should be licensed, for example, in circumstances where there were company structures, or partners and then part-time artists operating. Businesses were severely hampered, they said, as there were reports that building owners were not renewing tenancy arrangements, or that insurers were withdrawing apparently on the basis of negative public discourse and the uncertainty that the new legislation wrought (ATG, 2016, pp. 4-5).

More importantly, the legislation included no certification checks regarding education or training (especially in relation to cross-contamination or infection control). In this way, the sole reason a person might be rejected for a licence was on the basis of a perceived association with an OMCG or being a “controlled person”, rather than about their qualifications and experience. The ATG remarked how this can impact on public safety as it provides false guidance to consumers that the person is licensed because of their skills, when it is only about their criminal associations. The ATG conceded that forty to fifty years ago there were significant connections between OMCG and “tattoo parlours” but stressed that this has declined in the 21st century. By comparison, the Taskforce cited information from the Crime and Corruption Commission suggesting that some tattoo studios can be involved in drug-related crime and money-laundering activities, and that some tattoo operators had been subjected to threats and had to seek “protection” from OMCG members, where in several cases operators had been forced out of business (TOCL, 2016, p. 367).

Over twenty-five statements from individuals and businesses across several states were included in the ATG submission reflecting personal experiences with problems under the new legislative regime (ATG, 2016). While many artists supported the need for regulation of their industry, they nevertheless opined that the TPA operated in an unnecessarily bureaucratic and discriminatory manner. Our analysis, conducted for this paper, of the themes raised in these submissions reveals the following five areas of concern:

1. new studios were starting up with unqualified or amateur operators, and in many cases the OMCG-related studios were still operating;
2. the delay in obtaining licences caused considerable concern about practising illegally in circumstances where the licence was continually delayed or eventually not granted (with significant fines attached);
3. because of jurisdictionally-based licensing schemes there was an inability to travel or to host interstate and international tattooists as “guest artists” which impacted creativity and diversity;
4. police were attending studios unannounced and exercising search powers which was a stressful, insulting, and humiliating process that had the capacity to damage reputations; and
5. bureaucratic frustrations embedded in the licensing processes (with several saying it took six months to a year comprising multiple visits to police or the Office of Fair Trading plus numerous phone calls), coupled with the often contradictory advice and high fees, resulted in a lack of faith in the system.

The Taskforce duly reported to the government, and in September 2016 the Attorney-General introduced the Serious and Organised Crime Legislation Amendment Bill 2016 addressing most of the laws introduced in 2013. However, the TPA (relabelled as the *Tattoo Industry Act*) remains to oversee the licensing of body art tattooing with a view to decreasing the risk of criminal activity. The recommendations adopted in the Bill included a semantic shift from use of the word “parlours” in favour of “industry”. The process for applying for a licence has been rendered “more procedurally fair” and in particular removes the “use of confidential criminal intelligence in licensing decisions”. Furthermore the application process is less bureaucratic and there is provision for permits for mobile, guest, visiting artists and opportunities to take part in conferences and exhibitions (TOCL, 2016, pp. 385-386). The penalties continue to be quite substantial being \$63,000 for a first offence, over \$88,000 or six months for a second offence and \$126,000 or 18 months for a third offence; with minor penalties for failure to display licences of over \$5,000 (OFT, 2017). The new Bill proposed to allow those who were denied a licence under the TPA to reapply; the requirement to re-apply in full every one to three years was abandoned; finger and palm prints are to be taken once only; and the commissioner of police is no longer able to refuse a licence (Skene, 2016). It now falls to the CEO of the Office of Fair Trading to grant the licences, but criminal history in the previous decade is still a factor, as it is the honesty or integrity of the applicant that is paramount.

4. Conclusions

The haste in which these kinds of laws have been cast, labelled as “hyperlegislation” by some, raises significant questions (Ayling 2013). “The rush to criminal law” prevents examination of other options or indeed “whether existing laws were sufficient to deal with the perceived problem” and this pattern of “reactive legislation” appears to be “well-entrenched” (Loughnan, 2009, p. 458). They tend to be based around a distortion of perceptions about what constitutes organised crime without the support of any empirical evidence (Lurigio & Binder, 2013). There has been little opportunity to counter the “tendency of politicians to leap hastily at punitive options” and instead, through a deliberative process, ensure that the “very best laws possible are produced” (Ayling, 2013, p. 16). Clearly, such “hothouse conditions of moral panics and knee-jerk populism are ... rarely conducive to the formulation of good public policy” (Morgan et al., 2010, p. 588). It should also be pointed out that these laws can be expensive, for within two years of enactment, the New South Wales *Crimes (Criminal Organisations Control) Act 2009*, for example, was held unconstitutional by the High Court of Australia, and therefore “it had achieved nothing substantive except the expenditure of a significant amount of taxpayers’ money on the legal costs of defending it” (Ayling, 2013, p. 12). Yet, they are seen to allow governments to have a symbolic piece of legislation that shows they are doing something to address organised crime problems (Ayling, 2013).

These are not the first laws to have been criticised for raising “serious concerns about civil liberties and ... the undermining of the rule of law” (Morgan et al., 2010, pp. 580, 582). They are predicated on the view that a supposed biker menace has been so great that civil rights are now “unaffordable luxuries”, in much the same way that anti-terror laws have the capacity to erode our liberties (McCulloch, 2002, p. 283). However, the governmental responses to perceived OMCG threats meant that the tentacles of the law infiltrated key aspects of social and commercial life (Morgan et al., 2010). With respect to the TPA, or the revamped TIA, it means that every tattoo business, new or established, must undergo the application process for licensing. In addition these laws do little to regulate the body art industry as they fail to address public health or trade practices elements. This licensing regime does not prevent “bad tattooists” from operating because it enforces no specific levels of skills, training or qualifications (Mackander, 2014).

The issues highlighted here are visible in many renditions of modern law. Similar legislation extends to those in skilled occupations where hundreds of thousands of tradespeople can be subject to deregistration if there exists any secret police information that demonstrates links to “outlawed” groups (Keim, 2014). The use of “criminal intelligence” information is present in applications to drive a taxi, work with children or for many government positions, such as in corrective services. Such laws violate the right to work for not only the applicant but, as noted earlier, any close associates of the licensees. If given a control order or denied licensing because of so-called criminal associations then an individual can be prevented from working in a variety of fields, such as the security or liquor industries (Loughnan, 2009; Keim, 2014). “Regulation through licensing is an acceptable way of seeking to ensure high standards in an industry. However, no one should be excluded from their chosen occupation on the basis of information which has not been disclosed to them” (Keim, 2014, p. 3). It is not yet clear how the revised licensing schemes, such as the TIA, which came into operation on 9 March 2017, will impact on business enterprises in the state, but there are clearly lessons to be learned from its predecessor.

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