Australia: Constitutional challenge to Queensland anti-association laws

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Hells Angels member Stefan Kuczborski lodged a High Court application in March challenging the constitutional validity of "anti-bikie" legislation enacted in Queensland last October.

Introduced by the state's Liberal National Party government with the bipartisan support of the Labor opposition, the legislation is the latest in an escalation of laws passed by state and federal governments since 2001—Labor and Liberal alike—that erode basic democratic rights, including free speech, freedom of association and the right to remain silent.

Initially, such measures were rolled out under the guise of combating terrorism. Over the past several years, fresh pretexts have been promoted by the political and media establishment, including the need to suppress violent "bikie gangs." Far from being a purely Queensland development, such laws were pioneered by state Labor governments and strongly backed by the previous federal Labor government of Julia Gillard.

Queensland's legislation sweeps aside basic principles of criminal law and procedure. Under the hysterically named "Vicious Lawless Association Disestablishment Act" (VLAD Act), anyone convicted of committing a declared serious offence while a "participant" in an association (which includes taking part in one event), will be found to be a "vicious lawless associate"—unless they can prove that the association does not have a purpose of "engaging in, or conspiring to engage in, declared offences."

This not only reverses the burden of proof for a criminal trial. It also creates an impossible evidentiary hurdle for an accused person, who is required to prove a negative in order to make out their defence. There is also an extensive list of "declared offences," which currently includes unlawful assembly, affray, riot and drug possession. However, this list can be expanded by regulations, that is, by ministerial edicts.

Such "associates" face a mandatory 15-year jail term, on top of any other sentence. Association office bearers face an additional mandatory 10 years' imprisonment. Parole will also be denied, unless a prisoner turns state informer. Before being convicted, the normal presumption in favour of bail is also reversed. In summary, an office bearer of an "association"—otherwise facing, for example, a 3-year sentence for an offence—can be denied bail and then imprisoned without parole for 28 years.

Introduced alongside the VLAD Act, the Criminal Organisations Disruption Act (CODA) created a mechanism to prosecute individuals for the "crime" of meeting in public with others. The CODA provides that any person who is a "participant" in a "criminal organisation" and is "knowingly present" in a "public place" with 2 or more other such participants commits an offence. The minimum penalty is 6 months imprisonment. The maximum is 3 years.

Under the CODA, it is also an offence for participants to enter a "prescribed place," attend a "prescribed event" or recruit or attempt to recruit anyone to become a participant. As with the VLAD Act, the CODA reverses the onus of proof. In their defence, those accused must prove that the named organisation is not one whose participants have as their purpose, or one of their purposes, engaging in or conspiring to engage in "criminal activity."

The first woman arrested under the CODA was a 40-year-old library assistant. In January, Sally Keuther was accused of meeting with two men (one of whom was her partner, the other an associate of his) while wearing "bikie" club colours in public. Other reported arrests include five men drinking beer in a suburban pub, and a group of five people buying ice creams

during a family holiday.

In January, the *Brisbane Times* reported that between 6 October 2013 and November 2013, "Operation Resolute"—supposedly launched against "Criminal Motorcycle Gangs"—arrested 384 people on a combined 817 charges. However, only 3.4 percent of those charges, according to the *Brisbane Times*, could be considered "organised crime" type offences, such as drug trafficking and extortion. Further, of the 73,309 offences reported in October and November 2013 in Queensland, "bikies" accounted for just 1 percent.

The Queensland laws are not "anti-bikie" laws. They are broad anti-association laws, imposed in the context of developing opposition to state and federal policies of social austerity, mass surveillance and preparations for war. The Queensland laws can be employed against any organisation that the state government deems—for its own political purposes—to be illegal. The Queensland Law Society commented in its magazine *Proctor* last December that the VLAD Act's definition of "association" is so broad that it can apply to groups such as "workplaces, social clubs, sporting associates or teams." An "association" could also be a political group, organisation or party.

Kuczborski's written submissions have not yet been published on the web site of the High Court, Australia's supreme court, but it seems that his legal challenge will contain at least two strands. Both reflect the fact that the Australian constitution contains almost no protection of fundamental democratic rights.

Kuczborski's lawyers will argue that the VLAD Act breaches the constitutional doctrine of the "separation of powers." This aspect of the challenge is likely to centre on the objection that laws that compel judges to impose mandatory sentences could undermine the independence of the courts. That is, judges can be forced to act as mere "rubber stamps" for the government.

Kuczborski's case will also apparently seek to overturn the CODA's anti-association provisions. According to a joint media release by law firm Irish Bentley Lawyers and the United Motorcycle Council (Qld) last month, Kuczborski's lawyers will argue that the legislation breaches the Australian constitution by preventing people from exercising their right to meet for political reasons.

The constitution contains no bill of rights, however, or any other guarantee of key democratic rights, such as the right to associate. Rulings by the High Court in 2013 severely eroded the scope of the constitution's already very narrow and limited "implied freedom of political communication," which might be the basis for Kuczborski's legal argument.

In recent years, the High Court has also upheld laws providing for mandatory sentences, "control orders" without findings of criminal guilt and closed court hearings in which secret "criminal intelligence" is presented by the state in prosecutions.

These rulings have all been supported by Labor and Liberal governments alike. The VLAD Act and CODA are yet another development underlining the unanimity within the political establishment on erecting police-state methods of rule.

The author also recommends:

Australian High Court further erodes free speech [8 March 2013]