



ACT HUMAN RIGHTS
COMMISSION

Australian Capital Territory

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11 October 2019

Dear Dr Goldsworthy

Review of legislative provisions designed to target organised crime activity

The ACT Human Rights Commission welcomes the opportunity to make a submission to this important review. Thank you for the extension of time afforded to us to provide this submission.

The Commission has previously called for an independent review of the effectiveness of the ACT's measures to target organised crime activity, including outlaw motorcycle gangs.¹ We are therefore pleased to see that the scope of the review is not limited to the mandatory 12-month review of the crime scene powers in the *Crimes Act 1990*, but also includes a broader assessment of a range of other ACT legislative measures designed to target organised crime activity.

The attached submission is primarily focused on those aspects of the legislation under review that we consider give rise to concerns with the *Human Rights Act 2004* (HR Act).

Yours sincerely

Dr Helen Watchirs OAM
President and Human Rights Commissioner

¹ ACT Legislative Assembly, Standing Committee on Justice and Community Safety, *Annual and Financial Reports 2017-2018 Hearings: Transcript of Evidence*, 14 November 2018, p 46 (Dr Helen Watchirs OAM), available at: <http://www.hansard.act.gov.au/hansard/2017/comms/justice19a.pdf>.

About the ACT Human Rights Commission

The Commission is an independent agency established in 2006 by the Human Rights Commission Act 2005. Its main object is to promote the human rights and welfare of people in the ACT. The Commission comprises a number of Commissioners, including the ACT Human Rights Commissioner, the ACT Victims of Crime Commissioner, the ACT Discrimination Commissioner, and the ACT Children and Young People Commissioner, with distinct statutory functions that give effect to, support, or are otherwise relevant to fundamental human rights.

The Commission contributes to law reform in several ways, including by reviewing legislative proposals as part of the cabinet process, and advising government on the impact of laws on human rights, including obligations of public authorities to comply with human rights. As independent office holders with key oversight and advocacy functions in relation to human rights, including the rights of victims of crime and the welfare of the community generally, the adequacy and effectiveness of measures to deal with organised crime are areas of concern for the Commission as a whole.

Summary of our submission

- The Commission is aware of the serious community concerns about criminal activity by outlaw motorcycle gangs. There can be little doubt that any escalation of violence linked to outlaw motorcycle gangs can lead to a range of serious harms to victims and the community.
- The Commission strongly supports reasonable, justifiable and targeted measures to address threats of violence and criminal activity by outlaw motorcycle groups. We are committed to working constructively to address community concerns about violence and the activities of outlaw motorcycle gangs operating in the ACT. As set out in our submission below, we have consistently supported appropriate and proportionate measures to deal with organised crime, in particular, targeted measures taken to address specific gaps in the existing legislative framework, which are accompanied by adequate safeguards to ensure that powers are not abused.
- Human rights and community security are interdependent, and it is therefore important that measures targeting organised crime are not framed as setting individual rights against community interests. Human rights are not an impediment to making effective laws. Certainly, tough choices must be made. However, the HR Act recognises that limitations on rights are permissible, within the context of the rule of law, and within the parameters of legality, necessity, proportionality, and non-discrimination.
- Consistent with the government's express undertaking that measures targeting organised crime 'must continue to be compliant with the ACT's commitment to being a human rights jurisdiction',² we consider that it is important that the review be informed and underpinned by the ACT's human rights framework. In particular, any recommendations for legislative reform arising from the review should ensure that they meet the minimum standards for compliance with the HR Act.

² ACT Legislative Assembly, *Parliamentary Debates*, 28 November 2017, p 5126 (Gordon Ramsay MLA), available at: <http://www.hansard.act.gov.au/hansard/2017/pdfs/20171128.pdf>.

The ACT's human rights framework

1. The *Human Rights Act 2004* (HR Act) protects a range of rights and freedoms that are primarily drawn from the International Covenant on Civil and Political Rights (ICCPR). By their nature, measures targeting organised crime and outlaw motorcycle gangs are likely to limit various rights contained in the HR Act, including the right to equality and non-discrimination (s 8), the right to freedom of association (s 15), the right to privacy, home and family (s 17), and the right to a fair hearing (s 21).
2. The HR Act, however, recognises that few rights are absolute and in accordance with established international human rights norms, reasonable limits may be placed on rights with the aim of balancing competing interests. Limitations on human rights must meet the terms of s 28 of the HR Act:
 - (1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society¹.
 - (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
 - (a) the nature of the right affected;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relationship between the limitation and its purpose;
 - (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.
3. In general, this means that any measure that limits a human right must comply with the following criteria:
 - be prescribed by law;
 - be in pursuit of a legitimate objective;
 - be rationally connected to its stated objective; and
 - be a proportionate way to achieve that objective.
4. **Basis in law**: The requirement for limitations on rights to be 'set by laws' requires not only that the measure limiting the right be set out in legislation, it must also be accessible and precise enough so that people know what they need to comply with or when the authorities can restrict the exercise of their rights. This means that discretionary powers must be appropriately circumscribed and include adequate safeguards to prevent against abuse. For example, if legislation gives discretion to a public official, the power must not be open-ended and non-reviewable; the legislation should clearly indicate the scope of the discretion and how it should be exercised.
5. **Legitimate objective**: Any limitation on a right must be demonstrably aimed at achieving a legitimate objective. A legitimate objective is one that is necessary and addresses an area of public or social concern that is pressing and substantial enough to warrant limiting human

rights. In general, it will not be a legitimate objective to limit a right simply to prevent an outcome that may be undesirable, offensive to some or inconvenient. The Commission considers that preventing, disrupting and responding to serious and organised crime, including outlaw motorcycle gang activity, in order to protect public safety is a legitimate objective.

6. **Rational connection**: It must also be demonstrated that any limitation on a right has a rational connection to the objective to be achieved. The key question is whether the relevant measures are likely to be effective in achieving the objective being sought. It is not enough to put forward a legitimate objective if, in fact, the measure limiting the right would not make a real difference to achieving that objective.
7. **Proportionality**: A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. Even if the objective is of sufficient importance and the measures in question are rationally connected to the objective, the limitation may still not be justified because of the severity of its impact on individuals or groups. In considering whether a limitation on a right is proportionate, some of the relevant factors include:
 - whether there are other less restrictive ways to achieve the same aim;
 - whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;
 - the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate;
 - whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.
8. It is a general principle of human rights law that human rights are to be interpreted generously and limitations narrowly. Our consideration of the human rights implications of the various laws under review is set out below. Our assessment is based on the minimum standards required by the HR Act, as described above.

Human rights implications

9. The Commission considers that the following legislative measures do not give rise to any significant human rights concerns:
 - **‘Drive-by shooting’ offence (under Section 28B of the Crimes Act 1900)**: The Commission is satisfied that the offence for ‘drive by shootings’, which was introduced by the *Crimes (Police Powers and Firearms Offence) Amendment Act 2017*, is a targeted measure that addresses a specific omission in the statute book, and is unlikely to give rise to any human rights concerns.
 - **Anti-fortification laws (under Division 10.9 of the Crimes Act 1900)**: The Commission supports the anti-fortification laws that were introduced by the *Crimes (Fortification Removal) Amendment Act 2017*. In our view, these laws are likely to assist police to deal more effectively with serious and organised crime, including outlaw motorcycle gang

activity, by enabling access to premises to execute search warrants, as well as enhancing police safety. These are important and significant objectives. While the scheme necessarily limits rights, in particular the rights to privacy and home (s 17, HR Act), we are satisfied that it is appropriately tailored and contains adequate safeguards to ensure that the scheme does not overreach beyond its stated objectives, that is, to assist police to gain safe access to premises to execute search warrants.³

- **NAPROs and exclusion orders:** The Commission is similarly supportive of the new non-association and place restriction orders (NAPROs) introduced by the *Crimes (Serious Organised Crime) Act 2016*, and the new move-on powers also introduced by the 2016 amendments. We consider that NAPROs, which are made by a court as part of a criminal sentence, are an appropriate way to strategically target organised criminal activity where required. In our view, the new move-on powers in the *Crimes Act 1900* (known as exclusion directions) improve on the previous scheme under the (now repealed) *Crime Prevention Powers Act 1998* by requiring relevant information about exclusion directions to be recorded (s 178). The Commission had previously expressed concerns about the lack of record keeping on the use of move-on powers in the ACT, which made it difficult to assess whether they were being used appropriately.

10. The Commission, however, considers that the following measures give rise to human rights concerns:

(i) Crime scene powers (under Division 10.4A of the Crimes Act 1990)

11. The *Crimes (Police Powers and Firearms Offence) Amendment Act 2017* inserted new Division 10.4A into the *Crimes Act 1990* to enable police officers to establish crime scenes. A crime scene can be established on private premises, provided that the owner or occupier consents, in circumstances where the police officer ‘reasonably suspects that an offence punishable by a term of imprisonment has been or is being committed at the place or somewhere else’, and ‘considers that it is reasonably necessary to immediately establish a crime scene at the public place to protect or preserve evidence relating to the offence’ (s 210D(1)).
12. Where the owner or occupier of private premises does not consent, a crime scene can only be established where the police officer reasonably suspects that the offence is a serious offence, (punishable by imprisonment for 5 years or longer); arises out of use of a motor vehicle causing death or serious injury; or is a family violence offence (s 210D(2)). However, the police officer must make reasonable attempts to obtain consent of the owner or occupier, or otherwise consider that it is reasonably necessary in the circumstances to establish a crime scene without consent (s 210D(2)(b)).
13. Where a crime scene has been established, police officers can exercise various powers, including entering the place or any other premises to access the place, controlling the

³ For example, adequate judicial oversight is ensured through the requirement for the relevant orders to be made by the Magistrates Court upon application by the Chief Police Officer (ss 252N and 252T); the offence provisions for constructing or restoring fortifications are drafted in a way that goes towards ensuring that innocent individuals are less likely to be inadvertently captured (ss 252ZA and 252ZB); the threshold definition of a ‘specified offence’ required for making a fortification removal order is limited to more serious categories of offence (s 252M); and the entry and inspection powers are appropriately circumscribed (s 252R, s 252W) and subject to fixed time limits (eg, s 252V).

movement of people or things at the place, directing a person to provide their name and home address, and, if the police officer reasonably suspects a person possesses evidence removed from the place or has interfered with evidence at the place, detain and conduct a frisk search or ordinary search of the person (s 210G).

14. A crime scene can be established at a private premise for only as long as is reasonably necessary to preserve evidence, and for no longer than six hours unless a search warrant is obtained (s 210H). A crime scene cannot be established at private premises in relation to an offence more than once in a 24-hour period, unless related to another offence arising out of a different course of conduct (s 210I).
15. The Commission considers that legislative clarification of the authority of police to secure a crime scene in order to preserve evidence while a search warrant is being obtained is a legitimate objective. In our view, the human rights compatible way to combat serious crime in the long term is not to circumvent criminal due process, but rather to remove unnecessary obstacles to their effective prosecution. However, these powers inevitably involve limitations on human rights, including the rights to protection of the family and children (s 11, HR Act), privacy and home (s 12, HR Act), and freedom of movement (s 13, HR Act). While various safeguards have been included in the legislation, we are aware that concerns have been raised about the breadth of these powers. The ACT Bar Association and the ACT Law Society, for example, have expressed concerns that the ACT's crime scene powers are more expansive than those introduced in other jurisdictions.⁴
16. Given these concerns, we consider that the current review should give particular attention to whether these laws should be subject to additional safeguards, in particular:
 - whether the offence threshold for the use of the powers is appropriate;
 - whether review mechanisms should be included for the occupier of private premises where a crime scene is established;
 - whether provision should be made to ensure that alternative accommodation is provided for occupiers where they cannot continue to live in premises where a crime scene has been established;⁵ and
 - whether there are clear operating procedures to guide the exercise of the statutory powers.

(ii) Treatment of 'security sensitive information' under the Firearms Act 1996

17. The *Firearms and Prohibited Weapons Legislation Amendment Act 2018* introduced amendments to allow the registrar to withhold security sensitive information in deciding on a person's suitability for various purposes under the *Firearms Act 1996* (s 18A(2)). Where an application is made to ACAT or the court for review of a decision where security sensitive

⁴ See, statements by the ACT Bar Association and the ACT Law Society, *Traditional protections under threat by new police powers*, 29 November 2018, available at: <https://www.actlawsociety.asn.au/news/traditional-protections-under-threat-by-new-police-powers>; and *Concern over increased police powers*, 31 October 2017, available at: <https://www.actlawsociety.asn.au/news/concern-over-increased-police-powers>.

⁵ See, for example, s 179 of the *Police Powers and Responsibilities Act 2000* (Qld).

information has been withheld, the registrar must apply to ACAT or the court for a decision about whether the reasons disclose security sensitive information (s 18B). The applicant for review need not be told about the registrar's application (s 18B(3)). If ACAT or the court decides that the reasons disclose sensitive security information then ACAT or the court must ensure that information is not disclosed in any reasons for the decision (s 18C(2)(a)). ACAT or the court must also ensure that evidence or submissions must be received in private in the absence of the public, the applicant for review, the applicant's representative and any other interested party (s 18C(2)(b)), unless the registrar otherwise agrees (s 18C(3)).

18. The Commission is concerned that these provisions do not ensure that it should be for ACAT or the court to decide when and how to share security sensitive information. Instead, disclosure is only permitted where the information has been determined by ACAT or the court not to be 'security sensitive information', which has a very broad definition under s 18A(3).⁶ There are inherent dangers and unfairness associated with closed hearings and the use of secret evidence. Such provisions give rise to issues of incompatibility with the right to a fair hearing in s 21 of the HR Act if they have the potential to result in adverse licensing decisions being made without the individual affected being afforded a fair opportunity to respond to evidence on which the decision might be made.
19. We note that the registrar may choose to allow certain parts of any information to be released to the applicant in a hearing, despite that information's status as security sensitive information, (s 18C(3)). However, absent a power for ACAT or the court to weigh the potential harm of disclosing information against any impairment to the administration of justice should the information be withheld, and the ability to grant access to information on appropriate conditions ACAT or the court thinks fit, we consider that these provisions remain of concern with regard to their compatibility with the right to a fair hearing in the HR Act.

(iii) Commonwealth Unexplained Wealth Legislation Amendment Act 2018

20. We understand that the *Unexplained Wealth Legislation Amendment Act 2018* (Cth) will, among other things, extend the scope of restraining orders and unexplained wealth orders in the *Proceeds of Crime Act 2002* (Cth) to all Territory offences and relevant offences as specified by participating States.
21. Statutory schemes for confiscating unexplained wealth (and proceeds of crime more generally) give rise to difficult human rights issues. While such schemes are aimed at legitimate objectives in the public interest, their compatibility with human rights will wholly depend on the inclusion of sufficient safeguards to ensure that their impact on individuals is proportionate to the public interest.
22. While the national scheme does contain some important safeguards, (such as certain protections for innocent third parties), the scheme overall involves limitations on the right to

⁶ 'Security sensitive information' is defined in s 18A(3) to mean: 'information held by a law enforcement agency that relates to actual or suspected criminal activity ... the disclosure of which could reasonably be expected to – (a) prejudice a criminal investigation; or (b) enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement; or (c) endanger a person's life or physical safety.'

a fair trial and related rights (such as the presumption of innocence, prohibition against retrospectivity, prohibition against self-incrimination; and the right to legal representation). The human rights implications of the national scheme were extensively considered by the Parliamentary Joint Committee on Human Rights in *Report 13 of 2018* (pp 121-142).⁷ We draw your attention to that report, as similar concerns would arise under the HR Act.

23. We understand that the new Commonwealth laws will not exclude or limit state or territory laws where they can operate concurrently, and, for laws of participating jurisdictions, even where the state or territory law deals with the same matter (s 14L).
24. Should the ACT decide to enact its own unexplained wealth laws, we consider that such a scheme should incorporate the following minimum features for compatibility with the HR Act:
 - Regardless of whether the proceedings are classified as ‘civil’, the presumption of unlawful conduct must be narrowly contained to be compatible with the presumption of innocence. In our view, the prima facie link to a Territory offence should be connected to organised crime, and should not be left open to include any type of criminal conduct in which an unspecified amount of benefit has been obtained however minimal.
 - The court must retain full discretion not to make an unexplained wealth order (and related orders, such as preliminary orders and restraining orders) when there is a serious risk of injustice or hardship. This should apply even if all relevant criteria for making the orders have been satisfied.
 - The ability to make a restraining order or a preliminary unexplained wealth order without notice being given to the person who is the subject of the application should only be permitted in exceptional circumstances.
 - A final unexplained wealth order must not be made in relation to a person in the absence of that person. In addition, there should be no provision for interim orders to automatically crystallise into final orders.
 - The discretion to initiate unexplained wealth order proceedings should be subject to appropriate legislative guidance.
 - Unexplained wealth orders should be subject to full appeal rights.

(iv) Restraint and forfeiture of property under the Confiscation of Criminal Assets Act 2003

25. The Commission has previously written to the Attorney-General expressing concerns that the *Confiscation of Criminal Assets Act 2003* (COCA Act) may be incompatible with human rights. In particular, we are concerned by the absence of a hardship/interest of justice exception, limited judicial discretion, and broad prosecutorial powers to initiate confiscation proceedings.
26. In contrast to other confiscation regimes, a significant departure of the ACT scheme is the lack of provision of an undue hardship clause to safeguard against the potential for forfeiture

⁷ Available at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2018/Report_13_of_2018.

orders to impact disproportionately on the person and/or family members who may be affected by such an order, particularly where they relate to high value assets, such as a person's home. For example, comparable legislation in Victoria gives the court the discretion to take account of any hardship that is reasonably likely to be caused to any person by reason of a forfeiture order.⁸ The absence of a similar provision in the ACT legislation was noted by the ACT Supreme Court in *DPP v Close*:

[T]he legislature has not given this Court any discretion in the making of forfeiture orders based on hardship to innocent third parties, such as children.⁹

27. The Court also noted that guidelines published by the DPP acknowledged that forfeiture orders made in accordance with the COCA Act 'may cause hardship to innocent third parties, and were the subject of limited judicial discretion'¹⁰:

Neither the DPP nor the respondent will be able to rely on the exercise of judicial discretion to mitigate or temper the effect of orders that might otherwise be seen as excessively "harsh" or "draconian".¹¹

28. Forfeiture orders in relation to a person's home engage s 12 of the HR Act as they are an interference with the person's home. Where the forfeiture order will result in the person and their family being removed from their home, such an order also constitutes an interference with the person's family, which is protected in s 12 as well as s 11 of the HR Act. Forfeiture orders may also affect children's rights to protection in accordance with the best interests principle (s11(2), HR Act).
29. The overall compatibility of the COCA Act will depend on whether the confiscation regime includes sufficient safeguards to ensure that any limitations on human rights resulting from a particular forfeiture order are reasonable, necessary and proportionate to a legitimate objective (s 28 of the HR Act). As noted above, the lack of discretion accorded to the court under the COCA Act, particularly to take account of hardship issues, when determining whether to grant forfeiture order is a significant shortcoming of the ACT confiscation scheme, and gives rise to issues of inconsistency with the HR Act. The disproportionate impact of a forfeiture order is likely to be further exacerbated where there is a tenuous connection between the property that is sought to be confiscated and the criminal wrongdoing.
30. The Commission considers that the range of human rights issues raised by the COCA Act, which was enacted prior to the passage of the HR Act, warrants a comprehensive review of the legislation. It is particularly important that any review of the COCA Act ensures consistency with fundamental human rights principles.

⁸ See, *Confiscation Act 1997* (Vic), s 33(5), and s 45.

⁹ *DPP v Close* [2015] ACTSC 10, [62].

¹⁰ *Ibid.*

¹¹ *Ibid.*