

The CODOLA Act Amendments and the Rule of Law

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Q: What do holders of liquor licences, electrical and building contractors in Queensland have in common?

A: They can all have their licences taken off them “because some unreliable information on a police file, which has not been disclosed to the affected person, indicates that, some years ago, this respectable licensee was a member of an organisation which the Minister, without any form of due process, has caused the Governor to declare to be a criminal organisation”. Barrister Stephen Keim QC analyses the impact the Queensland “criminal organisation” laws can have on people in Queensland for RoLIA.

Introduction

Lord Bingham formulated the essence of the rule of law as “that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts”.¹ For present purposes, it is useful to note both the positive and negative dimensions of the rule. Laws obligate and protect. Discrimination on

either side of the ledger is equally objectionable.

His Lordship’s second sub-rule is “that questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion”.

The third sub-rule is “that the laws of the land should apply equally to all. Save to the extent that objective differences justify differentiation”.

And the fourth sub-rule is substantive in nature: “the law must afford adequate protection of fundamental human rights”. This sub-rule takes the rule of law beyond an obsessive concern with formalism. Parliaments that pass laws imposing the death penalty for being gay or for following or abandoning a particular religion depart from the rule of law as surely as those governments which use the secret police to murder and pillage.

Apart from human rights law’s obsession with equality before the law,² this paper places emphasis on article 6 of the International Covenant on Economic, Social and Cultural Rights³ which provides for recognition of “the right to work, which includes the **right of everyone** to the opportunity **to gain his living by work which he freely chooses or accepts**”.

Lord Bingham’s seventh sub-rule is “that adjudicative procedures provided by the state should be fair”. In this respect, His Lordship emphasises the importance of open hearings and open justice.

This principle is, of course, reinforced by international human rights law. Article 10 of the UDHR states: “Everyone is entitled **in full equality to a fair and public hearing** by an independent and impartial

tribunal, in the **determination of his rights and obligations**".

A wave of legislation passed by the Queensland Parliament since the middle of October 2013 has trampled upon the principle of equality by the law. The legislation has arbitrarily chosen a group of people publically identified as criminal motor-cycle gangs and has imposed discriminatory legal disabilities in the area of freedom of association; mandatory discriminatory prison sentences; and harsh prison regimes including compulsory solitary confinement. The purpose of this paper is to examine this departure from the rule of law and the principle of equality before the law in the area of freedom to follow one's chosen occupation.

The CODOLA Act

On 27 November 2013, Royal Assent was given to the *Criminal Law (Criminal Organisations Disruption) and other Legislation Amendment Act 2013* (Qld) ("the CODOLA Act"). This piece of legislation made changes to a series of Acts which regulate different occupational pursuits. The affected legislation includes the *Electrical Safety Act 2002*; the *Liquor Act 1992* ("the Liquor Act"); the *Queensland Building Services Administration Act 1991*; ⁴ the *Second-hand Dealers and Pawnbrokers' Act 2003*; and the *Tow Truck Act 1973*.

The methodology for preventing people from pursuing their chosen occupation is similar across the different acts. Because of the economic importance of the liquor industry, both to the community and individuals engaged therein, I have chosen to consider the amendments in terms of their effect on the that industry.

The Liquor Industry

Section 228B

The CODOLA Act amends the Liquor Act by a provision that says that an individual is disqualified from holding a licence, permit or approval under the Liquor Act if and while the individual is an **identified participant** in a **criminal organisation**.⁵

Criminal Organisation

The concept of **criminal organisation** was created by an earlier piece of legislation, the *Criminal Law (Criminal Organisations Disruption) Act* ("the CODA Act") which was assented to on 17 October 2013. The definition of "criminal organisation"⁶ has three alternative ways of being satisfied. Up to now, the practical impact of the changes has come from "an entity declared by regulation to be a criminal organisation".⁷

On this definition, the rights of people are dependent totally upon discretion exercised by a Minister of State. The Attorney-General can cause the Governor in Council to name any entity to be a **criminal organisation**. No evidentiary process is required. It may be that some people in the entity may have committed offences on some occasions. Others may have led blameless lives. Or no one may ever have committed an offence. On the say so of the minister, rights are stripped away.

This has already occurred. The Parliament, when it passed the CODA Act, declared 26 organisations to be **criminal organisations**.⁸ No evidence was required. The people affected were given no notice of the allegations. Those who were blameless were grouped with those who may have been guilty of criminal

conduct.

Identified Participant

Since an **identified participant** loses all her rights to hold a licence under the Liquor Act, one might think that a rigorous due process would ensue before a person could be so identified. One would be wrong. An **identified participant** in a criminal organisation is simply a person identified as such by the Commissioner of Police.⁹

The meaning of “**participant**” is very broad. It includes a person who has attended one gathering of persons who participate in the affairs of the organisation. It includes a person who takes part in the affairs in any way. It includes a person who has asserted herself to be a member. It includes a person who has sought to be associated with the organisation.¹⁰

What is not clear from the CODOLA Act amendments is whether there is any lawful limit on the Commissioner identifying participants on the basis of actions which occurred long in the past. Can the disqualification take place notwithstanding that an individual has long since her ties with old friends and associates?

There are some worrying indications on this question in other amendments effected by the CODOLA Act, this time to the *Police Service Administration Act 1990* (Qld). These enable 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.¹¹ Self-restraint, in the circumstances, from the Commissioner may be too much to ask.

The Procedure

Under the new regime, the Commissioner for Liquor and Gaming, in any licensing decision under the Liquor Act, is to enquire of the Commissioner for Police as to whether a relevant person is banned as having been identified as a participant in a criminal organisation.¹² This request goes not only to individuals seeking to be licensed but to persons holding office in corporations, partnerships or unincorporated associations which are licensed or seeking to be licensed.¹³

The Police Commissioner must provide the information he holds¹⁴ as to whether any relevant person is an **identified participant**. And the Commissioner for Liquor and Gaming must act on it.¹⁵

Secrecy

And does the newly banned applicant or licensee get to know what struck them? Probably not. The usual rule¹⁶ about receiving reasons for a negative decision is abrogated.¹⁷ And, although the Tribunal retains a jurisdiction to hear appeals,¹⁸ both the Tribunal and the Supreme Court (on appeals on matters of law from the Tribunal) are given a discretion to receive information in secret and to make their respective decisions without the appellant ever knowing the case she has to meet.¹⁹

Scope

It probably takes some reflection to comprehend the wide variety of occupations affected by these amendments to the Liquor Act. Not only are licenses issued under the Act for commercial hotels, casinos and convention centres,²⁰ licences are also issued for community clubs, restaurants and bars of many different varieties.²¹

These licences are held by people and businesses who, under the law that has long existed, have been subject to scrutiny and already found to be fit and proper people.²² These are people who may have invested large amounts of money and time and built up thriving businesses or worked many years to keep struggling but socially useful businesses alive. And some of these people are likely to have their license stripped away.

This is not because they have committed an offence. This is not because they are or have been members of an organisation that has been found by a court of law to have engaged in criminal activity. This is not even because they have been proven in an open court of law to be a member of an organisation deemed to be a criminal organisation.

It may be because some unreliable information on a police file, which has not been disclosed to the affected person, indicates that, some years ago, this respectable licensee was a member of an organisation which the Minister²³, without any form of due process, has caused the Governor to declare to be a criminal organisation.

The Electricity Safety Act 2002 (“the ESA”)

A similar regime of legal disability has been instituted in the electricity industry.

For obvious reasons, a person may not perform or supervise electrical work unless the person is a holder of the appropriate licence.²⁴

Neither may a person conduct a business which involves the carrying out of electrical work without an electrical contractor’s licence.²⁵

The opportunity to hold such licences are hard won with many years of training and study required to acquire the necessary skills.

The CODOLA Act amends the ESA so that a person **identified** by the Commissioner of Police as a **participant** in a **criminal organisation** must be stripped of her licence and stripped of her ability to work as an electrician or conduct her electrical contractor’s business.²⁶ The same secrecy applies as under the Liquor Act. The same inability to confront the information on which one has been identified is maintained. There is the same lack of any necessary connection between wrong doing on the part of the individual and the perceived wrongdoing that led to the organisation being deemed criminal.

Men and women who may never have been accused of a criminal offence will be stripped of their livelihood.

Building Contractors

As the list of amended legislation set out above indicates, these changes are not restricted to hoteliers and electrical contractors.

At least fifty-six different types²⁷ of licensed building contractors,²⁸ along with site supervisors²⁹ face the same type of arbitrary disqualification regime.³⁰ They include bricklayers, gasfitters, rooftilers and waterproofers.

A swathe has been cut through our skilled occupations. In these fields, the right to work at one’s chosen occupation has been withdrawn from many.

Conclusion

Many aspects of Lord Bingham’s rule of law

formulation have been breached by the legislative changes brought by the CODOLA Act.

In terms of the broad formulation, a group of people have been selectively chosen whose rights and obligations are different to those of everyone else in the community. They are disadvantaged in the way the law operates on their lives as compared with everyone else in the community. For most, this is done with retrospective effect, their disadvantaged state caused by being members of organisations before the new laws were passed.

The second sub-rule is broken by the discretion involved in the definition of criminal organisation. The minister's identification of groups is unrestricted. Arbitrary creation of legal disability by passage of an Act of Parliament is just as objectionable.

The third sub-rule is at the heart of what has occurred. The identification of people as members of deemed criminal organisations operates to make the affected people legally unequal in a number of areas of ordinary rights and freedoms. For present purposes and of great importance, the right to work at one's chosen occupation has been arbitrarily taken away.

Since equality before the law; the right to work; and the right to have legal obligations determined by a fair and independent tribunal are all basic human rights, Lord Bingham's fourth (and substantive) sub-rule is also dishonoured.

It follows that the seventh sub-rule is breached by the process instated by the legislation: arbitrary summary police execution of the disqualification ameliorated only slightly by appeal processes that keep the key information, so far as the affected person's rights are

concerned, secret.

The CODOLA Act, in its regulation of key industrial occupations by a regime of disqualified groups involves a grave departure from the rule of law and key human rights principles. The Parliament, which passed these laws, has failed to acknowledge this aspect of the legislation.

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Endnotes

1 All the references on the subject are taken from the famous Sixth David Williams lecture delivered by Lord Bingham on Thursday, 16 November 2006. The lecture may be found at <http://www.cpl.law.cam.ac.uk/Media/THE%20RULE%20OF%20LAW%202006.pdf> (accessed 28 February 2014).

2 One may start with the Preamble to the Universal Declaration of Human Rights (<http://www.un.org/en/documents/udhr/>) and continue through articles 1, 2 and 7. One will find the principle restated in many Conventions.

3 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (accessed 28 February 2014)

4 Since changed its appellation to *Queensland Building and Construction Commission Act 1991*

5 Section 114 CODOLA Act inserting s. 228B into the Liquor Act.

6	Section 1 Criminal Code 1999: the definition was inserted into the Criminal Code by s. 41 CODA Act	17	Section 47C Liquor Act
7	Paragraph (c) of the definition	18	Section 21 Liquor Act
8	The declared motorcycle clubs are the Bandidos, Black Uhlans, 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. The regulation was passed as schedule 1 to the CODA Act.	19	Sections 36-37 Liquor Act
9	Section 4 Liquor Act as amended by s. 87 CODOLA Act. Reference is made to s. 60A(3) of the Criminal Code, another amendment made by the CODA Act.	20	Section 58 Liquor Act
10	Section 60A(3) of the Criminal Code	21	Section 66 Liquor Act
11	Sections 122-126 CODOLA Act	22	Section 107 Liquor Act
12	Section 47B Liquor Act inserted by s. 92 CODOLA Act.	23	Or by a Parliamentary deeming process
13	Paragraphs 47B(1)(b), (c) and (d) Liquor Act	24	Section 55 ESA
14	Subsection 47B(2) Liquor Act	25	Section 56 ESA
15	Subsection 47B(s) Liquor Act is in permissive terms but compulsion is the effect of the disqualification in s.228B Liquor Act.	26	The amending provisions of the CODOLA Act are ss. 56-71
16	Section 27B <i>Acts Interpretation Act 1954</i>	27	Schedule 2 to Schedule 2 <i>Queensland Building and Construction Commission Regulation 2003</i>
		28	Section 31 <i>Queensland Building and Construction Commission Act 1991</i>
		29	Section 32AA <i>Queensland Building and Construction Commission Act 1991</i>
		30	Sections 127-137 CODOLA Act