

Submission for the Organised Criminal Groups Legislation

The Inspector
Legislation & Development Review Services
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Dear Inspector,

Thank you for providing the opportunity to comment on the proposed *Organised Criminal Groups Legislation – Position Paper* [1]. I make this submission as an individual and a general member of the Tasmanian public. I have a strong interest in justice, human rights and civil liberties. I am a non-practicing lawyer and hold a Bachelor of Social Science, majoring in social justice and behavioural science. I firmly support evidence-based policy in line with best practice.

Sincerely



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Submission

The *Position Paper*, released on 26th April 2018, lists eight proposed amendments to the *Police Offences Act 1935* to mitigate the potential and/or perceived dangers presented by outlaw motorcycle gangs (OMCGs) and organised criminal groups in Tasmania.

The proposals are based on the premise that OMCGs are a threat to public safety and are heavily involved in the importation and distribution of dangerous drugs in Tasmania. It draws on Police intelligence which “highlights a continuing and disturbing pattern of organised crime which places our community, families and children at unacceptable risk.”

This submission argues that the proposed amendments do not appropriately address the mischief which they set out to address and are based on a flawed premise.

Evidence from other jurisdictions demonstrates that anti-consorting laws and anti-association laws have had little impact on addressing organised criminal activities. The NSW model, which the *Position Paper* suggests should be generally adopted by Tasmania, has been heavily criticised, including by the NSW Ombudsman in its 2016 review report.

Additionally, there is no evidence to support that removing the visible presence of OMCGs through prohibiting items which show the patch, insignia or logo of "identified organisations" will reduce incidents of the public feeling "threatened, fearful or intimidated" or remove the risk of "undue adverse effect on the health or safety of members of the public, or the amenity of the community, including by increasing the likelihood of public disorder or acts of violence."

While on the face of it, the proposed amendments appear justified, the reasons provided in the paper are based partly on rhetoric, the misunderstood historical context of OMCGs, and select incidents of public violence and serious crime isolated from the broader statistical context of violent offending in Tasmania and Australia.

Legislation based on misrepresented information and rhetoric presented as fact presents a risk of undermining the justice system and eroding public confidence in Tasmania Police. This submission recommends that Tasmania Police adopt an evidence-based approach to combating organised criminal activities. Additionally, it recommends that it seeks opportunities to reduce the rate of actual offending in Tasmania, rather than seeking to remove the visible presence of perceived or potential offenders.

Comment on Part One – Introduction

OMCG participation in organised crime

In its introduction, the *Position Paper* relies on extracts from the Australian Crime Commission's *Organised Crime in Australia 2015 Report* [2]. It notes the organised crime is "a significant challenge to law enforcement agencies in Australia." This is supported by all available reports on organised crime.

It further asserts that "Outlaw Motorcycle Gangs (OMCGs) are significant participants in organised crime". This is not a conclusion readily drawn from the 87 page Australian Crime Commission's report. On page 10 of the report, it states: "The criminal activities of gangs, particularly outlaw motorcycle gangs (OMCGs), consistently attract public attention." The fact that OMCGs consistently attract public attention when members are involved in criminal activities does not support an assertion that OMCGs are significant participants in organised crime.

Additionally, other than a note of recent escalated violence (which does not provide a former baseline and relies on the same public incidences that recur through all such reports), the Australian Crime Commission only provides evidence that members of OMCG's have been involved in limited cases of international pharmaceutical crime, some illicit drug

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and weapons trafficking, and have a link with the manufacture and distribution of performance and image enhancing drugs. However, the only example provided by the report involved the charging of an associate of the Comanchero OMCG in relation to three alleged importations of steroids from China, rather than a "patched" member of an OMCG.

The substance of the 2015 Report is consistent with the Australian Criminal Intelligence Commission's *Organised Crime in Australia 2017* report which does not identify OMCG's as significant contributors to organised crime, and provides no actual figures for OMCG participation or involvement other than a cursory mention [3].

While this criticism may be viewed as unnecessarily pedantic, the *Position Paper* bases the need for the proposed amendments on the alleged threat OMCGs pose to the general public. The misrepresentation of the report and exaggeration of the part OMCG's play in organised crime undermines the credibility of the Police position.

Origin of "one-percenter"

The *Position Paper* goes on to state that: "The criminal activities of OMCGs distinguish them from other recreational motorcycle groups who gather purely to socialise and ride motorcycles. Unlike these other bodies, OMCGs self-identify as 'one-percenters', their view being that if 99 per cent of people who ride motorcycles are law abiding, they are the 1 per cent who are not."

This assertion is pure rhetoric and does not accord with the documented history of the meaning of 1% in the context of OMCGs.

The term "one-percenter" came about after an incident at the 1947 Gypsy Tour in Hollister, California. It was the first rally held after the end of World War II, with the last being held in 1936 without incident. The rally was sanctioned by the American Motorcyclist Association and had approximately 4000 attendees, many of which were veterans.

The reports from the time state that a small number of motorcyclists consumed a large amount of alcohol, resulting in some drunk and disorderly behaviour and minor fist fights. There were reports that motorcycles were raced in the street and there was some minor vandalism. The media sensationalised the event, including staging a photo of a drunken rider astride his motorcycle [4].

The American Motorcyclist Association denounced the actions of those who misbehaved, resulting in a "bond" reportedly being formed "among unemployed World War II veterans who took pleasure in their underdog status from the American Motorcycle Association's exclusionary statement, which presented 1% of motorcyclists as 'outlaws' who did not integrate well into society." Rather than a symbol of criminality the 1% patch worn by motorcyclists symbolised "non-conformity and distinction in a new defined subculture within the motorcycle society" [5].

The origin and meaning of 1% may seem insignificant, but when it underpins many of the assumptions drawn by police, media and the public, and is used as an identifier of

“criminality”, rather than “brotherhood” there is a serious risk of disproportionate action which does not adequately address the real issues.

The nature of organised crime has changed. The international evidence demonstrates it “occurs through loose and undefined networks made up of criminal entrepreneurs and freelancers with little concern for group branding or loyalty” [6]. Consorting laws or bans on logos or insignia are likely to have very little impact in combating organised criminal activities, and run the real risk of driving criminals underground, as what happened in Queensland after the suite of anti-bikie laws were introduced in 2013 [7].

OMCG threat

The examples presented in the *Position Paper* regarding the OMCG violence omits the prevalence of other serious crime in Australia not attributed to OMCG’s, which constitutes the majority of serious offending.

While the examples of incidents described in the *Position Paper* are clearly of concern, they date back to 1984 and exclude many other newsworthy and notable acts of violence which were not committed by members of OMCG’s, for example the Port Arthur Massacre committed by Martin Bryant in 1996, Peter Shoobridge who murdered his four daughters in Tasmania in 1997, Ivan Milat who murdered seven backpackers in Belanglo State Forest, Roger Dean who murdered 11 nursing home residents in 2011 [8], and John Bunting and Robert Wagner who were responsible for the eight “bodies in a barrel” Snowtown murders (1995-1999) [9].

The *Position Paper* also makes no mention of the brutal daylight shooting murder of a woman by her estranged husband in 2015 when she was stopped at traffic lights in her vehicle in New Town, which also resulted in an innocent woman also being seriously injured [10].

It makes no mention of the horrific stabbing of a shopkeeper in North Hobart in 2016, where the offender made further threats of violence against the grieving family when he appeared in court, allegedly making a “slashing motion across his throat” while saying “you’re dead, scum” [11].

There has been no commitment from the Government to ban football jerseys in public after a violent brawl at the UTAS stadium during the recent Hawthorn and St Kilda game, which occurred in the presence of women and children [12].

The *Position Paper*’s focus on only OMCG related violent, or potential or perceived violent incidences presents an unrealistic picture of the alleged threat OMCG’s pose to the Tasmanian public. The inclusion of incidences and offences only allegedly related to OMCG members leads to a biased perception of the likelihood of the public becoming involved in violent OMCG related incidents.

Further, the *Position Paper*’s reliance on the results of anti-OMCG taskforce Operation Morpheus in 2017 create a disproportionate perception of OMCG involvement in drug crime. The combined drug total (129kg +801 pills) and overall value (\$3,535,700 – although

the *Position Paper* does not state what proportion of this value related to drugs) are insignificant compared to the 1.2 tonnes of methamphetamine seized in December 2017 which was reportedly worth \$1 billion and has not been attributed to OMCGs [13], or the 903kg of ice, worth \$900 million, found in Melbourne in April 2017 [14].

In 2015, the Queensland Organised Crime Commission of Inquiry found that while OMCG's were involved in some organised crime types activities, the focus on OMCG's had led the Queensland Police Service and Crime and Corruption Commission to neglect investigating and pursuing other areas of organised crime which posed a risk to Queensland.

Of note, it mentioned that considering the extreme legislation introduced by the Newman Government in 2013, the significant extra funding granted to the Queensland Police Service, and the specific focus on OMCG's, from 1 October 2013 to 30 June 2015, OMCG members still accounted for only 0.52 per cent of criminal activity in Queensland [15].

Every public act of violence has the potential to traumatise, frighten and terrorise. However, laws which focus on such a sub-sector of the population are unlikely to reduce incidents of, or the potential for, terror, trauma and fear. This is particularly the case where the general public are unable to distinguish between motorcyclists who allegedly have the potential for serious violence, and those who do not.

Organised crime is an issue for Tasmanians. The use, and threats of violence are unacceptable. However, laws already exist to combat such offences, including for assault, weapons offences and extortion, and drug trafficking and distribution. The police already have powers to deal with those breaking the law.

In the growing climate of increased sophistication of organised criminal activities, it makes sense for the Government to adopt an evidence based approach to both combatting organised crime and the alleged risk of OMCG's using their club identity to threaten and intimidate.

Comment on Part Two – Discussion of Issues

Consorting laws

Proposals One to Five are aimed at updating the Tasmanian consorting laws. The *Position Paper* notes that every other jurisdiction in Australia has modernised its legislation and most have adopted a similar model to New South Wales (NSW).

However the *Position Paper* does not recognise that consorting and anti-association laws are generally ineffective at combating organised crime. International research suggests that anti-association laws do not work to prevent crime, and simply drive the serious and organised criminals underground [16]. The Australian Crime Commission has also acknowledged this in the past, and recommended that an approach of "following the money" is far more successful at breaking up organised and serious crime enterprises.

Based on crime statistics obtained from the NSW Bureau of Crime Statistics and Research, the NSW consorting laws do not appear to have had an impact on decreasing organised crime type offences [17].

For example: in the 24 months to December 2013, most crime was stable in NSW, but there was an increase in a number of offences often linked to organised crime groups: in the 24 months to September 2013, fraud was up 20.7%, a number of drug offences increased (possession and use of cocaine; +45.3%, p&u of methamphetamines; +13.6%, p&u other drugs; + 23%) with trafficking and dealing type offences stable, prohibited and regulated weapons offences were up 12.5%, and disorderly conduct with criminal intent up 39.6%.

In NSW, in the 60 months to December 2017, fraud, blackmail and extortion, harassment, threatening behaviour and private nuisance were stable, indicating that consorting warnings and charges had no impact on these types of offences. If the consorting laws worked to combat serious and organised crime, it would be reasonable to expect a decrease over time.

Further, in the same 60 months to December 2017, there was an increase in five drug type offences (possession and/or use of ecstasy; +11.1%, p&u of other drugs; +5%, dealing, trafficking in cocaine; +36.2%, dealing, trafficking in ecstasy; +8.6%, other drug offences; +2%). Dealing, trafficking in narcotics, amphetamines and other drugs was stable, as was importing drugs. The only decrease noted on a 60 month trend was dealing, trafficking in cannabis (-11.8%) and manufacture drug (-13%). Prohibited and regulated weapons offences were up 6.3%, and disorderly conduct with criminal intent was up 3.2%.

The drug offence trends are of interest, as it demonstrates that not only are drugs still readily available in NSW, but the increased trend shows the consorting laws are having absolutely no impact on dealing, trafficking and use. If the aim of consorting laws is to prevent future offending, clearly the laws have not achieved their aim in NSW.

The QLD anti-association laws also did not achieve their desired purpose, with an increase in organised crime type offences after introduction in 2013. Dr Terry Goldsworthy, Assistant Professor in Criminology, Bond University notes that "Queensland police credited the new bikie laws with a reduction in reported crime in 2013-14. However, no explanation was provided when reported crime increased in 2014-15, despite the anti-bikie laws still being in place. What this does highlight is how the laws cannot be held responsible for any increase or decrease in Queensland's overall crime rate." He further states, "We need to implement criminal justice policy from a strong evidence base with a view to establishing best practice" [18].

Ombudsman's Review

The NSW consorting laws were reviewed by the Ombudsman in 2016, which made 20 recommendations for improvement. Notably it commented in the report:

"Unless changes are made, it is likely that minor offenders and disadvantaged and vulnerable people not involved in serious criminal activity will continue to be subject to the consorting law. Operation of the consorting law in this manner carries a significant risk of

harm to the relationships between communities and police, and may erode public confidence both in the consorting law and in the NSW Police Force" (pg 115 [19]).

The *Position Paper* noted seven of the 20 legislative and policy recommendations, however only proposes to adopt several. If consorting laws are to be introduced, they should accord with the generally accepted principle under the "proportionality test"; the laws should represent the least drastic means of achieving the purpose [20]. The purpose of consorting laws is to prevent criminal activity, which is a legitimate purpose [21], however the Ombudsman's review found a clear misuse of the consorting laws by NSW Police.

Proposed legislation should not just be lawful and constitutionally valid, it should be evidence-based, best practice policy. The purpose of the Australian Constitution is to set out the balance of powers between the Commonwealth and states. It contains very few rights for citizens [22]. Where there is any room for misuse or abuse of proposed laws, legislators must adopt the highest standard possible.

Any such consorting laws adopted in Tasmania must address in full the recommendations of the NSW Ombudsman, including the following safeguards which are omitted from the proposal.

1. naming the person to which the warning applies
2. legislated right to have the consorting warning verified in writing with all particulars, including the date, time and location of the warning, and to whom it applies
3. legislated time-limit for any retrospective warnings, for example 14 days
4. legislated protection against disclosure of the nature of the conviction
5. identified legislated defences including a "reasonable grounds" defence
6. legislated definition of "serious crime" for the purposes of the Consorting Laws; as recommended by the NSW Ombudsman - "by reference to the maximum sentence available" with an appropriate level being "offences punishable by 10 years or more imprisonment." [23]

Prohibited items

Proposals Six to Eight propose to introduce a new offence "for a person to wear, carry or openly display in a public place (or in/on a vehicle in a public place) clothing, jewellery or other insignia that show the patches, insignia or logo of an 'identified organisation'."

The basic premise underpinning the proposed amendments is flawed on two grounds:

1. Public intimidation – the majority of the population cannot tell the difference between one bearded, tattooed rider wearing a patched leather vest astride a loud motorcycle and another.
2. Private intimidation – If a person is already committing an offence, for example, extortion, harassment, threatening behaviour and private nuisance, adding an additional offence is unlikely to impact on the likelihood of offending.

Public intimidation

The *Position Paper* differentiates between recreational and social motorcycle clubs and OMCGs, however the majority of the population cannot tell, on sight, the difference between the two.

If people find members of OMCG's threatening when riding in groups or associating together in public, they will likely also find HOGs (Harley Owners Group), Veterans, Ulysses and other social clubs who wear similar black vest or jackets with prominent logos, just as frightening. The average person cannot differentiate between club membership of one rider with a leather vest/jacket on a loud Harley style bike and another; even more so when that rider has a beard and is covered in tattoos.

There are several well-known OMCG's, however most logos, patches and insignia will be unfamiliar to Tasmanians. Additionally, popular recreational/social motorcycle clubs also use patches, logos and insignia. There are many smaller clubs (and individuals) across Australia who actively mimic the look of OMCG's, while purporting to be social clubs/riders.

When the suite of anti-bikie laws was introduced in 2013, the Queensland Police Service released an image which contained all the logos of the banned clubs, yet members of the public and the police themselves were regularly unable to differentiate between members of different clubs. There were countless reports from motorcyclists who were stopped and questioned by police, including social rider, Jamie Evans, who was reportedly stopped 21 times [24]. In an extreme case, police mistook a person wearing a shirt from the fictional "Sons of Anarchy" motorcycle club for a genuine "bikie" [25].

Prohibiting the visible presence of OMCG's will not have any real impact on offending. Prohibiting the logos, patches and insignia of "identified organisations" will have no impact on public perceptions of the threat of OMCG's, when in passing, the majority of Tasmanians cannot differentiate between an OMCG and a social club.

Additionally, a ban on OMCG's self-identifying may result in those people who do know the difference between clubs, no longer being able to identify a member of an OMCG. Their "fear" may potentially be intensified when any motorcyclist wearing a black leather jacket on a black and chrome cruiser or customised machine passes by.

Private intimidation

The *Position Paper* alleges that OMCG logos, insignia and patches constitute an "implied threat of violence." If a member of an OMCG is already committing an offence, for example, extortion, harassment, threatening behaviour and private nuisance, adding an additional offence of wearing or displaying a "prohibited item" is unlikely to impact on the likelihood of offending.

Deterrence is achieved by people being charged, convicted in court, and punished, not merely by creating an offence [26]. Extortion, harassment and threatening behaviour are already criminal offences, among others, and crime rates in Tasmania have remained relatively stable over the past five years with recent minor upwards trends. Adding an

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additional offence based on an "implied threat of violence" is unlikely to impact much on the long term trend, or affect the increase year for year for Offences Against the Person (+4%), Offences Against Property (+11%) and Fraud and Similar Offences (10%) [27].

There is no evidence to support the premise that removing an "implied threat of violence" for debt collecting and/or in participating in other activities, will prevent the original offence from occurring. If members of OMCG's are committing offences in the manner alleged, it is likely they will find other ways to threaten or intimidate. If existing arrests, prosecutions and convictions are failing to deter, adding an extra offence is unlikely to improve the deterrence effect.

The proposed amendments also do not consider verbal threats from non-OMCG members which are also likely to cause fear, for example, "I will set my bikie mates on you". In essence, the proposed amendments counter only a fraction of possible threatening scenarios, with an emphasis on an "implied threat" rather than an actual threat of violence. It excludes all other possible types of "implied threats" including the presence of habitual and repeat violent offenders who do not associate with OMCG's.

It makes better sense, from an evidence-based policy point of view, that where an implied or actual threat of violence is used in the commission of an offence, it is an aggravating factor. It does not make sense to create a criminal offence for a person to be perceived as frightening or intimidating because of their clothing, appearance or reputation, which is essentially the nature of the proposed amendments.

Conclusion

It is doubtful that updated consorting laws will have much impact on organised and serious crime in Tasmania. Likewise, the proposed prohibited items amendments are unlikely to be effective at reducing public or private intimidation or threatening behaviour. Removing the visible presence of those perceived to, or with the potential to commit violent and serious crime is a dubious way to reduce offending.

Tasmania Police should adopt an evidence-based approach to combatting organised crime in Tasmania. It should also consider alternative methods to deterring offending, for example arresting, charging and prosecuting those committing existing offences. It makes better policy sense to increase the visible presence of police officers in the state, rather than attempt to reduce the visible presence of alleged or potential offenders.

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