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Dear Secretary

**RE: POSITION PAPER ON ORGANISED CRIMINAL GROUPS LEGISLATION**

Thank you for your letter of 27 April inviting comment on the Department of Police, Fire and Emergency Management's Position Paper, 'Organised Criminal Groups Legislation'.

The Position Paper sets out several proposals that it says are aimed at "disrupting" organised criminal activities of 'outlaw motorcycle gangs' (OMCGs). These proposals focus on Tasmania's laws relating to consorting and also to proposed laws relating to the wearing and display of clothing and insignia that are associated with these OMCGs.

Civil Liberties Australia (CLA) is not an expert on OMCGs and is not in a position to comment on any links between them – as organisations – and organised criminal activity, including drug trafficking and extortion. For the purposes of this submission, therefore, we take on trust the evidence set out in the Position Paper.

Consorting and anti-association laws have serious implications for fundamental freedoms including the freedom of peaceful assembly and association and the freedom of movement – freedoms that are recognised in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

CLA recognises, however, that the freedom of association and the freedom of movement are not absolute rights and may be limited to the extent necessary to achieve legitimate public policy objectives, including to safeguard the security of the public. Nevertheless, given the serious implications for fundamental human rights, a high bar must apply to any limitations. Any limitations on these freedoms should be demonstrably necessary to achieve the public policy goals.

With that in mind, CLA seeks further information with regard to the following questions.  
***Without that information, CLA believes there is no sound evidence base for proceeding with the proposed legislation.***

## **What evidence is there that consorting laws are effective in addressing organised crime?**

Part 2 of the Position Paper argues that Tasmania's consorting laws contained in Section 6 of the *Police Offences Act 1935* are 'outdated' and 'archaic' and that, in order to combat the threat posed by OMCGs, Tasmania should follow the lead of other states in updating them.

However, the Position Paper does not provide evidence to demonstrate that strong consorting laws are effective in combatting organised criminal groups. Given that the updated consorting laws have been in place for several years in other jurisdictions and have been actively used by them, it should be possible to produce evidence of their effectiveness.

The Position Paper quotes the 2016 report of the NSW Ombudsman which says NSW's consorting law "appears to be effective, particularly in the context of the policing of high-risk OMCGs". However, the report makes clear that that assessment is based on feedback from the NSW Police itself and specialised squads. No crime statistics are provided in the Ombudsman's report nor in the Position Paper to indicate that the updated consorting laws in NSW (or other jurisdictions) have had a significant impact on organised crime in that state.

If statistical or other evidence does not show that consorting laws are effective in preventing organised criminal activity of the type described in the Position Paper, CLA cannot support the proposals.

## **Why have other laws that are already available for tackling serious organised crime not been effective?**

If groups, including OMCGs, are involved in carrying out or planning to carry out serious crimes, then other laws are available for dealing with this. In particular, the *Criminal Code Act 1924* includes the crime of conspiracy. The Position Paper does not consider the effectiveness of other laws, including conspiracy laws, that are already available to respond to any threat to public security posed by OMCGs. If serious crime is intrinsic to the activities of OMCGs in the way set out in the Position Paper, then why have conspiracy laws not been effective against them? If conspiracy laws have not been effective, have any reforms to these laws been considered?

Conspiracy laws have the advantage of targeting only those people who are associating with each other in order to engage in criminal activities or to plan such activities. On the other hand, consorting laws make it an offence to do something that might otherwise be entirely innocent and pose no threat to the public.

Consorting laws as proposed in the Position Paper also apply exclusively to persons who have previously been convicted of an offence. While in Australia conviction of an offence can carry consequences beyond the serving of a sentence, in general people who have "served their time" do not continue to incur adverse treatment by the law.

CLA recognises that in certain circumstances laws that act in a preventive manner and laws that apply only to people who have previously been convicted of a crime may be necessary and appropriate. However, in the absence of evidence to suggest that existing laws such as laws on conspiracy are not effective (or could not be made effective) in tackling organised criminal activity, new laws that seriously impact fundamental human rights and that target only one section of the community cannot be justified.

### **Will consorting laws disproportionately affect disadvantaged and vulnerable people?**

While the Position Paper supports some of the reforms proposed in the NSW Ombudsman's 2016 report, it does not address serious concerns raised in that report about the wide application of the consorting laws in that state.

The NSW Ombudsman found that "the broad framing of the consorting law and the absence of any requirement for police to suspect or prove a link between use of the consorting law and crime prevention increase the risk that already marginalised people will be disproportionately and inappropriately affected by the operation of the consorting law." The Ombudsman further found that "the consorting law has also been used in relation to disadvantaged and vulnerable people within our communities, and people involved in minor offending". The Ombudsman found that 37 per cent of all people who were subject to the consorting law during the review period were Aboriginal compared to just 2.5 per cent of the overall population identifying as Aboriginal.

The NSW Ombudsman concluded that "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."

The Position Paper does not explain how these effects could be prevented in Tasmania. Disproportionate impact on "already marginalised people" is a serious concern and without evidence to demonstrate that this would not happen in Tasmania, CLA would not be able to support the proposals.

### **How would 'mission creep' be prevented?**

The NSW Ombudsman's 2016 report found that "15% of 'convicted offenders' about whom police issued consorting warnings had only relatively minor or traffic offences in their criminal histories." The Ombudsman also found consorting laws were being used for purposes quite remote from tackling serious organised crime, for example, to remove homeless people from public places, including public benches and bus stops, including during daylight hours.

This type of 'mission creep' where laws justified on the basis of combating powerful organised criminal organisations are then used against minor offenders is a serious concern. While the Position Paper argues the case for updating the consorting laws to tackle organised criminal groups and specifically OMCGs, it does not say how it will prevent these laws from being used more widely over time.

Tasmania has seen this kind of mission creep before, including in relation to laws supposedly aimed at serious organised criminal organisations. In 2014, the Tasmanian Parliament passed unexplained wealth laws following the justification put forward by the then Attorney General that they were necessary to combat "senior organised crime figures, who organise and derive profit from crime, use business models which ensure that they are not linked directly to the commission of the offences or crimes which are the sources of their wealth." As shown by data collected during the independent review in 2017 of the unexplained wealth laws, these laws were predominantly used to recover small sums and not from "senior organised crime figures" with highly sophisticated "business models".

In Tasmania, it is not clear how updated consorting laws would be drafted so as to target only 'serious crimes' perpetrated by organised criminal groups. It is not clear how Tasmania would avoid the unforeseen consequences and mission creep that have resulted in other states. And it is not clear how the application of these laws could be prevented from being applied to other groups in society under the current or future governments – environmental protestors for example.

While there may be an argument for limiting fundamental human rights and freedoms to respond to the serious threat posed to public security by organised criminal groups, in the absence of proper consideration of how consorting laws can be prevented from being applied to minor offenders and other groups, CLA would not be able to support the proposals.

### **What evidence is there that 'prohibited items' laws are warranted in Tasmania?**

The Position Paper proposes that Tasmania adopt laws modelled on legislation in Queensland. As the Position Paper acknowledges, Queensland's legislation goes well beyond that in any other state or territory. The Position Paper provides no evidence to demonstrate that the scale of the problem in Tasmania justifies being out ahead of all other states and territories.

Other states and territories generally limit their prohibited items laws to licensed premises. In NSW, the application of the laws is restricted to only areas in and near to Sydney's CBD. The Position Paper proposes that in Tasmania these laws should apply to all public places throughout the state. It says it would be 'incongruous' not to protect the public from intimidation and the threat of violence in places like cafes and public parks.

While this may make some sense in purely rhetorical terms, CLA believes legislation should be justified by actual evidence of a problem and actual evidence that the proposed solution will address the problem. The Position Paper provides no evidence to suggest that intimidation and threats of violence by OMCGs in places like parks and cafes is a concern in Tasmania that requires such a solution. To the extent that it is a concern, we question to what extent the feeling of intimidation experienced by a member of the public confronted by an OMCG would be lessened if the OMCG members were not wearing certain items of clothing or insignia.

In the absence of evidence to demonstrate that such prohibited items laws are necessary and effective – either to combat criminal activities or to reduce the feeling of 'intimidation' experienced by the public, CLA could not support broad prohibited item legislation as proposed in the Position Paper.

### **We welcome this public consultation process**

CLA appreciates this public consultation process on the proposed legislative changes. The public consultation process gives all stakeholders, including experts and civil society organisations, an opportunity to contribute to the policy development process. The commitment to publish submissions also ensures that the Government, the parliament and the media have an opportunity to see firsthand the concerns and suggestions of the public.

### **Need for rigorous human rights assessment of proposed legislation**

At the same time, the Position Paper once again demonstrates that the assessment of whether limitations on fundamental human rights are justified to achieve public policy objectives would

be made more transparent and more rigorous if Tasmania had a Human Rights Act. We have tried to apply the principles of a human rights framework to this submission by considering whether, and to what extent, limitations on the human rights of freedom of association, peaceful assembly and of movement of Tasmanians might be justifiable to achieve the objectives set out in the Position Paper. However, we strongly believe this should be an approach applied at all levels of the policy development process. CLA supports the model for a Tasmanian Human Rights Act recommended by the Tasmanian Law Reform Institute. Further information on this model and how it would work is available at:  
<https://www.tashumanrightsact.org/>

Yours Truly

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