CONSORTING LAW

North West Community Legal Centre response to the Tasmanian Department of Police, Fire and Emergency Management Position Paper:

"Organised Criminal Groups Legislation" April 2018

CONSORTING LAW

SUMMARY

Vagrancy laws are nothing new. They have existed in Australia for close to a century. The new breed of consorting law sought to be introduced into Tasmania seeks to restrict the ability of specific criminal offenders form consorting with other convicted offenders.

This paper seeks to dispel some of the myths surrounding the reasoning behind the introduction of this type of legislation and highlight the risks to the general public in Tasmania if such legislation is enacted.

Sound reasoning based on research, data, community need and fairness should dictate the way Tasmania moves when it comes to consorting legislation.

Perceptions surrounding the impact of one group e.g. Outlaw Motorcycle Gangs (OMCG's) should not cloud the debate as to the actual impact of consorting legislation has on all of us and an individual's freedom and the community in general.

Granting further powers to Police that are discretionary and intrusive should only be contemplated in cases where a demonstrated need and capacity to appropriately discharge them is made out so that members of the community are not caught up in the consequences of ill-conceived legislation and have their right infringed.

This paper submits that the need for such legislation in Tasmania has not been made out.

"Generally speaking, the sufficiency of the justification required for such a burden should be thought to require some correspondence with the extent of that burden"

Gageler J

Tajjour v New South Wales [2014] 254 CLR 508 at 580

BACKGROUND

The North West Community Legal Centre (NWCLC) is an incorporated not-for-profit Association that exists to provide initial Legal Advice and Referral, Community Legal Education and participate in the Law Reform process.

The NWCLC is staffed by (3) Legal Practitioners with support staff who work on the North West Coast of Tasmania. NWCLC is specifically funded to assist those disadvantaged in our Community who are unable to access private legal representation or representation through the Legal Aid Commission of Tasmania.

The third limb of our function is to specifically respond to Law Reform Submissions and Papers, in this case the Tasmanian Department of Police, Fire and Emergency Management's Organised Criminal Groups Legislation - Position Paper released in April 2018

We are funded by the Federal Commonwealth Attorney General's Department and the Tasmanian Department of Justice as part of the National Partnership Agreement within the provision of Legal Assistance Services.

INTRODUCTION

The Minister's foreword at page (3) of the Department's Position Paper ("the paper") makes reference to the Liberal Government seeking to discharge its duty to ensure that community safety is paramount and provide Tasmania Police with adequate tools to deal with organised crime.

The paper makes 8 proposals to amend the Police Offences Act 1935 and related regulations. Upon our initial reading of the paper, we formed the view that it lacks the required clarity and definition to make more pointed or detailed comments as specific proposed legislation is yet to be put forward.

This submission should be read in the context that the Tasmanian Government seeks to introduce similar legislation into Tasmania that currently operates in NSW unless already specifically described elsewhere.

It is the position of the NWCLC that such legislative change in Tasmania is not necessary and if introduced will unnecessarily burden and interfere with a person's right to associate and otherwise interact in social groups and the like.

The paper from the Department is framed in the context of the perceived threat Outlaw Motorcycle Gangs ("OMCG's") pose to Tasmania. In our submission, it ignores the broader and unescapable impact

on the entire community's ability and freedom to associate no matter whether affiliated with any gang, group or club.

In its 2014 briefing note, the Law Council of Australia noted the overarching concern with association based offences with the forecast of such offences to allow for a much wider and more extensive use of intrusive police powers and that given the complexity and ambiguity of such legislation, the provisions may not generate many successful prosecutions but act as the hook for wider powers for police.[1]

THE TASMANIAN PROPOSAL AND TARGET OF THE LEGISLATION

We have already commented on the lack of clarity on certain issues in the discussion paper, but it is clear the intended targets of the proposed changes *are* OMCG's.

The detail we do have to hand allows the reader to summarise the effect of the Tasmanian proposal to mean:

- ***Any person*** aged 18 or over that ***has ever been convicted*** of a "***serious offence"*** can be served with a notice that stops them from "***habitually consorting"*** with another *nominated person*, aged over 18, who has also ever been convicted of a "***serious offence"***

- That a notice is to be served in writing by an Officer of Police (an Inspector or a higher rank)

- A review process to be instigated by the person served with the notice by a higher ranked Officer (if available) and then a Magistrate

- Assuming the NSW model is adopted, it creates ***some*** or a limited number of defences to consorting charges such as consorting with family (but noting a reasonable excuse defence is not proposed nor freedom of protest)

- A notice that issues upon a person lasts for 5 years

- Create a new offence of displaying prohibited items of ***"identified organisations"*** such as certain clothing/colours, badges, insignias and patches

- That the relevant Minister have the power to determine which groups become ***"identified organisations"*** and not a Court

[1] Briefing Note: "Anti Bikie' Laws – Recent Developments, Law Council of Australia 28 April 2014, para 27.

The basis for the introduction of this legislation in Tasmania put forward by Police are:

1. The belief that OMCG's pose a specific threat to Tasmania in that they are responsible for the manufacture and or importation and distribution of illicit substances such as methamphetamine ("ice") in Tasmania;

2. That without such legislation Tasmania will see an influx of interstate gangs operating in this State as they seek to establish their "business" in Tasmania and escape other States anti consorting legislation. Basically, an argument that Tasmania will be the victim of displacement from other States of OMCG's seeking to "set up shop" here;

3. Tasmania Police require this legislation to combat such issues despite the raft of legislative and other resources available to them.

The paper lacks evidence or reference to sources of information, data or peer reviewed research that would indicate that such legislation is needed or in fact workable.

The paper contains numerous generalised statements or anecdotes, unreferenced data and appears to be a Tasmania Police "wish list" based off other jurisdictions experiences. It lacks clarity of essential terminology such as *"serious offence", "habitually consorts"* and other extremely important terms requiring comment.

An example is the reference in the paper to the increased size of a particular OMCG in Tasmania growing by 300%. Have they grown in number from for 5 to 15, 20 to 60, and over what period?

What defences does the Department propose? What checks and balances will Police include in their Police Manual giving its members guidance and direction?

THE NEW SOUTH WALES EXPERIENCE AND CONSORTING LEGISLATION ACROSS AUSTRALIA

The NWCLC does not seek to evaluate the operation or impact of all the various models of Anti-Association Laws (commonly known as Consorting Laws) across each Australian jurisdiction.

The purpose of this submission is to respond to the Department's Position Paper which specifically draws upon the NSW's model that was introduced in that jurisdiction 2012.

This submission seeks to address the issues that have been raised in NSW, given that it appears to be the intention of the Department here in Tasmania to introduce specific legislation based on NSW's experience.

The paper issued by the Department is, with respect, critically absent in detail in relation to a number of issues. These include:

1. Any proposed specific drafting of changes to the *Police Offences Act;*
2. Definitions of matters such as serious offence, habitually consorting; and
3. Any evidentiary basis for amendments/implementation of the legislation of this nature to Tasmania.

The NWCLC in this submission will address these issues below while at the same time the submission should be read in the light of the assumption that any legislation in Tasmania will closely mirror that of the current Consorting Laws in NSW.

The New South Wales Experience

The Crimes Amendment (Consorting and Organised Crime) Bill 2012 was hurried into NSW's parliament in early 2012 in response to a high profile incident involving OMCG's and other incidents "believed" to be related to OMCG's or other gangs operating in NSW.

The amendments to the NSW Crimes Act 1900 commenced operation on 9 April 2012

The particular incident referred to above was a brawl that occurred in public at the Sydney International Airport involving members of OMCG's in or about 2009.The Sydney airport brawl was the tipping point in what was a simmering issue in the Sydney area as a result of recent spate of drive by shootings.

The proposal in Tasmania for the need to introduce such legislation (as put forward by the Minister) is the allegation that OMCG's are trafficking and otherwise responsible for the importation and distribution of methamphetamine and other illicit substances in Tasmania.

By inference, it can be assumed that the Government and Police hold the view that the introduction of such legislation will allow the Police to combat OMCG's and other organized criminal activity.

The relevant sections of the NSW's Legislation are reproduced below:

93W Definitions

In this Division:

"consort" means consort in person or by any other means, including by electronic or other form of communication.
"convicted offender" means a person who has been convicted of an indictable offence (disregarding any offence under section 93X).

93X Consorting

(1) A person who:
(a) habitually consorts with convicted offenders, and
(b) consorts with those convicted offenders after having been given an official warning in relation to each of those convicted offenders,

is guilty of an offence.
Maximum penalty: Imprisonment for 3 years, or a fine of 150 penalty units, or both.

(2) A person does not
"habitually consort" with convicted offenders unless:
(a) the person consorts with at least 2 convicted offenders (whether on the same or separate occasions), and
(b) the person consorts with each convicted offender on at least 2 occasions.

(3) An
"official warning" is a warning given by a police officer (orally or in writing) that:
(a) a convicted offender is a convicted offender, and
(b) consorting with a convicted offender is an offence.

DEFENCES IN NEW SOUTH WALES

The current defences open to a person served with a notice are:

93Y Defence

The following forms of consorting are to be disregarded for the purposes of section 93X if the defendant satisfies the court that the consorting was reasonable in the circumstances:

(a) consorting with family members,

(b) consorting that occurs in the course of lawful employment or the lawful operation of a business,

(c) consorting that occurs in the course of training or education,

(d) consorting that occurs in the course of the provision of a health service,

(e) consorting that occurs in the course of the provision of legal advice,

(f) consorting that occurs in lawful custody or in the course of complying with a court order.

There are only (6) defences. The Ombudsman Report and other submissions by the affected entities in NSW were critical of the fact that further defences have not be made available to the citizens of NSW and that the Government has been slow in reacting to such criticism.

The impact of the legislation in NSW was so significant that the Ombudsman in his findings made recommendations for the creation of further defences to attempt to overcome the impact and burden of the legislation on persons who were otherwise not the intended target of this legislation.

The further defences that should be implemented in NSW as submitted by the Ombudsman included:

1. Consorting that occurs in the course of complying with an Order by the State Parole by way of Parole Authority or with a Case Plan, Direction or recommendation by member of staff of that State's Corrective Services.

2. Consorting that occurs in the course of provision of transitional crisis or emergency accommodation.

3. Consorting that occurs in the course of the provision of welfare support service.

4. That an amendment to the Consorting Law to include definition of family members that will include kinship relations between Aboriginal people.

WHAT AND WHO WERE NEW SOUTH WALES ACTUALLY TARGETTNG?

During the debate in NSW before the legislation was voted on, discussion about the potential use and abuse of the Consorting Law was held in the context of the policing of gang and organised crime.

Members of the NSW Legislative Council noted that the Government was not oblivious to the fact the Consorting Laws have been misused in the past and some people might fear that they will be used to target marginal groups.

There were also concerns by other political parties, in particular the Greens, that there were inadequate defences and an amendment was proposed so that a defence could be provided for the purposes of protest, advocacy decent or industrial action, however the Government was able to use his numbers to defeat that amendment.

Unsurprisingly it was also noted that the Consorting Law may disproportionally impact on Aboriginal or Torres Strait Islander people, due to the well-documented overrepresentation in the criminal justice system by Aboriginal people in Australia.

Concerns were specifically directed to the potential for overreach of the proposed legislation and its effect to people that were not intended to be caught up in the operation of such legislation.

The NSW Ombudsman's Report[2] into the legislation made specific references to parliamentary debate and public comment by members of parliament, in particular the Premier and Attorney General that these laws specifically intended to target organised crime and to be used in specific situations.

The Ombudsman noted at page (16) that:

> *"The stated intention of the consorting law appears to have been expanded in more recent comments. In August 2013, the Police Minister described the updated consorting offence as being necessary "so that the Police could tackle both street level and organised crime"*[3].

The Ombudsman rightfully concluded that these statements appeared to indicate the support by both the Government and the Police for the use of the Consorting Law beyond organised crime and criminal gangs and to be used as a tool across the board in normal everyday policing to be applied to all and any.

Therefore, within a short amount of time of these laws coming into effect in NSW, the Government and Police made it absolutely clear that they had no issue with the shift of focus from organized crime/gangs to any NSW citizen.

What does this mean for Tasmania? Would/could that happen here. The answer is yes.

The current push by Police and the Government is to portray these proposed laws as a directed surgical strike at the heart of OMCG's and others who operate in organized criminal activity. To the contrary, it is akin to carpet bombing the rights and freedoms of all Tasmanians.

The rhetoric to date will have us believe we are a State at risk of being overrun by OMCG's and that we can't go and enjoy a meal without being harassed or intimidated.

A question that needs to be answered is whether this proposal, by placing OMCG's front and centre as the target, is a smoke screen for greater powers for Police when the data and research to date simply does not justify the implementation.

The NSW Ombudsman review according to Goldsworty (2016) highlighted the fallacy that the law targeted organised crime. The Ombudsman reviewed the histories of 604 individuals issued with notices in NSW and points out:

- Only 28 people of the 604 (4.64%) issued with notices by specialist police squads had a conviction for serious criminal offence; and

- Only 43 people of the 604 (7.12%) issued with notices by general duty police had a conviction for a serious criminal offence.[4]

---

[2] Ombudsman NSW (April 2016), "The Consorting Law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900,
[3] The Hon Michael Gallacher, MLC, NSWPD, (Hansard), Legislative Council, 29/8/2013 at p. 23012
[4] Criminalising Conversations: Australia's Damaging Love Affair with Consorting Laws – Terry Goldsworthy, dated 8 February 2016

By creating a new crime of consorting, by then making it an indictable matter, this then opens the door for Police to use an allegation of consorting to seek and obtain a warrant under Tasmania's *Listening Devices Act 1991 (Tas)* therefore using the allegation of consorting to expand access to other avenues of intelligence gathering that may not have been open to Police previously.

OPPOSITION TO THE INTRODUCTION OF THE NSW LEGISLATION

Prior to the introduction of the NSW's Legislation, numerous bodies within the legal system and outside raised serious concerns surrounding the proposed laws.

The NSW Bar Association had significant concerns with the operation of the NSW legislation, noting that the consorting laws are a discretionary action of a law enforcement officer, not a considered decision of a court or similar body:

> *"Consorting offences are blind to purpose. It is difficult to see any convincing argument that it is necessary in a democratic society for any law that prohibits association with family members and others with whom they are in relationship other than on the basis of a court order obtained after submission."*

Other concerns included:

1. The breadth of operation of the laws and who it may apply to;
2. The discretionary nature of the issuing of warning notices from a Police Officer with little to no judicial oversight or option to review;
3. The foreseeable impact on individuals who are not the intended target of the proposed legislation;
4. The general impact on freedom of association amongst citizens of NSW; and
5. The vagueness of its drafting.

All of these issues/fears (and others) came to fruition upon the legislation becoming operational in NSW.

The first person made subject of such a notice was not a member of a OMCG, was not a member of a middle eastern crime gang being investigated by NSW special police units, but a young man in his early 20's who has an intellectual disability[5]. His conviction for the consorting offence was later overturned on appeal.

Given the controversial nature of such legislation, part of the legislation required that a review be conducted into the operation of the legislation within the first (2) years of its start date.

[5] ABC: http://www.abc.net.au/news/2012-08-14/first-anti-consorting-jail-term-overturned/4199040

Due to various reasons operating within NSW (one of which was a High Court challenge to the laws validity) the review period was extended to (3) years, therefore the review into the Consorting Law in NSW covers the period of April 2012 to April 2015 with a subsequent review due to commence in 2018.

The Ombudsman in NSW was tasked to conduct such a review given that:

a. The Ombudsman was seen to be impartial
b. Has experience in conducting such reviews
c. Has the resources and expertise to deliver such a report

The NSW Ombudsman report was publicly released in April 2016 and was critical of the legislation and made numerous recommendations for its review and amendment.

Submissions to the Ombudsman's review were also made by entities including the NSW Bar Association, The Public Interest Advocacy Centre Limited, Kingsford Legal Centre, Redfern Legal Centre, The Law Council of Australia and other interested organisations.

Of the (34) submissions received by the Ombudsman in the NSW's review, all but one called for either the repeal of the legislation entirely, alternatively significant review.

It should be noted that a majority of the submissions called for the complete repeal of the legislation. The only submission received in support of the law was from NSW Police.

In our opinion the NSW experience as to the application of these laws and its consequences have been dramatic and in many cases unintended, too broad and misconceived.

The NSW legislation permits a police officer to issue a consorting warning to **anybody.** The NSW legislation does not require the person to whom the warning is issued to have any type of criminal conviction. Likewise the issuing of such a warning is not needed upon any factual evidence of a crime or offence likely to have been committed or to be committed in the future.

We appreciate that the Tasmanian proposal is for a person to be required to have been convicted of a "serious offence" and that the notice likewise requires for it to nominate persons who have likewise been convicted of "serious offences" for it to be an established consorting notice.

But what does a "serious offence" mean? Is the department intending on an offence or a crime? Are we talking indictable convictions or serious indictable convictions where a term of imprisonment for say 10 years or more is a minimum reference for such a Notice to be issued?

The use of the word "offence" by the Department points to a potential for the Parliament to seek to place in its legislation "summary offences". If that is the case then any person convicted of a summary offence could be the subject of a consorting notice.

Summary offences can be anything from speeding offences, drink driving offences, minor assaults, minor drug possession, theft etc. Summary offences are matters dealt with by our State based Magistrates Courts, Surely the Department does not mean everyday Summary offences?

Even if it is noted that an indicatable offence is enough to bring a person within the terms of this legislation, that could be anything from a minor stealing offence ten (10) years ago to an assault etc. Is that really the intention of the Department and Parliament to cast such a wide and intrusive net on to persons who have already been brought before the court, who have been reintegrated into the community and otherwise leading productive lives?

The proposed Tasmanian model, like NSW, will also permit a notice to issue by Police even though there is no tangible evidence to suspect a crime or offence has or will be committed in the near to medium term. It will require the individual served with the notice to seek a review.

Again, to be absolutely clear, a person ***does not*** need to be a current, prospective or former member of an OMCG for the terms of this legislation to apply to them. ***Anybody***, that is a member of the Tasmanian community who by reason of having a conviction on their record of the type listed in the final Bill can be the subject of a 5 year notice.

Tasmania Police publicity after the release of the paper, especially on social media platforms attempted to sway community concern and tried to educate the community on the proposal.

One example is the use of the social media platform Facebook. The Tasmania Police page on that platform list a post on 3 May 2018 under the heading "Myth Busted".
It listed a number of issues relating to the proposed legislation and provide a website link to further information it wanted the public to be aware of in relation to OMCG's.

The Tasmania police publicity continues to make reference to OMCG's and nowhere that we have seen have they made the admission that these proposed laws may effect anyone in the community, not just members of OMCG's.

The paper has been selective when it comes to the reporting of the NSW Ombudsman's Review into the Consorting Legislation in NSW. We acknowledge the Ombudsman's comments at p.115 that in his view the consorting law provided an additional tool to disrupt organised crime, however the Position Paper has taken a one sided approach in failing to outline the significant shortcomings of the legislation, particularly:

- The very broad application to citizens who were never the intended target of the law;
- Impact on children, youth, homeless and mentally ill;
- Drafting inadequacies of the legislation as to the nature of offences/crimes covered by the legislation;
- The inherit risks of shifting significant discretionary power to law enforcement without sufficient recourse for review or appeal;
- 40% of parties affected were Aboriginal showing a disproportionate effect on members of the Aboriginal community; and
- Perception that the laws were and still are being used a "street sweeping" exercise as opposed to the intended, specific targeting of violent criminals, drug trafficking and sexual offenders who target children.

While falling short of calling for the complete repeal of the law, the Ombudsman made lengthy and wide ranging recommendations for legislative intervention and change of the Act and Standard Operating Procedures (SOP's) of Police.

To date there is little evidence of such change occurring some two years after the official public release of the report and some two and a half years since the NSW Government first received it.

Tasmania is at risk of joining the ranks of other Australian jurisdictions caught up in the hype and unfounded hysteria when it comes to consorting legislation. The Tasmanian community should be given credit and the due respect to see what is being potentially forced on them.

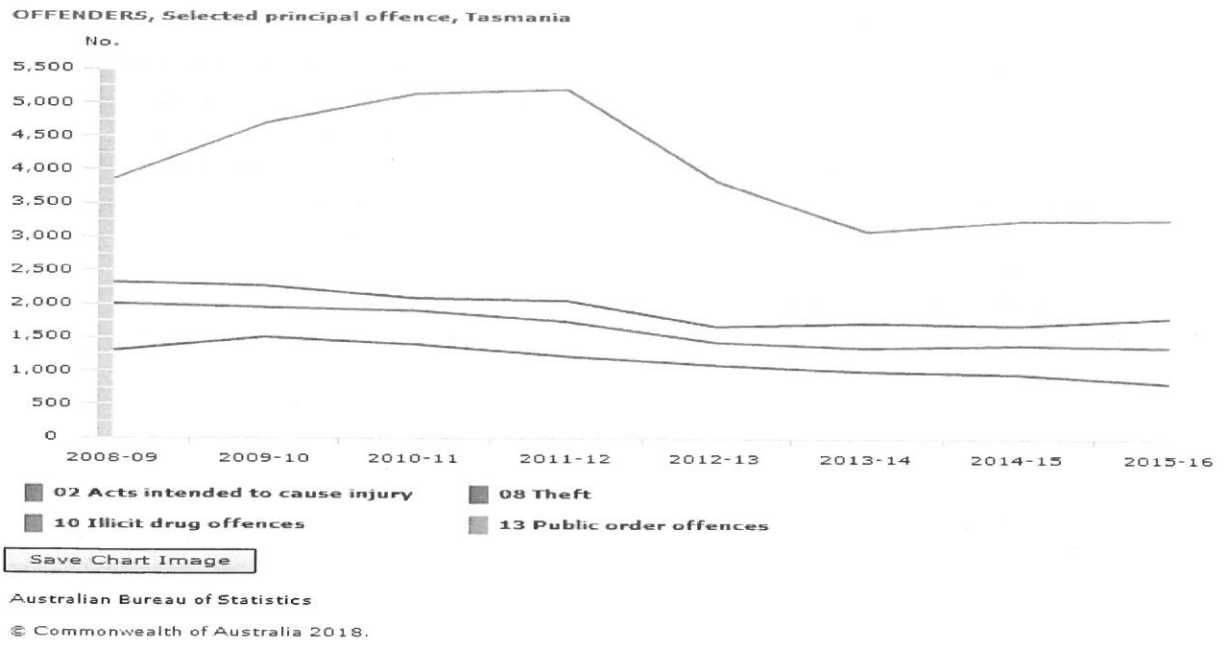
Evidence of the need has not been made out. Any evidence of insufficient policing powers or resourcing is lacking. To the contrary, the list of successes proclaimed by the paper at pages 10 to 11 suggests Tasmania Police are well equipped to handle the issue.

Crime data referred to below would suggest this as well, as would the manner in which Tasmania Police and their State and Federal counterparts were able to supervise recent motorcycle "runs" through this state with few issues.

CRIME DATA RELEVANT TO TASMANIA

Each year, organistions publish crime data or statistics for release to the public. Reproduced below are tables taken from the Australian Bureau of Statistics (ABS) and references made to Tasmania Police's own 2016/2017 Crime Statistics Supplement.

The first chart is taken form the ABS showing a snapshot of rather steady crime rate for particular selected offences in Tasmania between 2008/9 and 2015/16, in fact crime is reducing.



The Principal Offence Summary[6] on the previous page highlights from the beginning of the time series in 2008–09 to 2015–16, the number of offenders proceeded against by police in Tasmania declined by 27% (3,984 offenders). Over the same period:

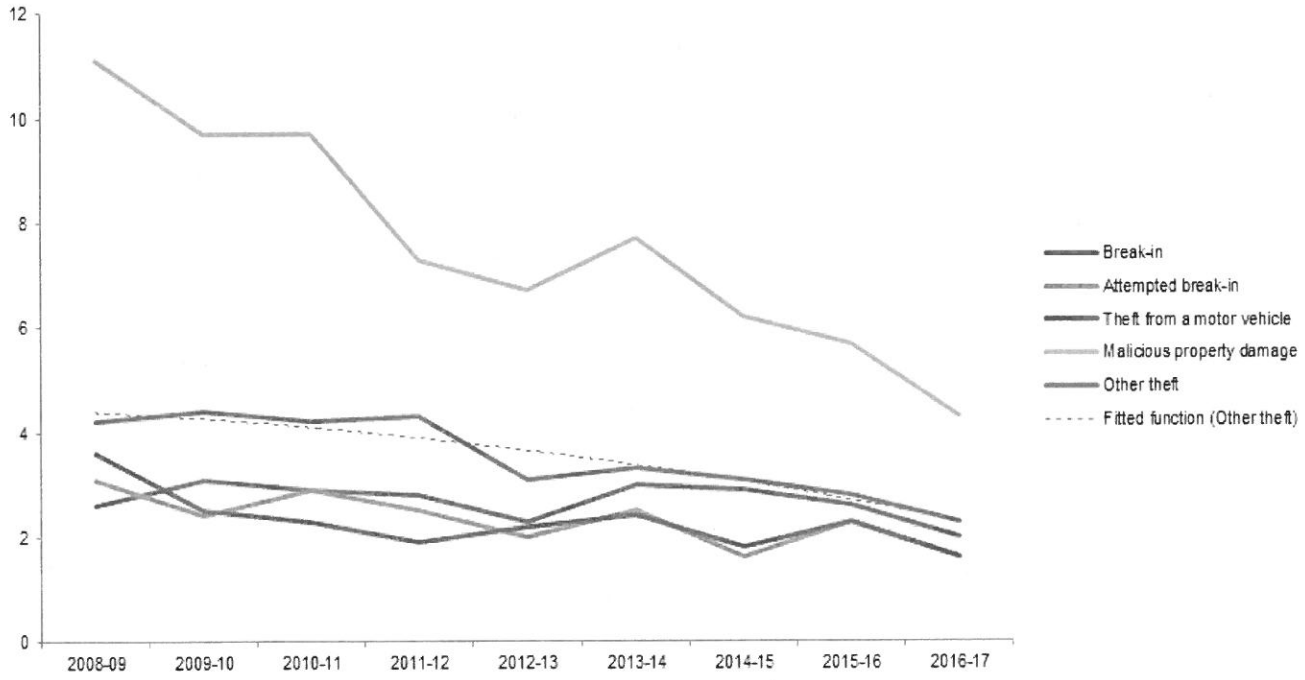
- Acts intended to cause injury decreased by 22% (516 offenders)
- Theft and related offences decreased by 36% (472 offenders)
- Illicit drug offences decreased by 32% (630 offenders)
- Public order offences decreased by 15% (593 offenders)

Again, we ask the question as to why the need for greater police powers in an environment of reducing crime and safer communities especially in the four listed areas of crime where drug involvement would be otherwise expected to impact on the data.

The next two charts, again taken form the ABS[7] indicate:

- Falling theft and property damage in Tasmania
- Falling numbers of physical assault in Tasmania

Property Offences – 000's

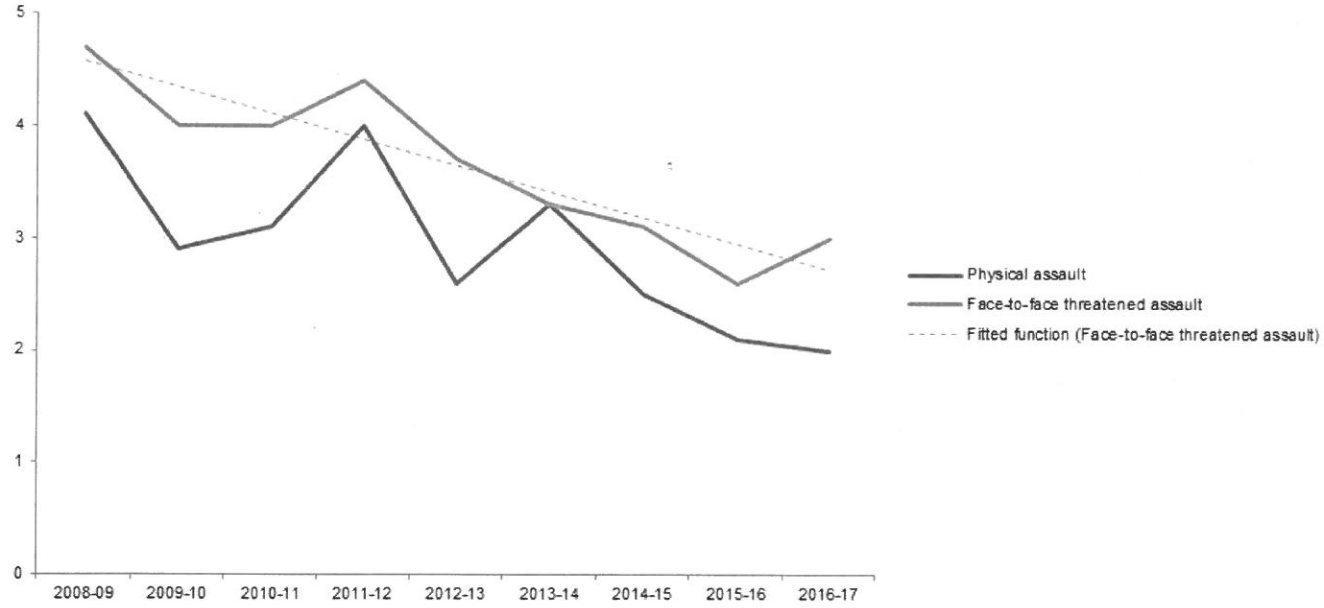


Australian Bureau of Statistics
© Commonwealth of Australia 2018.

[6] ABS: http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4519.0~2015-16~Main%20Features~Tasmania~13

[7] ABS: http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4530.0~2016-17~Main%20Features~Change%20in%20rates%20of%20crime%20over%20time%20in%20Tasmania~10025

Assault / Threatened Assault – 000's



Australian Bureau of Statistics
© Commonwealth of Australia 2018

The 2016/17 Tasmania Police Crime Statistics Supplement[8] noted a small increase in crime on the previous reporting period. The larger increases were in the areas of fraud and crimes against property. Police statements in local media put these increases down to increased reporting of offences while police clearance rates remained on par with previous years.

By reproducing this data, the point we are making here is that any argument that Tasmania is in the grip of any crime wave, or increased criminal activity is false. Unlike the incidents that were occurring in NSW at the time of the introduction of that jurisdictions consorting legislation, nothing from a statistical viewpoint supports such an introduction in Tasmania.

CONSTITUTIONAL ISSUES

Whenever discussions turn to the Government of the day (at a State or Federal level) placing restrictions upon freedom of opinion, political comment or association, the issue of the Australian Constitution and Australia's International Human Rights obligations are discussed.

The Department's Discussion Paper refers to a number of issues at page (15) under the heading Constitutional Issues.

[8] 2016/17 Tasmania Police Crime Statistics Supplement:
http://www.police.tas.gov.au.s3.amazonaws.com/wp-content/uploads/2013/10/Crime-Statistics-Supplement-2016-17.pdf

It is true to say that laws do exist that limit the association between people to prevent future harm and that they exist at State and Federal levels. The paper made reference to Family Violence Orders (FVO's) and Restraint Orders (RO's).

With respect, the Discussion Paper should have gone on to comment further to the effect that:

1. These laws that limit association between people to prevent future harm are based on evidence.

2. That these Orders are usually as a result of a judicial determination having heard the evidence of the parties and having turned their mind to the facts before them, rather than the non-judicial discretionary making of a consorting notice by say, a Police Officer.

3. That the Orders referred to such as FVO's and RO's are usually only in existence for a period of no more than (12) months and are open to challenge at any time.

The Discussion Paper makes further reference to the 2014 High Court decision of *Tajjour v NSW (2014)*[9].

In that case the argument surrounded the Consorting Laws in NSW and whether the NSW legislation conflicted with an implied constitutional right of freedom of association and/or that they were invalid because they conflicted with the implied freedom of political communication.

In Australia, unlike other jurisdictions such as the United States or other European jurisdictions, we do not have formal Bill of Rights Legislation that confer on its citizen's rights and responsibilities that cannot be reduced by the Government of the day.

Even though Australia does not have such formal legislation in the form of a Bill of Rights, it has been accepted by the High Courts that Australia does have implied freedoms, in particular, freedom of political communication.

The recent decision of the High Court in *Brown v Tasmania* (2017)[10] shows that the Court is mindful of the fact that we do have in Australia freedom of political communication and that attempts to limit that or burden that freedom to such an extent, may result in the law being held invalid.

That was the case in relation to the Tasmanian's Government attempt to implement the *Workplaces (Protection from Protestors) Act 2014.* This legislation attempted to criminalise actions of protestors in blocking or otherwise interfering with workplaces by way of political protest. The Court in that case held such legislation to be invalid.

The distinction between that case and that of *Tajjour* was that the Court in *Tajjour* ruled in a (6-1) majority that the law in that case, being the NSW Consorting Legislation, it accepted that it did burden

[9] Tajjour v NSW [2014] HCA 35 (8 October 2014)

[10] Brown v Tasmania [2017] HCA 43 (18 October 2017)

the implied freedom of communication about political matters, but it did not do so to such an extent that it was legitimate to prevent crime.

We make reference to *Tajjour* as have the Department in its Position Paper, because while the Court in that case by (6-1) majority held that the NSW's laws were not invalid, we point out the fact that:

1. The sole issue for the High Court was whether they were invalid or otherwise.

2. The Court could not, and is not there, to determine whether in fact such laws should be in place (a moral or ethical argument).

That is the point that we wish to make here. Just because it may be permissible to do something, it does not mean it **must** be done.

A civilised society such as Tasmania needs to have leadership and the community needs the facts as to whether or not such legislation and restrictions of freedom of movement, communication and association is necessary and justified.

The mere finding of constitutional validity should not be in itself a green light to legislation or regulation being passed. Demonstrated need, impact as a whole and other relevant factors need to be considered. A "wish list" of powers sought by a Police Department should not be in itself the reason to implement such law.

As noted by Grey (2013)[11] the High Court has been able to decide cases on the implied freedom of political communication but as yet a majority of the High Court has not ruled on the existence of an implied freedom of association, at least for political purposes.

USE OF CLUB COLOURS IN PUBLIC AND PRESCRIBED ORGANISATIONS

The Department's paper seeks further input on the issue of allowing, by legislation, the relevant Minister to do the following:

a. Prescribe an organization as an "identified organisation" in regulations
b. Make an offence of wearing or displaying in public prohibited items such as club colours, patches, badges, insignias or logos of an identified organization.

Our submission to these proposals is the same as the consorting proposal.

The power is not necessary.

[11] Freedom of Association in the Australian Constitution and the Crime of Consorting (Anthony Grey) The University of Tasmania – Law Review Volume 32 No. 2 2013

Pursuant to section 7 of the *Police Offences Act 1935,* Tasmania Police already have the power to require persons to "move on" from particular areas in the event that they are acting in a way that is against public interest, intoxicated or causing a disturbance.

These powers have been in place for some time. They are used regularly in areas of large concentration or people, particularly bars and clubs/pubs and restaurants. They serve a specific purpose; they last for a short time and in the vast number of cases work well.

The restriction on club colours or patches will not change the fact that a person still may feel some level of unease if they see 15 motorcycles in their rear vision mirror or a group 0f 15 or 20 congregating in a pub or public venue.

CONCLUSION

As discussed in this paper, it is our view that a case for implementation of Consorting Laws in Tasmania has not been made out by the Department. We appreciate that the Paper is, at this point, a positon paper however it is the opinion of the North West Community Legal Centre that the Department have not met the burden of demonstrating a need for such legislation in Tasmania.

Tasmania has a population of 500,000 people. According to the Department's own discussion paper there are at this point in time approximately 259 known members of OMCG's in Tasmania. On a pure statistical basis that is 0.05 % of the population of the State.

Justice Galeger in *Tajjour* stated:

> *"...generally speaking, the sufficiency of the justification required for such a burden should be thought to require some correspondence with the extent of that burden".*

The implementation of such a burden in this State would burden far more than the intended target, it will be an overreaction to any issues that are already being dealt with by authorities. Our crime statistics would suggest that. Consorting provisions are unnecessary and problematic because of the potential to reduce serious criminal activity is disproportionate to its potential to dismantle critical social structures.[12]

To permit police to issue a warning/consorting notice in relation to a person who has been convicted of an indictable offence many years after they were convicted, can impede their attempts to reintegrate into the community and entrenches discrimination against them[13].

The community of Tasmania should be afforded protection but also afforded the recognition that overly restrictive legislation and discretionary power being handed to the police would not benefit it as a whole and as such is too broad, too vague, and ultimately unnecessary.

---

[12] Public Interest Advocacy Centre Limited: Submission in Response to NSW Ombudsman's Issue Paper: Review of the use of the Consortium Provisions by the NSW Police Force (27 February 2014)

[13] Kingsford Legal Centre: Submission to NSW Ombudsman Legislative Review of the Consortium Provisions, dated 25 February 2014

The issue was put eloquently by the NSW Bar Association in its submission to the Ombudsman under the NSW Review:

> *"it is misconceived to look for gaps in the laws limiting association. Instead each legislative instrument that seeks to limit an association should be closely examined to consider whether it is necessary in a democratic society"*[14]

That approach if applied in this case clearly shows that such necessity has not been made out.

North West Community Legal Centre

10th May 2018

[14] NSW Bar Association: Submission to NSW Ombudsman: Consortium Provisions – Issues Paper, dated 28 February 2014