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The Inspector
Legislation and Development Review Services
GPO Box 308
Hobart, TAS, 7001

11 May 2018

By email: strategy.support@dpfem.tas.gov.au

Dear Inspector,

Re: Organised Criminal Groups Legislation Discussion Paper – Submission by Australian Lawyers Alliance (Tasmania)

I am writing to you as President and State Director if the Australian Lawyers Alliance's (ALA) Tasmania Committee. The ALA is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

Introduction

The Liberal government has issued a discussion paper calling for submissions with respect to proposed legislative change to amend the consorting offence in the *Police Offences Act* 1935, and to allow the Minister to identify organisations whose clothing, jewellery, and items will be prohibited in public places.

This submission constitutes the response of the ALA. **The ALA opposes the proposed laws, and contends that no legislative change should be made.**

What follows is a summary of the issues discussed in this submission, a short background, and detailed reasons for the ALA's opposition to the proposed laws.

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Summary

This submission argues that:

1. amendment to the consorting law is unnecessary, since there is no evidence that motorcycle clubs are involved in organised crime in Tasmania;
2. the proposed consorting law abrogates fundamental rights of persons affected by consorting notices;
3. the proposed consorting law is toxic to democracy because it emasculates effective democratic participation and opposition to consorting laws;
4. the proposed consorting law is considerably wider than is necessary even to affect members of motorcycle clubs;
5. the decision of the majority of justices of the High Court of Australia in *Tajjour v NSW* (2014) HCA 35 is largely irrelevant to the question of whether the Tasmanian parliament should pass the proposed consorting law, and whether the Tasmanian people should tolerate it; and
6. the proposed law to prohibit the wearing of clothing of identified organisations is potentially damaging to political communication.

Background

On 9 April 2012, an amendment to the New South Wales Parliament came into force creating Part 3A, Division 7 in the *Crimes Act 1900* (NSW) **(the Amending NSW Act)**. Section 93X of that Act provides that it is a criminal offence to continue to associate or communicate with two people who have both previously been convicted of an indictable offence, after receiving an official warning from police not to associate or communicate with them (**the NSW consorting law**).

The proposed Tasmanian consorting law is substantially modelled on the NSW consorting law, although particular features such as the intended definition of 'serious offence', and whether a Tasmanian consorting law would include a reversal of the onus of proof with respect to the limited defences that are available, are unknown. Other aspects of the law such as the policy framework in which it is to be utilised are also unknown.

The Amending NSW Act was to be subject to a report from the NSW Ombudsman in relation to its efficacy. That report was completed in April 2016 (**the NSW Ombudsman's report**).[1] It was highly critical of the way in which the NSW consorting law has been used by NSW police.

[1] *The Consorting Law: Report on the Operation of Part 3A, Division 7 of the Crimes Act 1900* (April 2016).

The NSW Ombudsman's report is the cause of significant concern for the ALA about the proposed Tasmanian consorting law.

Involvement of Tasmanian Motorcycle Clubs in Organised Crime

The use 'outlaw' as a normative description

The basis on which it argued that Tasmania's consorting law should be amended is to deal with an apparently pressing need of safeguarding the community from 'Outlaw Motorcycle Gangs' (**OMCGs**). Because of the pejorative connotation of the word 'gang', I do not adopt that expression, but use the neutral expression, 'outlaw motorcycle club' (**OMCC**).

Before I make some observations about the history of OMCCs in Tasmania to the extent as outlined in the discussion paper, it is desirable to correct the erroneous claim of the author of the discussion paper that OMCCs use the designation 'outlaw' to refer to a propensity to commit crime. The designation 'outlaw' is usually considered to refer to an event in 1947 in the United States following the end of the second World War, when a number of clubs did not acknowledge the supremacy of the American Motorcycle Association (AMA). Those clubs operating outside of the AMA's sanction were somewhat colourfully referred to as the 'outlaw' clubs.[2]

In an Australian context, particularly in relation to clubs that were formed after 1947, such as the Rebels Motorcycle Club (the largest such club in Tasmania) the designation as 'outlaw' arises from adherence to a particular motorcycle culture and aesthetic (such as the riding of Harley-Davidson or 'chopper' motorcycles), perceived by members as having originated and developed in the clubs that initially operated beyond the control of the AMA.

'Outlaw', in the context of motorcycle clubs, should therefore not be used in a normative sense as suggestive of a wilful involvement in criminal activity.

[2] William L Dulaney, 'A Brief History of 'Outlaw' Motorcycle Clubs ' (2005) *International Journal of Motorcycle Studies*.

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Particular events referred to in the discussion paper

The discussion paper asserts the involvement of Tasmanian motorcycle clubs in organised crime, and gives what it is contended are examples of that involvement.

The first event referred to is an apparent 'siege' in Kingston in 2013. I understand from media reporting that police attended the property and found a member of the Rebels Motorcycle Club involved in an altercation with another person. It is not apparent to me from media reporting, from inquiries amongst members of the legal profession, or from the discussion paper, whether any member of any motorcycle club was charged over the incident.

The second event relates to a trafficking case involving Colin Picard, the former President of the Rebels Motorcycle Club, in 2013. That matter was ultimately concluded in the Supreme Court of Tasmania. Comments on Passing Sentence of his Honour Justice Estcourt (*Tasmania v Picard*, 31 July 2013), and Comments on Passing Sentence of his Honour Justice Porter (*Tasmania v Gleeson*, 26 July 2012) do not disclose use of the hierarchy or structure of a motorcycle club to commit crime. There is accordingly nothing to mark the event in question as a crime involving a motorcycle club, as distinct from a crime that was committed by a person who happened to be a member of a motorcycle club.

The third event, the 2014 interception of four kilograms of methylamphetamine in Tasmania, is not related in the discussion paper with any precision, but it is notable that that the paper does not argue that any Tasmanian motorcycle club was used in the commission of a crime.

The fourth event relates to raids in 2015 during which significant quantities of cash and drugs were seized. The discussion paper does not contend that any person was charged as a result, nor that a motorcycle club was involved, merely that the premises were 'linked ' to the Rebels Motorcycle Club. It is not known at what degree of abstraction the premises were so 'linked '.

The fifth event is the September 2016 seizure of methylamphetamine, cash, and stolen property from a Devonport home 'linked' to the Bandidos Motorcycle Club. It is not known on what information it is asserted that there was a 'link', nor what kind of 'link' there was.

The sixth event is the sentencing in 2017 of one Ryan Zmendak for trafficking in methylamphetamine. The incidents the subject of sentence occurred in 2014 It is contended that Mr Zmendak was an 'associate' of the Rebels Motorcycle Club. The Comments on Passing Sentence of his Honour Justice Estcourt (*Tasmania v Zmendak*, 14 March 2017) disclose that Zmendak was a friend of a member of the Rebels Motorcycle Club from Queensland. The Comments do not disclose, nor does the discussion

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paper argue, that Zmendak or any person with whom he was involved, caused the structure of a motorcycle club in Tasmania to commit a crime.

The seventh event relates to a 'national run' involving the Rebels Motorcycle Club in 2017. What is notable is that despite significant police attention, no serious crime was alleged during the run. I understand from my own inquiries that the efforts of police resulted in two knives being located, and 4 riders of some 400 testing positive to methylamphetamine. Police appear to have believed that a serious assault occurred at the Rebels clubhouse, but it is not clear on what speculation that belief rests, given that no charge has ever been forthcoming. At the conclusion of the run, whilst two members of the Rebels Motorcycle Club were removed from a flight, it is apparent from media reports that no crime was committed, and no violence or threat of violence was offered.[3]

The eight event relates to a boxing match in Devonport in 2017. It is apparent that the police believed that something might have occurred had they not attended. It is not apparent what the basis of the belief is.

The ninth event relates to the charging of a man at the Bandidos clubhouse in Devonport on 3 April 2018. The discussion paper does not assert that he was a member of a motorcycle club, nor that a motorcycle club was involved in any way with the various things of which he was later charged.

Conclusions

Whilst the discussion paper refers to incidents where members of motorcycle clubs have been involved in crime, the incidents fall short of demonstrating an involvement of motorcycle clubs themselves in the commission of crime.

Crime exists across all sections of the community, in all classes, and in every occupation. Inevitably, emphasis on the criminal activity of members of a particular class will tend to suggest that the class as a whole is disposed to criminal activity. In the absence of data allowing comparison with other similar social groupings, it cannot even be concluded that members of motorcycle clubs are statistically overrepresented in criminal activity.

[3] *The Mercury*, 'Tasmania Police and Forensics swarm over Rebels North Hobart clubhouse' (24 October 2017).

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The proposed consorting legislation

Civil liberties issues

Open political debate and the ability to protest are fundamental to the democratic nature of the Commonwealth and Tasmanian polities. The proposed consorting law in its present form is open to exploitation to stifle political debate and to disrupt the ability to protest.

Political debate and protest require the association of citizens. The democratic institutions of both the Commonwealth and Tasmania assume that citizens may organise to create democratic opposition to laws. Such organisations may be relatively informal, such as a gathering of protesters. They may be more formal, such as with organisations dedicated to particular political issues or types of issue. They may be formalised in the party structure of political parties dedicated to putting up candidates in elections and to forming governments.

Informal gatherings of protesters and gatherings of elected representatives in parliament are, in fact, not conceptually distinct as categories of organisations, except in the fact that the constitutional ability to affect the passing of legislation belongs to the latter and not the former. In the political sense of their ability to contribute to, and to shape, political discourse, they are not different at all.

Any law that prevents organisation amongst a particular group of persons harms the ability of that group to organise and to contribute to political discourse.

The harm that flows from such a law affects democracy doubly, in that it is not merely the destruction of a fundamental liberty that the law achieves, but that the law also prevents a particular group from mounting resistance to it, or to contributing to political debate with respect to it.

On the terms in which the discussion paper expresses the proposed consorting law, it would not be, however, a law that prevents organisation by a particular group of persons nominated by parliament, but a law that allows police to determine which persons are to be prevented from consorting.

The ALA is especially concerned, therefore, that the proposed consorting law would give to agents of the executive government the power to determine which persons are to be bereft of their democratic right to organise.

The potential for the abuse of this legislation to control political dissent is obvious. Democracies do not flourish where unbridled power to control political dissent is given to police forces, and the civilian population is asked to trust that the police force will not abuse that power except in pursuit of an

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apparent enemy of good order – in this case, motorcycle clubs. Democracies flourish where power is given to citizens, and it is for governments to know that they ought to govern well and that their police forces must respect civil liberties, or lose office. It is the fundamental character of a democracy that the government fears the people, not that the people fear the government.

On the question of constitutional rights, the discussion paper makes reference to the decision of the High Court of Australia in *Tajjour v NSW* [2014] HCA 35 as suggesting that fears that constitutional rights are trammelled by the *Crimes Act 1900 (NSW) s93X*. The argument with respect to the significance of *Tajjour* is, with respect to the author of the discussion paper, misrepresented.

Tajjour was decided within a particular constitutional framework. That framework is derived from the basic notion that parliament is the supreme law-making body, not the High Court, and that parliament is best able to judge whether its laws are imposed for a legitimate end, and are adapted to achieving that legitimate end. As Hayne J observed in Tajjour at [82], *'this Court cannot, and will not, assess whether the relevant law has in fact achieved, or will in fact achieve, its intended end or object'*.

With respect to the ultimate question of whether the law so burdened the implied right of political communication that it was constitutionally invalid, a majority of the High Court concluded that there was nothing in the content of the law that made it necessarily so,[4] despite strongly dissenting judgments of French CJ[5] and Gageler J.[6]

The question before the High Court in *Tajjour*, whether constitutional doctrines derived from *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 relating to the legalistic question of whether a law excessively burdens and implied right, is not the question before either the Liberal government when it considers whether to adopt formally the proposal in the discussion paper; nor is it the question that would be before the parliament that considers the proposed consorting law in the form of a bill. It is certainly not the question that is before the Tasmanian people, whether the proposed consorting law is an acceptable restraint on their liberty.

The true question raised by the proposed laws is not a legal question, but a political one. I express it as being: *'what bulwarks of the liberty of the Tasmanian population as a whole should be given away*

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[4] *Tajjour v NSW* [2014] HCA 35 at, for example, [91].
[5] *Tajjour v NSW* [2014] HCA 35 at [167].
[6] *Tajjour v NSW* [2014] HCA 35 at, for example, [91].

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in pursuit of questionable claims of the alleged criminality of organisations whose combined membership does not exceed 300?'

The breadth of the proposed consorting law

Whilst the discussion paper attempts to justify the proposed consorting law by reliance on an apparent problem involving 'OMCGs', the proposed law does not relate in any way to organisations.

The proposed consorting law is to replace s6 of the *Police Offences Act* 1935 with an offence for persons aged 18 years or more, who have been convicted of a serious offence, from habitually consorting with another nominated person, aged 18 years or more, who has also been convicted of a serious offence.

Nothing in the proposed law purports to confine it to particular organisations, or indeed, to organisations at all.

The discussion paper gives no guidance on the meaning of 'serious offence'. Assuming that the *Crimes Act* 1900 (NSW) model is to be followed in this regard, 'serious offence' will mean an indictable offence. This is in general terms consistent with the meaning of 'serious offence' in other Tasmanian legislation, such as the *Evidence Act 2001 s3*.

Whilst it is the case that most indictable crimes that cannot be dealt with summarily are more serious than summary offences, this is not always the case.

For instance, a person who decides to use a crowbar to break into someone's garden shed to steal power tools, in order to fund a drug habit will, if stopped in the street by police and searched, without actually having carried out his purpose, be charged with being found prepared to commit a crime under s248 of the *Criminal Code*. That is a crime that is indictable and cannot be dealt with summarily, and he will therefore be liable to being issued with a consorting notice under the proposed law. But if he successfully carries out his purpose and makes off with a cordless drill valued at $200, he will be charged with burglary and stealing, and will be dealt with in the Magistrates Court, and he cannot be subject to a consorting notice that relies upon the same definition of 'serious offence' as in the *Evidence Act* 2001 s3.

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The proposed consorting law therefore would allow for consorting notices to be issued arbitrarily, to persons having nothing to do with organised crime; and depending on the meaning of 'serious offence', according to the at-times arbitrary distinction between indictable and summary offences.

The NSW experience of s93X of the *Crimes Act* 1900 suggests very strongly that this will be so in Tasmania. The NSW Ombudsman's Report noted the following:[7]

> *'Approximately half of all consorting warnings were issued by general duties police (n=4,401), and nearly 80% of people subject to the consorting law were affected as a result of an interaction with general duties officers (n=2,601). General duties officers were responsible for 85% of all occasions of use of the consorting law during the review period (n=1,538)...*
>
> *During our consultations, we found significant variation between commands in relation to why police were using the consorting law, what or whom they were targeting, and police views regarding its effectiveness...*
>
> *A number of LACs used the consorting law to police public areas. It was used to target people in public seating areas, and public walkways and in and around public transport hubs. Generally, the impetus for this use came as a result of nuisance offending in these areas or complaints from local businesses about 'undesirable' people disrupting retail or hospitality enterprises. We spoke with police from four metropolitan LACs in 2013 and then again in 2014 or 2015 in relation to this type of use. Three out of the four LACs discontinued use and advised they found their use of the consorting law in this context to be resource-intensive with few tangible results. One metropolitan LAC thought their use of the consorting law was an effective crime prevention strategy. This LAC targeted people in open, public areas and seated on public benches or at bus stops, often during daylight hours. A number of people experiencing homelessness were subject to the consorting law in this area. Police advised the aim was to 'clean up the CBD, to make it safer for everybody and discourage people from committing offences'. The Police Transport Command increased its use of the consorting law towards the end of the review period. In total, 147 consorting warnings were issued to 127 people by officers from the Police Transport Command. On most occasions, the consorting law was used by police in conjunction with*

[7] *The Consorting Law: Report on the Operation of Part 3A, Division 7 of the Crimes Act 1900* (April 2016) p 114-115.

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a person search and a move-on direction. On a number of occasions, people were initially approached by police for the purposes of determining whether they were travelling with a valid ticket; if they were not they were issued an infringement notice in addition to a consorting warning...

During our analysis of the consorting data and information relating to a number of people charged with consorting, we identified clusters of use by general duties police in relation to people experiencing homelessness. There is no suggestion that use of the consorting law in relation to people experiencing homelessness was widespread; instead the examples reported demonstrate the breadth of circumstances within which the consorting law may be used and highlight the importance of a carefully defined framework within which the consorting law may be appropriately applied.'

The defences

Whilst the discussion paper gives little indication of what the proposed defences might be to a charge of consorting under an amended s6 of the *Police Offences Act* 1935, reference to the *Crimes Act* 1900 (NSW) s93Y also causes the Australian Lawyers Alliance concern.

This concern is that s93Y purports to put a legal onus of proof onto a defendant to establish on the balance of probabilities the existence of one of the defences in paragraphs (a)-(f).

It is the view of the Australian Lawyers Alliance that the principle that a prosecutor bears an unmoving legal burden of proving guilt beyond reasonable doubt is fundamental to the common law system that Australia has inherited from England, and that legislation should alter that burden only in exceptional circumstances where doing so is clearly required.

In the case of the proposed consorting law, putting the burden of proving a defence onto a defendant is unjustified. It should be apparent to a police officer who chooses to charge a person with consorting whether one of the defences might apply. If there is doubt whether one of the defences applies, then that might give police concern enough not to charge the person with consorting at all — this would have the effect of discouraging police from abusing powers given to them by an amended s6 except whether the person is clearly engaging in illegal activity.

The presence of the reversal of the burden of proof also contributes to the stifling effect of consorting laws on democratic rights. People subject to consorting notices are much less likely to engage in lawful

consorting of the type dealt with in s93Y (a)-(f) if they know that they can be charged, prosecuted, and found guilty unless they can succeed in establishing a defence.

The range of consorting covered by the defence provisions is also inadequate. The NSW Ombudsman's Report noted[8] that there was scope for defence provisions to allow for:

1. consorting that occurs in the course of accessing welfare and support services, peer support or mentoring groups;
2. consorting that occurs in the course of sporting activities;
3. consorting that occurs in the course of religious activities;
4. consorting that occurs in the course of recreational and cultural activities;
5. consorting between neighbours;
6. consorting that occurs in the provision of a broader range of professional services;
7. consorting that occurs through participation in cultural or artistic activities;
8. consorting that occurs in the course of volunteering or participation in community activities; and
9. where a person has not understood a consorting warning.

It is the view of the Australian Lawyers Alliance that, if there were to be an amended consorting law in Tasmania, there would be no justifiable reasons for defences dealing with the additional circumstances referred to in the report of the NSW Ombudsman not to be included.

The proposed prohibition on clothing, jewellery and items

The position of the Australian Lawyers Alliance is that prohibitions on what may be worn by people in public places are extremely concerning, whenever the prohibition may interfere with the ability of people to communicate ideas and to engage in political discourse.

The items that it is proposed to be banned are argued to be intimidating because of their use of symbols that hold particular meanings. Whilst the view might be taken that symbols are intimidating to some people, the ALA is anecdotally aware that there is a large section of the community that views motorcycle club attire as deliberately reflective of a world-view in opposition to conventional cultural norms, that is not in itself criminal.

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[8] *The Consorting Law: Report on the Operation of Part 3A, Division 7 of the Crimes Act 1900* (April 2016) p 104.

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The process that is proposed, of prohibiting the clothing, jewellery, or other items to show the symbols of 'identified organisations' also threatens to capture the symbols of other organisations. Organisations such as those dedicated to environmental protest and animal rights sometimes skirt the edges of legality in the course of protest, and in recent times have been argued by police to have engaged in criminal conduct in the course of protest. These organisations also propound a world-view that is different from that of the dominant, conventional culture or world-view, and seek to change conventional culture or world-view by drawing attention to what they argue are issues worthy of concern. These organisations do so in a manner that is sometimes confronting.

It is not a proper role for a Minister of a democratic government to have the authority to determine which forms of political symbolism are appropriate to be displayed in public places. Doing so necessarily involves the Minister in an evaluative exercise of the role that is played by the voices of alternative cultures and world-views, to determine whether they are in effect validly held.

It is a legislative scheme that is ripe for abuse that one day there might be a Minister who concludes that not merely are motorcycle clubs criminal organisations that use symbols to intimidate and facilitate the commission of crime, but that so too are those organisations that would give shelter to and assist asylum seekers, or trade unions that might encourage the disruption of labour on private property, or any organisation that might encourage civil disobedience.

Democratic societies demand dissenting voices in order to function. An absence of dissenting voices in an apparently democratic society is a sign of its death. Attempts to silence dissenting voices must be resisted.

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Conclusion

For the foregoing reasons the proposed legislation will have the opposition of the Australian Lawyers Alliance.

Please do not hesitate to contact me if I can be of assistance, in which case please direct any correspondence to Fabiano Cangelosi at fabiano.cangelosi@outlook.com.

Yours faithfully,

Fabiano Cangelosi

Fabiano Cangelosi
Barrister
Australian Lawyers Alliance (Tasmania) – President & State Director