ACT HUMAN RIGHTS COMMISSION
Australian Capital Territory

Mr Jeremy Hanson MLA
Member for Murrumbidgee
Shadow Attorney-General
ACT Legislative Assembly

[By email: Jeremy.Hanson@parliament.act.gov.au]

Dear Mr Hanson

RE: Crimes (Anti-Consorting) Amendment Bill 2019 (PMB)

Thank you for seeking the Human Rights Commission's views on the Crimes (Anti-Consorting) Amendment Bill 2019, which was introduced in the Legislative Assembly today.

We understand that the bill, which seeks to introduce anti-consorting laws in the ACT, is intended to target the operation of outlaw motorcycle gangs (OMCGs) in the Territory, and is directed at preventing harm to members of the Canberra community as a result of OMCG activity.[1] The Commission appreciates that any escalation of violence linked to OMCGs can lead to a range of serious harms to the community, and we understand the serious community concerns that the bill seeks to address.

The Commission is committed to working constructively to address community concerns about violence and the activities of OMCGs operating in the ACT, and we remain fully supportive of reasonable, justifiable and targeted legislative measures to deal with such threats. To that end, as you know, we have welcomed the government's efforts to introduce measures aimed at resolving identified gaps in the statute book, including enhanced crime scene powers, the new 'drive-by shooting' offence, and anti-fortification laws, where those measures have been accompanied by appropriate safeguards to guard against abuse. We have also appreciated your early and constructive engagement with us on the Crimes (Criminal Organisation Control) Amendment Bill 2017, which sought to introduce a control order scheme that was properly tailored to target criminal organisations.

Summary of our advice

We note the bill reflects recent amendments to NSW legislation, implementing some of the recommendations of the NSW Ombudsman. The NSW Ombudsman considered that absent these changes being made, it was 'likely that the NSW consorting law will continue to be used to address policing issues not connected to serious and organised crime and criminal gangs and in a manner that may impact unfairly on disadvantaged and vulnerable people in our community'. The 2018 NSW amendments introduced in response to the Ombudsman's report, however, failed to fully implement all of those recommendations.

The Commission agrees that that preventing, disrupting and responding to serious and organised crime, including OMCG activity, in order to protect public safety is clearly a legitimate objective. However, we find the anti-consorting scheme proposed in the bill is overbroad and lacks sufficient legislative safeguards to ensure that the powers will not be misused. The bill's reliance on largely unfettered police discretion is, in our view, incompatible with the HR Act. Unchanged, it carries a significant risk of unreasonably interfering with the human rights of vulnerable groups, who are not involved in organised crime. At minimum, the

[1] See ES, p 2.

Commission considers that the bill should be revised to include additional safeguards. Such changes would ensure the legislation is able to achieve its important objective.

Outline of the bill

We note that the bill is closely modelled on NSW anti-consorting laws contained in Part 3A, Division 7 of the *Crimes Act 1900* (NSW), and reflects recent (and as yet uncommenced) amendments made to the NSW scheme by the *Criminal Legislation Amendment (Consorting and Restricted Premises) Act 2018* (NSW).

The bill will make it an offence for a person over the age of 14 years to consort (in person or by other means) on at least two occasions with each of two or more named offenders who have been convicted of an indictable offence after being given a warning (orally or in writing) by a police officer in relation to those offenders. Warnings issued by the police to a person under the age of 18 will expire after six months, while warnings issued to other persons will expire after two years. The offence carries a maximum penalty of 3 years imprisonment, a $24,000 fine (150 penalty units),[2] or both. A range of exceptions to a charge of consorting will apply whereby the court must disregard consorting in certain situations if it was reasonable in the circumstances. Provision is also made for the ACT Ombudsman to review and report on the operation of the legislation after two years.

Our comments below are focused on the human rights implications of introducing anti-consorting laws in the ACT that are based on the laws enacted (and recently amended) in NSW. Our analysis is grounded in the minimum standards contained in the *Human Rights Act 2004* (HR Act) with which all legislative proposals must comply to be considered compatible with human rights.

As set out below, we consider that there are various aspects of the bill, which, despite adopting the recent improvements made to the NSW scheme, give rise to considerable issues of incompatibility with the HR Act. In our view, these aspects would require revision to ensure that the bill does not result in disproportionate and/or unjustified interferences with the human rights of vulnerable individuals, including children and Aboriginal people, who are far removed from the stated rationale and intended reach of these measures.

Human rights implications

It is inevitable that anti-consorting laws, by their nature, will limit a range of rights contained in the HR Act, including the right to equality and non-discrimination (s 8), children's rights (s 11), the right to privacy and reputation (s 11), the right to freedom of association (s 15), the right to freedom of expression (s 16), and the right to a fair hearing (s 21). The HR Act, however, permits rights to be limited where the limitation is reasonable, necessary and proportionate to the objective being sought (s 28). In short, to meet the requirements of s 28 of the HR Act, a limitation must (i) be aimed at a legitimate objective, and (ii) be rationally and proportionately connected to that objective.

As you know, the Human Rights Commissioner previously provided advice, highlighting a range of serious concerns about the Government's 2016 proposals to introduce anti-consorting laws in the ACT.[3] Many of those concerns apply equally to this bill. In addition, we note that, in adopting the NSW model, this bill goes further than the 2016 proposals in several respects (see further below).[4]

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[2] Currently, one penalty unit in the ACT is equal to $160: see s 133 of the *Legislation Act 2001*.

[3] Available at: http://hrc.act.gov.au/wp-content/uploads/2016/06/Final-Consorting-Submission.pdf.

[4] See Discussion Paper on proposals for a model of consorting laws to target and disrupt serious and organised criminal activity in the Territory, June 2016, available at: http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/JACS_Consorting_Discussion_Paper.pdf

We also note that the recent amendments to the NSW anti-consorting laws, which were introduced by the *Criminal Legislation Amendment (Consorting and Restricted Premises) Act 2018* (NSW), addressed only some of the concerns identified by the NSW Ombudsman in his 2016 report on the operation of the NSW scheme.[5] Key recommendations by the Ombudsman remain unaddressed (see further below).

We also observe that while the NSW laws have been found to be constitutionally valid by the High Court,[6] the Court did not make any finding about the compatibility of those laws with equivalent rights guaranteed in the International Covenant on Civil and Political Rights (ICCPR). The Court instead unanimously concluded that the provisions of the ICCPR, where not incorporated in Commonwealth legislation, did not impose any constraint on the power of a State Parliament to enact contrary legislation.

(i) Legitimate objective: A legitimate objective is one that addresses an area of public or social concern that is pressing and substantial enough to warrant limiting human rights. Limitations on rights guaranteed in the HR Act must conform to the strict test of necessity in accordance with the requirements of s 28 of the HR Act, which requires limits to be reasonable and demonstrably justified in a free and democratic society. As we have previously advised in relation to the Crimes (Criminal Organisation Control) Amendment Bill 2017 (PMB), seeking to align the ACT legislation with the NSW laws purely for the purpose of achieving consistency between the two schemes is not in itself a legitimate objective for limiting rights in accordance with s 28 of the HR Act. However, we consider that preventing, disrupting and responding to serious and organised crime, including OMCG activity, in order to protect public safety is clearly a legitimate objective, provided that the legislative response in question is targeted at actual and demonstrable threats.

In this regard, we note recent statements made by the Attorney-General and the Minister for Police to the Legislative Assembly, advising that the number of active gang members has remained largely stable in recent years, and that police initiatives undertaken by Taskforce Nemesis have achieved some notable successes in disrupting OMCG activity. It is not within the scope of the Commission's competence to make a definitive judgement on the effectiveness of the ACT's current measures for dealing with OMCGs. We have previously said that we would be in favour of an independent review that looked at the effectiveness of the current suite of ACT's measures, however, we note that the burden of demonstrating effectiveness properly rests with the Government.

(ii) Rational and proportionate response: For a measure to be rationally connected to its objective requires the measure to be effective in achieving the objective being sought. It is not sufficient to put forward a legitimate objective if in fact the measure limiting the right will not make a real difference in achieving that aim. In other words, the objective might be legitimate but unless the proposed measure will actually go some way towards achieving that objective, the limitation of the right is likely to be impermissible for the purposes of s 28 of the HR Act. Proportionality requires that even if the objective of the limitation is of sufficient importance and the measure in question is rationally connected to the objective, it may still not be justified, because of the severity of the effects of the measure on individuals or groups. The inclusion of adequate safeguards is a key factor in determining whether the measures are proportionate. This includes ensuring that there are adequate processes for procedural fairness, as well as mechanisms for monitoring the operation and impact of the measures.

While it is far from clear whether consorting offences are effective in reducing organised crime and gang-related violence, we note that the NSW Ombudsman's 2016 report on the NSW laws nevertheless found 'qualitative evidence to support the effective use of the consorting law by the Gangs Squad to target high-

[5] NSW Government response to the Ombudsman's Report on the operation of Part 3A, Division 7 of the Crimes Act 1900 (April 2016), available at: https://www.justice.nsw.gov.au/Documents/NSW-govnt-response-Ombudsman-consorting-report.pdf.

[6] *Tajjour v New South Wales* [2014] HCA 35.

risk [OMCGs]'.[7] The report, however, noted that 'other specialist squads also tasked with policing serious and organised crime and criminal gangs, have either significantly reduced their use of the consorting law over time or did not initiate use'.[8]

Notably, the report also found that the NSW anti-consorting laws were used 'in relation to a broad range of offending, including minor and nuisance offending',[9] and in relation to 'disadvantaged and vulnerable people, including Aboriginal people, people experiencing homelessness, and children and young people. In addition, [there was] an exceptionally high police error rate when issuing consorting warnings in relation to children and young people'.[10] The report noted that:

> The central concern is that the consorting law may criminalise social interactions in circumstances where there is no requirement for police to suspect any link between the consorting and planning or undertaking criminal activity, organised or otherwise, or building criminal networks. The breadth of the new consorting law means that the main constraint on its application is the sensible exercise of discretion by police officers.[11]

The NSW Ombudsman recommended a range of amendments 'to increase the fairness of the operation of the consorting law, and to mitigate the unintended impacts of its operation on people in circumstances where there is no crime prevention benefit, or where the crime that may be prevented is relatively minor'. The recommended changes included:

- clarifying that the intent of the consorting law was for the prevention of serious crime;
- removing children and young people from the application of the consorting law;
- making additional defences available to a person charged with a consorting offence; and
- introducing clear time limits for the validity of police warnings.

The NSW Ombudsman considered that absent these changes being made, it was 'likely that the consorting law will continue to be used to address policing issues not connected to serious and organised crime and criminal gangs and in a manner that may impact unfairly on disadvantaged and vulnerable people in our community'.[12] The 2018 NSW amendments introduced in response to the Ombudsman's report, however, failed to fully implement the changes described in the first two dot points above.

The Commission shares similar concerns that the anti-consorting scheme proposed in the bill is overbroad and lacks sufficient legislative safeguards to ensure that the powers will not be misused. The bill's reliance on largely unfettered police discretion is, in our view, incompatible with the HR Act, and if left unmodified carries a significant risk of misapplication leading to disproportionate interferences with the human rights of vulnerable groups, contrary to s 28 of the HR Act. At minimum, the Commission considers that the bill should be revised to include the following safeguards, similar to those canvassed in the Government's 2016 proposals and the additional matters identified in our previous advice on those proposals:

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[7] Professor John McMillan, '*The consorting law Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*' (April 2016) p iii, available at: https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0005/34709/The-consorting-law-report-on-the-operation-of-Part-3A,-Division-7-of-the-Crimes-Act-1900-April-2016.pdf.

[8] Ibid, at p 3.

[9] Ibid, at p iii.

[10] Ibid.

[11] Ibid.

[12] Ibid.

- **Limiting the class of people who may be subject to police-issued consorting warnings to those who have been convicted of a serious indictable offence.** The bill currently prohibits a person (irrespective of whether they have been convicted of any offence) from consorting with a person convicted of an indictable offence (ie any offence carrying a penalty of more than 2 years imprisonment), irrespective of whether the offence has any connection to organised criminal activity, or when the offence was committed. This is patently overly broad and unconnected to the objectives of the scheme. To reduce the likelihood of vulnerable groups being disproportionately targeted, provision should also be made to ensure that a warning can only be issued by a police officer at the rank of Senior Sergeant or above. In our view, warnings issued to those who have not been convicted of a serious indictable offence should be issued by the Magistrates Court. This could reasonably include provision for interim warnings to be issued by police in urgent circumstances, subject to subsequent judicial authorisation.
- **Providing that a consorting warning can only be issued if there is a reasonable basis to believe that the warning is likely to prevent or disrupt organised criminal activity.** While we welcome the inclusion of time limits to govern the validity of police warnings, the bill, however, contains no threshold requirement to show any suspected link to identifiable criminal activity before these powers can be exercised. Without evidence that a particular crime may be committed, consorting provisions will effectively operate to criminalise status on the basis of 'guilt by association', and regardless of whether the warning is issued by police or a court, they cannot be cured of their inherent incompatibility with the HR Act.
- **Providing for right of review.** The bill currently makes no provision for a person to appeal or challenge a warning issued by police. To be consistent with the right to a fair hearing, a person who is subject to a police issued warning must at minimum be able to seek immediate independent administrative merits review in relation to the warning. A right of third parties to make representations in appeals in relation to a warning should also be provided, given that the consequences that can flow from a warning can affect not just the person subject to the warning but other persons as well, such as family members and employers.
- **Providing that consorting warnings cannot be issued to people under 18 years of age.** The NSW Ombudsman's report was clear that anti-consorting laws should not be applied to children and young people. During the review period, the NSW Ombudsman found that 201 children and young people between 13 and 17 years of age were subject to the use of the consorting law;[13] and nearly 60 per cent of them were Aboriginal.[14] Of 133 children and young people whose associates or friends were warned about consorting with them, 105 children and young people were incorrectly identified by police as convicted offenders.[15] The Commission considers that imposing consorting laws on children and young people will not disrupt serious and organised crime to an extent that would justify the limitations placed on children's rights under the HR Act.

  We query the statement on page 5 the ES, which says that the bill 'does not apply to young persons at all'. The bill will enable children and young people between 14-18 years of age to be subject to anti-consorting warnings (s 84). We note that in the ACT a child or young person is defined to be a person who is under 18 years old.
- **Requiring police-issued warnings to be in written form to ensure that warnings are appropriately given and understood.** In our view, oral warnings should not be permitted. The bill should also include a requirement for the police to ensure that the person understands what they are permitted to do and not do if issued with a warning, including information about the right to appeal the warning. Consistent with reforms in the civil area, this might also include an obligation on police to provide all

[13] Ibid, p 72.

[14] Ibid.

[15] Ibid, p 80.

necessary supports to ensure the person can understand the information. The bill should also ensure that police must not disclose the details of the offence a person was previously convicted of when issuing a consorting warning to others about them.

- **Providing for a defence of 'reasonable excuse'.** The inclusion of a range of exceptions to the offence of consorting in the bill, including the recognition of Aboriginal kinship structures as being exempt from the operation of the laws, is welcome. The bill in this regard improves on the NSW laws as these provisions are drafted as exceptions rather than defences, and involve an evidential burden only. However, to reduce the risk of over-criminalisation of persons who the law was not intended to target, we consider that the bill should also provide for a general 'reasonable excuse' defence, as was recommended in the Final Report of the Queensland Taskforce on Organised Crime Legislation.[16]

  We note that the Explanatory Statement to the bill states at p 4 and p 7 that the new s 85 'provides a general exemption for contact which is, in the view of the court, "reasonable in the circumstances"'. We query whether this is an accurate reflection of s 85. On our reading s 85 will only exempt the particular types of consorting listed in s 85(1), if it can be shown that the consorting was 'reasonable in the circumstances' (s 85(2)). As such, s 85(2) does not operate as a standalone exemption.

- **Providing for reporting and training requirements.** We welcome that the bill provides for the independent review the operation of the scheme after two years, as this is an important safeguard for monitoring whether the scheme is having any disproportionate impact on vulnerable groups. However, as the NSW Ombudsman's report demonstrates, it will also be necessary for the bill to include a requirement to collect and publish comprehensive data on use of the powers on annual basis, and to ensure that police are trained to use the powers appropriately. All relevant details should be recorded at the time that a warning is issued, including basic antecedents; demographical information including whether the person identifies as Aboriginal or Torres Strait Islander; the location of the incident; police observations at the time; and the nature of convictions of all persons involved in the consorting. Consistent with the NSW Ombudsman's report, we consider that ACT Policing must be required to design and implement a quality assurance process for the use of consorting law, which ensures accurate record keeping, includes assessment of procedures to deal with invalid warnings, and ensures compliance with relevant policies and guidelines.

Once again, we thank you for seeking our feedback on this bill. In line with our usual practice, we note that we will make a copy of this letter available on our website in due course.

Yours sincerely

Dr Helen Watchirs OAM	Jodie Griffiths-Cook	Karen Toohey	Heidi Yates
President and Human Rights Commissioner	Public Advocate and Children and Young People Commissioner	Discrimination, Health Services, and Disability and Community Services Commissioner	Victims of Crime Commissioner

20 February 2019

[16] Taskforce on Organised Crime Legislation, Department of Justice and Attorney-General (Qld), Final Report (2016), p 198.