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Victorian Law Reform Commission
GPO Box 4637
MELBOURNE VIC 3001

By email: law.reform.vic.gov.au

Submission: Use of regulatory regimes in preventing the infiltration of organised crime into lawful occupations and industries

Liberty Victoria welcomes the opportunity to make this submission on the use of regulatory regimes in preventing the infiltration of organised crime into lawful occupations and industries.

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government. Further information on our activities may be found at www.libertyvictoria.org.au.

Introduction

1. Liberty notes that the Consultation Paper poses a series of questions at pages 72 to 74. Liberty does not intend to respond to all the questions posed. Much of the discussion in the report touches on the potential for organised crime groups to infiltrate various lawful industries and occupations, or the concern that this may be occurring and is unregulated or insufficiently regulated. The data supporting the extent of alleged infiltration is slim and largely anecdotal.
2. Liberty wishes to concentrate on the 2 central aspects of the consultation paper. Firstly, the absence of sufficient data upon which to base a platform for change to the regulatory environment of the target industries and occupations, and the difficulty inherent in data

collection and secondly our concern that police powers not be expanded to fill a perceived void in the regulatory framework.

Difficulties in adopting a uniform or generalized approach.

3. The Consultation paper points out that some industries and sectors have great potential to be manipulated by organised crime groups; for example gambling, racing, debt collection and the security sector. However those industries and sectors are self evidently more difficult to regulate so as to exclude potential infiltration due to their vast scale and the wide demographic of members of the public participating.
4. Some of the aforementioned industries or sectors are known to be attractive to organised crime for funneling wealth or dealing in cash proceeds and investments. Gambling related industries, debt collection and security industries may involve cash based incentives and may be prone to exploitation by organised criminals seeking to engage in money laundering or otherwise conduct businesses which have a veneer of legitimacy.
5. Some of these industries and occupations are already subject to substantial and highly structured oversight through licensing and related requirements, internal investigatory bodies and external industry regulators. But this is not the case for all industries or occupations mentioned in the consultation paper. Indeed the breadth of industries and occupations referred to in the consultation paper makes it very difficult to apply a metadata approach to the questions posed.
6. Some of the industries mentioned are of a smaller scale of operation, ownership and impact; tattoo parlors, pawn dealers, small-scale brothels run by dual partnerships exist at the opposite end of the spectrum from the gambling, racing, or debt collection or security sector.
7. Some industries or occupations referred to are capable of being used or exploited by organised crime despite their conventional purpose within the mainstream economy; accounting practices real estate agencies, equity and securities consultancies, legal practices and mainstream commercial businesses by way of example .
8. Liberty considers that there is significant risk attached to adopting generalised measures to address perceived risks of infiltration into vastly disparate occupations, sectors and industries.
9. Localised data collection and long term research is needed to gather reliable evidence as to the actual level of risk posed by organised crime to specific businesses industries and occupations.

The draft model for assessing risks of infiltration

10. Liberty acknowledges that one of the key aims of the Consultation paper is to identify means of organised crime prevention rather than investigation and prosecution, and that it is sought to provide a framework for risk assessment within the industries and occupations under consideration (or any others subsequently identified). The paper also poses questions as to what kinds of regulatory measures might best expose, monitor and prevent infiltration within the industries and occupations nominated.
11. Questions posed by the Consultation paper seek assistance in identifying preferred approaches to risk analysis and prevention measures. Liberty will only address selected questions or topics which appear most relevant to our civil liberties based emphasis.
12. Question 2 asks whether the draft model for assessing risk infiltration, as set out at pages 32 to 37 is a helpful way to assess the risk of organised crime group infiltration into lawful occupations and industries. The draft model proposed may be a helpful way to assess the risk of organised crime groups infiltration into lawful occupations and industries, but is only likely to produce a partial understanding of what is occurring.
13. Royal Commissions into organised crime and statutory entities and corporations such as the Australian Crime Commission, New South Wales Crime Commission and the Queensland Crime and Corruption Commission have exercised extensive evidence gathering powers and resources for exposing the activities of organised crime groups including through public hearings. Victoria has not had the advantage of extensive public hearings into organised crime.
14. IBAC was established through the *Independent Broad based Anti corruption Commission Act 2011* but overly onerous threshold provisions have impeded the utility of IBAC as a means of producing evidence or data of the kind required to identify whether the range of occupations and industries and sectors referred to in the consultation paper are vulnerable to infiltration by organised crime groups. Liberty contends that the draft model for risk assessment would on its own be inadequate in providing sufficient data to launch an overhaul of industry and occupational regulation as a means of preventing or disrupting organized crime. Risk assessments of the kind proposed in the consultation paper have obvious limitations as a means of identifying what is really happening in regard to the activities of those involved in organised crime.
15. Given the unachievable threshold requirements for the initiation of corruption investigations IBAC is unlikely to be effective in exposing gaps in the current regulation of particular industry or occupational groups. However a properly structured and resourced IBAC should

be the obvious repository for information about organised crime penetration and undue influence in lawfully conducted agencies, sectors and instrumentalities within Victoria .

16. Liberty has expressed continued reservations about the adequacy and structure of IBAC. If these deficiencies were addressed there would be a better prospect of obtaining hard evidence to make decisions about changes to the regulatory framework in which industry and business operates within Victoria.¹

Should police powers be expanded to include greater involvement of police in the regulation of industries or occupations which are prone to infiltration?

17. Question 5 addresses the advantages and disadvantages of regulation by: (a) a traditional occupation or industry regulator such as the Business Licensing Authority (b) Victoria Police (c) both a traditional regulator and Victoria Police?
18. In addition to its more generalised powers to investigate, prosecute and combat organised crime, Victoria Police do have some specific regulatory powers in relation to industries that are perceived to be susceptible to infiltration by criminal organisations. Examples referred to in the Consultation Paper, include that Victoria Police has significant powers under the *Private Security Act 2004 (Vic)* to regulate the licensing and registering of industry participants.² Police also hold specific powers in the regulation of firearms.
19. Liberty notes that the current engagement of Victoria Police in the firearms and security sphere has come about in part through historical evolution but Liberty considers it desirable to provide a buffer from the further expansion of police power into regulation of other areas traditionally regarded as areas of vice and corruption.
20. The 1979 Beach Inquiry in Victoria, the Fitzgerald Inquiry in Queensland and evidence produced by more recent interstate and federal crime commissions give rise to the legitimate concern that there are significant risks attached to investing too much power and control in the hands of policing agencies and too little oversight in the hands of independent industry specific regulators or independent anti corruption agencies.
21. The risk of bribery and corruption may be greater where the monitoring, compliance, licensing and regulatory agency also has power to investigate and prosecute alleged breaches.

¹ Past president of Liberty Victoria Spencer Zifcak was quoted in *The Age*; Point Cook real estate agent first to be charged under corruption watchdog 21/7/14. Also in *Lawyers weekly*; *New Anti Corruption model under fire* 11/5/12 . Professor Zifcak also voiced his concerns on *Lateline* 16/4/14. Former Court of Appeal judge Stephen Charles has commented publicly about the constraints on IBACs enabling legislation

² *Regulatory Regimes and Organised Crime: Consultation Paper*, 4.7.

22. The focus of this submission is to sound a message of caution against unwarranted expansion of police powers into the regulatory sphere in light of the recognised distinction between prevention of criminal infiltration through regulation and the role of police to investigate crime that has occurred.

Current police powers to investigate organized crime and seek ancillary orders

23. Victoria Police already has been imbued with significant powers for the investigation and prosecution of organised crime through the *Major Crime (Investigative Powers) Act 2004 (Vic)* (MCIPA)

24. The MCIPA gives Victoria Police broad coercive powers to investigate, prosecute, combat and reduce the incidence of organised crime offences.³ These powers include investigation of links between organised criminal activity and lawful industries and occupations.

25. The coercive provisions of the MCIPA provide for questioning persons reasonably suspected of being involved in an organised crime offence as do the coercive examination powers in the *Australian Crime Commission Act 2002 (Cth)*⁴

26. More recent legislative changes in Victoria have provided Victoria Police with additional powers to investigate and combat organised criminal infiltration of lawful industries and occupations.⁵ *The Criminal Organisations Control Act 2012 (COCA)* provides for the making of declarations and control orders for the purpose of preventing and disrupting the activities of organisations involved in serious criminal activity.⁶

27. Part 3 of COCA gives the Supreme Court powers to make control orders in relation to declared criminal organisations including prohibitions in relation to association of members of declared organisations,⁷ carrying out specific activities; and the use of property.⁸

28. The Consultation Paper identifies anti-money laundering legislation as one form of regulation inhibiting organised crime through the creation of offences that prohibit dealings with the proceeds of crime or unjust enrichment. Both the *Confiscation Act 1997 (Vic)* and the *Proceeds of Crime Act 2002 (Cth)* provide regimes for forfeiture and confiscation of the proceeds of crime.⁹

³ *Major Crime (Investigative Powers) Act 2004 (Vic)* s 1.

⁴ *The extent to which the right to self incrimination has been legislatively eroded was the subject of comment in the High Court decision of X7 and Australian Crime Commission. 15/8/13*

⁵ *Regulatory Regimes and Organised Crime: Consultation Paper, 4.165 -67.*

⁶ *Criminal Organisations Control Act 2012 (Vic)*, s 1.

⁷ *Liberty is opposed to the introduction of further laws restricting freedom of association.*

⁸ *Criminal Organisations Control Act 2012 (Vic)*, s45.

⁹ *There are even new provisions regarding unexplained wealth declarations.*

29. Given the already wide powers held by police to investigate and expose organised crime and to disrupt unlawful gains, Liberty submits there is no proven need for the expansion of Victoria Police powers into the regulatory sphere.
30. In considering what regulatory measures might be applied to assist monitoring and disruption of organised crime into lawful industries and occupations a preferable approach may ultimately be found to include self-reporting and disclosure mechanisms by industry participants. This is a relatively low cost measure that is less likely to have a chilling effect on the pursuit of economic livelihood by ordinary members of the public seeking to conduct their affairs within sectors that may be targeted for regulatory overhaul. However more research is needed to justify the need and ensure practicability of these measures.

Our concerns

31. Liberty submits that it is preferable that the focus of traditional policing remain on investigation and prosecution of organised criminals rather than regulation of the industries and occupations under discussion. A more secure model for future regulatory oversight will properly involve a separation of responsibility between regulators and investigators.
32. Liberty considers that there is limited evidence to support an expansion of police powers into broader fields of regulatory compliance through licensing regimes, inspection regimes or other police inquiry models as a tool for disruption or prevention of the entry of organised crime into lawful industries and occupations.
33. We have not specifically addressed in this response whether IBAC requires enhanced powers or legislative improvements to achieve the aims discussed in the consultation paper of obtaining and analyzing supportive data with respect to organised criminal activity. Nevertheless it may reasonably be said that given the current weaknesses in IBAC's governing legislation, it is unlikely that IBAC can make any substantial contribution to this end.
34. We note that much evidence put forward to support an increase in police powers comes from law enforcement agencies and is anecdotal in nature. There may need to be careful analysis undertaken as to the inherent potential for corruption flowing from excessive concentration of police resources and powers if expansion of police powers and duties is to be contemplated.

Legal professional privilege and self - incrimination

35. Liberty is concerned about any further erosion of the privilege against self-incrimination or legal professional privilege under the guise of efforts to combat organised crime. The

introduction of virtually limitless powers of questioning in closed hearings conducted by policing agencies is very concerning and tramples upon the traditional common law rights of our citizens. Infringement of the long held principle of protection of privileged communications between a lawyer and client is also likely to damage rather than enhance the administration of justice.

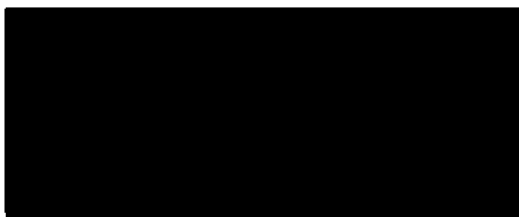
Conclusion

36. The Consultation paper poses a number of questions which are difficult to respond to in the abstract. Liberty is concerned that any reforms to industry practice and specific occupational groups aimed at disrupting organised crime do not at the same time create an excessive burden on individuals seeking to pursue their livelihood in a lawful manner. A firm evidentiary foundation should be the basis for any radical changes to business and industry regulation.

Liberty is prepared to further engage in the consultation process as it progresses and develops some more detailed proposals.

Thank you for the opportunity to make this submission. Please contact George Georgiou or Gillian Garner through the Liberty Victoria office on 9670 6422 or info@libertyvictoria.org.au if we can provide any further information or assistance. This is a public submission and is not confidential.

Yours sincerely



George Georgiou SC
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