Aboriginal & Torres Strait Islander
Legal Service (Qld) Ltd

www.atsils.org.au

Level 5, 183 North Quay Brisbane Qld 4000
PO Box 13035, George Street Brisbane Qld 4003
T: 07 3025 3888 | F: 07 3025 3800
Freecall: 1800 012 255
ABN: 116 314 562

30 November 2022

The Honourable Julie Dick SC
The Reviewer
Serious and Organised Crime Legislation Review
By email: SOCLegislationReview@justice.qld.gov.au

To the Honourable Julie Dick SC,

RE: SUBMISSION ON THE SERIOUS AND ORGANISED CRIME LEGISLATION REVIEW

Thank you for the opportunity to provide comments on the Serious and Organised Crime Legislation Review (**Review**).

Preliminary consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (**ATSILS**), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander peoples across Queensland. The founding organisation was established in 1973. We now have 24 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander peoples.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by nearly five decades of legal practise at the coalface of the justice arena and we, therefore, believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

Request for comment

In your covering letter dated 12 September 2022, you requested comments from ATSILS regarding the following specific matters:

1. Term 4 of the Terms of Reference (**ToR**) of the Review relating to whether any demographic, for example, Aboriginal and/or Torres Strait Islander peoples, homeless people or drug dependent people, has been disproportionately or adversely affected by the Serious and Organised Crime legislation;

2. Term 10 of the ToR of the Review relating to whether any demographic, for example, Aboriginal and/or Torres Strait Islander peoples, homeless people or drug dependent people, has been disproportionately or adversely affected by the *Peace and Good Behaviour Act 1982* (Qld) (other than Part 2);

3. Whether the serious organised crime circumstance of aggravation in Part 9D of the *Penalties and Sentences Act 1992* (Qld) is achieving its objects, including the disruption of criminal organisations by way of disincentivising involvement and encouraging cooperation with law enforcement agencies including providing recommendations as to any legislative changes required to improve the effective operation of the circumstance of aggravation; and

4. Whether the provisions being reviewed are compatible with rights protected under the *Human Rights Act 2019* (Qld), whether there are competing interests which may impact on whether any legislative amendments should be made, and whether the provisions should be retained notwithstanding any human rights incompatibility.

Please find below, our response to your specific questions above.

1. Term 4 – Whether any demographic, for example, Aboriginal and/or Torres Strait Islander peoples, homeless people or drug dependent people, has been disproportionately or adversely affected by the Serious and Organised Crime legislation

In our practise, we have observed somewhat limited use of these provisions against individuals from the abovementioned demographics groups (or other similar demographics) outside of where those individuals are part of some form of organised criminal activity. However, our comments are qualified to the extent that such instances will only come to the attention of legal representatives in circumstances where charges are laid as a result of a relevant police interaction.

We have been advised anecdotally from our Aboriginal and/or Torres Strait Islander clients that police officers utilise these and other powers in a manner that is seen as harassment by the clients, in situations that may not lead to charges, but which can still involve needless and embarrassing public police interactions including, in particular, being stopped, "street checked" and searched.

We are aware of particular instances where police have sought to use their powers under the consorting provisions in circumstances that do not immediately align with the legislative intent of the *Serious and*

Organised Crime Legislation Amendment Act 2016 (Qld) (**SOCLAA**).

Some examples of such interactions are as follows:

(a) where police have relied upon the powers in the *Police Powers and Responsibilities Act 2000* (Qld) (**PPRA**) to conduct personal or vehicle searches in situations where they have mistakenly identified an individual then in company with our client as a recognised offender, or have asserted that they have previously/recently seen our client with such an individual;
(b) where police have correctly identified an individual as a recognised offender, however, then sought to utilise their powers in a manner seemingly designed to elicit an anti-social response from the individual in company with the recognised offender.

We have also received body worn camera footage of interactions with police where racist and offensive remarks have been made by police officers in the context of using these powers. Some examples of comments that have been recorded are:

(a) "This bloke you're with is a grub. The law makes us target people like him and anyone he's with"; and
(b) "Where did you get this from? Murri kids? Must be stolen then.".

We are particularly concerned with the low bar that is provided for the use of the PPRA powers for consorting, namely, that it only requires a single instance of past or present consorting or even a likelihood of future consorting, without any material guidance as to how such likelihood is to be assessed. Given that a person does not need to have received an official warning for consorting before police may exercise their relevant powers under the PPRA, it is possible that a situation may arise where a person may not know that they are in the company of a registered offender and, therefore, unknowingly place themselves in a position where they are potentially liable to be searched, have their vehicle searched, receive a warning and be subject to additional obligations with respect to proof of their name and date of birth. It also is extremely challenging in that context for a person, particularly one from a vulnerable demographic group/s, to assert any opposition to police "overreach" in the use of these powers, for instance, by seeking to challenge how police may have formed a view as to a likelihood of future consorting.

The carve-out provided in the definition of "consort" in section 53BAA of the PPRA, which expressly states that "consort" does not include "an act of consorting mentioned in section 77C that is reasonable in the circumstances" has two particular limitations. Firstly, it only applies to that part of the PPRA and, therefore, it does not restrict the breadth of powers of police to search people or vehicles; secondly, in a practical sense, it creates confusion. For example, for these provisions to work, an individual would need to:

(a) be aware of this limitation on police powers;
(b) assert a relationship of relevance;
(c) articulate a circumstance that may then render the otherwise prohibited consorting act as one that is in fact "reasonable".

In our view this framework is materially unworkable and not practical, especially when considering the demographic groups being considered.

Furthermore, we have not yet, on recordings obtained in relation to matters or instructions taken from clients, heard of any interactions involving the use of these powers by police in which a relevant police officer has enquired as to whether there is a "close family member" relationship between a person that the police officer has engaged with pursuant to these provisions and a recognised offender.

In addition to our observations as outlined above, to answer your question, we also looked for data on the breakdown of individuals that have been the subject of police interactions pursuant to these provisions based on demographic group including with respect to Aboriginal and Torres Strait Islander peoples in the Queensland jurisdiction. Unfortunately, we have not been able to obtain a specific data set that is currently available that would shed light on the use and/or potential abuse of these discrete powers by police on the demographic groups identified.

When casting our eye to other jurisdictions, though the legal frameworks are not identical, we are aware that upon conducting a review of the operation of New South Wales' consorting laws in 2016, the New South Wales Ombudsman found that although the parliamentary intent of the consorting provisions was to regulate criminal groups and organised crime, the laws were so broad that they were being applied to "a wide range of policing issues ranging from antisocial behaviour and minor street crime to the most serious criminals" [1]. The Ombudsman also found that the use of the consorting laws against Aboriginal people was proportionally high which was found to be attributed to the overrepresentation of Aboriginal people in the criminal justice system as a whole and due to cultural factors that mean that Aboriginal people more commonly occupy public space[2].

The New South Wales Law Enforcement Conduct Commission (the New South Wales police oversight body) undertook a further review of the consorting laws in 2021 and in its report of October 2021, stated as follows:

> *Despite its positive findings, the Commission remains concerned by the high proportion of those subject to the consorting law who identify as Aboriginal and Torres Strait Islander, a figure commensurate with that reported by the NSW Ombudsman.* [3]

We appreciate that, at the time of the New South Wales' Ombudsman's report, there was no definition of "family member" in the family member defence against the consorting offence which included, for Aboriginal and Torres Strait Islander peoples, a kinship relationship (as there is now and as there is in the Queensland jurisdiction). However, we do not necessarily see this to be a silver bullet to avoiding abuse of power. And, indeed, in the report of the New South Wales Law Enforcement Conduct Commission noted earlier, it was found that despite amendments being made to the family members defence such to acknowledge kinship systems of Aboriginal and Torres Strait Islander peoples, 40% of people affected

[1] Ombudsman New South Wales, 'The Consorting Law, Report on the Operation of Part 3A, Division 7 of the *Crimes Act 1900* (2016) 111< https://www.parliament.nsw.gov.au/tp/files/68375/The%20consorting%20law% 20-%20Part%203A%20Crimes%20Act.pdf>.
[2] Ibid 66.
[3] Law Enforcement Conduct Commission, 'Discussion Paper: Review of the operation of the amendments to the consorting law under Part 3A Division 7 of the *Crimes Act 1900*' (2021) <https://www.lecc.nsw.gov.au/news-and-publications/publications/lecc-consorting-review-discussion-paper-20-10-21.pdf>.

by the laws were found to be Aboriginal and/or Torres Strait Islander persons[4].

In our view, there is still sufficient scope within Queensland's legal framework for the provisions to be abused to the detriment of Aboriginal and Torres Strait Islander peoples and other relevant demographic groups, including in the contexts outlined earlier under this section. The recent Independent Commission of Inquiry into the Queensland Police Service responses to Domestic and Family Violence (**QPS Inquiry**) revealed evidence of systemic cultural issues within the Queensland Police Service including evidence of police officers perpetrating racism against, or holding racist views with respect to, Aboriginal and Torres Strait Islander peoples (amongst other ethnic minority groups)[5]. It is indeed possible that, notwithstanding our limited exposure to such matters, abuse of powers may be occurring on the ground.

2. Term 10 – Whether any demographic, for example, Aboriginal and/or Torres Strait Islander peoples, homeless people, drug dependent people, has been disproportionately or adversely affected by the *Peace and Good Behaviour Act 1982* (Qld) (other than Part 2).

In our experience, we have not specifically been aware of, nor anecdotally been advised of, orders being made under the *Peace and Good Behaviour Act 1982* (Qld) (other than Part 2). Consequently, we are not in a position to say that any of the particular demographic groups outlined above have been disproportionately or adversely affected by application of the relevant provisions. As per our comments in relation to Term 4, it is only where such types of matters lead to criminal charges that legal representatives would be made aware of the use of these powers. Further, we appreciate that we cannot speak for the profession as a whole. It may be the case that the powers are being used/abused in a manner and context that we are not aware of.

Having said that, we do not necessarily support the wholesale repeal of these provisions. We understand the utility of having these orders as a means to fill gaps, legislative or otherwise, which may be important in certain contexts, for example:

- where a relationship falls outside the domestic and family violence legislation, however, there is essentially a domestic and/or family violence situation and legal redress is needed;
- as a response to serious threats that have not been taken seriously by police (i.e., it is more likely that action will be taken by police if, when calling in to make a complaint about offending behaviour, the complainant can assert that the behaviour is a breach of a court order);
- duty of care situations for an organisation where there is a severe falling out between volunteer "co-workers".

If the Queensland government is minded to repeal these provisions or amend them, consideration must be given as to what will replace them such that appropriate legal redress is available in contexts such as those outlined above.

[4] Ibid 47.

[5] Commission of Inquiry into Queensland Police Service responses to domestic and family violence, 'A Call for Change' (2022) 18 < https://www.qpsdfvinquiry.qld.gov.au/about/assets/commission-of-inquiry-dpsdfv-report.pdf>.

3. Whether the serious organised crime circumstance of aggravation in Part 9D of the *Penalties and Sentences Act 1992* (Qld) is achieving its objects, including the disruption of criminal organisations by way of disincentivising involvement and encouraging cooperation with law enforcement agencies including providing recommendations as to any legislative changes required to improve the effective operation of the circumstance of aggravation

In our experience, we have had limited matters involving the use of the serious organised crime circumstance of aggravation in Part 9D of the *Penalties and Sentences Act 1992* (Qld). We feel that there may be other relevant bodies who may be better placed to make comment on the application of these provisions.

4. Whether the provisions being reviewed are compatible with the *Human Rights Act 2019* (Qld)

Section 22 of the *Human Rights Act 2109* (Qld) (**HR Act**) enshrines the rights of peaceful assembly and freedom of association which is drawn from articles 21 and 22 of the International Covenant on Civil and Political Rights (**ICCPR**). It provides that every person has the right of peaceful assembly and freedom of association with others.

Consorting laws limit a person's rights to peaceful assembly and freedom of association. We acknowledge that consorting laws are not a recent phenomenon and that prohibitions on consorting have been embodied in the common law since the middle ages[6]. The codification of such limits, however, are more of a recent phenomenon. And in the context of the enactment of the HR Act in 2019, consideration of human rights when enacting legislation and amendments to legislation has become more important than ever.

We acknowledge that laws which address serious and organised crimes are important and that Queensland has come a long way since the enactment of the now repealed *Vicious Lawless Association Disestablishment Act 2013*. What remains important is striking the correct balance between upholding these fundamental human rights and imposing laws which limit those rights in a manner that is proportionate to the risk to community safety.

As has been outlined in our comments in relation to Term 4, there is scope in the legislation for the application of discretion by police officers when enforcing these laws. As noted earlier, the QPS Inquiry found evidence of racism within the service. In the domestic and family violence context, Aboriginal and Torres Strait Islander peoples were found to be over-policed as police-assessed respondents and under-policed as victim-survivors[7]. Due to these systemic failings within Queensland Police Service, we continue to have concerns that where there is breadth for discretion within criminal legislative frameworks in the application and enforcement of criminal laws against individuals, police may abuse those discretions in a way that may target Aboriginal and Torres Strait Islander persons and such abuse of power may contribute to their interaction with the criminal justice system.

To this end, we recommend:

[6] *Tajjour v New South Wales* (2014) 313 ALR 221, [7]. See Andrew McLeod, 'On the Origins of Consorting Laws' (2013) 37 *Melbourne University Law Review* 103, 113.

[7] Commission of Inquiry into Queensland Police Service responses to domestic and family violence (n 5) 18.

(a) a more robust framework within the PPRA which sets out how a likelihood of future consorting would be assessed by police officers in the field;
(b) sufficient guidance in Queensland Police Service's policies/procedures to support the legislative framework relating to how to a police officer in the field would assess the likelihood of future consorting;
(c) a positive legislative obligation on police officers seeking to use the consorting provisions to ask whether the subject individual identifies as an Aboriginal and/or Torres Strait Islander person;
(d) if the person identifies as an Aboriginal and/or Torres Strait Islander person, a positive legislative obligation on a police officer to then assess whether a close family member (including kinship relationship) exists between the two or more individuals that the police reasonably suspect are "consorting";
(e) a legislative framework on how a police officer would make this assessment in the field, for example, police should have an updated list of elders for the Aboriginal and Torres Strait Islander communities within their jurisdiction whom they could contact to determine this;
(f) sufficient guidance for police officers in Queensland Police Service's policies/procedures to support the legislative framework relating to the "close family member" assessment (including kinship connection) process; and
(g) regular cultural awareness training conducted by the Queensland Police Service for police officers with the aim of giving police officers in the field a better understanding of Aboriginal and Torres Strait Islander culture including the cultural norm of gathering and socialising in public spaces and the importance of kinship relationships.

CONCLUSION

We support measures that are aimed at addressing legitimate risk to community safety including with respect to addressing serious and organised crime. Any laws which seek to limit the fundamental human rights to freedom and peaceful assembly must be proportionate to the risk to the community which is intended to be addressed. We acknowledge that Queensland has come a long way in making consorting laws more targeted and less prone to abuse of power and overreach. However, there are still some aspects of the legislative framework that could benefit from reform. In this submission, we have sought to outline some proposed amendments and recommendations in this regard.

We thank you for the opportunity to provide feedback on the Serious and Organised Crime Legislation Review.

Yours faithfully,

Shane Duffy

Chief Executive Officer