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# **‘Cheating at Gambling’ Consultation Paper**

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**To:** Joseph Waugh, NSW Law Reform Commission

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## 1. Introduction

In March 2011, the New South Wales Law Reform Commission (**NSWLRC**) issued a consultation paper, *Cheating at Gambling*, which set out a number of issues and reform proposals relating to cheating on betting and gaming. The Consultation Paper comprehensively explores the current legislative regimes in NSW and other jurisdictions and makes a number of amendment proposals. The Law Institute of Victoria (**LIV**) supports many of the suggested changes, and was pleased to have the opportunity to make a submission to the NSWLRC regarding the review.

This submission contains the LIV's comments in response to the consultation questions in the paper. The LIV has limited the submission to specific issues, questions or proposals relating to sports and events only, and has expressly chosen not to comment on the proposed gaming provisions.

## 2. General Comments

The rapid growth of sports betting nationally and internationally has resulted in the emergence of corruption in sport as a critical issue facing both the sports and gambling industries.

It is important that there be a collaborative national approach to regulate, and prohibit cheating in relation to, sports betting.

Accordingly, the LIV welcomes the Consultation Paper which recommends a maximum 10 year criminal offence for manipulating sports, racing and/or other events in the context of gambling (**proposed offence**).

The most crucial consideration for the proposed offence is to ensure that the legislative provisions properly capture all the proper persons and conduct it is intended to regulate, without going any further than this. The LIV feels it is prudent that the penalty imposed should be proportionate to the seriousness of the offence, the role of the person convicted, the penalty that may be or has been imposed by a sport's governing body and any other relevant aggravating or mitigating factors.

## 3. A possible draft provision

The LIV respectfully offers the following suggestions which amend the draft provision.

### Definition of "induce"

The LIV submits that the term "induce" should be added to the list of defined terms in the draft provision. This definition could expressly include circumstances of blackmail, threats and/or duress.

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## **Narrowing the Scope of the Suggested Provision**

The LIV believes the suggested wording in subsection (1)(a)(iii) is far too loose and broad. The LIV suggests the concept of what “constitutes a threat to or which undermines the integrity...” should be tightened and limited to circumstances where there has been improper performance, improper withdrawal from an event or improper fixing of an event or contingency.

In the LIV’s interpretation of the provision, the section seeks to punish those who are acting dishonestly. As such, it is suggested that the word “reckless” be removed from subsection (4), to avoid inadvertently capturing persons who have not acted dishonestly.

## **Additions to the Suggested Provision**

In subsection (2)(c), the LIV suggests including the word “dishonestly” at the start of the subsection, in order to include the requirement of intent which is consistent with earlier provisions of the section.

The LIV also suggests that subsection (3) be amended, and the following wording added:

(3) It shall also be an offence where a third party, to whom information is disclosed by an insider, *or who has otherwise obtained information directly or indirectly from:*

By making this amendment, greater assurance will be provided that the provision captures cheating conduct where the insider information was not directly disclosed to the third party, but was otherwise obtained. For example, this amendment would cover the situation where documents were obtained with or without the insider’s knowledge, or where the information was obtained through an agent.

## **Scope of Penalty**

The LIV considers that circumstances surrounding the allegedly infringing conduct should be a consideration when determining the maximum penalty for the offence. Accordingly, the LIV suggests that a lesser maximum penalty should be considered in cases where extenuating circumstances, such as duress, threat and/or blackmail, are present.

Additionally, the LIV strongly believes that only conduct with a direct gambling link should be covered by the legislation. Actions which could otherwise be considered to be interfering with the sporting event or contingency, for example team selection, should remain within the control of the sport governing bodies. The LIV considers that it is imperative that sport governing bodies and organisations retain the right to protect the integrity of the individual sports, and be able to implement their own rules and regulations.

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## 4. National Sports Integrity Unit

The Consultation Paper considers whether there is a need for a National Sports Integrity Unit (NSIU) that would be independent of individual sports controlling bodies and operate on a similar basis to the Sports Betting Intelligence Unit (SBIU) in the United Kingdom.

The SBIU is a department of the UK Gambling Commission, which collects information and develops intelligence about potentially corrupt betting activity involving sport in the UK.

Specifically, information is collected by the SBIU where that activity:

- relates to a sporting event in Great Britain;
- involves parties based within Great Britain;
- occurs with a Gambling Commission licensed operator.

The intelligence that the SBIU gathers informs investigative decision making on the prosecution or disruption of criminal offences, for example cheating, by the SBIU enforcement team, the Police or regulatory action under the *Gambling Act 2005* (UK).<sup>1</sup>

In principle, the LIV supports the establishment of a NSIU, or similar body to support education, obtain intelligence, collect and analyse information and support prosecutions by the relevant police and other existing prosecuting authorities under criminal laws.

It is the LIV's opinion, however, that any NSIU's role in relation to specific offences and investigations should be confined to coordination and the collection and analysis of specialised information in relation to gambling activities, in support of police investigations. The LIV believes that existing police forces remain the most appropriate and effectively resourced bodies to collect and analyse information and intelligence relating to potential criminal activity in respect of sports betting (for example, by conducting searches and raids on individuals in accordance with their existing powers) and, if necessary, the subsequent prosecution of offences.

In addition to police forces, the LIV, as previously stated, believes that sport governing bodies should maintain their right to administer and regulate their sport at a practical level. The LIV does not support the imposition by government of a 'one-size-fits-all' standard anti-corruption code mandating the offences and associated penalties which must be imposed within the internal rules of a sport. The experience of sports administrators, athletes and lawyers in relation to the World Anti-Doping Authority (WADA) Code has been that a single, mandated code does not work for all sports at a practical level and that this can be counter-productive to the important aim at which the code was directed in the first place.

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<sup>1</sup> [http://www.gamblingcommission.gov.uk/licensing\\_compliance\\_enfo/intelligence/sbiu.aspx](http://www.gamblingcommission.gov.uk/licensing_compliance_enfo/intelligence/sbiu.aspx)

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The LIV believes that there is a valuable role for government in supporting the development of a high quality model Code of Conduct (**Code**) which can be adopted by the agreement of athletes and National Sporting Organisations in individual sports. The LIV also believes, however, the stakeholders in each sport should be free to vary the model Code or implement their own sport-specific codes as they see fit in light of the circumstances of their specific sport.

The LIV takes a similar view in relation to international efforts to combat cheating at gambling.

It supports international efforts to encourage the implementation of appropriate national criminal laws, collect and share appropriate gambling information among prosecuting authorities, support education and encourage sports to introduce suitable codes and policies within their sports.

While the LIV supports substantially uniform criminal laws, it does not believe that a 'one-size-fits-all' mandatory global Anti-Corruption Code based on the WADA-model is the best way of tackling the problem under the internal rules of the sports.

## **5. National Framework**

The LIV proposes that a national standard 'cheating at gambling' code or regulation be established to assist in the monitoring and regulation of match-fixing.

It is proposed that the national code impose minimum standards for licensed gambling companies to share information with sport governing bodies, and possibly gambling regulators, for which they provide betting in respect of its competitions (in a similar manner to the commercial agreements national sporting bodies, such as the AFL and FFA, have with its licensed sports betting companies).

This will ensure that all sporting bodies, and in particular those with less financial resources, will have access to information relating to betting on its events. Currently, only the larger sport organisations have the ability to request commercial information sharing arrangements from sports betting companies in return for making them an officially licensed betting company with the particular league.

The LIV notes the recent statement made by the Federal Minister for Sport, Mr Mark Arbib, which declared that Australia's Sports Ministers have agreed to develop a National Framework to address match-fixing in sport. The statement suggested that such framework is likely to adopt the following principles:

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- supporting a nationally-consistent approach to legislation relating to the criminality of match-fixing;
  - supporting information sharing and the development of better networks between governments, major sports, betting operators and law enforcers;
  - developing a consistent national code of conduct for sport; and
  - supporting international efforts to combat corruption in sport including the establishment of an international code of conduct and an international body similar to WADA.

In that regard, the LIV supports the introduction of a framework which incorporates the above mentioned principles, except for its concerns about too closely following an inflexible WADA-type model as highlighted in the preceding paragraphs.

## 6. Jurisdictional reach

Prime facie, applying the jurisdictional reach of the *Crimes Act 1900* (NSW) should enable the appropriate prosecution of cheating in the context of relevant sporting events.

For an offence to fall under the jurisdiction of the *Crimes Act 1900* (NSW), sections 10A and 10E require there to exist the necessary 'geographical nexus' between the offence and the State of NSW.<sup>2</sup> Furthermore, the existence of the necessary geographical nexus is presumed, and the presumption is conclusive unless rebutted under subsection 10E(2).<sup>3</sup>

For example, the proposed jurisdictional reach for the cheating at gambling offence would therefore include:

- conduct relating to an event held in NSW;
- acts by a person or persons occurring in NSW;
- acts by a person or persons residing in NSW; and
- betting undertaken in NSW.

However, there is a need to appropriately address the cross-jurisdictional issues to ensure persons cannot be prosecuted in multiple jurisdictions for the same conduct, whilst at the same time ensuring that the relevant conduct sought to be prohibited is not able to be manipulated in a way that such conduct is at risk of falling outside jurisdiction, for example, if a bet is strategically laid

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<sup>2</sup> Section 10C(2) states that a geographical nexus exists between the State and an offence if: (a) the offence is committed wholly or partly in the State (whether or not the offence has any effect in the State), or (b) the offence is committed wholly outside the State, but the offence has an effect in the State.

<sup>3</sup> *Crimes Act 1900* (NSW), section 10E(1).

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interstate or overseas or, if the conduct relates to a game or event interstate or overseas involving NSW teams or individuals.

The LIV suggests a provision be included which specifies that a person cannot be prosecuted for an offence if they have already been prosecuted in another jurisdiction in respect of that conduct. In this regard, State authorities will need to make a commitment to engage with each other in order to determine the most appropriate jurisdiction in which to prosecute the offence.

## **7. Penalty**

Relevantly, the LIV notes that the maximum penalties for gambling-related cheating offences (as outlined in Table 6.1) are commonly between 2 and 5 years imprisonment.

However, the more serious gambling-related cheating offences, such as organised and systematic match-fixing, should be more severely punished in order to achieve its purpose and operate as a satisfactory deterrent.

On the other hand, the maximum penalty for relevant fraud offences in Australia fluctuates between 2 years and 21 years, with the most popular maximum penalty being 10 years imprisonment (as outlined in Table 6.1). The maximum penalties for gambling-related bribery offences fall between 2 and 14 years. However, it is worth noting that there are lower maximum penalties for summary convictions.<sup>4</sup>

Probably most relevant is that fraud offences under the *Crimes Act 1900* (NSW) are punishable by up to 10 years imprisonment.<sup>5</sup>

Accordingly, it appears appropriate and proportionate that the cheating at gambling offence also be punishable by a maximum of 10 years imprisonment, with the exception of the partial-defence outlined in Chapter 8 and provided that the scope of the offence is appropriately restricted as outlined above.

## **8. A partial-defence for offences made under duress, threat and/or blackmail**

It is common that match-fixing in sport occurs in circumstances of duress, threat and/or blackmail. It is imperative that those persons initiating and conducting such forms of cheating are punished most severely.

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<sup>4</sup> See *Casino Control Act 1992* (NSW), section 150; *Prevention and Combating of Corrupt Activities 2004* (Sth Africa), sections 15 & 16; *Bribery Act 2010* (UK), sections 1 & 2.

<sup>5</sup> *Crimes Act 1900* (NSW), section 192E.



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The LIV suggests that there be a provision providing for a partial-defence and/or reduced penalty for offences made under extenuating circumstances of duress, threat and/or blackmail.

Whilst it is appreciated that these circumstances would ordinarily come into consideration by a judge at the sentencing stage of an offence, it is our view that a partial-defence, and/or reduced penalty, should be expressly recognised in the proposed legislation. As noted above, a number of jurisdictions prescribe lower maximum penalties in respect of summary convictions for certain bribery related offences.<sup>6</sup> It appears appropriate to prescribe a lower maximum penalty for cheating in gambling offences in extenuating circumstances. In order to avoid vagueness and ambiguity, the LIV recommends that a non-exhaustive list of such extenuating circumstances be outlined in the legislation to provide examples and act as a guide.

## 9. Standalone Act

The LIV believes the offences should be introduced in a new single, stand-alone criminal Act addressing 'Cheating at Gambling', to be enacted by all Australian jurisdictions as uniform legislation.

This will not only highlight the importance of the new legislation, but ensure that the new offences are more easily identified and referred to. The offences and provisions will therefore not be at risk of being 'hidden' or 'forgotten' if incorporated into the *Crimes Act 1900* (NSW) or other broader non-specific legislation.

Having uniform, standalone national legislation provides the best model for educating personnel involved in sports across multiple Australian jurisdictions and without legal expertise.

The LIV provides the following examples of names for the proposed new stand-alone Act:

- *Crimes (Cheating at Gambling) Act 2012* (NSW);
- *Criminal Cheating at Gambling Act 2012* (NSW);
- *Crimes (Gambling Manipulation) Act 2012* (NSW);
- *Gambling Criminal Manipulation Act 2012* (NSW);
- *Gambling Corruption Act 2012* (NSW).

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<sup>6</sup> See *Casino Control Act 1992* (NSW), section 150; *Prevention and Combating of Corrupt Activities 2004* (Sth Africa), sections 15 & 16; *Bribery Act 2010* (UK), sections 1 & 2.