

## Consorting Issues Paper

Review of the use of the  
consorting provisions  
by the NSW Police Force

Division 7, Part 3A of  
the *Crimes Act 1900*

November 2013

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**Any submissions or correspondence in relation to this review  
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# Glossary

Aboriginal	The term 'Aboriginal' refers to Aboriginal and Torres Strait Islander peoples.
Amendment Act the Bill	<i>Crimes Amendment (Consorting and Organised Crime) Act 2012</i> Crimes Amendment (Consorting and Organised Crime) Bill 2012
consorting Event records	COPS Events created by police officers documenting use of the consorting provisions.
consorting provisions	The provisions contained in Division 7, Part 3A of the <i>Crimes Act 1900</i> , sections 93W–93Y.
consorting records	Event records and Intelligence reports on COPS created by officers from the select group of LACs and Squads that document use of the new consorting provisions.
Consorting SOPs	NSW Police Force, State Crime Command, Consorting Standard Operating Procedures, April 2012
COPS	Computerised Operational Policing System
ICO	Intensive correction order
LAC	Local Area Command (NSW Police Force)
LEPRA	<i>Law Enforcement (Powers and Responsibilities) Act 2002</i>
MLC	Member of the Legislative Council
MEOCS	Middle Eastern Organised Crime Squad
MP	Member of Parliament
NSWPD	New South Wales Parliamentary Debates (Hansard)
official warning	An official warning is a warning given by a police officer (orally or in writing) that: (a) a convicted offender is a convicted offender, and (b) consorting with a convicted offender is an offence ( <i>Crimes Act 1900</i> , s. 93X(3)).
SOPs	Standard operating procedures
the select group of LACs and squads	Ten Local Area Commands and two specialist squads that appeared to have the highest use of the consorting provisions for the period 9 April to 16 December 2012, based on a count of COPS Events created in that period. We analysed the total consorting records (Event and intelligence reports) of these 12 commands individually.
subject of a warning	This term refers to a person who someone else is warned about consorting with.
subject to the consorting provisions	This term is used to refer collectively to people who have received an official warning, people who have been the subject of a warning and people who have been charged with consorting.

## List of case studies

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# Chapter 1. Background

Conorting with criminals has been an offence in NSW since the late 1920s; however over the years the offence has fallen into disuse.

On 9 April 2012 a 'modernised' version of the offence of consorting commenced in NSW. The new consorting provisions are contained in Division 7, Part 3A of the *Crimes Act 1900*. It is now a criminal offence to continue to associate with two people who have both previously been convicted of an indictable offence if you have been warned by police about their convictions and advised that to continue to associate with them is an offence. Consorting now includes associating in person and communicating by telephone, email or by other electronic means. The offence attracts a possible three year prison sentence and/or a \$16,500 fine (150 penalty units).

The consorting provisions have been widely used across NSW, although the majority of uses have occurred in the Sydney metropolitan area. The first 12 months of police data indicates in excess of 1,000 official police warnings have been issued, although only 16 charges have been laid. The constitutionality of the provisions is currently subject to challenge in the NSW Court of Appeal with a hearing date of 5 November 2013.

## 1.1 Background to the introduction of the consorting provisions

Between late 2011 and early 2012 there was a spate of shootings across Sydney. Media coverage of these incidents was extensive and heightened public concern about escalating gun violence and its suspected connection to the activities of criminal gangs. While most categories of crime involving firearms have significantly decreased or remained stable since 1995, the number of incidents of drive-by shootings more than doubled from 41 in 1995 to 100 in 2011.<sup>1</sup> According to recent analysis by the Bureau of Crime Statistics and Research:

... the trends in discharge firearm into premises, shoot with intent and unlawfully discharge firearm, individually and in total, have not shown statistically significant increases in the 2 years, 5 years, 10 years or 15 years up to December 2012. Generally speaking the pattern has been one of surges in the frequency of such incidence followed by periods of relative quiescence; ...<sup>2</sup>

On 14 and 15 of February 2012, the government introduced a package of reforms designed to 'combat organised crime in further support of police in their war on drive-by shootings'.<sup>3</sup> The reforms included the Crimes Amendment (Consorting and Organised Crime) Bill 2012; the Crimes (Criminal Organisations Control) Bill 2012; and the Firearms Amendment (Ammunition Control) Bill 2012.

According to a media release the preceding day, the Premier stated:

"The NSW Government's package of reforms will make it harder for criminal gangs to engage in planned criminal activity by modernising consorting laws and significantly tightening the laws relating to the sale of ammunition," ...<sup>4</sup>

## 1.2 Parliamentary debate

When the Crimes Amendment (Consorting and Organised Crime) Bill 2012 (the Bill) was introduced into Parliament it was unopposed by the Opposition. The Bill was referred to the Legislation Review Committee to consider whether it unreasonably encroached on specific rights and liberties.<sup>5</sup> The Committee outlined its concerns and referred a number of questions to Parliament including the potential for the proposed consorting provisions to:

- create discrimination against those who have been previously convicted of indictable offences, and

1 E Birdsey, *Criminal offences involving firearms in New South Wales, 1995–2011*, Crime and Justice Statistics: Bureau Brief, Issue paper no. 82, NSW Bureau of Crime Statistics and Research, Sydney, October 2012, p. 8.

2 J Fitzgerald, *Non-fatal shootings in New South Wales*, Crime and Justice Statistics: Bureau Brief, Issue paper no. 85, NSW Bureau of Crime Statistics and Research, Sydney, April 2013, p. 7.

3 The Hon. Barry O'Farrell MP (Premier of NSW), *New Laws to Tackle Drive-by Shootings*, media release, NSW Government, Ministry for Police and Emergency Services, Sydney, 13 February 2012, viewed 13 June 2013, <http://www.mpes.nsw.gov.au/newsarticle.html?newsid=625>.

4 *ibid.*

5 Section 8A of the *Legislation Review Act 1987* outlines the functions of the Legislation Review Committee with respect to Bills.

- criminalise individuals who may have not committed any offence.<sup>6</sup>

During debate, much of the discussion about potential use of the consorting provisions was in the context of the policing of gangs and organised crime.<sup>7</sup> It was also noted that the 'Government is not oblivious to the fact that consorting laws have been misused in the past and that some people fear they might be used to target marginal groups'.<sup>8</sup>

Concerns about possible inadequacies in the list of defences were debated and an amendment proposed by members of the Greens Party to provide a defence for those who consort for the purpose of protest, advocacy, dissent or industrial action was defeated.<sup>9</sup>

It was noted that the consorting provisions may disproportionately impact on Aboriginal people due to their over-representation in the criminal justice system.<sup>10</sup>

### 1.2.1 Parliamentary intention when enacting the consorting provisions

In its passage through Parliament, the Parliamentary Secretary (on behalf of the Police Minister) said the Bill 'modernises the offence of consorting, as well as extending and clarifying its application'.<sup>11</sup> The new provisions were intended to provide guidance about the meaning of 'habitual consorting' and the circumstances in which the provisions could be used by police.

In the second reading speech, the Parliamentary Secretary stated that the Bill aimed to ensure '... that the provisions of the [Crimes] Act remain effective at combating criminal groups in NSW' and that the NSW Police Force 'has adequate tools to deal with organised crime'.<sup>12</sup>

The government acknowledged that the existing consorting offence had 'been criticised for its potential application to everyday, innocent relationships which should not be the subject of prosecution'.<sup>13</sup> Accordingly, the second reading speech emphasised that the intention of the new consorting provisions was to prevent formation or development of criminal associations:

The requirement that the person consorts with more than one offender recognises the fact that the goal of the offence is not to criminalise individual relationships, but to deter people from associating with a criminal milieu.

... it is not the intention of the section to criminalise meetings where the defendant is not mixing in a criminal milieu or establishing, using or building up criminal networks.<sup>14</sup>

The second reading speech also referred to the discretion afforded to police officers in determining when it is appropriate to use the new consorting provisions:

This bill puts police in a position to do what they do best every day and make a judgment about whether observed behaviour reaches the level sought to be addressed by the bill, that is, behaviour which forms or reinforces criminal ties.<sup>15</sup>

## 1.3 Public commentary about risks stemming from the new law

Numerous people and organisations have expressed concerns about the potentially significant impact of the new consorting provisions on people's lives, including people without previous criminal backgrounds. Some of those concerns have included that the use of the new consorting provisions by police has the potential to:

- criminalise normal social activity
- bring people into contact with the criminal justice system in circumstances where they are not involved in criminal activity
- socially isolate people

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6 Legislation Review Committee, *Legislation Review Committee Digest; No. 10 of 55*, NSW Parliament, Sydney, 2012, p. 8.

7 New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Council, 7 March 2012, pp. 9091–9103.

8 The Hon. John Ajaka MP, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9097.

9 NSWPD, (Hansard), Legislative Council, 7 March 2012, pp. 9103–9107.

10 Mr David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9100. The NSW Young Lawyers have also raised this concern: The Law Society of NSW Young Lawyers, *NSW Young Lawyers concerned about new "consorting" laws*, media release, 2012, The Law Society of NSW, Sydney, viewed 20 February 2012, <http://davidshoebridge.org.au/wp-content/uploads/2012/03/NSWYL-Press-release-Consorting-laws.pdf>.

11 The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9091.

12 *ibid.*

13 *ibid.*, p. 9093.

14 *ibid.*, pp. 9092-9093.

15 *ibid.*, p. 9093.

- disclose private information about a person's criminal record to others whom they associate with
- further punish people who have already been punished
- disproportionately impact on certain disadvantaged or vulnerable groups within our community.

Some groups have raised concerns about the approach of criminalising associations rather than criminal acts. For example, in a letter dated 20 February 2012 to the Attorney General, the Law Society of NSW stated, 'offences should be based on conduct worthy of punishment; merely associating with people should not be a crime'.<sup>16</sup>

The Law Society also noted how broad the offence is and that it 'confers too much discretionary power on the police'.<sup>17</sup>

To date, our review has identified some examples of use that tend to support some of the concerns raised about how the provisions may be used. These are discussed in chapters 5 to 7.

## 1.4 Our role and the purpose of this paper

When the new provisions were introduced they included a requirement for a two year review by the Ombudsman, commencing on 9 April 2012, at the same time the new provisions came into effect. Part 29(1) to Schedule 11 of the *Crimes Act 1900* states:

As soon as practicable after the end of the period of 2 years from the commencement of Division 7 of Part 3A (as inserted by the *Crimes Amendment (Consorting and Organised Crime) Act 2012*), the Ombudsman must prepare a report on the operation of that Division.

The Ombudsman and the NSW Police Commissioner jointly sought a 12 month extension to this review period due to significant limitations in the consorting data to June 2013 and a possible dampening effect the recording mechanisms combined with the constitutional challenge has had on use of the provisions by police. On 30 October 2013, a Bill to increase the review period to three years was introduced to Parliament.

At the conclusion of the review period, we will provide a copy of our final report to the Attorney General and to the Commissioner of Police. The Attorney General is required to table the report in Parliament as soon as practicable after it is received.

In relation to this review, the Hon. David Clarke MLC in the second reading of the Bill stated:

The old [consorting] provision has fallen into disuse and has been criticised in the past. This report will provide an opportunity after two years of operation to review the use of the new provision and to consider any further amendments or repeal of the provisions as necessary.<sup>18</sup>

This paper seeks to identify what we consider to be the main issues emerging from the use of the new consorting provisions in their first 12 months of operation and to invite interested parties and members of the public to provide submissions and comments to better inform our review. This paper presents some analysis of the available consorting data provided by the NSW Police Force with a view to informing submissions about how the provisions are being used and whether the concerns expressed at the commencement of the legislation are well-founded.

We seek any comment about the specific issues detailed in this paper and on any other aspects of the provisions and their operation. In particular, we welcome information about the personal experiences of people who have been directly affected by the new consorting provisions.

## 1.5 Invitation for submissions or information

Submissions or correspondence in relation to this issues paper are due by 28 February 2014 and can be sent by email or post to the addresses below. Responses are also welcome by fax. There is a document containing all the questions for consideration and an optional submissions template (in MS Word) available on the Ombudsman website [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au).

You are welcome to comment on any matter related to consorting, not just those that we have raised in this issues paper. All submissions may be made public. Please advise us if you do not want your submission to be made public.

If you would prefer to provide your comments by telephone or in a meeting with Ombudsman staff, please contact us on the phone numbers below.

<sup>16</sup> Correspondence from Justin Dowd, President, The Law Society of NSW, to the Hon. Greg Smith MP, Attorney General and Minister for Justice, 20 February 2012, viewed 13 June 2013, <http://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/587207.pdf>.

<sup>17</sup> *ibid.*

<sup>18</sup> The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9093.

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## Chapter 2. Introduction

This chapter provides an historical overview of consorting in NSW and the details of the new provisions.

### 2.1 What was in place beforehand?

The offence of consorting was first introduced in NSW in 1929 into the *Vagrancy Act 1902* and in response to public concern about the 'razor gangs' in Sydney.<sup>19</sup> The razor gangs were organised criminal gangs based in East Sydney. Gang members resorted to using cut-throat razors as weapons after the *Pistol Licensing Act 1927* was passed, which provided gaol terms for any person found carrying an unlicensed pistol.<sup>20</sup> Under the *Vagrancy Act*, it became an offence to habitually associate with reputed criminals, prostitutes or people convicted of 'having no visible lawful means of support'.<sup>21</sup> In 1979 the offence of consorting was located within section 546A of the *Crimes Act 1900* and modified so that it was an offence to habitually associate with a 'convicted offender' who was defined as someone previously convicted of an indictable offence. Consorting was a summary offence with a maximum prison sentence of six months or a fine of \$400.

Section 546A of the *Crimes Act* did not define 'habitually'. In practice, police found it necessary to establish seven or more occasions of associating between two people within a six month period in order to satisfy the court the consorting was 'habitual'. If a defendant was found guilty, the court outcome was often a small fine or short sentence. The offence fell into disuse with few prosecutions in recent decades.

### 2.2 What the offence is now

Section 546A was repealed when the current offence of consorting was inserted into Division 7, Part 3A of the *Crimes Act*. Consorting is now an indictable offence with a maximum penalty of three years imprisonment and/or a fine of 150 penalty units (\$16,500). Arising from its status as a summary offence, the old consorting provisions contained in section 546A were restrained by a six month time limit beginning at the date of the first incident of consorting and running to the date of any consorting charge. No such time limit applies to the new offence of consorting in section 93X of the *Crimes Act*.

Section 93X of the *Crimes Act* requires that in order to be guilty of an offence, a person must habitually consort with at least two 'convicted offenders' on at least two occasions. One of these occasions must be after receipt of an official police warning with respect to each offender. That warning must inform the person:

- that their associate is a convicted offender,<sup>22</sup> and
- that consorting with a convicted offender is an offence.<sup>23</sup>

The warning may be issued orally or in writing.<sup>24</sup>

The definition of a 'convicted offender' is largely unchanged in the new provisions. A 'convicted offender' is defined as a person who has been convicted of an indictable offence (disregarding any conviction for consorting).<sup>25</sup> However, the definition of consorting has been widened to include consorting by 'electronic or other form of communication' in addition to consorting in person.<sup>26</sup>

There are six defences, set out in section 93Y of the *Crimes Act*, available to a person charged with consorting:

- consorting with family
- consorting that occurs in the course of lawful employment or in the operation of a business
- consorting that occurs in the course of training or education

<sup>19</sup> *Vagrancy (Amendment) Act 1929*.

<sup>20</sup> A Steel, 'Consorting in New South Wales: Substantive Offence or Police Power?', *University of New South Wales Law Journal*, vol. 26, 2003, pp. 567–602 at 582.

<sup>21</sup> *ibid*, p. 568.

<sup>22</sup> *Crimes Amendment (Consorting and Organised Crime) Act 2012*, s. 93X(3)(a).

<sup>23</sup> *Crimes Amendment (Consorting and Organised Crime) Act 2012*, s. 93X(3)(b).

<sup>24</sup> *Crimes Amendment (Consorting and Organised Crime) Act 2012*, s. 93X(3).

<sup>25</sup> *Crimes Amendment (Consorting and Organised Crime) Act 2012*, s. 93W.

<sup>26</sup> *Crimes Amendment (Consorting and Organised Crime) Act 2012*, s. 93W.

- consorting that occurs in the provision of a health service
- consorting that occurs in the provision of legal advice
- consorting that occurs in lawful custody or while complying with a court order.

The provisions place the onus on the defendant to satisfy the court that the consorting in these specified circumstances was reasonable.

Provisions setting out consorting offences in all Australian jurisdictions are to be interpreted in line with the leading High Court decision in *Johanson v Dixon* (1979) 143 CLR 376. This decision established that consorting need not occur for any particular unlawful or criminal purpose.<sup>27</sup> The decision also elaborated on the meaning of 'consort'. According to a majority of the court, it 'means "associates" or "keeps company" and it denotes some seeking or acceptance of the association on the part of the defendant.'<sup>28</sup> This contrasts with inadvertent, coincidental or unintended contact between people.

Division 7, Part 3A of the Crimes Act can be found at Appendix 1.

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<sup>27</sup> *Johanson v Dixon* (1979) 143 CLR 376 at 383 (Mason J); 395–6 (Aickin J). However, this position may be modified by statute. The Northern Territory regime, for example, provides that a warning may only be issued where it is considered likely the warning is likely to 'prevent the commission of a prescribed offence' involving two or more offenders and substantial planning and organisation.

<sup>28</sup> *Johanson v Dixon* (1979) 143 CLR 376 at 383 (Mason J); 395 (Aickin J). The judges cited the decision in *Brown v Bryan* [1963] Tas SR 1 (at 2) as authority for this interpretation.

## Chapter 3. Overview of use in NSW

In this chapter we provide an overview of the use of the consorting provisions in NSW and begin to explore publicly raised concerns. We outline how the NSW Police Force has been using the provisions and who they have been used against.

### 3.1 Limitations of the NSW Police Force data

The consorting provisions commenced before the NSW Police Force was able to make necessary modifications to the Computerised Operational Policing System (COPS) to enable effective computerised record-keeping of their use. As a result there are a number of significant shortcomings in the available data. Without individually interrogating the narrative section of each COPS record, we are unable to distinguish between people who were issued an official warning and people who were the subject of a warning given to others. This means we are unable to report on the total numbers of:

- official warnings issued
- people who received a warning
- people who were the subject of a warning.

When police officers record their use of the consorting provisions, whether that is to issue an official warning or to record an incident of consorting, a record called an 'Event' should be created in COPS. However, up to 30 November 2012 many officers mistakenly recorded their use of the provisions as 'intelligence reports', an alternative format within COPS. Our analysis suggests that the number of these records is not likely to be significant. However, the result is that analysis of the consorting Events does not provide a complete picture of use, as it does not capture those incidents recorded in intelligence reports.

To assess how the consorting provisions have been operating we have manually analysed the total consorting records (Event and intelligence reports) of 12 commands that appear to have the highest use of the provisions between their commencement on 9 April 2012 and 16 December 2012. This eight month period covers the first tranche of data received from NSWPF. This select group is made up of 10 Local Area Commands (LACs) and two specialist squads located in the Organised Crime Directorate of the State Crime Command (the select group).<sup>29</sup>

The LACs within the select group are distributed in the following four NSW Police Force Regions:

- Western Region – three LACs
- North West Metropolitan Region – three LACs
- Central Metropolitan Region – two LACs
- South West Metropolitan Region – two LACs.

There were no commands in the Southern or Northern Regions with high use of the consorting provisions for the period in question. Appendix 2 is a map of the six NSW Police Force Regions.

In addition to analysing all relevant consorting records we consulted directly with officers from each of the commands within the select group and met with senior officers from three LACs who have not used the provisions at all.

### 3.2 Overview of use of the consorting provisions in the first 12 months

In the first 12 months of operation of the consorting provisions there were 774 separate COPS Events created in relation to consorting in NSW.<sup>30</sup> Each consorting Event record contains all the details of the relevant consorting incident and usually outlines multiple warnings issued to a number of people. The Event record also includes police observations at the time, the location of the incident, the details of those who were the subject of official warnings issued and the content of the warnings themselves. These Events identify 1,260 different individuals who have been either issued official warnings by police not to consort with others with a conviction for an indictable offence, or who were the subject of such a warning, or both.

<sup>29</sup> Based on a count of COPS Event records created in the period 9 April 2012 to 16 December 2012.

<sup>30</sup> There were also six consorting COPS Event records that had no people listed in them. These have been excluded from our analysis.

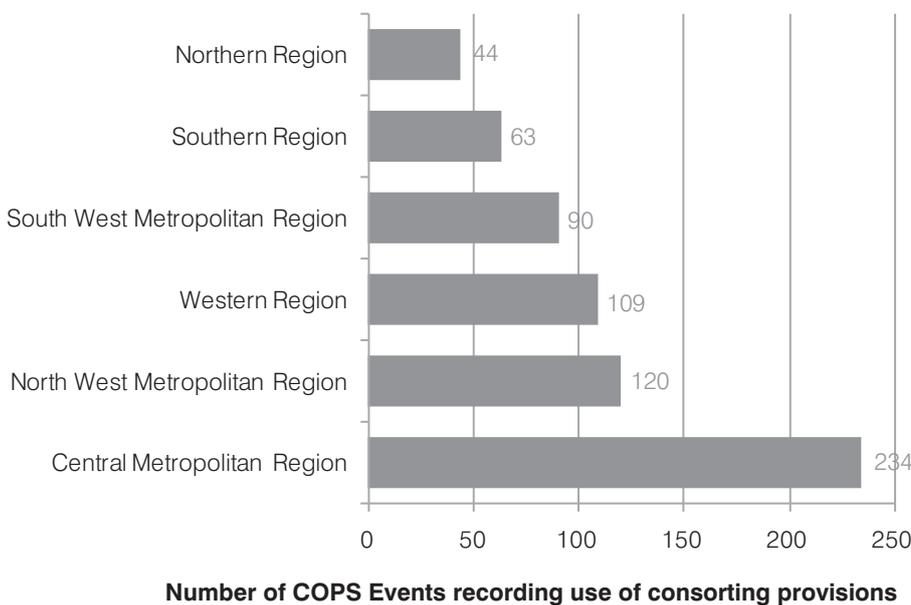
### 3.2.1 Where the consorting provisions are being used and who is using them

New South Wales was divided into 80 different police LACs at the time of our analysis.<sup>31</sup> The LACs are in turn divided into six regions. In addition, there are a number of specialist commands, the relevant one for this discussion being the State Crime Command. The State Crime Command is made up of 12 squads, each specialising in investigating a particular type of crime. The two specialist squads whose use of the consorting provisions we have analysed as part of the select group are tasked with investigating organised crime and criminal groups.

In the first 12 months of operation the majority of uses of the consorting provisions were by general duties police attached to LACs rather than officers from specialist squads. Use of the provisions was spread across NSW with general duties police in 70 different LACs creating just over 85% of consorting Event records in the 12 months to 9 April 2013 (n=660).

While the majority of LACs across the state have used the consorting provisions at least once, use has been concentrated in small pockets with only four LACs responsible for 42% of all uses by general duties police (n=277). Three of these four LACs are in the Sydney Metropolitan area and one is in the Western Region.

**Table 1: Use of the consorting provisions in the first 12 months by NSW Police Force Region<sup>32</sup>**



Approximately 11% of consorting Event records were created by officers attached to specialist squads (n=87). The majority of these were created by Strike Force Raptor which is situated in the Gangs Squad. Strike Force Raptor was established by the Gangs Squad in 2009 and '... is a proactive and high-impact operation targeting outlaw motorcycle gangs and any associated criminal enterprise'.<sup>33</sup> The Middle Eastern Organised Crime Squad (MEOCS) is the other specialist squad with significant use and 'conducts multi-level investigations and develops intelligence products on Middle Eastern Organised Crime groups including those who have a propensity for violence'.<sup>34</sup> In addition this squad is playing a key role in investigating gun crime.

Less than 5% of consorting Event records from the first 12 months were created by the highway patrol and transport commands (n=27).

### 3.2.2 Electronic consorting

One of the new features of the updated consorting offence is that it now extends to consorting by electronic or other form of communication.<sup>35</sup> There were no instances of electronic consorting amongst the consorting records of the select group of

31 The NSW Police Force is in the process of amalgamating a number of LACs. By 1 January 2014, four new amalgamated LACs will have commenced operation, reducing the number of LACs to 76: NSW Police Force, Police Monthly, August 2013, p. 7.

32 This table is based on COPS Event records, and does not account for consorting incidents saved by police as intelligence reports.

33 NSW Police Force, *Gangs Squad and NSW Fair Trading raid OMCG-linked car repair business – Kingswood*, media release, 6 May 2013.

34 NSW Police Force, 15 October 2012, viewed 29 July 2013, [http://www.police.nsw.gov.au/about\\_us/structure/specialist\\_operations/state\\_crime\\_command](http://www.police.nsw.gov.au/about_us/structure/specialist_operations/state_crime_command).

35 *Crimes Act 1900*, s. 93W.

LACs and squads, and officers from the select group confirmed during consultations that they had not used the consorting provisions in any case of electronic consorting.

The *Consorting Standard Operating Procedures* only provide guidance on face-to-face contacts.<sup>36</sup>

### 3.3 Overview of who the consorting provisions have been used against in the first 12 months

As outlined in chapter 1, the consorting provisions were part of a raft of legislative changes designed to ensure the NSW Police Force 'has adequate tools to deal with organised crime'.<sup>37</sup> The second reading speech emphasised that the intention of the new consorting provisions was to prevent formation or development of criminal associations and 'to deter people from associating with a criminal milieu'.<sup>38</sup> The NSW Police Force has stated the provisions will be used to target high risk offenders and their associates as well as people suspected of involvement in organised crime and criminal gangs.

Concerns have been raised, both publicly and during consultation, that the consorting provisions have the capacity to:

- be used to target people with no link to organised or gang-related criminal activity
- criminalise people not involved in any criminal offending
- disproportionately affect disadvantaged groups
- operate as a 'street-sweeping mechanism'.

In order to explore whether these concerns are well-founded and to gain insight into who is being directly affected by the consorting provisions we have undertaken a demographic analysis of the people targeted by police for consorting in the 12 months of their use and analysed the criminal histories of those subject to the provisions by officers from the select group (in section 3.5.1.2 below).

#### 3.3.1 Demographic information about all people subject to the consorting provisions in the first 12 months

There were 1,260 different people recorded in the consorting Event records in the first 12 months of use. We were given demographic information for 1,247 of these people, and have used this number as the basis of our analysis in this part of the issues paper.<sup>39</sup> All these individuals either received an official police warning about consorting with people who had previously been convicted of indictable offences, or were the subject of a warning given to their associates, or both.

Nearly a third of people (29%) were warned or were the subject of a warning on more than one occasion, although the majority of people were only linked to a single consorting Event record (71%). A small number of people were represented in five or more records (5%).

The consorting provisions were mostly used in relation to adult men aged between 18 and 34 years, with this group accounting for 85% of all individuals subject to the provisions (n=1,063). Overall, males accounted for 91% (n=1,138) of all individuals targeted and women for the remaining 9% (n=109). We found that the most common age group for women was 35 to 44 years, being slightly older than their male counterparts. There were 83 children and young people aged between 13 and 17 years who were subject to the consorting provisions in the same period.

According to the 2011 census, Aboriginal and Torres Strait Islander peoples comprise 2.5% of the total NSW population.<sup>40</sup> However, 40% of all people subject to the consorting provisions in the first year of use are Aboriginal.<sup>41</sup> The proportion of women and young people subject to the consorting provisions who are Aboriginal is especially high.

<sup>36</sup> State Crime Command, *Consorting Standard Operating Procedures* (Consorting SOPs), NSW Police Force, April 2012.

<sup>37</sup> The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9091.

<sup>38</sup> *ibid*, p. 9092.

<sup>39</sup> There are 13 people for whom the NSW Police Force has not recorded any demographic or criminal record information. However, we do know that these 13 people have a summary conviction, infringement notice or indictable conviction over 15 years old. Given the lack of information, we have excluded these 13 individuals in our calculations for this part of the issues paper, which results in a total of 1,247 people (rather than 1,260).

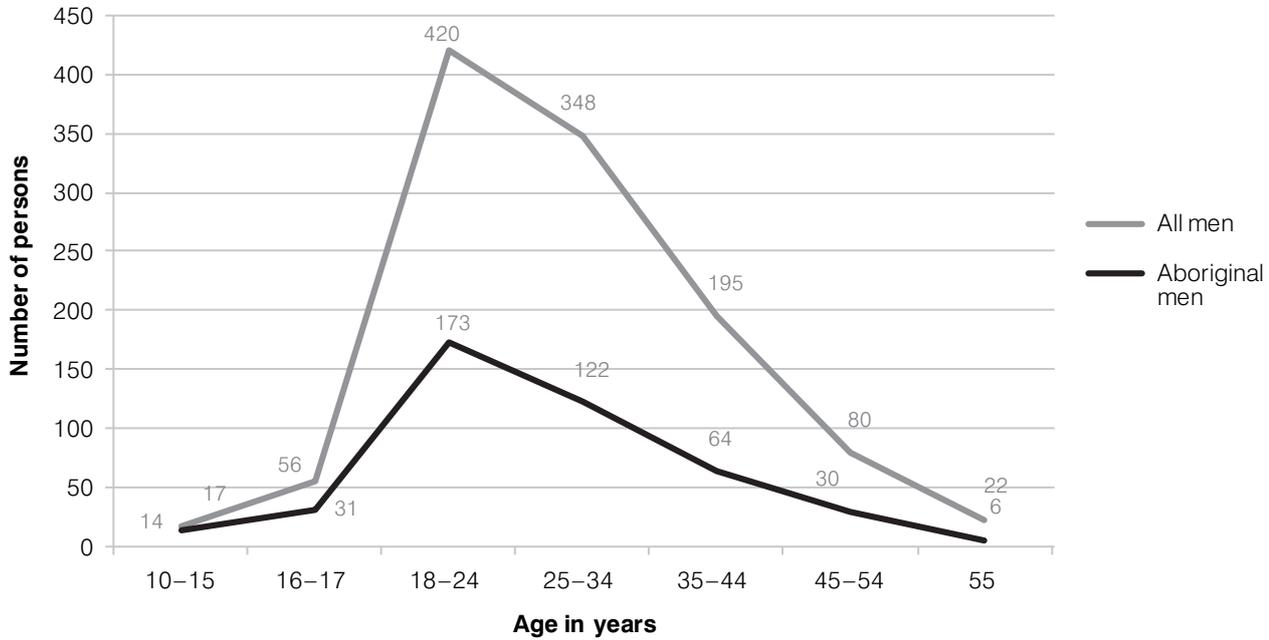
<sup>40</sup> Australian Bureau of Statistics, *Census of Population and Housing: Counts of Aboriginal and Torres Strait Islander Australians, 2011*, cat. no. 2075.0, ABS, Canberra, 2012, viewed 27 June 2013, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/2076.0Main%20Features1102011?opendocument&tabname=Summary&prodno=2076.0&issue=2011&num=&view=>.

<sup>41</sup> The number of Aboriginal people subject to the consorting provisions in the first year was 496 out of a total of 1247 people who were subject to the provisions.

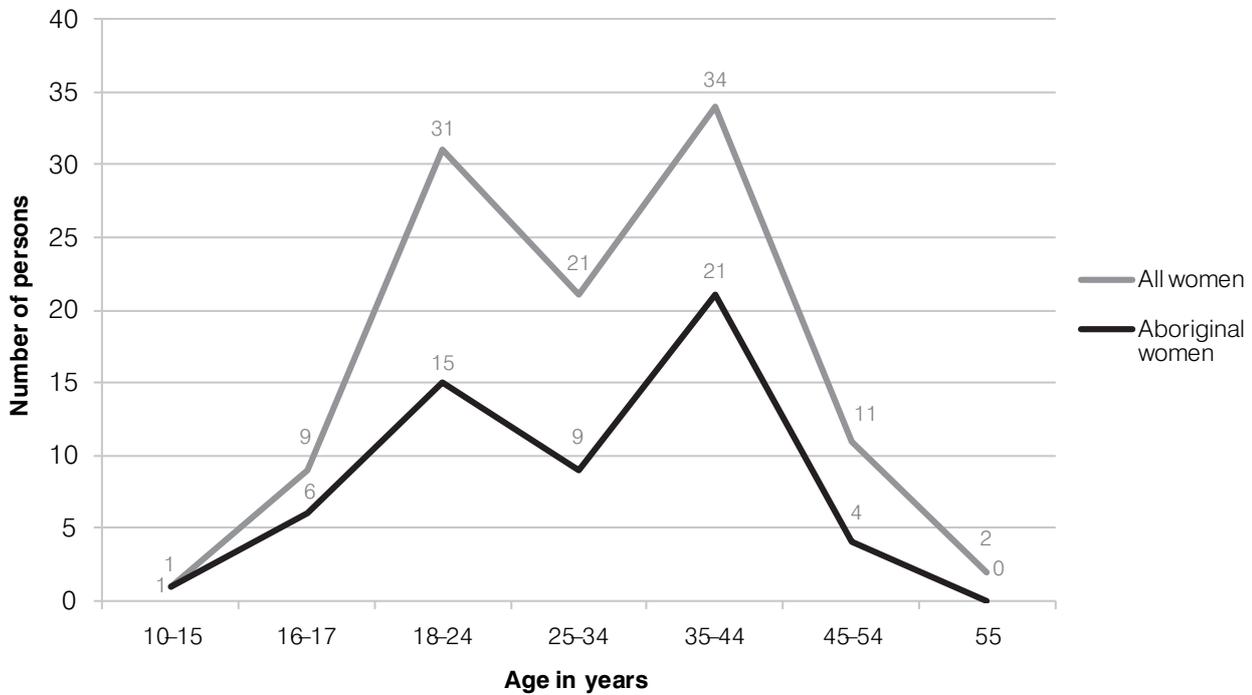
- Two thirds of the 83 children and young people aged between 13 and 17 years are Aboriginal (n=53).
- Just over half of the 109 women are Aboriginal (n=56).

Tables 2 and 3 below show the proportion of COPS Events that recorded a use of the consorting provisions against men and women, compared with men and women who identified themselves to police as being Aboriginal or Torres Strait Islander.

**Table 2: Uses of consorting provisions recorded against men in COPS Event records in first 12 months**



**Table 3: Uses of consorting provisions recorded against women in COPS Event records in first 12 months**



### 3.4 Consorting charges

Given the existence of more than 1,000 official consorting warnings in the first year of use of the provisions there have been relatively few criminal proceedings for consorting brought by the NSW Police Force.

By the end of August 2013 there had been 14 people charged with consorting under section 93X of the Crimes Act. Three people pleaded guilty and have been sentenced, one has been found not guilty and two are still proceeding through the local courts.

The remaining five people charged have joined the constitutional challenge to the consorting provisions that is to be heard in the Court of Appeal in November 2013. Their consorting charges are currently adjourned pending the outcome of the challenge. Two of this group are facing two consorting charges each.

In addition, three people, including two juveniles were wrongly charged under section 93X and have had their matters withdrawn by police at court.

Consultation with police has indicated a number of possible explanations for the low number of charges, including a desire to see the constitutional challenge finalised before laying charges and problems within COPS in relation to tracking who has been warned about whom and whether or not the threshold to charge has been reached. The NSW Police Force is of the view that the latter issue has been addressed by the enhancements to COPS implemented on 24 June 2013.<sup>42</sup>

### 3.5 What analysis of the consorting records of the select group tells us

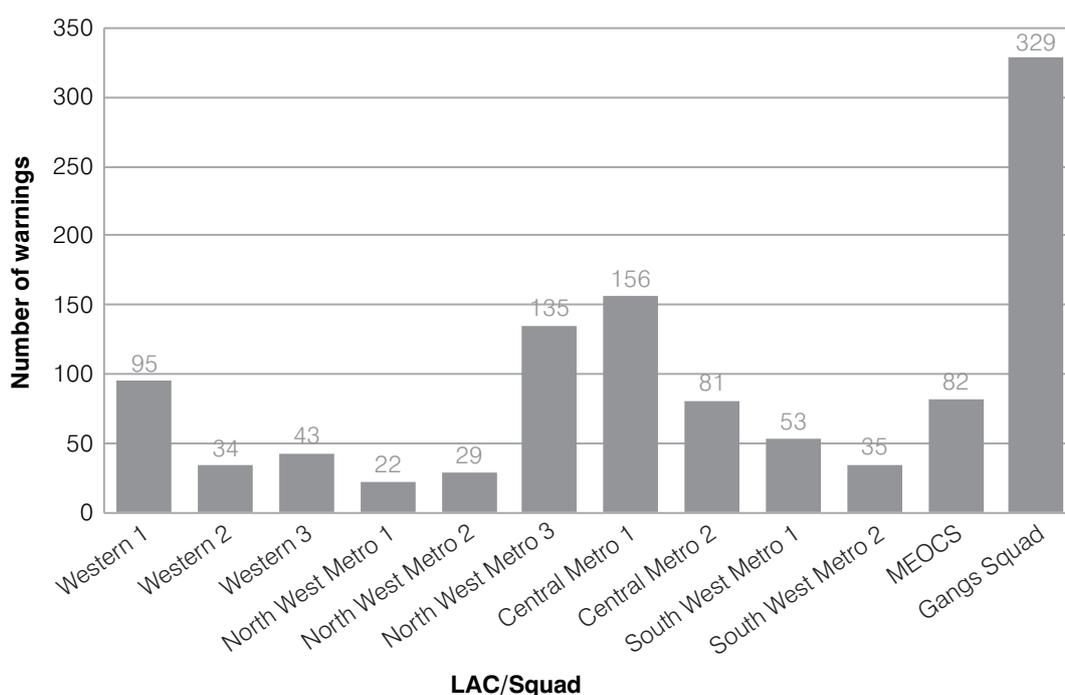
Officers from the select group issued 1,094 consorting warnings to 549 individuals between 9 April 2012 and 16 December 2012. There were 434 people who were the subject of these warnings. The consorting records identified 609 different individuals as being subject to the consorting provisions. This indicates that there was a significant overlap between the group of people who were issued official warnings and the group of people who were the subject of these warnings. Most people received an official warning and were the subject of a warning during the same incident (n=354).

Official warnings issued by officers from the select group were detailed in 391 separate consorting records on COPS, three quarters of which were created by general duties police located in the 10 LACs (n=292), with the remainder created by officers from the two specialist squads (n=99).

Table 4 compares the number of official warnings issued by each LAC in the select group. This comparison highlights the significant variation in use between LACs, including those within the same police Region. Consultation with senior police in each of these 10 LACs and with three LACs who have not used the provisions at all indicated that use tended to be driven by senior management – for example by the commander and crime manager – and was not necessarily reflective of differences in reported crime in the various locations.

The Gangs Squad was responsible for issuing the most consorting warnings in the period.

**Table 4: Comparison of number of official warnings issued by officers from the select group between 9 April 2012 and 16 December 2012**



<sup>42</sup> We will examine this issue after the COPS enhancements have been in operation for 12 months and report on it in our final report.

### 3.5.1 Some differences between those targeted for consorting by officers based in LACs and those targeted by officers attached to specialist squads

Analysis of people subject to the provisions by the select group indicated a number of differences between the LACs and the specialist squads in relation to their demographic details and criminal histories. There was little difference between the subgroups of people who received warnings and those who were the subject of warnings. This is due to the fact that a majority of people fall into both categories.

#### 3.5.1.1 Demographic differences

We found large differences between the LACs and squads in relation to use involving Aboriginal people. There were also significant variations between Regions.

The proportion of uses involving Aboriginal people was highest in the LACs located in the Western Region with 84% of people directly affected being Aboriginal.

In the remaining Regions, Aboriginal people accounted for:

- 57% of those subject to the consorting provisions in the Central Metropolitan Region
- 33% of those subject to the consorting provisions in the South West Metropolitan Region
- 33% of those subject to the consorting provisions in the North West Metropolitan Region.

One of the reasons for the markedly higher number of Aboriginal people subject to the consorting provisions in the three Western Region LACs examined as part of the select group is that Aboriginal people comprise a higher proportion of the population in the Western Region.<sup>43</sup> Aboriginal people account for 9.4% of the population in these three LACs, compared to 2.5% of the total NSW population.<sup>44</sup>

By contrast, only 6% of people subject to the provisions by the specialist squads are Aboriginal. This is explored in greater detail in chapter 6.

Analysis also revealed a difference in age with officers from the specialist squads most commonly targeting people in the 25 to 34 age range, compared to the LACs who tended to target people in the 18 to 24 age range.

#### 3.5.1.2 Differences in criminal histories

At our request the NSW Police Force provided us with information about the criminal histories of people who were subject to the consorting provisions as used by the select group of LACs and squads, covering the last 15 years.<sup>45</sup> Accurately predicting future offending is problematic as the reasons a person may offend are complex and vary across offence types and situations. However, there is some support for the general notion a risk factor for future offending is past offending. The Bureau of Crime Statistics and Research published an updated study in 2012 analysing re-offending rates in NSW and found that 'almost 60 percent of the 81,500 people convicted of at least one offence in a NSW criminal court in 1994 were reconvicted within 15 years'.<sup>46</sup>

Analysis of the criminal histories of those subject to the consorting provisions by the select group revealed that:

- three quarters of people who received official warnings had convictions for indictable offences
- just under a quarter of people who received official warnings had either no criminal record at all, or had only received a conviction for a summary offence or infringement notice sometime in the previous 15 years (n=123).

As an indicator of the seriousness of previous offending committed by individuals subject to the consorting provisions we determined whether or not the offence(s) they were previously sentenced for were strictly indictable. Indictable offences are the majority of offences in NSW and include less serious offences such as shoplifting as well as the most serious offences such

43 We note, however, that use of the consorting provisions in the Western Region LACs was focused in particular sectors rather than being spread evenly across all areas within each LAC. Discussion with officers who used the consorting provisions in those sectors indicated that these officers had used the consorting provisions in a careful and considered way to address local crime issues.

44 NSW Police Force, 'Population by NSW Police Force Local Area Command including Indigenous Population', unpublished data based on the 2011 census.

45 We received the details of the criminal histories for the period January 1998 to April 2013 of 604 of the 609 individuals subject to the consorting provisions by the select group.

46 Jessie Holmes, *Re-offending in NSW, Crime and Justice Statistics, Crime and Justice Statistics: Bureau Brief*, NSW Bureau of Crime Statistics and Research, Issue paper no. 56, Sydney, May 2011, revised January 2012, p. 1.

as murder. Summary offences are not indictable offences. An indictable offence may be either strictly indictable or indictable as outlined in the *Criminal Procedure Act 1986*.<sup>47</sup> Strictly indictable offences are the most serious offences and must be heard in the District or Supreme Courts. They include offences such as murder, discharge a firearm with intent, dangerous driving occasioning death, sexual assault and recklessly wounding a police officer.

Our analysis of the criminal histories of people targeted by the select group revealed:

- 24% of people who were the subject of official warnings issued by the specialist squads had a conviction for a strictly indictable offence (n=28).
- 15% of people who were the subject of official warnings issued by the LACs had a conviction for a strictly indictable offence (n=43).

This indicates more 'convicted offenders' targeted for consorting by the specialist squads have been previously sentenced for offences falling within the most serious category of offences than those targeted by the LACs.

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<sup>47</sup> Section 260 of the *Criminal Procedure Act 1986* provides that offences listed in Table 1 of Schedule 1 are indictable offences that are to be dealt with summarily (in the local court) unless the prosecuting authority or the person charged elects to have the offence dealt with on indictment, and that offences listed in Table 2 of Schedule 2 are indictable offences that are to be dealt with summarily unless the prosecuting authority elects to have the offence dealt with on indictment. All other indictable offences are strictly indictable offences and must be dealt with on indictment as provided in section 5 of the *Criminal Procedure Act*.

## Chapter 4. Are the NSW consorting provisions necessary?

As outlined in chapter 1, the intention behind the new consorting provisions is to prevent the formation or development of criminal associations. In NSW a person's freedom to associate with others can be restricted at different times under a variety of criminal statutes and common law designed to protect individuals, prevent criminal offending or to proscribe certain relationships and activities. In this chapter, we outline many of the current tools available to police and others within the criminal justice system to restrict the way that offenders and other people considered at risk of engaging in criminal activity associate.

### 4.1 Some restrictions on the associations of people not facing charges

The restrictions on association imposed by criminal law can be applied to people who have been charged or sentenced for criminal offences, as well as in some circumstances, people who have not been charged or sentenced.

The new consorting provisions are an example of restrictions that may be placed on people who have no criminal record. The person who receives an official warning need not have any criminal convictions before their association with others (who have been convicted of an indictable offence) is prohibited. They may also be charged under section 93X with habitually consorting.

#### 4.1.1 Apprehended violence orders

Apprehended domestic and personal violence orders are available to restrict an individual from associating or communicating with another person or people. They can be made if a magistrate is satisfied on the balance of probabilities that the person in need of protection has an actual and reasonable fear that the person against whom the order is sought will:

- commit a personal violence offence against them, or
- intimidate or stalk them.

While the magistrate must also consider whether the conduct alleged is sufficient to warrant the making of an order there is no requirement for charges to be laid in relation to it.<sup>48</sup>

The person who is the subject of an apprehended violence order need not have been charged with, or convicted of, any offence in order for the restrictions under the order to be imposed.

### 4.2 Some restrictions on the associations of people facing charges, being sentenced or following the completion of their sentence

Some mechanisms for restricting a person's freedom to associate with others are available specifically for people who are facing charges or have been sentenced for criminal offences.

The *Justice Legislation Amendment (Non-association and Place Restriction) Act 2001* commenced in 2002 and amended bail, sentencing and sentence administration laws with the intention of targeting gang-related crime. The reform provided for specific non-association and place restriction orders with the main objective of the Act being 'to prohibit an offender's association with persons and places that may increase the likelihood of their re-offending'.<sup>49</sup>

#### 4.2.1 Bail

Section 36B of the *Bail Act 1978* allows bail conditions restricting who an accused person can associate with before their matter is finalised at court. Police officers and the courts are unable to impose bail conditions unless they are satisfied the conditions are necessary for protecting certain people or the community, promoting effective law enforcement or reducing the likelihood of future offences.<sup>50</sup> Certain offences have presumptions for and against bail.

If a police officer believes on reasonable grounds that a person has failed to comply with their bail undertaking or condition, they may arrest the person and take them before a court as soon as practicable. The court may release the person on their

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48 *Crimes (Domestic and Personal Violence) Act 2007*, ss. 18–19.

49 NSW Ombudsman, *Review of the Justice Legislation Amendment (Non-association and Place Restriction) Act 2001*, December 2006, p. 1, [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au).

50 *Bail Act 1978*, s. 37(1).

original bail or revoke the person's bail (in which case the court may grant bail on more restrictive conditions or commit the person to prison).<sup>51</sup>

Parliament passed the *Bail Act 2013* on 22 May 2013 and it is expected to commence operation in May 2014.<sup>52</sup> The new Bail Act allows conditional bail to be imposed for the purpose of 'mitigating an unacceptable risk', and any conditions must be reasonable, proportionate to the offence and appropriate to the risk identified.<sup>53</sup> The types of risks to be considered by authorised decision-makers such as the police or courts are that the accused will fail to appear in court, commit a serious offence, endanger the safety of victims, individuals or the community or interfere with witnesses or evidence.<sup>54</sup> Under the new bail regime police officers will retain the ability to restrict an accused person's contact with certain people while on bail if such a restriction is necessary to mitigate an unacceptable risk.<sup>55</sup> Breaches of a non-association condition may result in arrest and/or the issuing of a court attendance notice.

## 4.2.2 Sentencing

Non-association orders can be made in addition to other penalties imposed by a sentencing court. They are available to the court when sentencing a person for any offence that is punishable by six months imprisonment or more (the majority of offences) and can forbid the person from associating with nominated individuals either in certain circumstances or at all, if the court is satisfied it is reasonably necessary to do so to prevent further offending by that person.<sup>56</sup> There is no requirement that the individuals specified in the order have anything to do with the criminal activity for which the person is being sentenced. A non-association order is not to exceed 12 months,<sup>57</sup> and can prohibit face to face contact as well as contact by telephone, email or post.<sup>58</sup> An order is not to include family members unless exceptional circumstances apply.<sup>59</sup> Contravention of an order (without reasonable excuse) is an offence punishable by a maximum of six months imprisonment or 10 penalty units (\$1,100).<sup>60</sup>

Similarly, section 33D of the *Children (Criminal Proceedings) Act 1987*, provides that non-association orders may be made when sentencing children and young people in the Children's Court.

Non-association orders are also available to the court when sentencing a person to an intensive correction order (ICO). Since 2010, a court that has sentenced an offender to imprisonment for not more than two years has been able to make an ICO directing that the sentence be served by way of intensive correction in the community under the strict supervision of Corrective Services NSW, rather than in full-time custody in a correctional centre.<sup>61</sup> In these circumstances a court may impose a condition requiring the offender to comply with any direction of a supervisor not to associate with 'specified persons or persons of a specified description'.<sup>62</sup>

## 4.2.3 Parole

Non-association conditions can also be imposed upon adult and child offenders as part of the conditions of their release from custody on parole.<sup>63</sup> An offender does not contravene a non-association condition attached to a parole order if their conduct was in compliance with a court order or if they unintentionally associated with the person and immediately terminated the association.<sup>64</sup> Breaches of parole conditions may result in an offender's parole being revoked.

51 *Bail Act 1978*, s. 50.

52 In a media release entitled 'Bail Act passes Parliament' dated 22 May 2013, the Attorney General advised the *Bail Act 2013* is due to commence operation in 12 months time being May 2014. See [http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll\\_corporate.nsf/vwFiles/22052013\\_Bail\\_Act\\_passes.pdf/\\$file/22052013\\_Bail\\_Act\\_passes.pdf](http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/22052013_Bail_Act_passes.pdf/$file/22052013_Bail_Act_passes.pdf), viewed 17 September 2013.

53 *Bail Act 2013*, s. 24.

54 *Bail Act 2013*, s. 17(2).

55 See s. 25 of the *Bail Act 2013*. Section 89 of the *Bail Act* restricts publication of information identifying people the accused is banned from associating with.

56 *Crimes (Sentencing Procedure) Act 1999*, s. 17A.

57 *Crimes (Sentencing Procedure) Act 1999*, s. 17A(5).

58 *Crimes (Sentencing Procedure) Act 1999*, s. 3.

59 *Crimes (Sentencing Procedure) Act 1999*, s. 100A(1).

60 *Crimes (Sentencing Procedure) Act 1999*, s. 100E.

61 *Crimes (Sentencing Procedure) Act 1999*, s. 7(1).

62 *Crimes (Administration of Sentences) Regulation 2008*, cl. 176(d). Section 81 of the *Crimes Administration of Sentences) Act 1999* empowers the sentencing court to impose conditions such as those outlined at cl. 176 of the Regulations.

63 *Crimes (Sentencing Procedure) Act 1999*, s. 51A; *Crimes (Administration of Sentences) Act 1999*, s. 128A.

64 *Crimes (Sentencing Procedure) Act 1999*, s. 51A(3); *Crimes (Administration of Sentences) Act 1999*, s. 128A(3). Section 29 of the *Children (Detention Centres) Act 1987* means that Parts 6 and 7 (relating to parole and revocation of parole) apply to juvenile detainees. If a child is subject to supervision while on parole he or she may be forbidden from associating with person(s) specified by their supervisor: *Children (Detention Centres) Regulation 2010*, cl. 96(2)(k).

#### 4.2.4 Temporary leave from custody

In certain circumstances, such as attendance at a funeral, job interview or training course, an inmate or detainee may be granted permission to leave custody for a specified amount of time. Non-association conditions can be imposed upon both adults and children or young people in these circumstances.<sup>65</sup>

#### 4.2.5 Examples of other association restrictions on certain offenders when residing in the community

Some sex offenders and violent offenders may have their associations with people and/or classes of people restricted while living in the community after the completion of their sentence. Restrictions in these cases are designed to protect community members by reducing the risk or opportunity of re-offending. In this approach the restrictions are imposed only on the offender rather than on any other person who associates with them.

The State of NSW<sup>66</sup> may apply to the Supreme Court for an extended or interim supervision order for offenders in the final six months of their sentence for serious sex and/or violence offences in circumstances where the court is satisfied 'to a high degree of probability that the offender poses an unacceptable risk' of committing a serious sex offence or a serious violence offence if not kept under supervision.<sup>67</sup>

Under the *Child Protection (Offenders Prohibition Orders) Act 2004*, police can apply to the local court for 'child protection prohibition orders'<sup>68</sup> against people who are on the NSW Child Protection Register. These orders may restrict a person's contact with specified individuals or classes of people if the court is satisfied on the balance of probabilities there is reasonable cause to believe:

- that the person poses a risk to the lives or sexual safety of one or more children or children generally, and
- the making of the order will reduce that risk.<sup>69</sup>

Police can also seek 'contact prohibition orders' under this Act designed to prevent associations between an offender and his or her victim(s) and any co-offenders.<sup>70</sup>

### 4.3 Restrictions on associating with members of a criminal group or organisation

Another means of limiting the capacity of people to associate for the purpose of planning or participating in criminal activities are the provisions designed to restrict associations between members of criminal gangs. The legislation outlined in this part provides some examples.

#### 4.3.1 Restrictions on members of criminal organisations

The Police Commissioner may apply to the Supreme Court for a declaration that a particular organisation is a criminal organisation for the purposes of the *Crimes (Criminal Organisations Control) Act 2012*.<sup>71</sup> The court may make a declaration if satisfied that members of the organisation 'associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity', and 'the continued existence of the organisation is an unacceptable risk to the safety, welfare or order' of the NSW community.<sup>72</sup> A declaration remains in force for five years unless revoked or renewed.<sup>73</sup> Upon application by the Commissioner, the court may make interim control orders in relation to members of the declared organisation pending the hearing and final determination of an application for a control order.<sup>74</sup>

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65 *(Administration of Sentences) Act 1999*, s 26A; *Children (Detention Centres) Act 1987*, s. 24A.

66 *Crimes (High Risk Offenders) Act 2006*, s. 5H.

67 Sections 5B(2) and 5H(2) of the *Crimes (High Risk Offenders) Act 2006* relate to high risk sex offenders and high risk violent offenders respectively. The person subject to the order must also fall within the definitions of high risk sex offender and high risk violent offender in ss. 5B and 5E of the *Crimes (High Risk Offenders) Act 2006* respectively.

68 *Child Protection (Offenders Prohibition Orders) Act 2004*, s. 5.

69 *Child Protection (Offenders Prohibition Orders) Act 2004*, ss. 5 and 8.

70 *Child Protection (Offenders Prohibition Orders) Act 2004*, s. 16C.

71 *Crimes (Criminal Organisations Control) Act 2012*, s. 5(1).

72 *Crimes (Criminal Organisations Control) Act 2012*, s. 7(1).

73 *Crimes (Criminal Organisations Control) Act 2012*, s. 9.

74 See *Crimes (Criminal Organisations Control) Act 2012*, Part 3, Division 1.

Members of a declared organisation that are subject to interim control orders and control orders are prohibited from associating with each other and engaging in a range of other activities. Division 3 of Part 3 of the Crimes (Criminal Organisations Control) Act outlines the offences relating to controlled members' ability to associate with each other and recruit to the declared organisation. Penalties range from two to five years imprisonment for associating with each other.<sup>75</sup> All types of association including electronic communications are restricted.<sup>76</sup>

The Ombudsman is required to review the powers conferred on police under the Crimes (Criminal Organisations Control) Act for a period of four years from commencement of the Act. The review period concludes in March 2016.

A key difference between the association restrictions under the Crimes (Criminal Organisations Control) Act and the new consorting provisions relates to the requirement to establish that the associations relate to, or are intended to further, serious criminal activities. Under the Crimes (Criminal Organisations Control) Act, the association restrictions are only applicable after the NSW Police Force has satisfied the Supreme Court that members of an organisation associate for the purpose of 'organising, planning, facilitating, supporting or engaging in serious criminal activity'<sup>77</sup> and the restrictions apply only to members of the declared organisation associating with each other. This approach is significantly different to the consorting provisions, which do not require police to establish any link between the associations of a person warned or charged with consorting and involvement in criminal activity of any type. That is, police are not required to show that the purpose or intention of the consorting is to engage in or plan criminal activities. To prove a consorting charge, police need only establish that the person is associating with a person who has previously been convicted of an indictable offence, after being warned that this amounts to consorting.

A further difference is that association restrictions under the Crimes (Criminal Organisations Control) Act are time limited whereas there is no time limit in the consorting provisions, and initial breaches attract a lesser maximum penalty (two years) compared to the three year maximum sentence available to the courts when sentencing for habitual consorting.

### 4.3.2 Participation in a criminal group

Division 5 of Part 3A of the Crimes Act outlines a series of offences relating to participation in criminal groups. Section 93T(1) makes it an offence to participate in a criminal group if the person 'knows or ought to reasonably know' that the group is a criminal group and that his or her participation in that group contributes to the occurrence of criminal activity.

A criminal group is defined as three or more people who have as one of their objectives obtaining material benefits from conduct that constitutes a serious indictable offence or serious violence offence whether committed in NSW or elsewhere.<sup>78</sup>

The Commonwealth *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010* inserted a new Part 9.9 into the Criminal Code (Cth) dealing with criminal associations and organisations, containing offences of:

- associating in support of serious organised criminal activity
- supporting a criminal organisation
- committing an offence for the benefit of, or at the direction of, a criminal organisation, and
- directing the activities of a criminal organisation.

The offence of associating in support of serious organised criminal activity requires that the association facilitates the commission of an offence involving two or more people that the person's associate is engaged in or proposes to engage in.<sup>79</sup>

Again, Division 5 of Part 3A of the Crimes Act and the Commonwealth offences dealing with criminal organisations require the establishment of a link between the association to be penalised and criminal activity. No such link is required under the new consorting provisions.

<sup>75</sup> *Crimes (Criminal Organisations Control) Act 2012*, ss. 26(1)–26(1B).

<sup>76</sup> *Crimes (Criminal Organisations Control) Act 2012*, s. 3(1).

<sup>77</sup> *Crimes (Criminal Organisations Control) Act 2012*, s. 7(1).

<sup>78</sup> See *Crimes Act 1900*, s. 93S.

<sup>79</sup> *Criminal Code (Cth)*, s. 390.3(1)–(2).

## 4.4 Relevant statutory and common law offences for conspiring, planning or organising unlawful activity

Another mechanism available to penalise people who come together to plan criminal acts are the offence provisions for conspiring, planning or organising unlawful activities. The key difference between these offences and the consorting provisions appears to be that the offences involve a link between the association and some identifiable criminal activity, whether or not the activity is executed. By contrast, under the consorting provisions, there is no requirement to prove that the purpose of association involved any intention to engage in criminal activities.

Involvement in planning or organising unlawful activity is prohibited by the criminal law whether or not the unlawful activity actually takes place. For example, under the crime of conspiracy it is an offence for two or more people to agree and intend to carry out an unlawful act.<sup>80</sup>

It is also an offence to assist others to commit criminal offences. Part 9 of the Crimes Act details the law relating to those who assist in the commission of criminal offences and outlines the various ways a person can be criminally liable for a crime undertaken by another person, whether this assistance occurs before, during or after the crime itself. Part 2.4 of the *Criminal Code* (Cth) outlines Commonwealth offences for attempt, complicity, joint commission of crimes and conspiracy.

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### Question for consideration:

1. What gaps, if any, do the new consorting provisions fill that the suite of laws and powers regarding limiting association do not already cover?
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<sup>80</sup> *Yip Chiu-Cheung v R* (1994) 99 Cr App R 406 at 410 (Lord Griffiths); *R v Wilson* (unreported, NSW Court of Criminal Appeal, 12 August 1994).

## Chapter 5. Are the consorting provisions too broad?

The majority of Australian jurisdictions have a consorting offence within their criminal statutes. While all of the various consorting regimes make it a criminal offence to associate with proscribed people, the circumstances required to enliven the offence vary between the jurisdictions. The range of differences between consorting offences in the different states and territories make direct comparison difficult. Differences range from the characteristics of people whose associations can be restricted, the number of people or associations required for an offence to be made out, the length of time that associations can be restricted, the mode and details of warnings and the need to establish a suspected link to criminal activity or crime prevention. New South Wales has the broadest consorting regime in terms of who can be subject to the provisions and also has the highest penalty.<sup>81</sup>

Appendix 3 summarises the main differences between the consorting offences in the various Australian jurisdictions.

The NSW consorting offence includes a number of characteristics which limit the ambit of its operation:

- consorting is only proscribed in relation to associating or communicating with 'convicted offenders', defined as people previously convicted of an indictable offence
- the requirement for a person to associate or communicate with at least two different convicted offenders, on at least two occasions
- the requirement for one of these contacts with each offender to occur after receipt of an official police warning
- the requirement for the police warning to state that the convicted offender is a convicted offender and consorting with a convicted offender is an offence
- the availability of six specific defences to a person charged with consorting.<sup>82</sup>

In addition to the characteristics of the offence itself, the NSW Police Force has made a policy decision that criminal proceedings are not to be commenced for consorting:

- unless the occasions of consorting occurred within a six month period, unless exceptional circumstances exist
- against children under the age of 16, unless exceptional circumstances exist
- unless the convicted offender has been convicted within the last 10 years.<sup>83</sup>

However, it should be noted that the limits outlined in the *Consorting Standard Operating Procedures* (Consorting SOPs) have the status of policy only and do not restrict the extent of the powers granted to police at law.

### 5.1 Who can be subject to the consorting provisions?

A person is considered to be subject to the consorting provisions in the following circumstances:

- they receive an official warning from police about who they are associating or communicating with
- they are charged with consorting
- another person receives an official warning about associating or communicating with them (i.e. they are the subject of an official warning).

81 In the Northern Territory, Western Australia, Victoria, South Australia and Tasmania the maximum penalties for consorting range from custodial sentences of six months to two years. In Western Australia the penalty is a custodial sentence of up to two years and/or a fine of up to \$25,000. This compares to a penalty of up to three years imprisonment and/or a fine of \$16,500 in NSW. The differences are set out in Appendix 3.

82 The defences require the accused to satisfy the court that his or her consorting falls within one of these six defences and was reasonable in the circumstances: *Crimes Act 1900*, s. 93Y. This is further discussed in section 7.4.

83 State Crime Command, *Consorting SOPs*, NSW Police Force, April 2012, p. 15.

### 5.1.1 Who can receive an official warning from police and/or be charged with consorting under section 93X of the Crimes Act?

Excluding children under the age of criminal responsibility, every person in NSW can receive a consorting warning or be charged with consorting if they associate or communicate with a person or people who have been previously convicted of an indictable offence and whose conviction has not become spent.

Our analysis of the criminal histories of people who were issued official consorting warnings by officers from the select group of LACs and squads revealed that:

- just over three quarters of these people had been sentenced by a court for an indictable offence in the last 15 years
- just under one quarter had no criminal record at all, had only been convicted of a summary offence or had only received an infringement notice in the same time period.

Across NSW over the first 12 months of use there were 200 people directly affected by the provisions with either no criminal record at all, a conviction for a minor (summary) offence, or who had only received an infringement notice in the past 15 years.<sup>84</sup> This amounts to 16% of the total individuals identified in COPS events as being subject to the consorting provisions in the first year.

### 5.1.2 Who can be the subject of an official warning?

Only people who fall within the definition of 'convicted offender' can be the subject of an official warning for consorting given to others. Section 93W of the Crimes Act defines 'convicted offender' as 'a person who has been convicted of an indictable offence (disregarding any offence under section 93X).' There are two types of criminal offences in NSW – summary and indictable. Indictable offences include those attracting a maximum term of imprisonment of more than two years. They include the most serious criminal offences such as murder, but also less serious offences such as shoplifting and minor property offences.<sup>85</sup>

Appendix 4 sets out the parts of the *Criminal Procedure Act 1986* that define indictable offences.

In its consideration of the Crimes Amendment (Consorting and Organised Crime) Bill 2012 the Legislation Review Committee noted:

**Indictable offences form the majority of offences in New South Wales and, as such, a sizeable amount of the population has been convicted of an indictable offence.**<sup>86</sup>

### 5.1.3 The proportion of the NSW population who are 'convicted offenders'

To assist in understanding the proportion of the NSW population that falls within the definition of 'convicted offender' we asked the Bureau of Crime Statistics and Research about the number of people who were convicted of an indictable offence in NSW in the 10 years up to 30 June 2012. We also obtained NSW population data from the Australian Bureau of Statistics.

**Table 5: Proportion of adult population in NSW convicted of an indictable offence over a 10 year period<sup>87</sup>**

Age at 30 June 2012	Women		Men		Total	
	Number of people	% of population	Number of people	% of population	Number of people	% of population
18–29	10,593	1.75%	49,290	7.89%	59,883	<b>4.87%</b>
30 and over	26,522	1.17%	113,540	5.27%	140,062	<b>3.16%</b>
<b>Total</b>	<b>37,115</b>	<b>1.29%</b>	<b>162,830</b>	<b>5.86%</b>	<b>199,945</b>	<b>3.53%</b>

<sup>84</sup> This count is based on the information contained in COPS Event records for use of the consorting provisions across the whole state. We have outlined the limitations to the information contained in COPS in section 3.1.

<sup>85</sup> *Criminal Procedure Act 1986*, ss. 3–6 set out the definition of an indictable offence. These sections are contained in Appendix 4.

<sup>86</sup> Legislation Review Committee, *Legislation Review Committee Digest; No. 10 of 55*, NSW Parliament, Sydney, 2012, p. 8.

<sup>87</sup> NSW Bureau of Crime Statistics and Research, NSW Criminal Courts Re-offending Database – July 2002 to June 2012, Adults convicted of an indictable offence, excluding those dealt with under s. 10 *Crimes (Sentencing Procedure) Act 1999* and appearances in Children's Courts, unpublished data; Australian Bureau of Statistics, *Population Projections, Australia, 2006–2010*, 'Table B1. Population projections, By age and sex, New South Wales – Series B', time series spreadsheet, cat. no. 3222.0, ABS, Canberra, 2008, viewed 26 March 2003, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3222.02006%20to%202010?OpenDocument>.

This data indicates that at least 199,945 people in NSW are 'convicted offenders' having been convicted of an indictable offence within the last 10 years. The actual number of 'convicted offenders' will be higher as many people with convictions older than 10 years will also fall within the definition of 'convicted offender' in circumstances discussed later in this chapter in section 5.5.1. Young adult males feature highly in the data with almost 8% of males under 30 years of age being 'convicted offenders'. The figures are dramatically higher for Aboriginal people. This is discussed in chapter 6.

## 5.2 Should use of the consorting provisions be limited to people suspected of involvement in current criminal activity?

The consorting provisions have been criticised because of their potential to punish:

- people with indictable convictions who are no longer involved in criminal activity
- any person engaging in normal social activities with people with indictable convictions.

As outlined in section 1.2.1, Parliament stated the intention of the consorting provisions is not to 'criminalise meetings where the defendant is not mixing in a criminal milieu or establishing, using or building up criminal networks'.<sup>88</sup> However, whether this occurs or not comes down to the appropriate exercise of police discretion. There is nothing in the offence itself to guide this discretion and evidence that the consorting in question did not involve 'establishing, using or building up criminal networks' is not relevant to a determination of guilt. The consorting provisions do not require police to collect or present to court evidence of any link between the consorting and any criminal intent or purpose.

The Consorting SOPs and training provided to officers emphasise the need for police to consider their use of the provisions and exercise their discretion thoughtfully. The Consorting SOPs for example, provide three scenarios where use of the consorting provisions is undesirable. They involve:

- playing team sport where one or two people are 'convicted offenders' and the association is for the purposes of participating in the sport
- where families visit each others' house to allow for their children to play together
- 'convicted offenders' travelling together to attend work.<sup>89</sup>

### 5.2.1 Other jurisdictions

Generally, consorting laws in the Australian jurisdictions do not require police to establish a person's actual or suspected involvement in criminal activity in order to be guilty of consorting. The Northern Territory however, requires the relevant decision-maker to 'reasonably believe' the giving of a notice (breaching of which amounts to the offence) is 'likely to prevent the commission of a prescribed offence'.<sup>90</sup>

### 5.2.2 What police told us about who they are targeting and why

While there is no requirement in the NSW legislation that police suspect the purpose of a person's association is for planning or committing criminal acts, all of the police we consulted advised us they considered the people they targeted for consorting to be currently or recently involved, or at risk of involvement, in some type of criminal offending, or to be associating with people who were. There was, however, significant divergence in the grounds upon which the suspicions were based, as well as the type of criminal activity suspected.

#### 5.2.2.1 Targeting locations

In some LACs, police advised they were targeting people spending time in certain locations in response to complaints received from businesses and members of the public who expressed concern or fear in relation to these people's presence. While we were advised there was intelligence that some of these people were suspected of involvement in offending, such as stealing or distributing prescription drugs, a motivating factor for police was to respond to the community perception of what was taking place.

88 The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9093.

89 State Crime Command, Consorting SOPs, NSW Police Force, April 2012, pp. 15–16.

90 *Summary Offences Act* (NT), s. 55A(4)(b).

### 5.2.2.2 High risk offenders and their associates

Some of the people targeted for use of the consorting provisions had been identified by police as high risk offenders through an accountable process whereby intelligence holdings, patterns of reported crime and information relating to the person's previous offending was analysed by an intelligence officer before being submitted for review and discussion with senior police. Criminal intelligence is information that is 'collected about crime and criminals and evaluated, analysed and disseminated'.<sup>91</sup> The nature of intelligence means that use in court proceedings poses significant problems. Intelligence is not evidence.<sup>92</sup> High risk offenders are believed by police to be highly likely to be involved in current criminal activity, the nature of which varies between LACs and between individuals.

### 5.2.2.3 Taskforce targets

Police in one LAC advised they targeted a number of young men believed to be members of a street gang involved in a series of recent violent robberies and break and enter offences. This belief was based on intelligence and information gathered from police operations as well as from victim statements. According to the crime manager at this LAC, police had been unable to collect enough evidence to lay charges for the robberies despite two strike forces. The consorting provisions were used as a last resort to intervene into the suspected activities of the gang.

### 5.2.2.4 Other intelligence-driven use

Police in a number of LACs advised they were targeting people suspected of involvement in break and enter offences, often following a spike in offending within the area. Individuals targeted for consorting were identified through intelligence holdings, and/or through their presence in locations where the crimes were commonly occurring at times of the day when their presence was not easily explained.

### 5.2.2.5 Targeting by specialist squads

Officers from the two specialist squads we consulted advised they were targeting people known to them to be members of organised crime groups and people associating with them. Members of these crime groups were either suspected by police to be involved in current criminal activity or had members charged with a variety of offences including drug distribution, violence and firearms offences.

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## Questions for consideration:

2. What checks and balances, if any, should be in place to ensure personal relationships between people who are not involved in any criminal activities are not criminalised by the new consorting provisions?
  3. Should police be required to show the associations that are the subject of official warnings are linked to current or suspected criminal activity?
  4. Should police be required to hold a reasonable belief the issuing of consorting warnings is likely to prevent future offending?
- 

## 5.3 Should the NSW consorting provisions be restricted to certain categories of offenders?

Under the NSW consorting provisions, associations that are proscribed are those between a person previously convicted of an indictable offence and any other person. Indictable offences are the majority of criminal offences and include virtually all types of criminal activity or offence category.

One of the aims of the *Crimes Amendment (Consorting and Organised Crime) Act 2012* which introduced the consorting provisions (among other things) was to ensure the provisions of the Crimes Act remain effective at combating criminal groups and that police have 'adequate tools to deal with organised crime'.<sup>93</sup>

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91 Parliamentary Joint Committee on Law Enforcement, *Inquiry into the Gathering and Use of Criminal Intelligence*, Commonwealth of Australia, Canberra, May 2013, p. 5. The committee established that there is broad agreement on this definition.

92 *ibid*, p. 6.

93 The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9091.

However, use of the consorting provisions in NSW is not restricted to officers targeting organised criminal activity. Use by both general duties police and those attached to specialist squads focusing on organised crime and criminal groups, has been encouraged by the NSW Police Force during implementation:

These new powers will be a valuable tool for both front line police officers and specialist commands when targeting high risk and recidivist offenders within their respective areas. This legislation is aimed at stopping the associations that go hand in hand with criminal activity.<sup>94</sup>

As stated in section 5.2, there is nothing in the offence itself to ensure the legislation is used to target associations linked to any criminal activity (current or past) or to criminal activity relating to organised crime or criminal groups.

### 5.3.1 Restrictions to the offence of consorting in other Australian jurisdictions relating to categories of offender

In all Australian jurisdictions other than NSW, use of consorting provisions is limited to specified categories of offenders or people suspected of having committed particular types of offences.

### 5.3.2 Consorting between those convicted or suspected of involvement in serious and organised crime

In Victoria and South Australia the offences of consorting are restricted to preventing associations related to serious and organised crime. In these states it is an offence to habitually consort with a person who has been found guilty of, or who is reasonably suspected of having committed, an organised crime offence.<sup>95</sup> In Victoria this is defined as an offence punishable by a maximum of 10 years imprisonment or more and that:

- involves two or more offenders, and
- involves substantial planning and organisation, and
- forms part of systemic and continuing criminal activity, and
- has a purpose of obtaining profit, gain power or influence.<sup>96</sup>

While the offence type and level of seriousness required in these jurisdictions is significantly more restrictive than in NSW, there is no need for any person to have been convicted of any criminal offence in order to bring a consorting charge in Victoria and South Australia.

The Victorian offence was introduced in 2005, repealing and replacing the previous consorting offence contained in the *Vagrancy Act 1966* (Vic). The previous offence had existed in similar form since the 1930s. Under that provision, it was an offence to habitually consort with 'reputed thieves'.<sup>97</sup> In the second reading speech for the new Victorian consorting offence, the Attorney-General stated, '(w)hile the original consorting offences targeted thieves, the new offence is directed at people involved in organised crime and is designed to assist police in creating a hostile environment for organised crime'.<sup>98</sup> In the parliamentary debate at the time it was noted that the changes to consorting would ensure that the police are able to target their crime prevention strategies on the most serious offending and make sure 'people are not being harassed where their only crime is a lack of resources and a limited circle of friends'.<sup>99</sup>

The offence of consorting has followed a similar trajectory in South Australia. Up to September 2008, people associating with 'reputed thieves, prostitutes or persons having no lawful visible means of support' could be guilty of consorting.<sup>100</sup> In June 2012, a new consorting offence commenced which has a similar focus to that in Victoria. In South Australia it is now an offence for anyone to habitually consort without reasonable excuse with a person 'who has been found guilty of, or who is reasonably

94 NSW Police Force Intranet, 22 January 2013, viewed 1 July 2013, [http://intranet.police.nsw.gov.au/strategy\\_and\\_knowledge\\_maps/gangs\\_strategy\\_map/consorting](http://intranet.police.nsw.gov.au/strategy_and_knowledge_maps/gangs_strategy_map/consorting).

95 *Summary Offences Act 1966* (Vic), s. 49; *Summary Offences Act 1953* (SA), s. 13.

96 *Summary Offences Act 1966* (Vic), s. 49F(3).

97 *Vagrancy Act 1966* (Vic), s. 6(1)(c).

98 The Hon. Rob Hulls MP, Victoria Parliamentary Debates, (Hansard), Legislative Assembly, 21 July 2005, p. 2003. This was stated in the second reading speech for the *Vagrancy (Repeal) and Summary Offences (Amendment) Bill*.

99 Mr Rob Hudson MP, Victoria Parliamentary Debates (Hansard), Legislative Assembly, 18 Aug 2005, p. 486.

100 *Summary Offences Act 1953* (SA), s. 13 (repealed on 3 September 2008).

suspected of having committed, a serious and organised crime offence.<sup>101</sup> Such offences include those punishable by life imprisonment or involving offences relating to criminal organisations.<sup>102</sup>

### 5.3.3 Consorting between convicted drug traffickers and between child sex offenders or those convicted of a range of offences attracting a maximum of 10 years imprisonment

In Western Australia and the Northern Territory, only people who have been convicted of serious criminal offences can be charged with consorting. In Western Australia for example, the offences of consorting contained in sections 557J and 557K of the Criminal Code (WA) are aimed at preventing convicted drug traffickers and child sex offenders from continuing to offend by prohibiting them from habitually consorting with people with similar convictions to themselves. Following a police warning, it is an offence for a drug trafficker (defined as a person who has been convicted of three serious drug offences within a 10 year period)<sup>103</sup> to habitually consort with another drug trafficker; and similarly for a child sex offender to habitually consort with another child sex offender.<sup>104</sup>

The offence of consorting in the Northern Territory applies to associations between people previously convicted of a wide range of offences attracting a maximum penalty of 10 years or more imprisonment.<sup>105</sup> Offence categories include child abuse, homicide, firearms, drug misuse, riot, sexual servitude, robbery and receiving stolen property.<sup>106</sup>

### Question for consideration:

5. Should the targeting of people for consorting be left wholly to police discretion or should the provisions be limited to people convicted of certain categories of offences as legislated in other jurisdictions? What offence categories would be appropriate?

## 5.4 The type and seriousness of offending the NSW Police Force is targeting

Our consultations with officers from the select group revealed the consorting provisions were being used to target people suspected of involvement in different types of crime and in crime of differing levels of seriousness. This was only in part explained by differences in the policing issues facing the different commands. For example:

- four of the 10 LACs advised they were targeting convicted offenders and others congregating in public places including shopping malls, outdoor seating areas and in cafes, some of whom were suspected of involvement in using and selling illicit and prescription drugs and stealing from shops
- three LACs advised they were focusing their use of the consorting provisions on people suspected of involvement in robberies, aggravated break and enter offences, and home invasions
- a number of remote areas in the Western Region advised they were targeting drug supply and property offences involving malicious damage and trespassing
- officers from the specialist squads advised they were using the consorting provisions as an additional tool to interrupt the activities of criminal gangs involved in organised criminal activity including extortion, drug supply and firearms offences.

Our analysis of the criminal histories of relevant people confirmed that the criminal histories of the convicted offenders who were the subject of official warnings were varied, and there were different patterns when comparing LACs to specialist squads.

101 *Summary Offences Act 1953* (SA), s. 13(3).

102 As contained in Part 3B of the *Criminal Law Consolidation Act 1935* (SA). Section 5 of the *Criminal Law Consolidation Act 1935* (SA) defines 'serious and organised crime offence'.

103 *Misuse of Drugs Act 1981* (WA), s. 32A(1) and *Criminal Code* (WA), s. 557J.

104 *Criminal Code* (WA), s. 557K. A 'child sex offender' is defined in section 557K(1) of the *Criminal Code* (WA) as someone previously convicted of a wide range of specified offences against or in relation to people under the age of 18 years.

105 *Summary Offences Act* (NT), s. 55A(10)(b).

106 The prescribed offences are defined in regulation 9 of the Summary Offences Regulations (NT).

'Theft and related offences' was the most significant category of all indictable offences in the criminal histories of those targeted by the LACs comprising nearly 40% of the total offences (n=937).<sup>107</sup> By contrast, this category of offence only comprised 10% of the total offences of the group targeted by the squads (n=61).

As discussed in section 3.5.1.2, our analysis of these criminal histories also revealed more 'convicted offenders' targeted for consorting by the specialist squads had been previously sentenced for offences falling within the most serious category of offences than those targeted by the LACs:

- 24% of people who were the subject of official warnings issued by the specialist squads had a conviction for a strictly indictable offence (n=28).
- 15% of people who were the subject of official warnings issued by the LACs had a conviction for a strictly indictable offence (n=43).

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## Questions for consideration:

6. Is it appropriate for police to target people for consorting who are suspected of involvement in less serious offences such as shoplifting?
  7. Should convictions for certain offences or offence categories be excluded from defining a person as a convicted offender, and if so, which ones?
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## 5.5 Limiting the definition of 'convicted offender' to those with recent convictions

Stakeholders have raised concerns that under the new consorting provisions people can be treated as 'convicted offenders' and have their associations with people controlled a long time after they were convicted of an indictable offence and after their involvement in criminal activity ended. According to the Bureau of Crime Statistics and Research study of re-offending rates in NSW most re-offending occurs within a few years of the reference offence, '(f)or example, for adult offenders, 21 percent re-offended within one year, another 10 percent re-offended within two years and a further 6 percent re-offended within three years.'<sup>108</sup>

The NSW Police Force has made the policy decision that criminal proceedings are not to be commenced for consorting 'unless the convicted offender has been convicted within the last 10 years.'<sup>109</sup>

There are currently a number of statutory constraints to the amount of time following a conviction for an indictable offence that a person may be considered a 'convicted offender' for the purposes of the consorting provisions. These are outlined below.

### 5.5.1 Statutory constraints to the amount of time after a relevant conviction that a person may be considered a 'convicted offender'

#### 5.5.1.1 Adults

The *Criminal Records Act 1991* provides that some criminal convictions will become spent for many people following a crime-free 10 year period. A person cannot be a 'convicted offender' for the purposes of the consorting provisions if their convictions are spent.<sup>110</sup>

Certain convictions will never become spent including convictions for sexual offences and those where a sentence of more than six months was imposed.<sup>111</sup>

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107 This is Division 08 of the Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification (ANZSOC)*, 3rd ed, cat. no. 1234.0, ABS, Canberra, 2011, viewed 1 July 2013, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/1234.02011?OpenDocument>. The category of 'theft and related offences' includes all types of theft, motor vehicle theft and receiving or handling proceeds of crime.

108 Jessie Holmes, *Re-offending in NSW*, Crime and Justice Statistics: Bureau Brief, Issue paper no. 56, NSW Bureau of Crimes Statistics and Research, Sydney, May 2011, revised January 2012, pp. 1–2.

109 State Crime Command, *Consorting SOPs*, NSW Police Force, April 2012, p. 15.

110 *Criminal Records Act 1991*, s. 12.

111 *Criminal Records Act 1991*, s. 7.

### 5.5.1.2 Children and young people

If a child aged between 10 and 15 years is found guilty of an indictable offence in the Children's Court, the court is unable to record a conviction with respect to the matter.<sup>112</sup> For young people aged 16 to 17 years found guilty of indictable offences in the Children's Court, the court has discretion as to whether a conviction will be recorded.<sup>113</sup>

Children's Court convictions that are recorded with respect to a child or young person may become spent following a three year crime-free period with a number of exceptions.<sup>114</sup>

## 5.5.2 What the data and police consultations tell us about the recency of convictions

Analysis of the criminal histories of people the subject of official warnings by the select group indicated 77 % of those targeted by the LACs had been sentenced for an indictable offence in the last three years (n=188); compared to 57% of those targeted by the squads (n=61).<sup>115</sup> This may be partially explained by the fact more people targeted by the squads had been sentenced for the most serious offences with lengthy sentences of imprisonment.

During our consultations, police from specialist squads advised that some of the people they suspected of holding senior positions in criminal groups do not have recent or serious criminal convictions as their seniority in their organisation allowed them to rely on intermediaries to undertake riskier activities. Officers from specialist squads emphasised their operational need to be able to target a broad range of offender whom they suspected of involvement in organised criminal activity.

During our consultations, we asked police officers about the impact that limiting the consorting provisions to use against people with more recent convictions (for example, by imposing a limit of three or five years recency of conviction) might have on the operation of the new provisions. Officers told us that limiting the conviction history by timeframe may restrict the usefulness of the consorting provisions to target people involved in suspected current criminal activity.

## Question for consideration:

- 8. Should NSW consorting provisions include a requirement that a convicted offender must be convicted of an indictable offence within a specified timeframe? If such a requirement is included, what would be the appropriate timeframe?**

## 5.6 Time limits on the period in which habitual consorting occurs

The previous offence of consorting required police to charge a person within a six month time period starting on the first occasion of associating due to the time restrictions placed on all summary offences in NSW. Consorting is now an indictable offence and consequently the time limits applicable to summary offences no longer apply. There is now no time limit contained in the offence of consorting. The Consorting SOPs indicate that officers should not commence criminal proceedings for consorting unless 'the occasions of consorting occurred within a six month period' except in 'exceptional circumstances'.<sup>116</sup> However, this policy provides guidance only.

The new offence of consorting contained in section 93X involves a person who 'habitually' consorts with convicted offenders.<sup>117</sup> Section 93X(2), which we have set out in Appendix 1, defines 'habitually consort'.

At the time of publication only four prosecutions under section 93X of the Crimes Act have been finalised. The longest timeframe between the first and last consorting incidents forming the basis of the charge in these three prosecutions was seven months.<sup>118</sup> To date there has been no opportunity for the courts to comment on whether occasions of consorting that are a long time apart may amount to 'habitual consorting'. There are also no limits in the new consorting provisions on the duration that an official warning lasts.

<sup>112</sup> Due to the operation of section 14(1)(a) of the *Children (Criminal Proceedings) Act 1987*.

<sup>113</sup> *Children (Criminal Proceedings) Act 1987*, s. 14(1)(b).

<sup>114</sup> *Criminal Records Act 1991*, s. 10.

<sup>115</sup> These are proportions of all people who are the subject of warnings and who have been sentenced in the last 15 years, for the LACs and squads respectively.

<sup>116</sup> State Crime Command, Consorting SOPs, NSW Police Force, April 2012, p. 15.

<sup>117</sup> *Crimes Act 1900*, s. 93X(1)(a).

<sup>118</sup> *R v David MacFarlane* (unreported, North Sydney Local Court, Magistrate Milovich, 18 April 2013). The consorting incidents as set out in the facts sheet (for charge H 50930656) occurred between 14/8/12 and 13/3/13.

### 5.6.1 Time limits present in other jurisdictions

Express time limits contained within consorting offences are not common in other Australian jurisdictions. The restrictions that do exist relate to whether or not the offence is a summary offence and the consequent time restrictions that follow its summary status.

Consorting offences in Victoria, South Australia, West Australia and Tasmania are all summary offences and therefore police are restricted by the following time limits between the relevant incident(s) of consorting and charge:

- Victoria – 12 months;<sup>119</sup>
- South Australia – two years;<sup>120</sup>
- Western Australia – 12 months<sup>121</sup>
- Tasmania – six months.<sup>122</sup>

In the Northern Territory a time limit applies to the length of time an official warning remains valid. In that jurisdiction warnings are required to be in writing and must not exceed 12 months.<sup>123</sup>

### 5.6.2 What police told us about the impact of limiting the time period in which consorting must occur

We asked police from the select group of LACs and squads about the potential impact of limiting the time within which incidents of consorting must occur. We explored a range of time periods with police and found a consensus that being able to rely on occasions of consorting occurring within a two-year period would have very little, if any, detrimental impact on their use of the provisions. A time period of this length may enable police to bring section 93X charges at the end of lengthy covert operations without exposing any details of the operation before its completion.

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## Questions for consideration:

9. Should there be a limit governing the period of time during which the occasions of consorting must occur included in the offence? If so, what timeframe?
  10. Should official police warnings remain valid for a specified timeframe, such as 12 months or two years? If so, what timeframe?
- 

119 *Criminal Procedure Act 2009* (Vic), s. 7(1).

120 *Summary Procedure Act 1921* (SA), s. 52(1)(b).

121 *Criminal Procedure Act 2004* (WA), s. 21.

122 *Justices Act 1959* (Tas), s. 26(1)(a).

123 *Summary Offences Act* (NT), s. 55A(1)(a).

## Chapter 6. Use in relation to disadvantaged and vulnerable groups

During the parliamentary debate about the consorting provisions the government acknowledged the fear held by some that the provisions ‘might be used to target marginal groups’.<sup>124</sup> A number of concerns have been raised regarding the potential for use of the consorting provisions to disproportionately impact on disadvantaged and vulnerable groups including:

- Aboriginal and Torres Strait Islander people
- children and young people
- people experiencing homelessness.

In this chapter we consider the impact of the use of the provisions to date on these groups.

As there was little or no reliance by police on electronic consorting in the first 12 months, use of the consorting provisions primarily involved police observing people in public places to determine if they were consorting. To establish that consorting is taking place, police must observe people associating with each other, establish ‘some seeking or acceptance of the association on the part of the defendant’<sup>125</sup> and rule out the incident being merely a brief coincidental meeting.<sup>126</sup> Because police strategies for identifying consorting rely on observations of behaviour in public places, there is the potential for people who spend a lot of time in areas open to the public, such as young people, Aboriginal people and people experiencing homelessness, to be subject to the consorting provisions to a greater degree than others who may spend less time in public places.

In addition to being more visible to police, some vulnerable or disadvantaged groups have proportionally higher numbers of people with previous convictions for indictable offences when compared to the general population. This brings those vulnerable groups and the people they spend time with, more readily within the ambit of the consorting provisions.

### 6.1 Use of the consorting provisions in relation to Aboriginal people

New South Wales has the largest Aboriginal population in Australia, comprising almost 30% of the national total. Overall, Aboriginal people comprise approximately 2.5% of the total NSW population,<sup>127</sup> however almost 40% of NSW Aboriginal people are under the age of 15 and the population is growing.<sup>128</sup>

#### 6.1.1 Relevant NSW Police Force policy

There is no specific reference to use in relation to Aboriginal people in the *Consorting Standard Operating Procedures* (Consorting SOPs) and no guidance for officers about whether they should consider kinship ties between Aboriginal people as falling within the definition of ‘family’ in section 93Y(a) of the *Crimes Act 1900*. Kinship ties are broader than lineal or blood relations and assist in structuring Aboriginal people’s relationships with each other. Association with family members, if established by the defendant, is one of the six statutory defences to a charge of consorting, however ‘family’ is not defined.

In assessing the impact of the consorting provisions on Aboriginal people, it is useful to consider the main NSW Police Force policy governing the area. In 2012, the NSW Police Force introduced a revised *Aboriginal Strategic Direction 2012–2017* being ‘the overarching document which guides the NSW Police Force in its management of Aboriginal issues.’<sup>129</sup> In this document the NSW Police Force explicitly recognises Aboriginal people as the most disadvantaged group in Australia and note that the ‘over-representation of Aboriginal people in the criminal justice system has been a challenge for policy makers and a source of advocacy and concern for many, particularly the Aboriginal community themselves’.<sup>130</sup>

<sup>124</sup> The Hon. John Ajaka MLC, NSWPD, (NSWPD), (Hansard), Legislative Council, 7 March 2012, p. 9097.

<sup>125</sup> *Johanson v Dixon* (1979) 143 CLR 376 at 383 (Mason J); 395 (Aickin J). The judges cited the decision in *Brown v Bryan* [1963] Tas SR 1 (at 2) as authority for this interpretation.

<sup>126</sup> *Johanson v Dixon* (1979) 143 CLR 376.

<sup>127</sup> Australian Bureau of Statistics, *Census of Population and Housing: Counts of Aboriginal and Torres Strait Islander Australians, 2011*, cat. no. 2075.0, ABS, Canberra, 2012, viewed 27 June 2013, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2075.0main+features32011>.

<sup>128</sup> *ibid.*

<sup>129</sup> NSW Police Force, *Aboriginal Strategic Direction 2012–2017*, 2012, p. 6.

<sup>130</sup> *ibid.*

## 6.1.2 What proportion of the Aboriginal population falls within the definition of ‘convicted offender’ in NSW?

The well-documented over-representation of Aboriginal people in criminal statistics creates a substantially increased potential for Aboriginal people and people they spend time with to become subject to the consorting provisions as many from this group will fall within the definition of ‘convicted offender’ in section 93W of the Crimes Act.

In order to determine the proportion of the NSW Aboriginal population who are ‘convicted offenders’ for the purposes of the provisions we sought details of the number of Aboriginal people convicted in the past 10 years of an indictable offence in NSW from the Bureau of Crime Statistics and Research and compared this with population data from the Australian Bureau of Statistics.

As discussed in section 5.1.3, there are nearly 200,000 (199,945) adults in NSW who have been convicted of an indictable offence in the past 10 years and who are therefore ‘convicted offenders’ for the purposes of the consorting provisions. As a proportion of the total population, the figures are dramatically higher for Aboriginal and Torres Strait Islander peoples as shown in Table 6 below.

**Table 6: Proportion of adult Aboriginal and Torres Strait Islander population in NSW convicted of an indictable offence over a 10 year period**

Age at 30 June 2012	Women		Men		Total	
	Number of people	% of population	Number of people	% of population	Number of people	% of population
18–29	2,498	13.86%	7,774	40.69%	10,272	27.66%
30 and over	5,220	15.64%	14,719	49.04%	19,939	31.45%
<b>Total</b>	<b>7,718</b>	<b>15.01%</b>	<b>22,493</b>	<b>45.79%</b>	<b>30,211</b>	<b>30.05%</b>

NSW Bureau of Crime Statistics and Research, ‘NSW Criminal Courts Re-offending Database – July 2002 to June 2012, Adults convicted of an indictable offence, excluding those dealt with under s. 10 *Crimes (Sentencing Procedure) Act 1999* and appearances in Children’s Courts’, unpublished data.<sup>131</sup>

**Note:** Table 6 in the Consorting Issues Paper, 2013 contained the wrong figures in the ‘Number of people’ columns. The figures used were for the total Aboriginal and Torres Strait Islander population rather than the number of Aboriginal and Torres Strait Islander people convicted of indictable offences. This is a revised version of the table containing the correct figures as provided by the NSW BOCSAR.

According to our analysis, 46% of all Aboriginal men in NSW have been convicted of an indictable offence in the last 10 years compared to 5.3% of all men; and half (49%) of the Aboriginal male population aged over 30 years have indictable convictions compared to 5% of the total male population of the same age range. In relation to adult women, 15% of Aboriginal women in NSW have indictable convictions received in the last 10 years, compared to 1.3% of all women.

## 6.2 What the consorting data tells us about use in relation to Aboriginal people

In section 3.3.1 we noted that 40% of all people who either received a warning for consorting or were warned about in NSW in the first 12 months of use are Aboriginal. Our analysis also indicates there were 83 children and young people aged between 13 and 17 years who were subject to the consorting provisions in the first 12 months and two thirds of these are Aboriginal (n=53).

However, these figures do not differentiate between those who were issued with an official warning and those who were the subject of a warning. Our analysis of the select group of LACs and squads enabled us to determine the number and proportion of Aboriginal people who fell into these two categories.

<sup>131</sup> We used projected Aboriginal and Torres Strait Islander population figures from two sources: Australian Bureau of Statistics, *Experimental Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 1991 to 2021*, ‘Projected population, Aboriginal and Torres Strait Islander Australians, Australia, states and territories, 2006–2021’, Series B, data cube, cat. no. 3238.0, ABS, Canberra, 2009, viewed 26 March 2003, <http://www.abs.gov.au/AUSSTATS/abs@.nsw/DetailsPage/3238.01991%20to%202021?OpenDocument>; and Australian Bureau of Statistics, *Customised Report*, ‘Table 1: Aboriginal and Torres Strait Islander population projections by sex and age (custom) for 30 June 2012’ (Source: *Experimental Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 1991 to 2021* (cat. no. 3238.0)), ABS, Canberra, 2013, unpublished data. These population projection figures for the NSW Aboriginal and Torres Strait Islander population are based on the 2006 census and are therefore not accurate and up to date. The Aboriginal and Torres Strait Islander population has increased post-2011. Projections based on the 2011 census will not be released by the Australian Bureau of Statistics until mid-2014. To enable a more accurate comparison to be drawn between the NSW Aboriginal and Torres Strait Islander and total populations, we used an ABS product containing projections of the resident population of Australia also based on the 2006 census to determine the total NSW population.

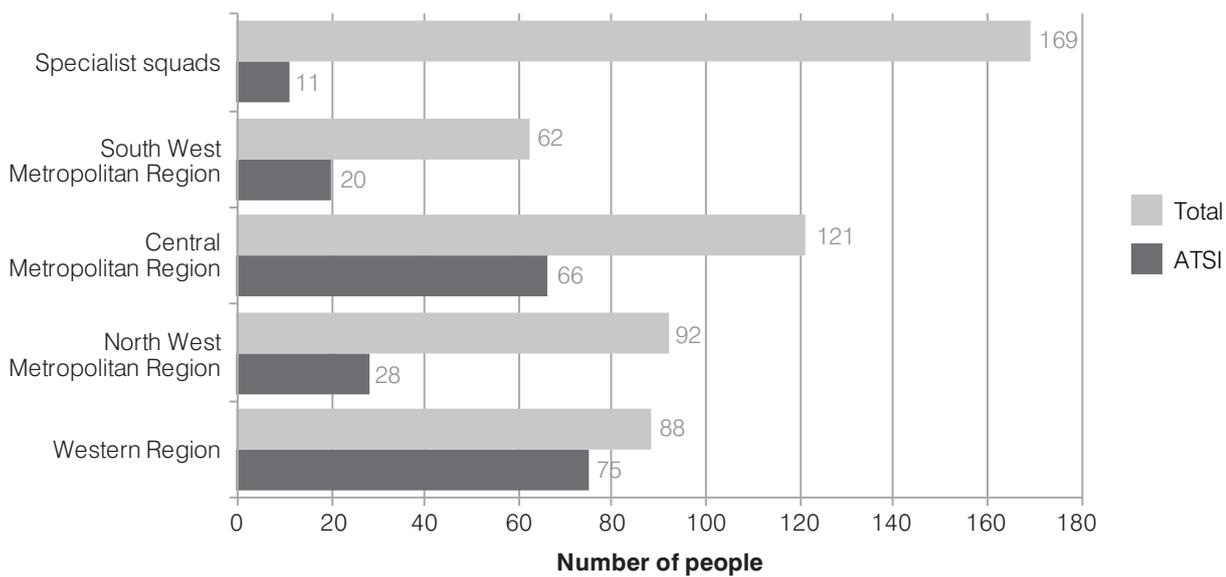
### 6.2.1 Analysis of the select group of LACs and squads

As outlined in chapter 3 at 3.1, the select group is made up of ten LACs and two specialist squads. It includes three LACs from the Western Region, three from the North-West Metropolitan Region, two from the Central Metropolitan Region and two from the South-West Metropolitan Region. The two specialist squads are attached to the Organised Crime Directorate of the State Crime Command. Out of the 609 people subject to the consorting provisions by officers from the select group, just over one third are Aboriginal (n=221). Only 10% (n=61) of this cohort are women, however the majority of women dealt with under the consorting provisions are Aboriginal (n=37).

#### 6.2.1.1 How many Aboriginal people received a warning for consorting from officers in the select group of LACs and squads?

Aboriginal people accounted for 38% of all people who were issued an official warning by officers from the select group (n=200). Table 7 shows the number of Aboriginal people in relation to the total number of people, who received an official warning in the period 9 April 2012 to 16 December 2012.

**Table 7: Number of people by Aboriginal status issued with an official warning by the select group**



Out of the 480 men who received official warnings from officers in the select group, 164 are Aboriginal, accounting for one third of all men who received warnings for consorting.

Overall, 36 of the 58 (62%) women who received warnings in this cohort are Aboriginal.

Aboriginal children and young people were issued with official warnings at a higher rate than Aboriginal people in general by officers from this select group. Just over half (n=25) of all children and young people issued with warnings are Aboriginal, whereas 38% of all people issued with warnings are Aboriginal (n=200).

Almost half of all 16 to 17 year olds (n=17) and eight of the 12 children aged 10 to 15 years who were issued with consorting warnings by the select group are Aboriginal.

#### 6.2.1.2 How many Aboriginal people were the subject of an official warning by officers in the select group of LACs and squads?

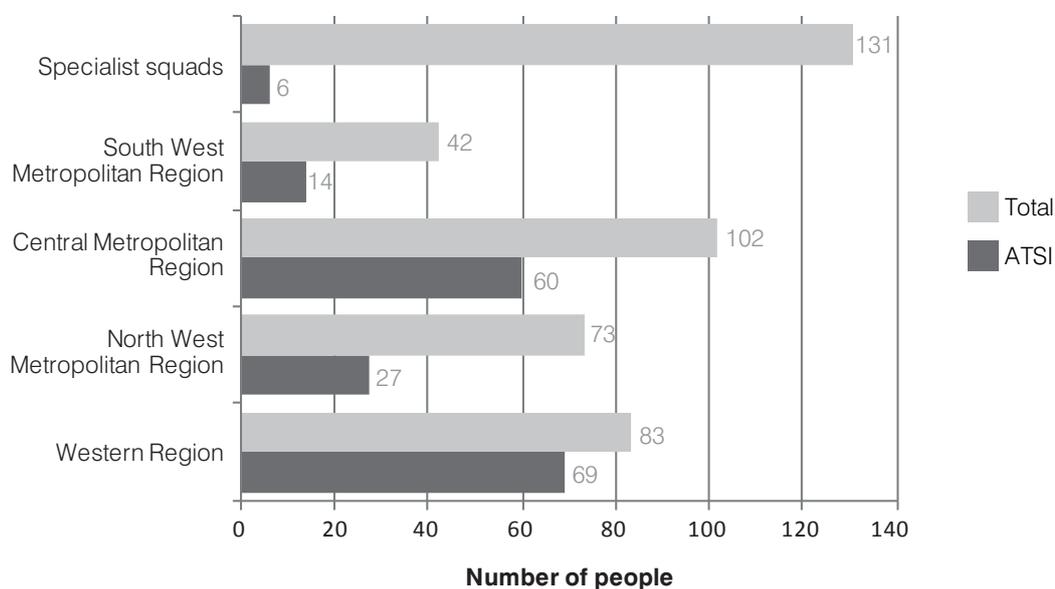
Aboriginal people accounted for 41% of all people who were the subject of an official warning issued by officers from the select group (n=176).

Table 8 shows the number of Aboriginal people relative to the total number of people who were the subject of a warning. Just under 40% of all men who were the subject of an official warning are Aboriginal (n=150), compared to 65% of women (n=28).

Overall, 85% of all children and young people who were the subject of an official warning issued by the select group are Aboriginal (n=22), including all seven children in the 10 to 15 year age group.

Our analysis indicated there was little demographic difference between the subgroups of those who received warnings and those who were the subject of warnings. This is in part explained by the large overlap between these two groups – that is, the majority of people were both issued a warning and were the subject of a warning.

**Table 8: Number of people by Aboriginal status who were the subject of warnings issued by the select group**



### 6.2.1.3 Comparing use in relation to Aboriginal people by LACs and squads from the select group

Tables 7 and 8 indicate significant variation between the use of the consorting provisions against Aboriginal people by general duties police and use by officers attached to specialist squads targeting organised crime and criminal gangs. Very few of the uses by the specialist squads involved Aboriginal people, whereas the proportion of uses by general duties police against Aboriginal people was significantly higher. These tables also indicate marked differences in use against Aboriginal people between LACs from the select group located in metropolitan Sydney and those in Western NSW.

Among the LACs in the select group the proportion of uses involving Aboriginal people was highest in the Western Region LACs, with 85% of men who received a warning (n=68), and 85% of men who were the subject of a consorting warning (n=64), being Aboriginal.

In the remaining Regions, Aboriginal men accounted for:

- 48% of men who received a warning (n=51) and 55% of men who were the subject of a warning (n=49) in the Central Metropolitan Region
- 30% of men who received a warning (n=16) and 29% of men who were the subject of a warning (n=10) in the South West Metropolitan Region
- 28% of men who received a warning (n=21) and 34% of men who were the subject of a consorting warning (n=21) in the North West Metropolitan Region

One of the reasons for the higher number of Aboriginal people subject to the consorting provisions in the three Western Region LACs examined is that Aboriginal people comprise a higher proportion of the population in the Western Region. Aboriginal people account for 9.4% of the population in these three LACs, compared to 2.5% of the total NSW population.<sup>132</sup> It is also noteworthy that use of the consorting provisions in the Western Region LACs in the select group was focused in particular sectors within each LAC and not spread across the whole command and some of these sectors include towns where the majority of people are Aboriginal.

<sup>132</sup> NSW Police Force, 'Population by NSW Police Force Local Area Command including Indigenous Population', unpublished data based on the 2011 census.

The total numbers of women subject to the provisions by the select group were statistically low. While caution is needed in interpreting them, it is of note that there were approximately equal numbers of Aboriginal and non-Aboriginal women subject to the provisions in the first 12 months.

By contrast, in the specialist squads, only 5% of both the men who were issued with a warning (n=9) and those who were the subject of a warning (n=6) are Aboriginal.

The above data does not establish an intention by police to target Aboriginal people on the basis of their Aboriginality. One of the reasons for regional differences in the proportion of Aboriginal people subject to the provisions is likely to be the demographic makeup of the different communities featured in the data.

During consultation with officers from the select group we were advised police are targeting individuals suspected of involvement in current offending and their associates as well as people spending time in certain locations. This is discussed in greater detail in section 5.2.2. An explanation for the high proportions of Aboriginal people being subject to the provisions may lie in high levels of involvement in offending. Alternatively, with four out of 10 LACs targeting consorting in public places including parks and transport hubs, the explanation may include Aboriginal people's use of public space coupled with the fact approximately half of all Aboriginal men fall within the definition of 'convicted offender'. We are unable to verify these possible explanations. However, the data does establish that Aboriginal people were not common targets of the two specialist squads whose focus is organised criminal activity and gangs. This may indicate a relatively low involvement of Aboriginal people in this type of offending.

Our analysis established that significant numbers of Aboriginal people were targeted for use of the consorting provisions by general duties police and that this use varied according to location. Additionally, while the numbers of women and children subject to the provisions were low relative to the numbers of adult men, the data established a majority of the women and a majority of the children subject to the provisions are Aboriginal.

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## Questions for consideration:

11. What, if any, protections should be put in place to ensure that Aboriginal people are not unfairly affected by the consorting provisions?
  12. One of the defences listed in section 93Y of the Crimes Act is 'consorting with family members'. Should 'family' be defined within the legislation or in the Consorting SOPs and if so, what definition of 'family' should be adopted?
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## 6.3 Use of the consorting provisions in relation to children and young people

Public space is important to young people for a variety of reasons. Young people often socialise in public areas because they lack private space and need a place to spend time without close parental supervision. Licensed venues are off limits to them and other venues may be prohibitively expensive. Additionally, young people rely extensively on public transport. Policing of public space has historically led to over-representation of young people in criminal statistics.<sup>133</sup>

### 6.3.1 NSW Police Force policy

The NSW Police Force made the policy decision that criminal proceedings for consorting should not be brought against children under the age of 16 years 'except in exceptional circumstances'.<sup>134</sup> However, there are no instructions in the Consorting SOPs which prevent officers from issuing official warnings to children under 16 years old.

For young people aged 16 and 17 years who may be charged with consorting under section 93X of the Crimes Act, police officers are advised to consider dealing with the matter via the diversionary scheme put in place by the *Young Offenders Act 1997*. This Act establishes a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences through the use of youth justice conferences, cautions and warnings.<sup>135</sup> A requirement for offences to

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133 For example, the Crime and Misconduct Commission found that Indigenous people and young people (aged less than 25 years) are over-represented as public nuisance offenders: Crime and Misconduct Commission, Queensland, *Policing Public Order: A Review of the Public Nuisance Offence*, CMC, Brisbane, May 2008, p. 80.

134 State Crime Command, Consorting SOPs, NSW Police Force, April 2012, p. 15.

135 *Young Offenders Act (1997)*, s. 3(a). Section 8 outlines which offences may be dealt with under the Young Offenders Act.

be dealt with through the use of youth justice conferences and cautions is that the child or young person must admit guilt.<sup>136</sup> The NSW Police Force was initially unable to provide us with data in relation to their use of the Young Offenders Act due to statutory restrictions.<sup>137</sup> This means that we are unable to report in this paper on whether or not police officers have dealt with children or young people in accordance with this scheme. These restrictions were removed in June 2013 and we expect to be able to report on the use of the scheme by the NSW Police Force in our final report.

### 6.3.2 Relevant statutory limitations regarding whether or not a child or young person can be a 'convicted offender' for the purposes of the consorting provisions

As previously outlined, the consorting provisions proscribe associating or communicating with people who are 'convicted offenders'.<sup>138</sup> In section 5.5.1 of this issues paper we outlined the limitations contained in the *Children (Criminal Proceedings) Act 1987*, relating to the recording of convictions with respect to children and young people aged 10 to 15 years and aged 16 to 17 years. Only in the extremely rare case of a child aged 15 or under being found guilty in the District or Supreme Court may he or she have a conviction for an indictable offence recorded and therefore be a 'convicted offender' for the purposes of consorting. The Children's Court retains some discretion in this regard and may decide to record convictions with respect to 16 and 17 year olds in certain circumstances.<sup>139</sup>

Children's Court convictions that are recorded with respect to a child or young person may become spent following a three year crime-free period with a number of exceptions.<sup>140</sup>

### 6.3.3 What the data tells us about use of the consorting provisions in relation to children and young people

Our analysis of all consorting Event records in NSW in the first 12 months indicated that there were 83 children and young people aged between 13 and 17 years who were subject to the consorting provisions in the first 12 months of use. As outlined in section 6.2 above, two thirds (53) of these are Aboriginal children and young people.

**Table 9: Number of children and young people by Aboriginal status subject to the provisions**

	10 to 15 years	16 to 17 years
Non-Aboriginal males	3	25
Aboriginal males	14	31
Non-Aboriginal females	0	3
Aboriginal females	1	6
<b>Total</b>	<b>18</b>	<b>65</b>

#### 6.3.3.1 Children and young people who received official warnings

Our detailed analysis of all consorting records created by the select group of LACs and squads found that 9% of all the official warnings issued by this group were issued to children and young people (n=48). Twelve of these young people were aged between 13 and 15 years.

There was significant variation between the commands in the select group regarding whether or not children and young people were targeted for consorting. That being said, eight of the ten LACs issued warnings to at least one person in the 16 to 17 year age group. For example, two LACs did not issue warnings to any young people and five LACs did not issue warnings to young people aged 15 or under. We explored police use of the consorting provisions in relation to children and young people in our consultations with officers from the select group. This is discussed in section 6.3.5.

<sup>136</sup> Sections 19(b) and 36(b) require the child to admit guilt before a caution can be given or a youth justice conference held.

<sup>137</sup> Section 66 of the *Young Offenders Act 1997* restricts the disclosure of information acquired or prepared in the exercise of functions under the Young Offenders Act and previously applied to restrict the NSW Ombudsman's access to such information. Section 66 was amended in June 2013 to enable the NSW Police Force to provide us with the relevant records.

<sup>138</sup> Under section 93W of the *Crimes Act 1900*, a convicted offender is someone who has a conviction for an indictable offence.

<sup>139</sup> *Children (Criminal Proceedings) Act 1987*, s. 14(1)(b).

<sup>140</sup> *Criminal Records Act 1991*, s. 10.

### 6.3.3.2 Children and young people who were the subject of official warnings

Police records showed that there were 26 children and young people who were the subject of official warnings in the records created by the select group. This represented 6% of the total 428 people who were the subject of an official warning issued by these commands. Within that group, there were seven children in the 10 to 15 year age range and 19 young people in the 16 to 17 year age range.

As discussed in section 6.2, 85% of all children and young people who were the subject of an official warning issued by the select group are Aboriginal, including all seven children in the 10 to 15 year age group (n=22).

Again, there was significant variation between the commands within the select group. Warnings issued about consorting with children or young people comprised less than 1% of those issued by the squads whereas 19% of the warnings issued by one metropolitan LAC were in relation to consorting with young people.

### 6.3.4 Official warnings issued wrongly by police officers about children and young people

Our analysis of the statewide consorting Event records in the first tranche of data (9 April 2012 to 16 December 2012) identified occasions where the NSW Police Force had wrongly issued warnings about young people who were not 'convicted offenders' as defined in the consorting provisions. The mistakes appear to have arisen from a lack of understanding by issuing officers of the restrictions on the Children's Courts' ability to record convictions for children aged under 16 years.

We raised this issue and provided the details of all affected 10 to 15 year olds to the NSW Police Force in March 2013. In response to our concerns, the Commander of Police Prosecutions wrote to the commander of each officer who had made a mistake and recommended:

- each relevant COPS record be amended or deleted
- that all staff including supervisors were trained properly regarding the correct application of the consorting provisions
- that LACs 'ensure any such action necessary is taken to address any incorrect information that has been given to any person that may have been wrongly advised not to associate with any other person.'<sup>141</sup>

To avoid similar errors by others, the NSW Police Force also disseminated a statewide email to all police officers and published an article in the May 2013 *Police Monthly* magazine detailing the law regarding determining 'convicted offender' status among other things. We commend the NSW Police Force for taking these steps to avoid further similar errors.

In August 2013 we again wrote to the NSW Police Force to ascertain what steps the LACs that had wrongly issued warnings had taken to retract those warnings. We also raised an additional concern regarding the group of young people aged 16 and 17 years old who are the subject of official warnings but who are not 'convicted offenders'. We compiled a list of all 16 and 17 year olds who appear in the first 12 months of consorting Event records across the state and identified the young people who did not appear to be 'convicted offenders'. Due to the limitations of police records, we are unable to determine who from this group is the subject of a warning as opposed to a warning recipient, without manually interrogating each record.

We asked the NSWPF to review the list of 16 and 17 year olds to check whether any of the young people who were the subject of a warning were not convicted offenders as defined within the consorting provisions, and to advise us what steps they would take if they identified any young people who were wrongly made the subject of an official warning.

We will continue to monitor this issue during our review.

The case study below is an example of a matter involving police error in relation to the convicted offender status of two young people.

#### Case study 1: Two young people wrongly charged with consorting

**Two 16 year old males were charged with habitually consorting with each other on 28 January 2013 by a Sydney metropolitan command. We became aware of the charges as part of the information sharing arrangements in place for this review. When we checked the criminal histories of the young people we became concerned that neither of them were 'convicted offenders' and, therefore the charges appeared to be wrongly laid. Of further concern was that one of the young people appeared to be in custody due to breaching bail conditions in place from the consorting charge. We contacted the Commander of the Prosecutions Command who confirmed there were a variety**

<sup>141</sup> Correspondence from Commander Trichter, Prosecutions Command, NSW Police Force to the NSW Ombudsman, 4 April 2013.

of errors including the mistake about the 'convicted offender' status of both young people. The charges were withdrawn. In an interview with the ABC, Jane Sanders, principal solicitor for the Shopfront Legal Centre, described one of the young people (who was a client of the centre) as having 'had some periods where he has been homeless or where at least he has spent a lot of time out on the streets'.<sup>142</sup> In our view, the other young person charged could also be described as vulnerable.

While matters that result in charge will be reviewed at court, there is no system in place for the independent review of wrongfully issued official warnings. Even where no charges are laid, official warnings may have a significant impact on both the subject of the warning and the warning recipient, as the warning may limit their associations. In chapter 7 we consider in more detail the absence of mechanisms to identify and review wrongly issued official warnings.

#### **6.3.4.1 COPS enhancements**

On 24 June 2013, the NSW Police Force implemented enhancements to COPS to better record police use of the new consorting provisions. These enhancements have the potential to reduce officer mistakes regarding the convicted offender status of people the subject of official warnings. For example, COPS no longer allows an officer to submit a record where the person who is the subject of a warning is under 16 years of age or does not have a relevant indictable conviction. In this way an officer will become aware of such a mistake when he or she is creating a COPS Event record of a warning issued. However, the Consorting SOPs do not provide any instruction to officers in relation to rectifying wrongly issued consorting warnings. This remains an issue as consorting Event records will always be created after the warning has been issued. While COPS may not allow a wrongly issued warning to be recorded, a warning may have already been physically given to the recipient, which effectively operates like a police direction to stop the identified association. This raises the question of whether, and if so how, police should retract the wrongly issued warning.

### **6.3.5 What people told us during consultation about use of the consorting provisions in relation to children and young people**

We consulted with police from the select group of LACs and squads as well as staff from non-government organisations who represented young people, about their views on using consorting provisions against children and young people.

#### **6.3.5.1 Consultation with officers from the select group of LACs and squads**

We found police officers in different commands held divergent views about the appropriateness of using the consorting provisions in relation to children and young people. In two metropolitan LACs officers, expressed their suspicion that a number of young people aged 15 to 17 years were responsible for offending, involving repeated aggravated break and enter offences and robberies within their commands. One command had identified a 15 year old female as one of their high risk offenders. Officers from these commands advised it was desirable to increase the circumstances in which children and young people could be the subject of official warnings. For example, they suggested the definition of 'convicted offender' should be expanded to include young repeat offenders who had not yet had an indictable conviction recorded against them by the Children's Court but had been sentenced for serious offences that would attract a maximum of 10 years or more if sentenced as an adult.

Officers from other LACs expressed the view that any convictions accumulated in the Children's Court should not be considered when determining if a person is a convicted offender. One commander stated that mistakes made as a juvenile should not follow a person into adulthood.

Officers from specialist squads said they had little need to use the consorting provisions in relation to children or young people.

#### **6.3.5.2 Non-police consultation**

Services involved in providing support to vulnerable children and young people, such as homeless youth, advised that many of their clients would be unable to abide by this legislation as their clients 'have very little control over their circumstances' and furthermore, much of their offending involves 'crimes of poverty', such as stealing. One youth worker who provides an outreach service stated she has 'no idea of whether or not the legislation is effective in terms of preventing further offending but it does have the potential to isolate kids further' from their support networks. We were advised that the most vulnerable of young people tend not to have supportive family relationships and rely heavily on a few friends for company and support.

<sup>142</sup> ABC, *PM*, 'Revived NSW consorting laws marred by legal battles', 19 March 2013, viewed 20 June 2013, <http://www.abc.net.au/pm/content/2013/s3719242.htm>.

### 6.3.6 Current state government initiatives in relation to children and young people with complex needs

There is a current commitment by the government to adopt an integrated approach to working with high risk adolescents. In 2012 the NSW Government commissioned Family and Community Services to establish a Vulnerable Teenagers Review to recommend strategies to reduce the numbers of older children and young people:

- re-entering Juvenile Justice
- affected by homelessness and long-term instability in their accommodation
- entering out-of-home care.

In May 2013, the government announced Youth on Track, an early intervention scheme for young people to provide integrated and early intervention services and case management in Blacktown, the Hunter and the Mid North Coast local area commands with more sites planned in the future. Youth on Track is designed to create a holistic approach to responding to offending by children and young people. The Department of Attorney General and Justice is the lead agency. Also involved are the NSW Police Force, and the departments of Education and Communities, Family and Community Services and Health:

Police and schools are often best placed to identify those at risk of becoming involved in crime. Under this scheme, they will refer young people considered to be at risk of committing crimes, to be assessed and provided with services which address their needs.<sup>143</sup>

There is a risk that use of the consorting provisions in relation to children and young people may run counter to these initiatives.

### 6.3.7 Privacy issues for children and young people

When a police officer gives an official warning to a person, they are required to disclose the fact that the person they are associating with has been convicted of an indictable offence. Both the NSW Law Society and the NSW Young Lawyers have raised the concern that this is an invasion of the privacy of the person who is the subject of the warning.<sup>144</sup> The warning recipient would not otherwise be legally entitled to know about their associate's criminal record.

Particular privacy issues arise when it comes to convicted offenders who are children or young people. A range of NSW laws dealing with juveniles' interaction with the criminal justice system contain stringent privacy protections for young people who become involved in the criminal justice system. For example, it is an offence under the Children (Criminal Proceedings) Act to publish or broadcast the name of a person in a way that connects them to criminal proceedings if they were a child when the relevant offence was committed.<sup>145</sup> The Young Offenders Act also contains a number of provisions prohibiting disclosure and publication of information about a child's involvement in the criminal justice system.<sup>146</sup> One observation that has been made is that disclosing the criminal record of a child or young person runs contrary to these privacy protections and defeats the objective of ensuring that convictions gained as a child or young person do not have an adverse impact on a person's adult life.

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## Questions for consideration:

13. What protections, if any, should be introduced concerning the use of consorting provisions in relation to young people?
14. Should young people sentenced for certain classes of offences be included in the definition of 'convicted offender' even where no indictable conviction has been recorded by the Children's Court? If yes, what types or classes of offences?
15. Should the circumstances in which an official warning can be issued about a young person be restricted due to privacy considerations?

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143 Lawlink, Attorney General & Justice, 'Youth on Track Fact Sheet', NSW Government, 15 May 2013, viewed 15 July 2013, [http://www.youthontrack.lawlink.nsw.gov.au/agdbasev7wr/\\_assets/yot/m771002l2/yot\\_fact\\_sheet.pdf](http://www.youthontrack.lawlink.nsw.gov.au/agdbasev7wr/_assets/yot/m771002l2/yot_fact_sheet.pdf).

144 Correspondence from Justin Dowd, President, The Law Society of NSW, to the Hon. Greg Smith MP, Attorney General and Minister for Justice, 20 February 2012, viewed 13 June 2013, <http://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/587207.pdf>; The Law Society of NSW Young Lawyers, *NSW Young Lawyers concerned about new "consorting" laws*, media release, The Law Society of NSW, Sydney 2012, viewed 20 February 2012, <http://davidshoebridge.org.au/wp-content/uploads/2012/03/NSWYL-Press-release-Consorting-laws.pdf>.

145 *Children (Criminal Proceedings) Act 1987*, s. 15A.

146 For example, *Young Offenders Act 1997*, ss. 65–66.

## 6.4 Use of the consorting provisions in relation to people experiencing homelessness

As previously discussed, the new consorting provisions were introduced as part of a set of legislative amendments intending to make it more difficult for people involved in organised crime and criminal gangs to engage in unlawful activities. With specific reference to the consorting provisions it was stated, 'it is not the intention of the section to criminalise meetings where the defendant is not mixing in a criminal milieu or establishing, using or building up criminal networks'.<sup>147</sup> However, given the way consorting is focused on observations of public behaviour, the potential impact of the provisions is greater on people who spend more time in public places, including people experiencing homelessness.

It is not possible to measure the proportion of people subject to the consorting provisions who were homeless at the time because a person's housing status is not necessarily a part of the information collected or recorded during the relevant police interaction. However, information about the homeless status of the first person to be sentenced under the new provisions in NSW was included in the sentencing hearing.<sup>148</sup> B was sentenced on 7 November 2012 for consorting – his case is discussed in the case study below.

### Case study 2: R v B, 7 November 2012, Manly Local Court

**B is a homeless man with terminal and chronic pancreatic cancer. He had been warned by police for consorting with three people while sitting and talking with them on park benches, at Manly Oval and at the beachfront. The locations were described by his legal representative as 'areas where homeless people hang out.'**<sup>149</sup>

**His lawyer advised the court:**

**He is ostensibly a homeless man. I have got some material to hand up to your Honour about him suffering chronic pancreatitis which is terminal. So he is a homeless man with significant medical problems. He's not the person that this legislation is designed to be targeting. Technically they have all the elements there and that's why we've entered the plea.**<sup>150</sup>

**The magistrate discussed the criminal histories of the three people B had been warned about consorting with and noted they did not contain serious indictable offences.<sup>151</sup> B received a 12 month bond to be 'of good behaviour' under section 9 of the *Crimes (Sentencing Procedure) Act 1999*.**

In an interview with us following his sentencing hearing, B said that one of the people he was warned about consorting with had offered him a room to stay when he was sleeping in a park as he was so unwell. B also said this person was one of the few friends he had in Sydney. B normally lived in northern NSW but needed to be in Sydney to attend a pain management clinic at a major hospital that is not available to him in his hometown. While in Sydney he is homeless. B's case provides an example of a homeless person being convicted for consorting. This raises questions about the manner in which the provisions may criminalise and isolate vulnerable people and whether such use is in keeping with the original intention expressed by Parliament. B was not identified by the LAC as a high risk offender at the time he was warned or charged.

### 6.4.1 What is homelessness?

The most common definition of homelessness is the one used by the Australian Bureau of Statistics and adopted by the state government in key policy documents in the area. This definition involves three types of homelessness:

- Primary homelessness involves 'sleeping rough' in parks, squats or derelict buildings.
- Secondary homelessness applies to people living in emergency accommodation, refuges, 'couch-surfing' or staying with relatives or friends. as they have no accommodation of their own.

147 The Hon. David Clarke MP, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9093.

148 A male was convicted and sentenced in a rural court at an earlier date however his matter was overturned on appeal to the District Court and is currently adjourned.

149 *R v John O'Brien* (unreported, Manly Local Court, Magistrate Brydon, 7 November 2012), transcript of proceedings, p. 3, para. 5.

150 *R v John O'Brien*, (unreported, Manly Local Court, Magistrate Brydon, 7 November 2012), transcript of proceedings, p. 2, para. 40.

151 *R v John O'Brien*, (unreported, Manly Local Court, Magistrate Brydon, 7 November 2012), transcript of proceedings, p. 4, para. 20.

- Tertiary homelessness describes people who live in circumstances where there are shared facilities such as kitchen and bathrooms and they do not have the security of a lease. This can also include people living in caravan parks or in boarding houses for the medium or long term.<sup>152</sup>

People experience homelessness for a variety of reasons the most common being domestic violence and relationship issues, financial difficulties, transitioning from care or custody and mental health and drug or alcohol abuse. People who are experiencing primary homelessness are likely to have had contact with the criminal justice system as both an offender and a victim of crime:

It is estimated that up to three quarters of the homeless population in some areas have a significant mental illness. The reasons for this are complex. For some people it is the experience of having a severe mental disorder, such as psychotic illnesses, which is a major contributing factor to their homelessness. For others, drug and alcohol abuse, social isolation and mental disorders can be consequences, as well as causes, of homelessness.<sup>153</sup>

#### 6.4.2 Analysis of homelessness issues in police consorting records

In order to explore the issues raised by B's case we examined the police records of five individuals who appeared to be homeless in one local area command in the select group who received consorting warnings over a six month period starting when the consorting provisions commenced on 9 April 2012. Our analysis was based on an examination of police records on COPS, consultation with local senior police and with staff from three local non-government organisations involved in providing services and supports to vulnerable people.

We adopted the same definition of homelessness used by the state government and recent Protocol for Homeless People in Public Places, of which NSW Police is a signatory.<sup>154</sup> Police records showed that three of the men in this group were 'sleeping rough' in and around the time they were warned for consorting. The two others advised police they were staying at a local men's refuge that provides crisis accommodation.

We examined all interactions between police and these individuals recorded on COPS over an 18 month period between 9 April 2011 and 9 September 2012. The new consorting provisions were in use for the final six months of the period under analysis.

The police records state the five individuals were frequently observed to be intoxicated in public. There were many references to use of prescription drugs and to consuming alcohol in company in public places. Syringes were located near where one of the men was sleeping on one occasion. There were numerous records describing mental health issues including in-patient stays in a psychiatric unit and self-harm incidents. All five men are convicted offenders having been previously convicted of an indictable offence.

During the six months following the commencement of the consorting provisions on 9 April 2012, these five men received 12 consorting warnings between them, ranging from one to four each. Police sought to charge one of the men with consorting under section 93X of the Crimes Act, however they have been unable to locate him to serve the Court Attendance Notice. The incidents of consorting often involved sitting in public places such as parks and drinking or talking with others. One man received a warning while packing up his sleeping bag near to where a group was sitting and drinking. All five men received warnings and were the subject of warnings to others. On occasion they were warned for spending time with each other.

With a view to gaining insight into any involvement in criminal offending by the group we examined all of their interactions with police recorded on COPS in the 12 months before they were targeted for consorting by police. This involved analysing all intelligence reports, Event records and charge information recorded on COPS between 9 April 2011 and 8 April 2012, being the 12 months prior to the commencement of the new consorting provisions.

These records established that in the 18 month period from 9 April 2011 to September 2012 the men in this group were searched by police on 36 separate occasions, although one person was searched 27 times. Police did not locate any unlawful objects during these searches and there were no charges laid in relation to them. In the same period members of the group

<sup>152</sup> NSW Government, *A Way Home: Reducing Homelessness in NSW, NSW Homelessness Action Plan 2012-2014*, NSW Government, 2009, p. 5, viewed 19 July 2013, <http://www.housing.nsw.gov.au/NR/rdonlyres/070B5937-55E1-4948-A98F-ABB9774EB420/0/ActionPlan2.pdf>.

<sup>153</sup> Family & Community Services, Housing NSW, *Protocol for Homeless People in Public Places, Guidelines for Implementation*, NSW Government, May 2013, p. 9, viewed 19 July 2013, <http://www.housing.nsw.gov.au/NR/rdonlyres/526F64E9-FE16-4580-AE63-7831436A3E6B/0/ImplementationGuidelines.pdf#xml=http://www.housing.nsw.gov.au/hoogle9/isysquery/90a5a94c-6e53-4d12-a8d7-e03fc6c6190d/1/hilite>.

<sup>154</sup> Family & Community Services, Housing NSW, *Protocol for Homeless People in Public Places*, NSW Government, May 2013, viewed 12 Jun 2013, <http://www.housing.nsw.gov.au/NR/rdonlyres/A3BD2529-5E0A-4DFF-BAD5-BEA99A91C357/0/Protocol.pdf>.

were issued 24 move-on directions, usually related to being intoxicated in public. All of the searches and move-on directions were complied with.

In the 18 month period analysed, two of the group were charged with criminal offences. One person was charged with the now repealed summary offence of consorting<sup>155</sup> and one person was charged with breaching an apprehended violence order and with domestic violence-related assault on two separate occasions. The consorting provisions are not a policing tool designed to be used to address domestic violence-related offending. There was no other police record of offending by these five individuals in the 12 months prior to them being subject to the consorting provisions.

### 6.4.3 Consultation in relation to the homeless men subject to the consorting provisions

#### 6.4.3.1 What police told us

We met with the commander and the crime manager in the LAC that issued the official warnings to the five homeless individuals. They are responsible for implementing that LAC's strategy in relation to consorting. We were advised there is no intention to target homeless people generally, and that if people who are homeless are receiving warnings it is because they are suspected of involvement in criminal offending. The consorting provisions do not require police to establish any link between offending and the relationships between individuals that are being targeted and we are unable to tell from police records whether the officers issuing the warnings suspected the homeless men of involvement in offending. None of the men had been formally identified within the LAC as high risk offenders.

#### 6.4.3.2 What other local service providers told us

We spoke to a number of non-government organisations operating in the same local area providing services and supports to vulnerable, disadvantaged and homeless people. All services reported a positive relationship with police, however the following issues were raised about use of the consorting provisions locally and about the legislation itself:

- A number of people are no longer spending time in the area or attending the local services to receive support out of fear of receiving additional consorting warnings. Instead these people were staying in neighbouring areas where police were not using the consorting provisions in any significant way. An issue arising from this is that these neighbouring areas do not have the same level of supports or services available for vulnerable people.
- There is no defence to consorting in section 93Y of the Crimes Act relating to people accessing shared or communal accommodation such as in a refuge or accessing services providing meals.
- A major issue for their clients is social isolation and exclusion and policing strategies that may increase the isolation of vulnerable people run counter to the work conducted by the services.

The warnings issued to the five homeless men appear to be lawful and properly recorded and homeless men do not form the majority of people targeted for use of the consorting provisions by this LAC. Police stated they hold concerns about their potential involvement in a range of criminal activities such as stealing from shops and abuse of alcohol and other drugs. Additionally, members of the public and other community representatives have expressed concern to local police about homeless people congregating in local parks and damaging facilities, leaving rubbish and being noisy. The NSW Police Force has a range of powers available to them to deal with public disorder including offences relating to drug possession and theft, the ability to move people on from public areas if intoxicated and a range of summary offences covering language, noise, and offensive behaviour issues.

However, the use of the consorting provisions with respect to the group of homeless men and B raises the question of whether or not this is the 'criminal milieu' Parliament was concerned about when introducing these provisions.

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## Question for consideration:

**16. What, if any, safeguards should be included within the legislation or police policy with regard to the use of consorting provisions against homeless people?**

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<sup>155</sup> The previous consorting offence was contained in section 546 of the Crimes Act.

## Chapter 7. Issues relating to the offence

In this chapter we discuss a range of issues relating to different elements of the offence of consorting in section 93X of the Crimes Act, including official warnings and the defences available to a person charged with consorting.

### 7.1 Official warnings

Under the new consorting provisions police must issue a person an 'official warning' in relation to at least two convicted offenders.<sup>156</sup> A person may be charged with consorting if he or she consorts with each of these offenders on at least one occasion after receiving the warning. The warning can be oral or written but must state:

- the person he or she is consorting with is a convicted offender<sup>157</sup>
- consorting with a convicted offender is an offence.<sup>158</sup>

As this chapter highlights, a warning may have a range of consequences, including:

- making it an offence for the person warned to continue to consort with his or her friends or associates who are the subject of a warning
- limiting the person warned from associating with others who may have, or be perceived to have an indictable conviction history
- impacting on the privacy of the person who is the subject of a warning.

These consequences may affect the lives of people warned, people the subject of the warning, and possibly, others who have, or are perceived to have, an indictable criminal history.

The only other Australian jurisdictions in which warnings are expressly required to be given are the Northern Territory and Western Australia.<sup>159</sup>

While 16 consorting charges have been laid to date, there were at least 774 consorting incidents recorded by the NSW Police Force in the first 12 months of use. The majority of these incidents involved police issuing multiple warnings.<sup>160</sup> Due to issues with the way data has been recorded by police we are unable to report on the total number of warnings issued to date, however we found officers from the select group of LACs and squads issued 1,094 warnings in the eight months from 9 April to 16 December 2012.

Given the impact of official warnings on people's lives, it is important to consider whether adequate guidance is provided to operational police about the mode and detail of warnings.

#### 7.1.1 The content and format of an official warning

The *Consorting Standard Operating Procedures* (Consorting SOPs) provide guidance to police on how to give an official warning that is drawn from section 93X(3). The following is the suggested content and format:

This is an Official Warning.

(Name of convicted offender) is a convicted offender.

Consorting with a convicted offender is an offence.

Do you understand that?<sup>161</sup>

<sup>156</sup> *Crimes Act 1900*, s. 93X(1).

<sup>157</sup> *Crimes Act 1900*, s. 93X(3)(a).

<sup>158</sup> *Crimes Act 1900*, s. 93X(3)(b).

<sup>159</sup> *Summary Offences Act* (NT), s. 55A(1)(a); *Criminal Code* (WA), ss. 557J(2) and 557K(4).

<sup>160</sup> As stated above in section 3.1, this does not include an unknown minority of consorting incidents which were recorded in COPS intelligence reports. Although warnings are issued during most consorting incidents, there was a small number of consorting records of the select group of LACs and squads which did not involve the issue of warnings. This was because police sometimes recorded an incident of consorting and noted that a warning was to be issued in the future. Alternatively, when police observed two or more people consorting on a subsequent occasion, after warnings had already been issued to them, they did not necessarily issue a further warning.

<sup>161</sup> State Crime Command, *Consorting SOPs*, NSW Police Force, April 2012, p.12.

Our analysis of the consorting records of the select group identified variation in practices relating to the content of the warnings between the commands. We identified examples where the record of the official warning suggests that the person was warned that they are not to associate with a particular named individual, and some examples of warnings which implied that further association with any convicted offender would be an offence. For example, during some incidents police from one of the LACs warned people that 'further associations with persons convicted of indictable offences may result in prosecution.'

We note that section 93X(3)(b) requires the warning to state that consorting with a convicted offender is an offence. The practice of warning a person that associating with any convicted offender (rather than the named offender) is consistent with this section. However, we note that this practice also implies that an offence could be committed if the person associates with someone who they have not specifically been warned about.

This potentially restricts the associations of the person warned beyond associations the subject of the police attention. For example, the person warned may be concerned they will commit an offence the next time they associate with other people they know or suspect have criminal records despite not being observed by police with these people previously.

It is possible that warnings that do not make this clear will give rise to uncertainty as to who the person warned is effectively prohibited from associating with.

This raises the question of whether an official warning should explain that a person's associations will only lead to an offence if they involve a person about whom they have received a consorting warning.

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### Questions for consideration:

17. Should the description of an official warning in section 93X be amended to clarify that it is only an offence to continue to associate with a named convicted offender?
  18. What further guidance, if any, should be provided in the Consorting SOPs regarding the content and format of an official warning?
- 

## 7.2 Ensuring that official warnings have been understood

Officers we consulted advised they ensure that an official warning has been understood by asking the person questions following the warning and recording the responses in their notebooks and on COPS. Although the Consorting SOPs suggest that officers should check whether the person has understood the warning, they do not provide further guidance about how to ensure this has happened or what steps to take if the person does not appear to understand.

A number of factors may impact upon a person's capacity to understand an official warning including:

- being intoxicated
- being from a culturally or linguistically diverse background
- having an intellectual or other disability.

The NSW Police Force has a number of policies that set out best practice and provide guidance to officers when questioning people whose ability to communicate may be affected and who may have difficulty understanding what is said to them. These policies provide advice about when to defer questioning due to intoxication and when to engage interpreters and/or relevant support people.<sup>162</sup> When people are in custody, police have an opportunity to defer their questioning until the relevant interpreter or support person arrives. However, as there is no power for police to arrest or detain a person for the issuing of initial consorting warnings there are practical issues for police facing the above situations when issuing warnings to people on the street.

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### Question for consideration:

19. What practical strategies can police adopt to assist people who may have difficulty understanding the content of official warnings?
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<sup>162</sup> NSW Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)*, February 1998, updated January 2012, pp. 66–69.

## 7.3 Types of official warnings

Our analysis of the consorting records for the select group of LACs and squads revealed a range of different approaches in the way police issued warnings, such as whether the warning was given orally or in writing, and whether it was given at the time of an incident of consorting or at another time.

### 7.3.1 Oral and written warnings

An official warning may be given by a police officer either orally or in writing.<sup>163</sup> There were only four written warnings issued by police officers from the select group of LACs and squads. One of these written warnings was given at the request of the person being warned, the others were given to three people while in custody following their arrest for an offence committed together.

While in NSW the decision to issue a written warning is discretionary for police, the Northern Territory consorting provisions require the Police Commissioner to give the person a written notice prohibiting them from associating with one or more specified people.<sup>164</sup> Appendix 3 outlines the consorting provisions in each Australian jurisdiction.

Written warnings may provide greater certainty to the person warned about exactly how their associations are restricted, as they may list the persons who are the subject of the warnings.

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### Question for consideration:

**20. Should the consorting provisions require police officers to provide official warnings in writing in addition to giving an oral warning?**

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#### 7.3.1.1 Pre-emptive and retrospective warnings

The vast majority of warnings issued by officers from the select group of LACs and squads were issued at the same time as the consorting incident.

The NSW Police Force is of the view that official warnings can be issued pre-emptively. This means that a police officer warns a person about consorting with a convicted offender before observing any instances of consorting. During police training about the consorting offence, pre-emptive warnings were recommended as a useful strategy in relation to people who are well known to police and suspected of committing offences together.<sup>165</sup> If a person receives a pre-emptive warning, a charge for consorting can only follow if they have associated with the named convicted offender on at least two occasions following the warning.

We also note that police officers sometimes issue official warnings retrospectively, after the first consorting incident has taken place. A police officer may observe two or more people associating with each other, but only find out about their convicted offender status later, or become aware about people associating by viewing CCTV footage. The officer may issue warnings retrospectively in such cases, the next time they see the people in question or by visiting their residence. It may also be appropriate to issue a warning after the consorting incident if the person is too intoxicated to understand the warning at the time of the incident or if police need to arrange for an interpreter or support person to be present.

The legislation and the Consorting SOPs do not contain any guidance on the timeframe within which a warning must be given after an instance of consorting. The officers we consulted suggested that they never issue retrospective warnings later than a few days, or at most a week, after observing an instance of consorting.

Officers from one LAC told us that they regularly issued warnings retrospectively because this meant they were able to go back to the station and properly check the convicted offender status of particular individuals and assess how appropriate it would be to use the consorting provisions before issuing warnings.

Only 4% of the consorting records from the select group involved pre-emptive warnings (n=13). A slightly higher proportion involved retrospective warnings (10% or n=37).

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<sup>163</sup> *Crimes Act 1900*, s. 93X(3).

<sup>164</sup> *Summary Offences Act* (NT), s. 55A(1)(a).

<sup>165</sup> Observation notes, Training on the consorting provisions, 16 August 2012.

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## Questions for consideration:

- 21. Should police officers be able to issue official warnings pre-emptively? If yes, in what circumstances would it be appropriate for police officers to issue warnings in this way?**
- 22. What guidance, if any, should be provided to police officers about the timeframe between an incident of consorting and the issuing of an official warning?**
- 

### 7.3.2 Privacy issues

When a police officer gives an official warning to a person, they are required to disclose the fact that the person they are associating with has been convicted of an indictable offence. Both the NSW Law Society and the NSW Young Lawyers have raised the concern that this is a serious invasion into the privacy of the person who is the subject of the warning.<sup>166</sup> The warning recipient would not otherwise be legally entitled to know about their associate's criminal record. The disclosure has the potential to affect a person's social relationships and employment opportunities (if disclosed to work colleagues), among other things beyond simple privacy concerns.

Particular privacy issues are raised by the consorting provisions when it comes to convicted offenders who are children or young people and this is discussed in section 6.3.7.

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## Question for consideration:

- 23. Are there any practical ways police can reduce the impact on people's privacy when issuing official warnings?**
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### 7.3.3 Mistakes made by police about convicted offender status when issuing official warnings

Only convicted offenders can be the subject of an official warning.

Based on data received from the NSW Police Force, 200 of the 1,260 people subject to the consorting provisions across NSW in the first 12 months had either no criminal record at all or no indictable convictions. We analysed the consorting COPS Event records detailing use of the provisions involving these people and found approximately 50 of the 200 people were wrongly treated as convicted offenders resulting in official warnings to an estimated 100 individuals being wrongly issued.<sup>167</sup>

In chapter 6, we outlined police errors made in relation to the convicted offender status of children and young people which also resulted in invalid warnings being issued to people.

In August 2013, we wrote to the Commissioner of Police detailing our concerns about mistakes made in relation to the convicted offender status of people when issuing official warnings for consorting.

The NSW Police Force advises the enhancements to COPS relating to the recording of consorting incidents (implemented on 24 June 2013) will assist officers to identify if mistakes about whether or not a person the subject of a warning to others is a convicted offender as defined in section 93W of the Crimes Act. We have been advised an officer will no longer be able to create a consorting Event record in the circumstances where a person the subject of a warning is not a convicted offender.

At present there is no guidance in the Consorting SOPs to officers about what to do if such a mistake is identified. Nor is there any specific advice to supervisors whose role includes verifying the COPS Event record created by the officer who issued the warning. Records of consorting incidents will necessarily be made after the incident and therefore after any official warnings have been given.

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<sup>166</sup> Correspondence from Justin Dowd, President, The Law Society of New South Wales, to the Hon. Greg Smith MP, Attorney General and Minister for Justice, 20 February 2012, viewed 13 June 2013, <http://www.lawsociety.com.au/cs/groups/public/documents/internetpolicy submissions/587207.pdf>; The Law Society of New South Wales Young Lawyers, *NSW Young Lawyers concerned about new "consorting" laws*, Sydney, media release, 2012, viewed 20 February 2012, <http://davidshoebridge.org.au/wp-content/uploads/2012/03/NSWYL-Press-release-Consorting-laws.pdf>.

<sup>167</sup> At the time of writing, the NSW Police Force was checking the number of official warnings that were issued to people who were not convicted offenders.

### 7.3.4 The lack of review mechanisms for the issuing of official warnings when no charge is laid

The consorting provisions do not establish any mechanism for a person to appeal, or seek a review of, an official warning. The lack of a review mechanism means that a person is not able to challenge the validity of an official warning unless they are charged with consorting.

Before commencement of the new provisions, the Legislation Review Committee made the following comment about this issue:

The offence requires the receipt of at least two official warnings [section 93X(1)(b)]. There is nothing in the legislation that enables an individual to appeal the receipt of official warnings. It would appear that the only reviewable decision is the charge of consorting.

**The Committee refers to Parliament the question as to whether the inability to appeal official warnings constitutes a non-reviewable decision.<sup>168</sup>**

This issue was not discussed in parliamentary debate.

There has been comment that although judicial review according to administrative law principles may in theory be available, this is unlikely to be a feasible avenue for most people. Judicial review involves a person challenging the decision of a government decision-maker in court on the basis that it contravenes certain principles of administrative law. In the case of an official warning that has been invalidly issued, the decision would be challenged on the basis that the police officer did not have the authority to issue the warning.<sup>169</sup> Seeking judicial review in relation to an official warning in the Supreme Court would be an expensive and time-consuming process.

The issue of how a person warned might challenge an official warning is of particular consequence given we have observed warnings issued erroneously, about people who did not have an indictable conviction.

Under the legislation, it appears that the available options for challenging an official warning (even one that has been given erroneously) are:

- The person warned can complain to the NSW Police Force. The Ombudsman would oversight the way police deal with such a complaint, pursuant to Part 8A of the *Police Act 1990*.
- If the person is charged with the offence of consorting, they could challenge the validity of the warnings in court.

A statutory system whereby a person could seek administrative review of official warnings by an external decision-maker may provide a mechanism to challenge erroneously issued warnings before any charge was prosecuted. One example of an administrative review process is review by the NSW Administrative Decisions Tribunal of decisions made by the NSW Police Commissioner about security licences. After the Tribunal has reviewed a decision of the Commissioner it can make orders including affirming or reversing the decision.

One advantage of administrative review is that it would avoid the matter entering the criminal justice system if the person's arguments were upheld. On the other hand, this process would be resource-intensive for the NSW Police Force and may detract from the performance of other police functions.

An alternative to administrative review, or first port of call, would be an internal review process to enable people to lodge claims with the NSW Police Force about official warnings which they believe have been erroneously issued. The NSW Police Force has an internal review process in place for security licence decisions made by the Police Commissioner. A person who disagrees with a decision made in relation to their license can apply for an internal review by the Security Licensing and Enforcement Directorate. If the person is not satisfied with the review, they can then apply to the Administrative Decisions Tribunal for a further review.

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### Questions for consideration:

**24. Should the consorting provisions provide for a process for review of official warnings? If yes, what kind of review process would be appropriate?**

**25. Should police formally establish an internal review process to assess the validity of warnings upon the request of the person warned?**

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<sup>168</sup> Legislation Review Committee, *Legislation Review Committee Digest; No. 10 of 55*, NSW Parliament, 2012, p. 8.

<sup>169</sup> Invalid warnings would involve 'jurisdictional error', as discussed in *Craig v South Australia* (1995) 184 CLR 163 at 179.

## 7.4 Defences

As outlined in section 2.2, the NSW offence contains a list of six defences that may be available to a person charged with consorting:

- consorting with family members
- consorting that occurs in the course of lawful employment or the lawful operation of a business
- consorting that occurs in the course of training or education
- consorting that occurs in the course of the provision of a health service
- consorting that occurs in the course of the provision of legal advice
- consorting that occurs in lawful custody or in the course of complying with a court order.<sup>170</sup>

In addition to establishing that the consorting falls within one of the above categories, the defendant must also satisfy the court it was 'reasonable in the circumstances'.<sup>171</sup>

The Consorting SOPs state:

While interactions may occur on their face in one of the contexts detailed in 93Y above, that does not necessarily mean that the interaction is "reasonable in the circumstances". If there is evidence to suggest the interaction was not in the nature that one would expect given the context, the matter may require further consideration.<sup>172</sup>

It appeared that there was some inconsistency in the way that police officers applied the consorting provisions in relation to the defences. Some LACs encouraged officers to exercise their discretion on the ground when deciding whether or not to issue warnings, for example, not issuing warnings about associating with family members. In other LACs, officers decided to issue warnings regardless of whether the association appeared, on its face, to satisfy the circumstances of one of the defences to consorting, leaving the question of whether the defence applies in the circumstances to be decided in court if the person is charged.

### 7.4.1 Is there a need for additional defences and/or a general defence of reasonable excuse?

One view that has been consistently expressed is that the defences contained in the consorting provisions are inadequate. The consorting provisions in most other Australian jurisdictions include a general defence of 'reasonable excuse'. Examples of associating, which are not covered by the defences but might be viewed as reasonable, include associating with people who are not members of one's family in the course of a family commitment, playing team sport, attending a soup kitchen, living in a boarding house or refuge, living in shared accommodation, participating in a variety of support groups that do not involve the provision of a health service or performing a community service which does not involve employment.

The case study below provides some details in relation to the first defended hearing of a person charged with consorting under section 93X of the Crimes Act and may provide an example of the potential benefit of allowing the court to consider whether the consorting was reasonable in the circumstances:

#### Case study 3: *R v C*, 22 July 2013, Downing Centre<sup>173</sup>

On 22 July 2013, the consorting charge against C was heard at the Downing Centre. He was found not guilty by the magistrate on the basis that the prosecution failed to establish that two of the three alleged incidents that formed the basis of the charge amounted to consorting. These two incidents involved official warnings issued to C and two others while at bus stops after being observed by police for less than a minute. The third incident, which the magistrate found did amount to consorting, involved a vehicle stop near the Spit Bridge in Sydney. Police stopped the car that C and a number of others were travelling in. Official consorting warnings were issued to three of the people in the car including C. C told police that they were travelling to the hospital to visit his brother who had been recently seriously injured. Other records verified that C's brother had been seriously injured and was a patient at the time.

<sup>170</sup> *Crimes Act 1900*, s. 93Y.

<sup>171</sup> *Crimes Act 1900*, s. 93Y.

<sup>172</sup> State Crime Command, Consorting SOPs, NSW Police Force, April 2012, pp.14–15.

<sup>173</sup> *R v Stephen Crowe* (unreported, Downing Centre Local Court, Magistrate Stapleton, 22 July 2013).

A general defence of 'reasonable excuse' would allow the court to consider whether consorting that involved travelling to hospital with friends to visit a patient was reasonable in the circumstances.

It has been suggested that some additional types of association should be included as defences in the legislation, such as associations between people who live together and who are in a relationship. Our analysis of the consorting records of the select group of LACs and squads has identified that police officers have not taken a consistent approach in relation to issuing official warnings to people who live together. One of the consorting charges currently being considered by the courts involves consorting between housemates. At the time of publication, this matter has not been finalised.

NSW Young Lawyers raised the possibility that the consorting provisions could impact negatively on people's engagement in sporting and recreation activities:<sup>174</sup>

For example, under the proposed legislation, if you play in a football team with a couple of mates who got into a fight and were convicted of assault, then the police can 'officially warn' you of consorting. If you then go on to 'consort' with these team mates you would be committing an offence, and risk jail for up to 3 years.

In one consorting incident two people who received official warnings were told by the police officer that they could associate with each other whilst playing sport but not outside of that context.

We note that there is a defence for consorting that occurs in the provision of a health service. However, the term 'health service' is not defined, and it is unclear whether a range of quasi-health and allied health services, such as social work, would fall within this term. During police training about the consorting offence, police were told that a methadone clinic, for example, qualifies as a health service.

Both police officers and others we consulted have expressed concern about the lack of a definition of 'family members' in relation to the family defence and how this term will be interpreted by the courts. One of the particular concerns they raised was whether 'family members' should be interpreted to include extended kinship ties among Aboriginal people and other cultural groups.<sup>175</sup> In the second reading speech, the Parliamentary Secretary stated:

Consorting with extended family may therefore be reasonable in circumstances where the defendant is heavily reliant on, or lives in a community based on, extended kinship. It may not however be reasonable in other situations.<sup>176</sup>

The NSW Law Society has criticised the consorting provisions on the basis that consorting that occurs in the provision of legal advice is not an outright defence and that the defendant must still prove that the consorting was 'reasonable in the circumstances'. The NSW Law Society has suggested that this could hamper the ability of lawyers to communicate freely with clients and witnesses who have been convicted of an indictable offence and may undermine the principle of independent courts 'as their officers (solicitors and barristers) can potentially be charged for merely undertaking the usual activities involved in the provision of legal services.'<sup>177</sup>

The Greens proposed inclusion of an additional defence for 'consorting that occurs principally for the purpose of genuine advocacy, protest, dissent or industrial action'. However, this amendment was not passed by Parliament.<sup>178</sup> The Hon. David Shoebridge MLC commented during parliamentary debate that prisoner advocacy groups may have no grounds on which to defend their continued operation if given official warnings by police.<sup>179</sup>

## 7.4.2 What police told us about the impact of a general defence of reasonableness and additional defences

Most police officers we consulted with in the select group of LACs and squads considered that both a general defence of 'reasonable excuse' and any extra defences would be too easy for people to manipulate. They were of the view that this would

174 The Law Society of NSW Young Lawyers, *NSW Young Lawyers concerned about new "consorting" laws*, media release, The Law Society of NSW, Sydney, 2012, viewed 20 February 2012, <http://davidshoebridge.org.au/wp-content/uploads/2012/03/NSWYL-Press-release-Consorting-laws.pdf>.

175 The Law Society of NSW Young Lawyers, *NSW Young Lawyers concerned about new "consorting" laws*, media release, The Law Society of NSW, Sydney, 2012, viewed 20 February 2012, <http://davidshoebridge.org.au/wp-content/uploads/2012/03/NSWYL-Press-release-Consorting-laws.pdf>.

176 The Hon. David Clarke MP, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9093.

177 Correspondence from Justin Dowd, President, The Law Society of NSW, to the Hon. Greg Smith MP, Attorney General and Minister for Justice, 26 October 2012, viewed 13 June 2013, <https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/659437.pdf>.

178 The Hon. David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9107.

179 *ibid*, p. 9106.

enable people involved in high level, sophisticated criminal enterprises in particular to manufacture an excuse for associations which go hand in hand with criminal activity. In some LACs, police felt strongly that properly exercised and supervised police discretion would ensure that official warnings were not issued in inappropriate cases. Some officers advised that they do not give warnings to people who are in a relationship, and would not target people who lived together unless they felt it was necessary to prevent criminal activity.

Some officers we consulted, including a commander, expressed a preference for a general defence of reasonable excuse instead of the six defences. This approach would allow for a wider range of circumstances beyond the six defence criteria to be taken into account by the courts, as discussed above. However, one disadvantage of replacing the current defences with a general defence of reasonable excuse is that it would mean less certainty and predictability for warning recipients and the police about what circumstances give rise to a defence.

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## Questions for consideration:

**26. Should the defences to consorting be expanded to include any of the following:**

- consorting between people who live together
- consorting between people who are in a relationship
- consorting that occurs in the provision of therapeutic, rehabilitation and support services
- consorting that occurs in the course of sporting activities
- consorting that occurs in the course of religious activities
- consorting that occurs in the course of genuine protest, advocacy or dissent?

**27. Should the list of defences be an inclusive list instead of an exhaustive list?**

**28. Should a general defence of reasonable excuse be included in addition, or as an alternative, to the current list of defences?**

**29. Should definitions of 'family members' and 'health service' be included in section 93Y? If yes, how should these terms be defined?**

**30. What guidance, if any, should be provided to police about how they should exercise their discretion in relation to the defences?**

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### 7.4.3 The reverse burden of proof

In criminal law there is a general rule that the prosecution must establish the elements of the offence and rebut any defence raised by the defendant to the standard of proof beyond a reasonable doubt. This is a fundamental principle stemming from the presumption of innocence.

Under the new provisions, a reverse burden of proof applies in relation to the six defences available to a person charged with consorting. When the burden of proof is reversed, the defendant bears the onus of proving certain matters to the standard of a balance of probabilities. In order to make out a defence under the new consorting provisions, the defendant must satisfy the court that the consorting was reasonable in the circumstances and falls within one of the six listed defence categories.<sup>180</sup> The Law Society of NSW has written to the Attorney General urging the Government to amend the consorting provisions so that the burden of proof is not reversed.<sup>181</sup> An alternative construction which would not reverse the onus of proof could be:

The following forms of consorting are to be disregarded for the purposes of section 93X unless the prosecution proves that the consorting was not reasonable in the circumstances ...

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## Question for consideration:

**31. Should the consorting provisions be amended to provide that the prosecution must satisfy the court that the consorting was not reasonable in the circumstances?**

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<sup>180</sup> *Crimes Act 1900*, s 93Y.

<sup>181</sup> Correspondence from Justin Dowd, President, The Law Society of New South Wales, to the Hon. Greg Smith MP, Attorney General and Minister for Justice, 26 October 2012, viewed 13 June 2013, <https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/659437.pdf>.

## Chapter 8. Evaluating the effect of the consorting provisions

Part of reviewing the operation of the new consorting provisions involves evaluating the impact of the provisions on people directly affected, as well as determining whether or not the provisions are achieving the stated or implied objectives set by Parliament. As emphasised in the second reading speech, the intention of the new consorting provisions is to prevent the development and continuation of criminal associations,<sup>182</sup> and it follows, to prevent or frustrate criminal activity.<sup>183</sup> To assist our review we are seeking input from people, their legal representatives and organisations with direct experience of the consorting provisions.

### 8.1 Difficulties in evaluating the effectiveness of official warnings and initial views of police

It is not the purpose of this issues paper to report on the effectiveness of the provisions to date. Police will often use a variety of strategies simultaneously to target people they suspect of involvement in criminal activity, making measuring the impact of use of the consorting provisions on crime reduction difficult.

We have however been canvassing issues relating to the impact and effectiveness of use of the consorting provisions with police officers of the select group of LACs and squads in the course of our consultations. Officers reported a variety of results including:

- people targeted for consorting moving to areas where they are not known by police, to areas of larger populations where they may be more anonymous, or moving to areas where local police are not using the consorting provisions
- groups of people separating on sight of police
- people no longer being seen in public together.

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#### Questions for consideration:

32. Do you have any suggestions regarding how to approach evaluation of the effectiveness of official warnings and the consorting provisions in your local area?
  33. If you have received an official warning for consorting or been the subject of a warning issued to others, what impact did this have on you?
  34. What behaviour, if any, have you changed as a result of receiving an official warning or being the subject of a warning?
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### 8.2 Impact on government and non-government initiatives to reintegrate ex-prisoners and support vulnerable people

New South Wales has in place a range of government and non-government initiatives aiming to reintegrate ex-prisoners and support vulnerable members of the community.

For example, Corrective Services NSW has a Throughcare strategy involving strategic partnerships with government and non-government agencies to assist prisoners post-release, support offenders' integration into the community and reduce the risk of re-offending.<sup>184</sup> One concern raised is that use of the consorting provisions in relation to ex-prisoners may hinder the provision

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182 The Hon. David Clarke MP, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9091.

183 The Hon. Barry O'Farrell MP (Premier of NSW), *New Laws to Tackle Drive-by Shootings*, media release, NSW Government, Ministry for Police and Emergency Services, Sydney, 13 February 2012, viewed 13 June 2013, <http://www.mpes.nsw.gov.au/newsarticle.html?newsid=625>.

184 Corrective Services NSW, 'Throughcare', March 2008, NSW Government, Sydney, viewed 6 August 2013, <http://www.correctiveservices.nsw.gov.au/about-us/publications/throughcare>.

of support services to this group. As noted in chapter 7, there is no specific defence for consorting that occurs in the provision of therapeutic, support and rehabilitation services other than health services.

We are interested in finding out about the experiences of ex-prisoners who have been subject to the provisions and of prisoner and ex-prisoner support services so that we can comment on this issue in the final report. Submissions from affected people's legal representatives are also encouraged.

### **8.2.1 The experience of disadvantaged and vulnerable people with the consorting provisions**

In chapter 6 we provided some details regarding the use of the consorting provisions and emerging issues in relation to Aboriginal people, children and young people and people experiencing homelessness. The details in chapter 6 are drawn mainly from our analysis of the consorting data provided by NSW Police and our consultations with police officers from ten LACs and two specialist squads attached to the Organised Crime Directorate identified as being high users of the provisions.

We would like to hear from people who have been directly affected by the consorting provisions by being warned for consorting by police or having their friends warned about them. We also seek submissions from advocates and organisations providing services to disadvantaged or vulnerable people, including Aboriginal people, children and young people and people experiencing homelessness.

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#### **Questions for consideration:**

**35. If you are involved in providing a service to vulnerable or disadvantaged people or ex-prisoners:**

- Have clients of your service been affected by the consorting provisions and, if so, how?
- Has there been any impact on your clients' engagement with services and supports?

Please describe the impact of the provisions on your clients.

**36. How could any potential adverse effects of the consorting provisions on vulnerable people or ex-prisoners be mitigated?**

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## Chapter 9. Questions for consideration

Following is a list of all questions that we have included in this Issues Paper for consideration. These questions are not meant to be exhaustive and we welcome comments and submissions on any other issues individuals, organisations or agencies may wish to raise regarding how the consorting provisions have been used, or might be used in the future.

### **Are the consorting provisions necessary?**

1. What gaps, if any, do the new consorting provisions fill that the suite of laws and powers regarding limiting associations do not already cover?

### **Are the consorting provisions too broad?**

2. What checks and balances, if any, should be in place to ensure personal relationships between people who are not involved in any criminal activities are not criminalised by the new consorting provisions?
3. Should police be required to show the associations that are the subject of official warnings are linked to current or suspected criminal activity?
4. Should police be required to hold a reasonable belief the issuing of consorting warnings is likely to prevent future offending?
5. Should the targeting of people for consorting be left wholly to police discretion or should the provisions be limited to people convicted of certain categories of offences as legislated in other jurisdictions? What offence categories would be appropriate?
6. Is it appropriate for police to target people for consorting who are suspected of involvement in less serious offences, such as shoplifting?
7. Should convictions for certain offences or offence categories be excluded from defining a person as a convicted offender, and if so, which ones?
8. Should NSW consorting provisions include a requirement that a convicted offender must be convicted of an indictable offence within a specified timeframe? If such a requirement is included, what would be the appropriate timeframe?
9. Should there be a limit governing the period of time during which the occasions of consorting must occur included in the offence? If so, what timeframe?
10. Should official police warnings remain valid for a specified timeframe, such as 12 months or two years? If so, what timeframe?

### **Use in relation to disadvantaged and vulnerable groups**

11. What, if any, protections should be put in place to ensure that Aboriginal people are not unfairly affected by the consorting provisions?
12. One of the defences listed in section 93Y of the Crimes Act is 'consorting with family members'. Should 'family' be defined within the legislation or in the Consorting SOPs and if so, what definition of 'family' should be adopted?
13. What protections, if any, should be introduced concerning the use of consorting provisions in relation to young people?
14. Should young people sentenced for certain classes of offences be included in the definition of 'convicted offender' even where no indictable conviction has been recorded by the Children's Court? If yes, what types or classes of offences?
15. Should the circumstances in which an official warning can be issued about a young person be restricted due to privacy considerations?
16. What, if any, safeguards should be included within the legislation or police policy with regard to the use of consorting provisions against homeless people?

### **Issues relating to the offence**

17. Should the description of an official warning in section 93X be amended to clarify that it is only an offence to continue to associate with a named convicted offender?

18. What further guidance, if any, should be provided in the Consorting SOPs regarding the content and format of an official warning?
19. What practical strategies can police adopt to assist people who may have difficulty understanding the content of official warnings?
20. Should the consorting provisions require police officers to provide official warnings in writing, in addition to giving an oral warning?
21. Should police officers be able to issue official warnings pre-emptively? If yes, in what circumstances would it be appropriate for police officers to issue warnings in this way?
22. What guidance, if any, should be provided to police officers about the timeframe between an incident of consorting and the issuing of an official warning?
23. Are there any practical ways police can reduce the impact on people's privacy when issuing official warnings?
24. Should the consorting provisions provide for a process for review of official warnings? If yes, what kind of review process would be appropriate?
25. Should police formally establish an internal review process to assess the validity of warnings upon the request of the person warned?
26. Should the defences to consorting be expanded to include any of the following:
  - consorting between people who live together
  - consorting between people who are in a relationship
  - consorting that occurs in the provision of therapeutic, rehabilitation and support services
  - consorting that occurs in the course of sporting activities
  - consorting that occurs in the course of religious activities
  - consorting that occurs in the course of genuine protest, advocacy or dissent?
27. Should the list of defences be an inclusive list instead of an exhaustive list?
28. Should a general defence of reasonable excuse be included in addition, or as an alternative, to the current list of defences?
29. Should definitions of 'family members' and 'health service' be included in section 93Y? If yes, how should these terms be defined?
30. What guidance, if any, should be provided to police about how they should exercise their discretion in relation to the defences?
31. Should the consorting provisions be amended to provide that the prosecution must satisfy the court that the consorting was not reasonable in the circumstances?

#### **Evaluating the effect of the consorting provisions**

32. Do you have any suggestions regarding how to approach evaluation of the effectiveness of official warnings and the consorting provisions in your local area?
33. If you have received an official warning for consorting or been the subject of a warning issued to others, what impact did this have on you?
34. What behaviour, if any, have you changed as a result of receiving an official warning or being the subject of a warning?
35. If you are involved in providing a service to vulnerable or disadvantaged people or ex-prisoners:
  - Have clients of your service been affected by the consorting provisions and, if so, how?
  - Has there been any impact on your clients' engagement with services and supports?
 Please describe the impact of the provisions on your clients.
36. How could any potential adverse effects of the consorting provisions on vulnerable people or ex-prisoners be mitigated?

# Appendices

## Appendix 1

### **Crimes Act 1900**

#### **Part 3A Offences relating to public order**

#### **Division 7 Consorting**

##### **93W Definitions**

In this Division:

*consort* means consort in person or by any other means, including by electronic or other form of communication.

*convicted offender* means a person who has been convicted of an indictable offence (disregarding any offence under section 93X).

##### **93X Consorting**

(1) A person who:

- (a) habitually consorts with convicted offenders, and
- (b) consorts with those convicted offenders after having been given an official warning in relation to each of those convicted offenders,

is guilty of an offence.

Maximum penalty: Imprisonment for 3 years, or a fine of 150 penalty units, or both.

(2) A person does not *habitually consort* with convicted offenders unless:

- (a) the person consorts with at least 2 convicted offenders (whether on the same or separate occasions), and
- (b) the person consorts with each convicted offender on at least 2 occasions.

(3) An *official warning* is a warning given by a police officer (orally or in writing that:

- (a) a convicted offender is a convicted offender, and
- (b) consorting with a convicted offender is an offence.

##### **93Y Defence**

The following forms of consorting are to be disregarded for the purposes of section 93X if the defendant satisfies the court that the consorting was reasonable in the circumstances:

- (a) consorting with family members,
- (b) consorting that occurs in the course of lawful employment or the lawful operation of a business,
- (c) consorting that occurs in the course of training or education,
- (d) consorting that occurs in the course of the provision of a health service,
- (e) consorting that occurs in the course of the provision of legal advice,
- (f) consorting that occurs in lawful custody or in the course of complying with a court order.

## Appendix 2

### *Police Regions of NSW*



## Appendix 3

### Comparison of consorting provisions across Australian jurisdictions

Jurisdiction	Relevant legislation	Can a person with no convictions be charged?	Seriousness and type of offence committed or reputedly committed by the associate/s	How many instances of consorting are required?	How many associates must the person consort with?	Must there be a suspected link to criminal activity?
NSW	<i>Crimes Act 1900</i> , ss. 93W–93Y	Yes	A person who has been convicted of an indictable offence	At least two associates	At least two occasions with each associate	No
SA	<i>Summary Offences Act 1953</i> , s. 13	Yes	A person who has been found guilty of, or is reasonably suspected of having committed, an organised crime offence	At least one associate	'habitually consorts'	No
VIC	<i>Summary Offences Act 1966</i> , s. 49F	Yes	A person who has been found guilty of, or is reasonably suspected of having committed, an organised crime offence	At least one associate	'habitually consorts'	No
WA	<i>Criminal Code</i> , ss. 557J–557K	No	A declared drug trafficker or child sex offender – the person charged with consorting must also satisfy this criterion	At least one associate	'habitually consorts'	No
NT	<i>Summary Offences Act</i> , s. 55A	No	A person who is guilty of committing a prescribed offence, including firearms offences, misuse of drugs offences and other serious offences – the person charged with consorting must also satisfy this criterion	At least one associate	At least one occasion	Yes – the Police Commissioner must reasonably believe that giving the warning is likely to prevent the commission of a prescribed offence involving 2 or more offenders and substantial planning and organisation: s. 55A(4)(b)
TAS	<i>Police Offences Act 1935</i> , s. 6	Yes	A reputed thief	At least two associates	'habitually consorts'	No
ACT	There is no consorting offence					
QLD	There is no consorting offence					

Must a warning be given?	Applicable time limit	Defences	Maximum penalty
Yes – oral or written	No	Consorting that was reasonable in the circumstances limited to consorting: with family members; in the course of lawful employment or the operation of a business; in the course of training or education; in the course of the provision of a health service or legal advice; in lawful custody or whilst complying with a court order	Three years imprisonment or \$16,500 or both
No	There is a two year limit on commencing summary proceedings: <i>Summary Procedure Act 1921</i> , s.52(1)(b)	Reasonable excuse	Two years imprisonment
No	There is a 12 month limit on commencing summary proceedings: <i>Criminal Procedure Act 2009</i> , s. 7(1)	Reasonable excuse	Two years imprisonment
Yes – oral or written	There is a 12 month limit on commencing summary proceedings: <i>Criminal Procedure Act 2004</i> , s. 21	Consorting with spouses, de facto partners, de facto children and lineal relatives	Two years imprisonment and/or \$25,000
Yes – written	12 months – the warning prohibits association for up to 12 months: s. 55(1)(a)	Reasonable excuse or the person unintentionally associated with their associate and terminated the association immediately	Two years imprisonment
No	There is a six month limit on commencing summary proceedings: <i>Justices Act 1959</i> , s. 26(1)(a)	The person has sufficient lawful means of support and had good and sufficient reasons for consorting	6 months imprisonment

## Appendix 4

### ***Criminal Procedure Act 1986***

#### **Section 3 Definitions**

...

Indictable offence means an offence (including a common law offence) which can be prosecuted on indictment.

#### **Section 5 Certain offences to be dealt with in indictment**

- (1) An offence must be dealt with on indictment unless it is an offence that under this or any other Act is permitted or required to be dealt with summarily.
- (2) An offence may be dealt with on indictment if it is an offence that under this or any other Act is permitted to be dealt with summarily or on indictment.

#### **Section 6 Certain offences to be dealt with summarily**

- (1) The following offences must be dealt with summarily:
  - (a) an offence that under this or any other Act is required to be dealt with summarily,
  - (b) an offence that under this or any other Act is described as a summary offence,
  - (c) an offence for which the maximum penalty that may be imposed is not, and does not include, imprisonment for more than 2 years, excluding the following offences:
    - (i) an offence that under any other Act is required or permitted to be dealt with on indictment,
    - (ii) an offence listed in Table 1 or 2 to Schedule 1.
- (2) An offence may be dealt with summarily if it is an offence that under this or any other Act is permitted to be dealt with summarily or on indictment.



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