

The consorting law

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

April 2016

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Foreword

In February 2012 consorting laws in New South Wales were modernised as part of a suite of amendments designed to assist police to tackle organised crime and criminal gangs. The Parliament acted in response to increased concern about drive-by shootings. The controversial nature of the new consorting law was acknowledged by Parliament in requiring the NSW Ombudsman to prepare this report about the first three years of the operation of the new consorting law.

The new consorting law makes it a criminal offence for a person to continue to associate or communicate with people who have been previously convicted of an indictable offence, after receiving an official police warning. The consorting law aims to prevent criminal activity by disrupting or deterring associations that may lead to the building or continuation of criminal networks.

Public concern about the operation of the new consorting law was reflected in consultations conducted by the Ombudsman's office and in the number of submissions we received expressing serious concern about the law and calling for it to be amended or repealed. The central concern is that the consorting law may criminalise social interactions in circumstances where there is no requirement for police to suspect any link between the consorting and planning or undertaking criminal activity, organised or otherwise, or building criminal networks. The breadth of the new consorting law means that the main constraint on its application is the sensible exercise of discretion by police officers.

In order to prepare this report we conducted state-wide consultations, a comprehensive analysis of police consorting data, and published an issues paper that identified emerging issues and called for submissions.

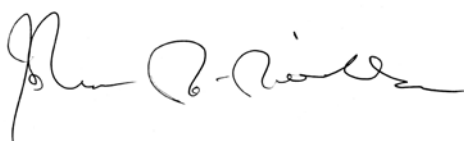
During the review period police issued more than 9,000 consorting warnings and 46 charges for the offence of consorting. Our review found qualitative evidence to support the effective use of the consorting law by the Gangs Squad to target high-risk Outlaw Motorcycle Gangs. However, this review also found evidence to indicate use by officers attached to Local Area Commands in relation to a broad range of offending, including minor and nuisance offending. The report details use of the consorting law in relation to disadvantaged and vulnerable people, including Aboriginal people, people experiencing homelessness, and children and young people. In addition, this review found an exceptionally high police error rate when issuing consorting warnings in relation to children and young people.

We found that although the NSW Police Force has used the consorting law to disrupt serious and organised crime and criminal gangs as intended by Parliament, it has also used the consorting law in a manner that, to some extent, illustrated public concerns about its operation.

I recommend that statutory and policy amendments are made to increase the fairness of the operation of the consorting law, and to mitigate the unintended impacts of its operation on people in circumstances where there is no crime prevention benefit, or where the crime that may be prevented is relatively minor.

I recommend the adoption of a new statutory and policy framework for use of the consorting law, to ensure its use is focused on serious crime, is closely linked to crime prevention, and is not used in relation to minor offending such as summary offending. This framework is consistent with the overarching intent of Parliament that the consorting law adequately equips police to combat serious and organised crime and criminal groups.

Unless these changes are made it is likely that the consorting law will continue to be used to address policing issues not connected to serious and organised crime and criminal gangs and in a manner that may impact unfairly on disadvantaged and vulnerable people in our community. My view is that the implementation of these recommendations is essential to maintain public confidence in the NSW Police Force and its use of the consorting law.



Professor John McMillan AO
Acting Ombudsman

Acknowledgements

We would like to thank the NSW Police Force, NSW Department of Justice, Corrective Services NSW, Juvenile Justice NSW and the NSW Bureau of Crime Statistics and Research for providing information and assistance to the preparation of this report. Particular thanks to the NSW Police Force Consorting Standing Committee, the NSW Police Force Performance Improvement and Planning Command, and the police officers from the State Crime Command and Local Area Commands who participated in interviews and provided us with their comments during consultations.

We would also like to thank the government agencies, community organisations and service providers, and individuals who provided information during interviews, responded to our issues paper and participated in consultations. Without the valuable information you provided we would not be in a position to comprehensively assess and report on the operation of the new consorting law.

This report was researched and written by Kate McDonald and Natalie De Campo with editing by Michael Gleeson and Selena Choo. Daniele Capraro assisted with the statistical analysis of police consorting data. Other assistance was provided by the Research and Project team, Police Division of the NSW Ombudsman's office.

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Glossary

Aboriginal	The term 'Aboriginal' refers to Aboriginal and/or Torres Strait Islander people.
amending Act	<i>Crimes Amendment (Consorting and Organised Crime) Act 2012</i>
ANZSOC	Australia and New Zealand Standard Offence Classification system
the Bill	Crimes Amendment (Consorting and Organised Crime) Bill 2012
BOCSAR	NSW Bureau of Crime Statistics and Research
children	This term generally refers to people aged 10 to 15 years.
children and young people	This term refers to people aged 10 to 17 years.
consorting Event narrative	The free-text portion of a COPS Event created by police officers documenting the use of the consorting law.
consorting Event records	COPS Events created by police officers documenting use of the consorting law.
consorting interaction	This term refers to an occasion involving one or more people where police have recorded a use of the consorting law.
the consorting law	The provisions contained in Part 3A, Division 7 of the <i>Crimes Act 1900</i> , sections 93W, 93X and 93Y.
consorting records	Event records and intelligence reports on COPS created by NSW police officers to record their use of the new consorting law.
Consorting SOPs	NSW Police Force, State Crime Command, <i>Consorting Standard Operating Procedures</i> , November 2014. This document was originally published in April 2012. It was republished in November 2014 with revisions to reflect changes to the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> in relation to arrest.
consorting warning	A consorting warning is a warning given by a police officer (orally or in writing) that: <ul style="list-style-type: none"> (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)).
COPS	Computerised Operational Policing System (NSW Police Force)
Corrective Services	Corrective Services NSW
FACS	Department of Family and Community Services
general duties police	This term refers to police officers attached to Local Area Commands of the NSW Police Force.
ICCPR	International Covenant on Civil and Political Rights
Juvenile Justice	Juvenile Justice NSW
LAC	Local Area Command (NSW Police Force)
LEPRA	<i>Law Enforcement (Powers and Responsibilities) Act 2002</i>
MEOCS	The Middle Eastern Organised Crime Squad of the NSW Police Force
MLC	Member of the Legislative Council
NCAT	New South Wales Civil and Administrative Tribunal
NSW	New South Wales
NSWPD	New South Wales Parliamentary Debates (Hansard)
OMCG	Outlaw Motorcycle Gang. This term has been adopted by the Australian Crime Commission and the NSW Police Force and is acknowledged by the Supreme Court of NSW in cases such as <i>Moefli v State Parole Authority</i> [2009] NSWCC 1146.

review period	9 April 2012 to 8 April 2015. This term refers to the time period for which the Ombudsman's office is required to report to the Commissioner of Police and the Attorney General on the operation of the new consorting law in Part 3A, Division 7 of the <i>Crimes Act 1900</i> . The review period was initially two years but was extended in 2013 to three years.
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 law for the period 9 April 2012 to 16 December 2012, based on a count of COPS Events created in that period. We analysed the total consorting records (Event and information reports) of these 12 commands individually.
SOPs	Standard operating procedures
specialist squads	This term refers to the 12 squads housed in the Organised Crime Directorate and the Serious Crime Directorate located in the State Crime Command of the NSW Police Force.
STMP II	Suspect Target Management Plan II. Confidential NSW Police Force policy regarding the identification and management of high-risk and recidivist offenders. The policy is undated but was implemented in 2005.
subject to the consorting law	This term is used to refer collectively to people who have received an official consorting warning, people who have been the subject of a warning and people who have been charged with consorting.
<i>Tajjour v New South Wales</i>	This refers to the High Court case <i>Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales</i> [2014] HCA 35, which challenged the constitutionality of the new consorting law contained in Part 3A, Division 7 of the <i>Crimes Act 1900</i> .

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Executive Summary

The Crimes Amendment (Consorting and Organised Crime) Bill 2012 (the Bill) was introduced in February 2012 against a background of increased public concern about drive-by shootings and their suspected connection to criminal gangs. The Bill contained a suite of amendments, including a new consorting law, that were aimed at tackling organised crime and criminal gangs.

Consorting is not a new offence. It has existed in New South Wales (NSW) since the 1920's when it was enacted in response to concern about the 'razor gangs' in East Sydney. Over time, it fell into disuse and was the subject of criticism.

In the second reading speech introducing the Bill to Parliament, the Hon. David Clarke (the Parliamentary Secretary speaking on behalf of the Minister for Police) said the Bill 'modernises the offence of consorting, as well as extending and clarifying its application'.¹

The second reading speech 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'.² With specific reference to the intention of the consorting law, the Parliamentary Secretary stated that 'the goal of the offence is not to criminalise individual relationships, but to deter people from associating with a criminal milieu'.³

The new consorting law was framed widely. It retained the broad definition of 'convicted offender' contained in the preceding version of the offence.⁴ The meaning of 'consorting' had been previously considered by the High Court, which established there is no need for an occasion of 'consorting' to have any unlawful purpose or be linked to ongoing or recent criminal activity.⁵ The result, acknowledged in a more recent decision, is that the 'primary practical constraint upon its application is the discretion afforded to police officers'.⁶

The extent of the police discretion in determining the operation of the new consorting law was recognised by Parliament. The second reading speech noted that the consorting law requires police to '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'.⁷ This brings with it a risk that the law will not be properly applied, as acknowledged by other Government speakers in the Parliamentary debates, for example:

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.⁸

When enacting the new consorting law, Parliament required the NSW Ombudsman to 'prepare a report on the operation' of the new law to be provided to the Attorney General and to the Commissioner of Police.⁹ The importance of this review was noted in the second reading speech:

The old [consorting] provision has fallen into disuse and has been criticised in the past. This Report will provide an opportunity... to review the use of the new provision and to consider any further amendments or repeal of the provisions as necessary.¹⁰

This is the Ombudsman's report on the operation of the new consorting law as required. This report covers the three year period from the date the law commenced on 9 April 2012 to 8 April 2015. We provide this report to the Attorney General and Commissioner of Police, in accordance with our obligations under Part 29, schedule 11 of the *Crimes Act 1900*.

The new consorting law

The consorting law is located in Part 3A, Division 7 of the Crimes Act. Section 93X provides that it is an offence to habitually consort with at least two 'convicted offenders' on at least two occasions, after receiving an official consorting warning from police in relation to each offender. Any person, except children under the age of criminal responsibility, can be warned or charged with habitually consorting.

1. The Hon. David Clarke MLC, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Council, 7 March 2012, p. 9091.
2. The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9093.
3. The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, pp. 9092–9093.
4. Section 546A *Crimes Act 1900* was repealed.
5. *Johanson v Dixon* (1979) 143 CLR 376.
6. *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 at 1, per French CJ.
7. The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9093.
8. The Hon. John Ajaka MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9097.
9. *Crimes Act 1900*, Schedule 11, Part 29.
10. The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9093.

The new consorting law includes a number of significant changes:

- consorting is extended from face-to-face associations to include consorting by electronic means such as communicating by phone, text or social media
- the maximum penalty is increased to three years imprisonment and/or a \$16,500 fine, from a maximum of six months and/or a fine of \$400
- the offence is changed from a summary offence to an indictable offence, with the result that the statutory time limit applying to summary offences is removed
- consorting with at least two different 'convicted offenders' is required
- official police warnings are required to be given to a person in relation to each 'convicted offender' guidance regarding the meaning of 'habitual' is provided so that 'habitual consorting' involves a minimum of two associations with each offender, and
- six possible defences to a charge of consorting are included.

In chapter 4 we outline the different elements of the new consorting law. Key terms such as 'habitually' and more precise meanings of terms contained in the defences, such as 'family members', were not tested in court proceedings during the review period.

Public concerns about the operation of the consorting law

Consorting is a controversial offence as it involves the criminalisation of social interactions between people, who may be otherwise unconnected from criminal activity. The object of the offence is to allow police to intervene and attempt to prevent future offending.

We received 34 submissions from organisations and individuals in response to our issues paper. Nearly all of these expressed serious concern about the consorting law, with the majority of submissions also calling for it to be repealed.

The central concern is that the consorting law curtails the freedom of association and communication between people to whom the law is applied in circumstances where there is no requirement for police to suspect any link between the consorting and planning or undertaking criminal activity or 'building criminal networks'.

The validity of the new consorting law was subject to a constitutional challenge that was finalised in October 2014. The High Court, by majority, held the law to be valid. The grounds of challenge submitted that the impact of the consorting law contravened the implied constitutional freedom of political communication and freedom of association of people. The High Court noted that it was not its role in the proceedings to assess the merits or fairness of the consorting law. In a joint judgment, three of the High Court Justices noted that '[t]he desirability of consorting provisions such as this is not relevant to the task before the Court'.¹¹ The High Court's assessment of the new consorting law was limited to determining whether it was valid in light of the implied rights protected by the Constitution.

In the submissions we received, human rights concerns relating to the consorting law were generally discussed in the context of Australia's human rights obligations under the International Covenant on Civil and Political Rights (ICCPR). While there may be no constitutional foundation for a right to freedom of association in Australian law (as decided by the High Court), the infringement of this freedom remained a concern to many people and organisations that provided submissions to us during the review period.¹²

Additional concerns expressed to us included the ability of the law to further marginalise disadvantaged and vulnerable people, to breach convicted offenders' privacy, and to impede efforts by community organisations and government agencies to rehabilitate and reintegrate people into the community following imprisonment or detention.

In chapter 5 of this report we outline the primary concerns expressed to us about the law. The impact of the High Court proceedings on the implementation of the consorting law by police is described in section 6.7.1 of chapter 6, and section 7.2.1 of chapter 7.

11. *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 at 112. Justices Crennan, Kiefel and Bell.

12. Rule of Law Institute of Australia, Submission, *Review of the Use of the Consorting Provisions by the NSW Police Force*, 26 May 2014, p. 2.

Use of the consorting law

This report examines the use of the new consorting law by the NSW Police Force during its first three years of operation. We have not been able to quantify the extent to which the consorting law has been used by police officers to target people suspected of involvement in serious and organised crime or criminal gangs. However, we have quantified use of the consorting law by specialist squads in the Organised Crime Directorate and Serious Crime Directorates of the NSW Police Force. These specialist squads have operational remits that restrict their focus to serious crime, organised crime and criminal gangs. This provides insight into the extent of the use of the consorting law in relation to criminal activity within these categories.

To prepare this report, we analysed police consorting data, consulted extensively and published an issues paper seeking views regarding emerging issues in relation to the operation of the consorting law. Our methodology is outlined in chapter 2 and a statistical overview of the operation of the consorting law is provided in chapter 6. A discussion of the different types of use of the consorting law is located in chapters 7 and 8.

At the outset, the NSW Police Force made a policy decision not to limit use of the new consorting law to organised crime and/or criminal gangs. This broad implementation resulted in the law being used across NSW to target a variety of local policing issues.

We found more than 3,300 people were subject to use of the consorting law as a result of being issued with a consorting warning or having others warned about consorting with them. The law was used on approximately 1,800 different occasions. More than 9,100 consorting warnings were issued, with 42 people charged with 46 offences of habitually consorting.

Officers attached to specialist squads tasked with policing serious and organised crime and criminal gangs were responsible for half of all the consorting warnings issued during the review period. The other half of the warnings were issued by general duties police attached to Local Area Commands (LACs).

Despite the even split in the number of warnings issued by specialist squads compared to general duties police, three quarters of all people subject to use of the consorting law were affected only as a result of an interaction with general duties police. This can be explained by the different way the Gangs Squad used the consorting law, for example, they targeted individuals on more than one occasion. The different characteristics of use by squads and general duties police are outlined in chapters 6, 7 and 8 of this report.

Use by specialist squads

The biggest single user of the consorting law was the NSW Police Force Gangs Squad. It was responsible for half of all consorting warnings issued and 34 of the 46 charges brought. The Gangs Squad leads the NSW Police Force response to serious and organised gang-related crime, particularly that involving Outlaw Motorcycle Gangs (OMCGs).

Use of the consorting law by the Gangs Squad involved a targeted and intelligence-driven approach. This is discussed in section 7.5 of chapter 7. During consultations with us, officers from the Gangs Squad indicated support for the consorting law and belief in its effectiveness as a tool for policing high-risk OMCGs. Gangs Squad officers used the consorting law to prevent criminal offending and to disrupt the ability of gang members to associate. It was used in addition to traditional criminal investigative strategies. As outlined in section 7.5, the consorting law's effectiveness in this context lies in the cultural characteristics of OMCGs, and in the multi-layered approach adopted by the Gangs Squad to policing those gangs whose members were considered to be involved in ongoing, serious criminal activities.

The Gangs Squad was of the view that the operational flexibility that arises from the breadth of the consorting law and its restricted defences is crucial to the effectiveness of the consorting law in relation to high-risk OMCGs.

In contrast, other specialist squads also tasked with policing serious and organised crime and criminal gangs, have either significantly reduced their use of the consorting law over time or did not initiate use. The reasons for this are reported in sections 7.6 and 7.7 of chapter 7.

Use by general duties police

Nearly all LACs across NSW used the consorting law on at least one occasion, though sustained use was rare. The majority of use by general duties police attached to LACs was concentrated in Sydney metropolitan areas, with pockets of significant use in western NSW.

We found that different LACs employed the consorting law to attempt to address a range of local policing issues. While there was evidence of use by general duties police to target people suspected of very serious criminal activity, the law was also used to target people in public seating areas and public walkways, and at public transport hubs. Generally, the impetus for this use came as a result of nuisance offending in these areas or complaints from local businesses about 'undesirable' people disrupting retail or hospitality enterprises. In the months prior to the end of the review period, the Police Transport Command began using the consorting law on public transport such as trains and at train stations.

Some LACs advised they thought the consorting law was an effective disruption and crime prevention tool, while other LACs discontinued their use of the consorting law because they found few tangible benefits resulted.

We provide analysis and discussion of use of the new consorting law by general duties police officers in chapters 6, 7 and 8.

Who was targeted by police?

We analysed the demographic and criminal conviction histories of people subject to use of the consorting law during the review period. A statistical overview of this analysis is provided in section 6.8 of chapter 6.

With little use of electronic consorting, the operation of the consorting law relied on police observations of people spending time together in places open to the public. As a result, there was an increased potential for people who spent a lot of time in areas open to the public to be subject to use of the consorting law to a greater degree than others. In addition to being more visible to police, some groups have a proportionally higher number of people with previous convictions for indictable offences when compared to the general population. This brought these groups, and the people they spent time with, more readily within the ambit of the consorting law.

In chapter 8 we outline use of the consorting law in relation to disadvantaged and vulnerable people. In particular, we report use in relation to Aboriginal and Torres Strait Islander peoples, people experiencing homelessness, and children and young people.

Demographic analysis of the consorting data revealed high use of the consorting law in relation to Aboriginal people, with significant variation between police regions. These variations are represented in figures 6 and 9 in chapters 6 and 8 respectively.

The proportion of Aboriginal people and the incidence of children and young people were far higher among those targeted by general duties police when compared with those targeted by specialist squads. Overall, 44% of people targeted by general duties officers were Aboriginal, compared to 13% of those targeted by specialist squads. Only a handful of people aged less than 18 years were subject to use of the consorting law by the specialist squads. The proportion of women, children and young people subject to use of the consorting law who were Aboriginal was especially high, with half of adult women, and 60% of children and young people, identified as Aboriginal.

During police consultations we found that the list of six defences available to a person charged with consorting had a significant influence on police officers' exercise of their discretion to issue consorting warnings. If an officer considered a person may be able to rely on a recognised defence contained in section 93Y of the Crimes Act, the officer was unlikely to issue a consorting warning in the circumstances. Consorting with 'family members' is one of the six defences available, though 'family' is undefined. We found an inconsistent application of 'family' in the context of policing of Aboriginal people, with some officers failing to recognise concepts of kinship consistent with Aboriginal cultural practice when considering if the people consorting were 'family members'.

We also identified clusters of use by general duties police officers in relation to people experiencing homelessness. This is reported in section 8.2.4 of chapter 8. In one Sydney metropolitan area we were advised by a community service provider that people were no longer attending their support services for fear of being further targeted for consorting.

An issue raised with us throughout the review is the lack of any defence to a charge of consorting for a person seeking to access supports and services such as those required by people experiencing homelessness. This is discussed in section 8.2.5 of chapter 8.

Particular concern arose about use of the consorting law in relation to children and young people. Significantly, almost 80% of children and young people who had their associates warned about consorting with them were mistakenly identified as 'convicted offenders' by police. This resulted in nearly 200 invalid warnings and represents a significant waste of policing resources as well as an unknown impact on those directly affected. The exceptionally high error rate with respect to children and young people, including the remedial actions taken by the NSW Police Force in response to our findings, is reported in section 8.3.4 of chapter 8.

In order to gain insight into the children and young people represented in the consorting data, we analysed police and Family and Community Services records in relation to a random sample of half of the cohort. This revealed multiple indicators of disadvantage for nearly every child and young person. In a number of recent reports and submissions prepared by this office we have argued the need for human services agencies to take an 'intelligence-driven' approach to the early identification of vulnerable children and young people who are 'at-risk', for the purpose of undertaking integrated case management aimed at supporting them and their families.¹³ Experts in the area of juvenile offending by at-risk children and young people advised that the consorting law is likely to be ineffective in relation to this cohort.

While we have quantified use of the consorting law in relation to Aboriginal people and children and young people, and have identified pockets of use with respect to people experiencing homelessness, our analysis does not establish whether any measurable crime prevention benefit has been achieved by this use, or whether the people targeted have merely become caught up in the consorting law net through their otherwise innocent use of public space.

The use of the consorting law in relation to certain disadvantaged and vulnerable groups demonstrates the breadth of circumstances to which the consorting law may be applied, and illustrates some of the negative consequences that may arise from its operation. In particular, our discussion in chapter 8 highlights the importance of a carefully defined framework within which the consorting law should be appropriately applied. Our proposed framework is discussed in chapter 11.

Our recommendations

This report makes 20 recommendations designed to increase the fairness of the operation of the consorting law for those directly affected and to reduce the risk of negative consequences that may arise from lawful but inappropriate use. These recommendations are contained in chapters 8 to 11. A summary of recommendations follows. Some of the adjustments to the consorting law we recommend are the responsibility of the Attorney General and Parliament, and others are within the responsibility of the NSW Police Force.

Our recommendations seek to balance the operational advantage of the law's flexibility that is important to the Gangs Squad's use, against the risk of negative or unintended impacts associated with its broad implementation.

There are clear advantages to reducing inappropriate use of the consorting law in relation to people not involved in any criminal activity or who are involved in only minor offending, including people belonging to disadvantaged and vulnerable groups. The focus should instead be on use of the law in prevention of serious crime.

We recommend that this be achieved by amending NSW Police Force policy so that the operation of the consorting law is:

- focused on serious offending
- closely linked to crime prevention, and
- prohibited from being used to address minor or nuisance offending.

We also recommend the Attorney General introduce, for the consideration of Parliament, an objects or purpose clause to the consorting law to clarify that the intent of the consorting law is for the prevention of serious crime.

In chapter 8 we recommend the removal of children and young people from the application of the consorting law. The reasons for this are both practical and based on concerns regarding a lack of effectiveness of the consorting law in relation to children and young people, and its incompatibility with other relevant policy and legislation.

In chapter 10 we discuss issues relating to the defences in section 93Y of the Crimes Act available to a person charged with consorting. We recommend that additional defences be inserted into section 93Y and that broad definitions of 'family members' and 'health service' are adopted. Specifically, we recommend section 93Y include a defence for people complying with the directions of Corrective Services NSW or the State Parole Authority, for people accessing emergency or transitional accommodation, and for people accessing welfare and support services. Also in this chapter, we recommend 'family members' be defined to ensure recognition of Aboriginal kinship relations, and 'health service' is defined to include beneficial services such as counselling services, rehabilitation services, and accessing social workers.

The recommendations in relation to the section 93Y defences are expected to influence the exercise of discretion by police officers and to provide access to appropriate legal defences for disadvantaged and vulnerable people.

Other recommendations aimed at increasing the fairness of the operation of the consorting law are discussed in chapter 9. These relate to the provision of accurate information to people subject to the use of the consorting law, minimising the

13. NSW Ombudsman, *Inquiry into service provision to the Bourke and Brewarrina communities*, December 2010, p. lx; NSW Ombudsman, *Responding to Child Sexual Assault in Aboriginal Communities*, December 2012, pp. 26–27.

required breach of privacy of 'convicted offenders' when warnings are issued about them, removing the ambiguity from the suggested statutory format of consorting warnings, and creating a policy regarding the time frame following an incident of consorting within which a retrospective warning may be issued. We also recommend the introduction of clear time limits governing the validity of warnings.

Over the course of the review we have identified errors made by police in relation to the 'convicted offender' status of people identified in a consorting warning, and identified significant issues in relation to the accuracy of police record keeping. This is reported in chapter 9 in sections 9.2 and 9.3. The NSW Police Force has taken numerous steps to address these errors; however, there remains a need for further training of officers and a specific quality assurance process for the ongoing use of the consorting law.

Finally, criminological research and law enforcement experience indicates that organised crime groups are adaptable and are likely to respond to successful law enforcement strategies by altering their methods. It follows that members and associates of high-risk OMCGs, for example, may change the way they associate or communicate with each other in response to the Gangs Squad's use of the consorting law. In acknowledging this adaptability, as well as the potential risks associated with inappropriate but lawful use identified in this report and the lack of quantitative evidence to enable the evaluation of crime prevention outcomes linked to use of the consorting law, we recommend a further independent review of the operation of the consorting law be conducted in the future. This should occur when normal use of the law has been established and implementation of any of the recommendations made in this report has occurred.

Summary of Recommendations

Recommendation	84
1. The Attorney General propose, for the consideration of Parliament, an amendment to the consorting law to remove children and young people aged 17 years or less from the application of the consorting law. These amendments should prohibit: a) the ability for police to issue consorting warnings and charge a child or young person aged 17 years or less under section 93X, and b) the ability for police to treat a child or young person aged 17 years or less as a 'convicted offender' for the purposes of the consorting law.	
Recommendation	86
2. The Attorney General propose, for the consideration of Parliament, an amendment to section 93X(3)(b) of the Crimes Act, to remove the present ambiguity and reflect the NSW Police Force submission that a consorting warning state: '(Name) is a convicted offender. Consorting with (name) is an offence.'	
Recommendation	90
3. The NSW Police Force amend its consorting policy, publications, standard operating procedures and training, to ensure retrospective consorting warnings are issued as soon as practicable after an incident of consorting, and not later than 14 days.	
Recommendation	93
4. The NSW Police Force develop and implement training for frontline officers involved in issuing consorting warnings and creating consorting Event records on COPS that includes: a) the different types of consorting warnings b) the difference between warnings and bookings c) how to ensure accurate record-keeping, including ensuring that all warnings are accurately recorded and any invalid warnings are identified and addressed according to the Consorting SOPs.	
Recommendation	94
5. The NSW Police Force design and implement a quality assurance process for the ongoing use of the consorting law. This process should be implemented within each command or relevant organisational unit and must ensure: a) accurate record-keeping b) that correct procedures are followed if invalid warnings are identified, and c) that NSW Police Force consorting policy and guidelines are complied with.	
Recommendations	96
6. On request, whether made at a police station, in writing, or to the Police Assistance Line, the NSW Police Force provide the following information in writing to a person issued with a consorting warning, or a person about whom a warning is issued: a) confirmation or otherwise of the validity of the relevant consorting warning b) details of the warning including the name of the person(s) warned, the name of the person(s) warned about, and the date and location of the warning.	
7. The NSW Police Force prepare and publish a fact sheet about the consorting law, on the NSW Police Force website. The consorting fact sheet should include relevant information about the consorting law and the police complaints system, and links to the Police Assistance Line and LawAccess NSW.	
8. The NSW Police Force refer to the requirements imposed by recommendations 6 and 7 in consorting policy, publications, standard operating procedures and training.	
Recommendation	98
9. The Attorney General propose, for the consideration of Parliament, an amendment to the consorting law to include a statutory time limit.	

Recommendations	100
10. The NSW Police Force include in the Consorting Standard Operating Procedures practical guidance to officers to avoid unnecessary disclosure of the 'convicted offender' status of a person about whom someone is warned.	
11. The NSW Police Force include in the Consorting Standard Operating Procedures instructions that officers are not to disclose the details of the indictable offence a person was previously convicted of when issuing a consorting warning to others about them.	
Recommendation	109
12. The Attorney General propose, for the consideration of Parliament, amendments to section 93Y of the Crimes Act to include the following additional defences:	
a) Consorting that occurs in the course of complying with an order by the State Parole Authority or with a case plan, direction or recommendation by a member of staff of Corrective Services NSW.	
b) Consorting that occurs in the course of the provision of transitional, crisis or emergency accommodation.	
c) Consorting that occurs in the course of the provision of a welfare or support service.	
Recommendations	109
13. The Attorney General propose, for the consideration of Parliament, an amendment to the consorting law to include a definition of 'family members' that includes kinship relations between Aboriginal people.	
14. The Attorney General propose, for the consideration of Parliament, an amendment to the consorting law to include a broad definition of 'health service' that includes therapeutic, rehabilitation, drug and alcohol services, and accessing social workers and other counselling services.	
Recommendation	110
15. The NSW Police Force amend its consorting policy, standard operating procedures, publications and training to encourage officers to exercise their discretion not to issue consorting warnings or commence criminal proceedings on the basis of the following types of consorting:	
a) Consorting that occurs in the course of complying with an order by the State Parole Authority or with a case plan, direction or recommendation by a member of staff of Corrective Services NSW.	
b) Consorting that occurs in the course of the provision of transitional, crisis or emergency accommodation.	
c) Consorting that occurs between family members where 'family members' is defined in a culturally inclusive way, with particular reference to the Aboriginal kinship system.	
d) Consorting that occurs in the course of the provision of a welfare or support service.	
Recommendation	117
16. The NSW Police Force amend its consorting policy, standard operating procedures, relevant publications, and training so that application of the consorting law is focused on the prevention of serious criminal offending.	
Recommendation	119
17. The NSW Police Force amend its consorting policy, standard operating procedures, relevant publications, and training so that:	
a) identification of people who are to be targeted for consorting should be intelligence-driven, and based on an identified risk that the relevant individuals are involved in recent or ongoing serious criminal offending, and	
b) use of the consorting law in the circumstances is likely to assist to prevent serious criminal offending.	
Recommendation	119
18. The NSW Police Force proscribe use of the consorting law to address or prevent minor offending, including offences outlined in the Summary Offences Act 1988, and reflect this in NSW Police Force consorting policy, standard operating procedures, relevant publications, and training.	
Recommendation	120
19. The Attorney General propose, for the consideration of Parliament, an amendment to the consorting law to insert an objects clause into Part 3A, Division 7 of the Crimes Act that defines the purpose of the consorting law to be the prevention of serious criminal offending.	
Recommendation	121
20. The Attorney-General require the preparation of a further public report by an independent body on the operation of the consorting law in Part 3A, Division 7 of the Crimes Act.	

Chapter 1. Introduction

This report relates to the operation of the new consorting law that commenced on 9 April 2012. This office is required to provide a report to the Commissioner of Police and the Attorney General on the operation of the new consorting law over a three year period ending 8 April 2015.¹⁴ The Attorney General is required to table our report in Parliament as soon as practicable following its receipt.

In relation to our role, the Hon. David Clarke MLC in the second reading of the Crimes Amendment (Consorting and Organised Crime) Bill 2012 which introduced the new law stated:

The old [consorting] provision has fallen into disuse and has been criticised in the past. This Report will provide an opportunity... to review the use of the new provision and to consider any further amendments or repeal of the provisions as necessary.¹⁵

1.1 The new consorting law

Consorting with reputed criminals has been an offence in New South Wales (NSW) since the late 1920s. Over the years, the offence fell into disuse.

On 9 April 2012, a new version of the consorting law commenced operation. This 'modernised' version is now contained in Part 3A, Division 7 of the *Crimes Act 1900*. Section 93X of that Act states that it is a criminal offence to continue to associate or communicate with two people who have both previously been convicted of an indictable offence, after receiving an official warning from police not to associate or communicate with them. Any person can be given an official warning not to consort with a 'convicted offender', whether or not the person being warned has a criminal record.

The new law extended the definition of 'consort' which now includes communicating by telephone, email or other electronic means as well as associating face-to-face.¹⁶ The penalties were significantly increased and the offence now attracts a maximum three year prison sentence and/or a \$16,500 fine.

A challenge to the constitutionality of the new law was launched in late 2012 and finalised in October 2014 when a majority of the High Court found the law to be valid.¹⁷ Specifically, the Court concluded by majority that firstly, section 93X of the Crimes Act did not impermissibly burden the implied freedom of communication on governmental and political matters in the Commonwealth Constitution; and secondly, that the Constitution did not include an implied freedom of association that could be contravened by section 93X.

1.2 Our role

When the new consorting law was introduced, a requirement was included that the operation of the law be reviewed by this office over a two-year period:

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.¹⁸

In 2013, in conjunction with the NSW Police Commissioner, we sought an extension to this review period because certain issues had limited police use of the consorting law and impacted on our ability to conduct an effective review. These issues included significant limitations in the consorting data, and the possible dampening effect on use caused by the recording mechanisms and the constitutional challenge. In November 2013, Parliament passed legislation increasing the review period to three years.

This report addresses the operation of the new consorting law from its commencement on 9 April 2012 until 8 April 2015.

Both Part 3A, Division 7 of the Crimes Act and the review provisions in Schedule 11 are reproduced in full at Appendix 1.

14. *Crimes Act 1900*, Schedule 11, Part 29.

15. The Hon. David Clarke MLC, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Council, 7 March 2012, p. 9093.

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

17. *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35. In the body of this report, we refer to this case as *Tajjour v New South Wales*.

18. *Crimes Act 1900*, Schedule 11, Part 29.

Chapter 2. Methodology

We employed a variety of research and consultation strategies to obtain information for this report. Our consultation strategies have largely been informed by NSW Police Force consorting data and our analysis of that data. We undertook extensive consultations with police officers as well as with a range of non-police stakeholders. In addition, we gathered information from sources such as government bodies, submissions made by members of the public and organisations, academic literature, media reports, comparable or relevant legislation, complaints and parliamentary debate.

2.1 Information from the NSW Police Force

We reviewed 1,968 records provided by the NSW Police Force from its Computerised Operational Policing System (COPS) database where police had electronically recorded their use of the consorting law. These records include information reports and consorting Event narrative reports. In addition to records of the consorting law use, we also received conviction histories for all people subject to the use of the consorting law during the review period.

Certain limitations are attached to the different types of records provided. These limitations meant that we were required to manually interrogate each individual record to attain accurate counts of numbers of official warnings and individuals subject to the consorting law in the review period. This will be discussed in further detail in chapter 6.

The NSW Police Force also provided relevant materials including consorting training documents, guidelines and standard operating procedures (SOPs).

The regular provision of data throughout the review has enabled us to identify pockets of high use, consorting operations and patterns of use which then informed our consultation strategy.

2.2 Police consultations

We implemented a state-wide consultation strategy which focused primarily on commands and squads with significant use. We also consulted commands where there was little or no use of the consorting law. In total, we conducted 47 separate consultations with police officers, involving 26 Local Area Commands (LACs), specialist squads housed in the State Crime Command, and we also consulted with the Police Transport Command. These consultations involved officers from a range of ranks, from Senior Constable to Chief Superintendent. This meant that we spoke to officers who were responsible for issuing consorting warnings in the field, as well as senior officers responsible for creating and implementing consorting strategies.

In the first year of the review period, we identified 10 LACs that appeared to have the highest use of the consorting law. We consulted directly with officers from each of these commands in 2013 and again in late 2014 and early 2015. We also consulted officers from the Gangs Squad and the Middle Eastern Organised Crime Squad (MEOCS) located in the Organised Crime Directorate of the State Crime Command. Their remit involved investigating criminal gangs and organised crime. During these consultations we spoke to officers from the rank of Senior Constable to Superintendent, occupying both front line and leadership positions. Overall, we spoke to more than 40 officers from Strike Force Raptor of the Gangs Squad. In addition, we attended quarterly meetings of the Consorting Standing Committee over three years. Members of this Committee include the Commander of the Gangs Squad, the Commander of Prosecutions, a Detective Inspector attached to Strike Force Raptor and an Inspector attached to Northern Beaches LAC.

We conducted face-to-face consultations with officers in metropolitan, regional and rural locations across New South Wales (NSW). We also undertook telephone interviews with officers in a range of locations, including remote locations in the Western Region.

During the early stages of the review, we observed police training on the consorting law.

2.3 Information from other government agencies

For particular research enquiries, we sought information from other government bodies and agencies. We received statistical information from the NSW Bureau of Crime Statistics and Research in relation to people convicted of an indictable offence within a 10 year period and NSW population information from the Australian Bureau of Statistics.

In addition, we conducted consultations with Corrective Services NSW and Juvenile Justice NSW.

2.4 Issues paper and submissions

In November 2013, we released the 'Consorting Issues Paper: Review of the use of the consorting provisions by the NSW Police Force', which outlined police use of consorting for the first 12 months of the review period, as well as emerging issues and concerns. We invited comments and submissions in response to the information provided in the issues paper. We also developed a fact sheet and invited the broader community to participate in our review.

A total of 34 submissions, from 24 organisations and 10 individuals, were received in response to our issues paper. We reviewed each submission, identifying key themes as well as specific issues relating to the operation of the consorting law. Several additional consultations were conducted following this analysis. The information provided in submissions also helped to inform research strategies adopted during the review.

A list of the individuals and organisations who provided submissions is located in Appendix 2 of this report.

2.5 Consultations with community groups, service providers and government bodies

We conducted 32 consultations with various organisations and individuals, including face-to-face and telephone interviews. The organisations consulted included community and welfare services, community legal centres and government agencies. We also spoke to a number of people who had been charged with consorting and their legal representatives.

In several locations where we undertook police consultations, we identified key community groups and organisations and sought their views on the consorting law and its impact within their community.

2.6 Charges and court observations

Forty-two people were charged with a total of 46 consorting offences under section 93X of the *Crimes Act 1900* during the review period.¹⁹ For each charge, we accessed the charge details, facts sheets and briefs of evidence where available. For any charges finalised within the review period, we also received sentencing information.

For hearings, including sentencing hearings, relating to charges laid during the review period, we requested the transcript from the relevant court. Where possible, we attended and observed court proceedings.

2.7 Academic literature

We reviewed a range of academic literature on consorting laws including material on its history and its context within the criminal justice system, and legal analyses. We also reviewed relevant academic literature on preventive justice measures, recidivism, specific criminal justice responses to disadvantaged and vulnerable groups and organised and gang-related crime.

2.8 Parliamentary and public debate

We reviewed Hansard where consorting was discussed or debated, any media reports on consorting, and other published commentary relevant to consorting. This included articles in legal journals and submissions made to other bodies in relation to consorting.

2.9 Related laws

We researched other laws in NSW that limit or prevent associations between people. In addition, we conducted a comparative analysis of similar or relevant laws in other Australian jurisdictions.

19. Note that 47 charges were initiated, but the Court Attendance Notice relating to one charge was never served.

Chapter 3. Context and background

Built on colonial anti-vagrancy laws, the new consorting law introduced in 2012 is simultaneously located in policing practices of the 1920s and in the contemporary trend of preventive policing.²⁰ It remains a controversial offence which has been described as involving 'the criminalisation of ordinarily harmless and seemingly innocent behaviour in order to allow authorities to intervene at an early stage'²¹ and attempt to prevent or reduce future offending.

3.1 The historical context of consorting laws in New South Wales

The offence of consorting was first introduced in New South Wales (NSW) in 1929 through amendments to the *Vagrancy Act 1902* in response to concern about Sydney's 'Razor Gangs'.²² The Razor Gangs were organised criminal gangs based in East Sydney. The *Pistol Licensing Act 1927* had provided gaol terms for any person found carrying an unlicensed pistol, and as a consequence, gang members resorted to using razors as weapons.²³ Under the Vagrancy Act, it was an offence to habitually associate with reputed criminals, known prostitutes, or people convicted of 'having no visible lawful means of support'.²⁴ In the 1997 Final Report of the Royal Commission into the NSW Police Service it was noted that:

although this enabled police to crush the Razor Gangs, the special powers conferred later came to be an instrument for corruption and for the establishment of improper relationships.²⁵

The 1930s in Sydney saw the emergence of black markets with a proliferation of illegal betting and gaming, vice, and sly-grog markets.²⁶ The combination of the availability of illegal cash and the ability of the consorting law to be applied to a significant proportion of the inner city population provided a fertile environment for police corruption to flourish as individuals relied on police officers' personal discretion to avoid being charged.²⁷

The consorting law remained unchanged until the 1970 repeal of the Vagrancy Act and the introduction of the *Summary Offences Act 1970*, which contained an amended offence of consorting. During the 1970s it was an offence to associate with 'reputed prostitutes', 'reputed drug offenders or other reputed criminals', and those convicted of vagrancy.²⁸

In 1979, the Summary Offences Act was repealed and the consorting law was enacted within section 546A of the *Crimes Act 1900*. Under this section, it was an offence to knowingly habitually associate with a 'convicted offender'. A 'convicted offender' was defined as someone who had previously been convicted of an indictable offence. This reform shifted the definition of criminality away from an officer's understanding of a person's reputation to an objective and broader test.

From 1979 to 2012, habitual consorting was a summary offence providing a maximum prison sentence of six months and/or a fine of \$400.

'Habitually' was not defined in section 546A of the Crimes Act. As a result of the offence's summary status, a six month time limit from the date of the first incident of consorting to the date of charge applied.²⁹ In practice, police found it necessary to establish seven or more occasions of associating between two people within a six month period to satisfy the court that the consorting was 'habitual'. If found guilty, the defendant would often be subject to a short sentence or a small fine. The offence fell into disuse over time due to the significant police resources it required relative to the sentencing outcome, with few prosecutions in recent decades.

20. For a discussion of the historical development of consorting laws and their predecessors, see Andrew McLeod, *On the origins of consorting laws*, Melbourne University Law Review, 37, 2013, pp. 103–142.

21. David Brown et al., *Criminal Laws: Materials and commentary on criminal law and process of New South Wales*, The Federation Press, 6th edition, 2015, p. 101.

22. *Vagrancy (Amendment) Act 1929*.

23. Alex Steel, 'Consorting in New South Wales: Substantive offence or police power?', *University of New South Wales Law Journal*, 26, 2003, pp. 567–598.

24. Alex Steel, 'Consorting in New South Wales: Substantive offence or police power?', *University of New South Wales Law Journal*, 26, 2003, pp. 567–598.

25. Royal Commission into the NSW Police Service, *Final Report, Volume 1: Corruption*, May 1997, p. 43.

26. Royal Commission into the NSW Police Service, *Final Report, Volume 1: Corruption*, May 1997, p. 44.

27. Royal Commission into the NSW Police Service, *Final Report, Volume 1: Corruption*, May 1997, p. 43.

28. *Summary Offences Act 1970*, s. 25.

29. This was adjusted in 2006 via the *Crimes Legislation Amendment (Gangs) Act 2006*, which amended s.546A of the *Crimes Act 1900*, to allow a consorting charge to be commenced at any time within a 12 month period from the date of the commission of the offence.

In 2012, section 546A of the Crimes Act was repealed when the new consorting law was inserted into Part 3A, Division 7 of the Crimes Act by the *Crimes Amendment (Consorting and Organised Crime) Act 2012*. The new law commenced operation on 9 April 2012.

3.2 Increased concern about organised crime and criminal gangs

In the past decade, there has been a growing concern nationally about the operation of organised crime and criminal gangs, including Outlaw Motorcycle Gangs (OMCGs). In NSW, there has been a series of legislative responses that increase the number of tools and strategies available to police to tackle organised crime and criminal gangs including:³⁰

- the creation of new offences located in Division 5 of the Crimes Act relating to participation in a criminal gang³¹
- the introduction of 'control order' legislation allowing the Police Commissioner to apply to the Supreme Court to have an organisation declared to be a criminal organisation and have its members subject to strict controls relating to associating with each other, recruiting to the organisation and participating in certain industries³²
- the establishment of schemes for the licensing and regulation of the tattoo industry³³ and Combat Sports events³⁴
- restrictions on entry to licensed premises by OMCG members while wearing the 'colours' or insignia of their club³⁵
- amendments in 2013 to Part 7 of the *Firearms Act 1996* giving police the power to search without a warrant any person subject to a firearms prohibition order and any vehicle and premises they occupy, control or manage, and
- amendments in 2013 to the *Restricted Premises Act 1943* giving police the power to search certain premises for weapons and explosives without a warrant.³⁶

The Crimes Amendment (Consorting and Organised Crime) Act that introduced the new consorting law in 2012 contained a number of additional provisions aimed at organised crime and criminal gangs. This Act also increased penalties for directing the activities of a criminal group and introduced a new offence of receiving 'a material benefit that is derived from the criminal activities of [a] criminal group'.³⁷

The Australian Crime Commission has continued to report on the growth in OMCG membership, the escalation in the level of violence within and between motorcycle gangs and the increase in the variety and sophistication of OMCGs involvement in criminal activity.³⁸ The Australian Crime Commission's 2015 report 'The Australian methylamphetamine market: The national picture' notes the involvement of members of different OMCGs in the importation, manufacture and trafficking of the drug methylamphetamine, or 'ice'.³⁹

In a 2013 statement, the Executive Director of the Australian Crime Commission declared:

OMCGs remain one of the most high profile manifestations of organised crime, and they have an active presence in all Australian States and Territories.

During 2012, there were 44 active OMCGs in Australia, comprising of 4,483 individuals (excluding associates and prospects). This represents an increase of 53 per cent since 2007.⁴⁰

The legislative responses to organised crime and criminal gangs have been reinforced with reorganisation of police resources both nationally and in NSW. On 27 March 2009, five days after a brawl at Sydney airport between members of the Hells Angels and Comanchero OMCGs, Strike Force Raptor was launched by the NSW Police Force 'to target the illegal activities of and prevent violence between Outlaw Motorcycle Gangs. The Strike Force conducts high impact pro-active policing strategies targeting OMCG members and their associates'.⁴¹ Strike Force Raptor is part of the NSW Police Force Gangs Squad.

30. For a useful summary of anti-gang laws in all Australian jurisdictions, including NSW, see NSW Parliamentary Research Service, *Anti-gang laws in Australia*, Issues Backgrounder No. 5, December 2013.

31. *Crimes Legislation Amendment (Gangs) Act 2006*.

32. *Crimes (Criminal Organisations and Control) Act 2012*. This type of legislation was first introduced in 2009 but repealed and replaced in 2012 following a successful High Court challenge.

33. *Tattoo Parlours Act 2012*.

34. *Combat Sports Act 2013*.

35. Liquor accord provisions are located in the *Liquor Act 2007*, Part 8 and Liquor Regulation 2008, cl. 53K.

36. The NSW Ombudsman is required to keep under scrutiny certain provisions of the 2013 amendments to the *Firearms Act 1996* and the *Restricted Premises Act 1943*. Separate reports will be provided to the Attorney General and the Commissioner of Police in 2016.

37. *Crimes Act 1900*, s. 93TA.

38. Australian Crime Commission, *Crime Profile Series – Outlaw Motorcycle Gangs*, July 2013, pp. 2–3.

39. Australian Crime Commission, *The Australian Methylamphetamine Market: The National Picture*, 2015, p. 11.

40. Paul Jevtovic APM (Australian Crime Commission Executive Director), *OMCG activity in QLD*, media statement, 4 October 2013.

41. NSW Police Force, *Strike Force Raptor*, Intranet Bulletin, 17 February 2015.

Additionally, the NSW Police Force is part of a multi-agency national task force named Operation Morpheus created by the Serious and Organised Crime Coordination Committee of the Australian Crime Commission and comprising all state and territory police forces and certain federal agencies such as the Australian Tax Office and the Department of Immigration and Border Protection. Operation Morpheus is designed to continue and expand the work of the Attero National Task Force, which targeted the Rebels OMCG from 2012 to 2014.

3.3 Consorting laws in other states and territories

At the time of writing, consorting was a criminal offence in most Australian states and in the Northern Territory.⁴² All jurisdictions have modernised their respective consorting laws, except Tasmania, where it remains an offence to consort with 'reputed thieves'.⁴³

Apart from NSW and South Australia, the other jurisdictions have tailored their consorting laws to specific offending groups or those convicted of more serious offences. 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 offence of consorting contained in the *Criminal Code* (WA) is aimed at preventing convicted drug traffickers and child sex offenders from continuing to offend by prohibiting them from consorting with people with similar convictions.⁴⁴ On 6 August 2015, a new version of the consorting law commenced in South Australia that is very similar to the NSW law, although it carries a maximum penalty of two years imprisonment rather than three years, and prosecutions must be commenced within two years from the date the offence is alleged to have been committed.⁴⁵

In October 2015, the Victorian Parliament decided to repeal the Victorian offence of consorting that sought to criminalise habitually associating with people who had been found guilty of, or who were reasonably suspected of having committed, an organised crime offence.⁴⁶ This offence will be replaced with a new consorting offence that seeks to target unlawful associations with people previously tried on indictment for an offence carrying a maximum penalty of five years imprisonment or more.⁴⁷ This is a narrower class of people than in the NSW legislation.

The NSW and South Australian consorting laws have the broadest reach in the country in terms of the class of people a person can be charged for associating or communicating with.

3.4 Immediate background to the introduction of the new consorting law in 2012

A spate of shootings took place across Sydney during late 2011 and 2012. The extensive media coverage of these incidents heightened public concern about gun violence and its suspected connection to criminal gangs. The number of incidents of drive-by shootings in NSW increased from 41 in 1995 to 100 in 2011, while most other categories of crime involving firearms significantly decreased or remained stable.⁴⁸ According to analysis by the NSW Bureau of Crime Statistics and Research (BOCSAR):

...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 to December 2012. Generally speaking the pattern has been one of surges in the frequency of such incidence followed by periods of relative quiescence.⁴⁹

42. Consorting is not an offence in Queensland and the Australian Capital Territory.

43. *Police Offences Act 1935* (Tas), s.6.

44. *Criminal Code* (WA), ss. 557J and 557K.

45. *Summary Offences Act 1953* (SA), s.13. The *Statutes Amendment (Serious and Organised Crime) Act 2015* (SA) repealed and replaced the previous consorting offence. The new version commenced on 6 August 2015. The *Summary Procedure Act 1921* (SA), s.52(1)(b) determines the time limit within which prosecutions must be commenced.

46. *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015* (Vic). The Act will repeal s.49F of the *Summary Offences Act 1966* (Vic). It will commence on 1 July 2016 or earlier, if an earlier date is proclaimed: *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015* (Vic), s.2.

47. *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015* (Vic), s.124D. The new Victorian consorting offence will be inserted into the *Criminal Organisations Control Act 2012* (Vic).

48. Emma Birdsey, NSW Bureau of Crime Statistics and Research, *Criminal offences involving firearms in New South Wales, 1995–2011*, Crime and Justice Statistics: Bureau Brief, Issue Paper No. 82, October 2012, p. 8.

49. Jacqueline Fitzgerald, NSW Bureau of Crime Statistics and Research, *Non-fatal shootings in NSW*, Crime and Justice Statistics Bureau Brief, Issue Paper No 85, April 2013, p. 7.

On 14 and 15 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'.⁵⁰ These 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. The Premier stated at the time:

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.⁵¹

3.5 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.⁵² The Committee outlined its concerns and referred a number of questions to Parliament including the potential for the proposed consorting law to:

- create discrimination against those who have been previously convicted of indictable offences, and
- criminalise individuals who may not have committed any offence.⁵³

The Committee also noted that 'indictable offences form the majority of offences in NSW and, as such, a sizeable amount of the population has been convicted of an indictable offence'.⁵⁴ Data provided to this office by BOCSAR established that in the 10 years to 30 June 2014 there were just over 205,000 people convicted of an indictable offence in NSW.⁵⁵

During parliamentary debate, much of the discussion about potential use of the consorting law was in the context of the policing of gangs and organised crime.⁵⁶ 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'.⁵⁷

Concerns about possible inadequacies in the list of defences were debated. 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.⁵⁸

It was also noted that the consorting law may disproportionately impact on Aboriginal or Torres Strait Islander people due to their well documented over-representation in the criminal justice system.⁵⁹

3.6 Parliamentary intention

In the second reading speech for the Bill that introduced the new consorting law, the Hon. David Clarke (the Parliamentary Secretary speaking on behalf of the Minister for Police) said that the Bill 'modernises the offence of consorting, as well as extending and clarifying its application'.⁶⁰ The new consorting law was intended to provide guidance about the meaning of 'habitual consorting' and the circumstances in which the law could be used by police.

In this speech, the Parliamentary Secretary stated that the Bill as a whole 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'.⁶¹

50. The Hon. Barry O'Farrell (Premier of NSW), *New Laws to Tackle Drive-by Shootings*, media release, Sydney, 13 February 2012.

51. The Hon. Barry O'Farrell (Premier of NSW), *New Laws to Tackle Drive-by Shootings*, media release, Sydney, 13 February 2012.

52. The functions of the Legislation Review Committee with respect to Bills are outlined in the *Legislation Review Act 1987*, s.8A.

53. Legislation Review Committee, NSW Parliament, *Legislation Review Digest No. 10/55*, Sydney, 21 February 2012, p. 8.

54. Legislation Review Committee, NSW Parliament, *Legislation Review Digest No. 10/55*, Sydney, 21 February 2012, p. 8.

55. NSW Bureau of Crime Statistics and Research, NSW Criminal Courts Re-offending Database June 2004 to June 2014, Adults convicted of an indictable offence, excluding those dealt with under s.10 *Crimes (Sentencing Procedure) Act 1999*, appearances in Children's Court and people aged under 18 at finalisation, unpublished data; Australian Bureau of Statistics, *Population Projections, Australia, 2012 (base) to 2101*, Table B1. Population projections, By age and sex, New South Wales – Series B', time series spreadsheet, cat. no. 3222.0, ABS, Canberra, 2013.

56. For example, the Hon. David Clarke MLC, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Council, 7 March 2012, pp. 9091–9103.

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

58. David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9105–9107.

59. David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9100. The NSW Young Lawyers also raised this concern: see The Law Society of NSW Young Lawyers, *NSW Young Lawyers concerned about new 'consorting' laws*, media release, Sydney, February 2012.

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

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

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'.⁶² Accordingly, the second reading speech emphasised that the intention of the new consorting law was to prevent the 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.⁶³

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

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.⁶⁴

In response to the High Court's upholding of the constitutionality of the new consorting law in October 2014,⁶⁵ the Attorney General said that:

The anti-consorting laws give police the powers they need to disrupt and dismantle criminal organisations, including outlaw motorcycle gangs.⁶⁶

This is consistent with the former Premier's media release at the time the laws were introduced, in which the package of reforms was linked to activity by criminal groups.⁶⁷

The stated intention of the consorting law appears to have been expanded in more recent comments. In August 2013, the Police Minister described the updated consorting offence as being necessary 'so that the police could tackle both street level and organised crime'.⁶⁸ In October 2013, the Attorney General explained that the provisions are aimed at 'detering people from associating within a criminal environment'.⁶⁹ Additionally, in submissions to the High Court filed on behalf of the state of NSW, the Solicitor General stated that 'the policy end or objective of section 93X is the prevention of crime'.⁷⁰ These statements appear to indicate support for use of the consorting law beyond organised crime and criminal gangs.

3.7 NSW Police Force consorting policy

The NSW Police Force made a policy decision not to limit use of the consorting law to organised crime or criminal gangs. In practice, police use the consorting law as a tool against behaviour ranging from minor street crime to the most serious offences. Police *Consorting Standard Operating Procedures (Consorting SOPs)* reflect this broader view of the law, noting that:

Police need to make a judgement about whether the observed behaviour reaches the level sought to be addressed by the legislation, that is, behaviour which forms or reinforces criminal ties.⁷¹

Advice to police officers about the new consorting law notes that it provides an additional tool to combat organised crime and criminal groups but will also prove valuable 'for both front line police officers and specialist commands when targeting high-risk and recidivist offenders within their respective areas'.⁷²

Additionally, the NSW Police Force has made a policy decision that unless there are exceptional circumstances, the occasions of consorting must fall within a six month period if charges are to be laid; and that charges are not to be laid against children under the age of 16 years or in matters where the consorting involves a person whose conviction is older than 10 years.⁷³ This policy advice, however, does not prevent police from giving official consorting warnings to children and young people. Use of the law in relation to children and young people will be discussed in this report at chapter 8.

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

63. The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, pp. 9092–9093.

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

65. *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35.

66. The Hon. Brad Hazzard (Attorney General and Minister for Police) and the Hon. Stuart Ayres (Minister for Police and Emergency Services), *High Court Green Light to Consorting Laws*, media release, Sydney, 8 October 2014.

67. The Hon. Barry O'Farrell (Premier of NSW), *New Laws to Tackle Drive-by Shootings*, media release, Sydney, 13 February 2012.

68. The Hon. Michael Gallacher MLC, NSWPD, (Hansard), Legislative Council, 29 August 2013, p. 23012.

69. The Hon. Greg Smith MP, NSWPD, (Hansard), Legislative Assembly, 30 October 2013, p. 25099.

70. *Tajjour v New South Wales*, submission of the State of NSW, 14 April 2014, p. 2.

71. State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures*, November 2014, p. 9.

72. NSW Police Force, *Consorting*, Intranet Strategy and Knowledge Maps, 31 March 2015.

73. State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures*, November 2014, p. 15.

3.7.1. Guidance to police officers about exercising their discretion when using the new consorting law

All police officers have discretion when deciding 'what should be done in a particular situation'.⁷⁴ This discretion resides in the individual officer and is to be exercised 'in good faith and be appropriate to the circumstances presented'.⁷⁵ NSW Police Force training, guidelines and SOPs provide a framework to support the officer when making these decisions but cannot direct how discretion is to be exercised.

The Consorting SOPs provide examples of situations where an officer 'may exercise [their] discretion not to commence criminal proceedings'.⁷⁶ One example is where a person plays a team sport with people who are 'convicted offenders' but the association is for the purposes of sport.

The 'Statement of values of members of the NSW Police Force' also stipulates that officers must act in a manner which preserves the rights and freedoms of individuals, makes efficient and economical use of public resources, and ensures that authority is exercised responsibly.⁷⁷

74. NSW Police Force, *Understanding LEPR: Power, Discretion and Responsibility*, 26 November 2014, p. 2.

75. NSW Police Force, *Understanding LEPR: Power, Discretion and Responsibility*, 26 November 2014, p. 2.

76. State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures*, November 2014, pp. 15–16.

77. *Police Act 1900*, s.7.

Chapter 4. The new consorting law

The new consorting law is set out in Part 3A, Division 7 of the *Crimes Act 1900*. It repealed and replaced the previous offence of consorting that was located in section 546A of the same Act. Section 93X sets out the offence of consorting, section 93W includes relevant definitions and section 93Y lists defences that may be raised by a person charged with habitually consorting.

The new consorting law changes the offence from a summary offence attracting a maximum penalty of six months imprisonment and a small fine, to an indictable offence carrying a maximum penalty of three years imprisonment and/or a \$16,500.00 fine. Under the former consorting provisions proceedings were required to be commenced within 12 months of the date of the commission of the offence.⁷⁸ Now, as an indictable offence, no time limits apply.

The new consorting law now provides guidance regarding the meaning of 'habitually'. Under the new law, 'habitually consorting' involves, at a minimum, consorting with two people on at least two occasions. Previously, 'habitually consorting' had been interpreted by the courts to involve seven or more occasions of consorting with one person within a six month period.

The new consorting law introduced six defences available to a person if charged, and extended the definition of consorting to include consorting by electronic means such as via the internet or telephone.

This chapter discusses the elements of the new consorting law in detail.

4.1 The offence

Any person, except children under the age of criminal responsibility, can be warned or charged with consorting.

Section 93X provides that it is an offence to habitually consort with at least two 'convicted offenders' on at least two occasions after receiving an official consorting warning in relation to each offender:

Section 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.

One or more occasions of consorting with each 'convicted offender' must follow the relevant warning. The offence is committed upon a person's 'second contact with the second convicted offender'.⁷⁹

4.2 The meaning of 'consort'

In order to modernise the consorting law, section 93W widened the definition of consorting to include consorting by 'electronic or other form of communication' in addition to consorting in person.⁸⁰ The term 'consort' is not otherwise defined in the new consorting law. When considering the constitutionality of the consorting law, the High Court in *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35, affirmed that 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 376.⁸¹ In *Johanson v Dixon*, the court established that consorting "means 'associates' or 'keeps company'", 'denotes some seeking or acceptance of the association on the part of the defendant', and need not occur for any unlawful intention or criminal purpose.⁸²

The fundamental ingredient of association of this kind is companionship, or seeking out the company of the other person. It follows that not every meeting with a convicted offender would qualify as habitually consorting.⁸³

78. *Crimes Act 1900*, s.546A(2).

79. State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures*, November 2014, p. 5.

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

81. *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 at 64 and 101.

82. *Johanson v Dixon* (1979) 143 CLR 376 at 383 and 395–6 citing *Brown v Bryan* [1963] Tas SR 1 at 2. Note that this position may be modified by statute. The Northern Territory regime, for example, provides that a warning may only be issued where the warning is considered likely to 'prevent the commission of a prescribed offence' involving two or more offenders and substantial planning and organisation: *Summary Offences Act* (NT), s.55A(4)(b).

83. *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 at 101 citing *Johanson v Dixon* (1979) 143 CLR 376.

Brief coincidental meetings will not amount to consorting. In hearing the appeal against one of the first convictions under the new consorting law in March 2014, the District Court quashed the Magistrate's finding of guilt. The court accepted that there was a reasonable possibility that two of the meetings alleged by police to be consorting were coincidental and, accordingly, the court was not satisfied beyond reasonable doubt that the offence of habitually consorting had been made out.⁸⁴

4.3 The meaning of 'habitually'

The term 'habitually' is not specifically defined in the new consorting law. However, section 93X(2) provides:

A person does not habitually consort with convicted offenders unless:

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

Previously, the courts interpreted 'habitually consorting' in section 546A of the Crimes Act to require seven or more occasions of consorting within a six month time period. At the time of writing there was no specific case law regarding the meaning of 'habitually' in the context of the new consorting law. It is anticipated that case law will develop in relation to the meaning of 'habitually consort' in the context of section 93X and that this will provide guidance to consorting prosecutions in future.

Current NSW Police Force policy provides that, unless exceptional circumstances exist, criminal proceedings should only be commenced under the new law if the incidents of consorting occur within a period of six months.⁸⁵

There is no policy in place regarding how long after the final occasion of consorting a charge may be brought by police. Charges can be brought at any time after the offence is committed. For example, if a person habitually consorts with two 'convicted offenders' within a six month period in 2012, the person could still be charged four years later.

4.4 Official warnings by police for consorting

Section 93X(3) provides:

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.

Any person over the age of 10 years can be issued a warning. There is no statutory time limit governing the time-frame during which an official warning is valid.

Official warnings can be issued by police:

- before an incident of consorting has been observed to try to prevent a person from consorting in the future with an identified individual (a 'pre-emptive warning')
- at the time the incident of consorting takes place, or
- at a time following the incident of consorting with a named individual or individuals (a 'retrospective warning').

There is no express power for police officers to detain a person for the purposes of giving an official warning.

4.5 The meaning of 'convicted offender'

Any person can be warned or charged by police for consorting if they associate or communicate with someone who is a 'convicted offender', as defined in the new consorting law.

Section 93W defines a 'convicted offender' to be 'a person who has been convicted of an indictable offence (disregarding any conviction for consorting).'⁸⁶

This definition in the new consorting law is the same as its immediate predecessor in section 546A of the Crimes Act.

84. *Green v R*, (Unreported, District Court of New South Wales, Flannery J, 3 March 2014).

85. State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures*, November 2014, p. 15.

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

While the definition of 'convicted offender' appears straightforward, there are a number of technical legal issues that create complexities and can make it difficult to determine whether a person is a 'convicted offender'.

For the purposes of the consorting law, a person is considered to be a 'convicted offender' if he or she was found guilty or pleaded guilty to a criminal offence and:

- the offence was indictable, and
- a conviction was recorded, and
- the conviction is not 'spent'.

4.5.1. What is an indictable offence?

There are two types of criminal offences in New South Wales (NSW) – indictable and summary. The majority of criminal offences are indictable offences. They include the most serious crimes, such as murder, but also less serious ones, such as shoplifting and causing minor property damage. Indictable offences generally include offences that may attract a maximum penalty of two years or more imprisonment. Many indictable offences may be dealt with summarily in the local court but,⁸⁷

An indictable offence does not change its character just because it is dealt with summarily so if the Local Court imposes a conviction for an indictable offence, the defendant becomes a 'convicted offender' for the purposes of consorting.⁸⁸

Appendix 3 reproduces the sections of the *Criminal Procedure Act 1986* that define an indictable offence.

4.5.2. Recorded convictions

A person is not a 'convicted offender' for the purposes of the new consorting law if a conviction for an indictable offence is not recorded by the court.⁸⁹

A court may find a person guilty of an indictable offence without proceeding to conviction.⁹⁰ Such a decision may be based on factors such as a person's good character, age, or health, or the trivial nature of the offence.⁹¹

The special circumstances for children and young people under 18 years

If a child aged between 10 and 15 years is found guilty of an indictable offence in the Children's Court, the court does not record a conviction with respect to the matter.⁹² The only way a child aged 10 to 15 years may have a conviction recorded against them is if they are found guilty in the District or Supreme Court of a 'serious children's indictable offence'.⁹³ Offences in this category are the most serious and include aggravated sexual assault and murder.⁹⁴ The superior courts have discretion as to whether or not to record a conviction for these offences.

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 or not to record a conviction.⁹⁵

4.5.3. Spent convictions

The *Criminal Records Act 1991* implements a scheme designed to 'limit the effect of a person's conviction for a relatively minor offence if the person completes a period of crime-free behaviour'.⁹⁶ Following completion of the crime-free period, the conviction is considered to be 'spent' and is not to form part of the person's criminal history.⁹⁷ The crime-free period is 10 years for adults and three years for children and young people.⁹⁸

87. *Criminal Procedure Act 1986*, Schedule 1, Tables 1 and 2.

88. NSW Police Force, 'Law Notes of 2013: 13/05 Consorting – who is a "convicted offender"?', *Police Monthly*, May 2013, p. 35.

89. NSW Police Force, 'Law Notes of 2013: 13/05 Consorting – who is a "convicted offender"?', *Police Monthly*, May 2013, p. 35.

90. *Crimes (Sentencing Procedure) Act 1999*, s.10.

91. *Crimes (Sentencing Procedure) Act 1999*, s.10(3).

92. *Children (Criminal Proceedings) Act 1987*, ss.5 and 14(1)(a).

93. *Children (Criminal Proceedings) Act 1987*, ss.3, 17 and 28(1)(a).

94. *Children (Criminal Proceedings) Act 1987*, s.3 and Children (Criminal Proceedings) Regulation 2000, cl. 32.

95. *Children (Criminal Proceedings) Act 1987*, s.14(1)(b).

96. *Criminal Records Act 1991*, s.3(1).

97. *Criminal Records Act 1991*, Part 2. There are a number of exceptions, for example *Criminal Records Act 1991*, s.15.

98. *Criminal Records Act 1991*, ss.9 and 10.

Certain convictions never become spent. These include convictions for sexual offences and those where a sentence of more than six months imprisonment is imposed.⁹⁹

There is provision in the Criminal Records Act to exempt proceedings before a court from the spent convictions regime.¹⁰⁰ This may make a person's conviction, despite being spent, relevant to their status as a 'convicted offender' under the consorting law. The NSW Police Force has made a policy decision that a person will not be considered a 'convicted offender' for the purposes of the consorting law if their conviction is 'spent'.¹⁰¹ The first appendix of the *Consorting Standard Operating Procedures* (Consorting SOPs) states:

It is important to note that a person who has a spent conviction for an indictable offence is not a convicted offender for the purposes of the new consorting offence.¹⁰²

This policy decision is reflected in the Consorting SOPs which state that criminal proceedings for consorting are not to be commenced 'unless the convicted offender has been convicted within the last 10 years'.¹⁰³ It is also reflected in the recording machinery in place in the Computerised Operational Policing System (COPS). The modifications to COPS implemented in June 2013 mean that an officer cannot record a consorting warning about a person in COPS unless that person has a relevant conviction within the previous 10 years.

4.6 Available defences

In the second reading speech, the Hon. David Clarke noted that the previous consorting law had been criticised for its potential to criminalise innocent relationships, and explained that the new law included six relationships that could be raised as a defence to a charge of consorting.¹⁰⁴ Section 93Y provides:

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.

The intention of including these defences was to direct police 'on what relationships should be exempt' from the operation of the consorting law.¹⁰⁵ While the defences are directly applicable to circumstances where a person is charged with consorting, they can also affect a police officer's decision to issue a consorting warning in circumstances where the officer is aware that a defence may be able to be raised if the matter proceeds to court.

It should also be emphasised that the defendant is required to satisfy the court that consorting in the circumstances specified in section 93Y was reasonable. This represents a reversal of the usual onus of proof in most criminal matters.

The list of defences is an exhaustive list. It is not within the ambit of the court to consider any other type of relationship or activity as a defence to a consorting charge. Furthermore, the terms 'family members' and 'health service' are not specifically defined.

99. *Criminal Records Act 1991*, s.7(1).

100. *Criminal Records Act 1991*, s.16(1).

101. See also *Criminal Records Act 1991*, s.12.

102. State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures*, November 2014, p. 22. The first Appendix – New Law: Consorting and organised crime offences, Michael Knight, Solicitor Executive Legal Support Unit, Police Prosecutions. This article is also published on the NSW Police Force Intranet at http://intranet.police.nsw.gov.au/__data/assets/file/0009/428616/New_Law_article_-_Consorting_and_organised_crime_offences.pdf, accessed 6 July 2015.

103. State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures*, November 2014, p. 15.

104. The Hon. David Clarke MLC, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Council, 7 March 2012, p. 9093.

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

Chapter 5. The controversial nature of the consorting law

The consorting law has been the subject of considerable public debate. Criticism, historical misuse, and the need to consider the possibility of amendments or even repeal, were raised in Parliament when the law was introduced and debated. These concerns continued to be expressed to us throughout the review period, and an understanding of them assists to provide context for the statistical overview of the consorting law's operation and discussion of the law's use presented in later chapters.

All of the 34 submissions we received in response to our issues paper, with the exception of that from the NSW Police Force, expressed serious concern about the law, with more than half of the submissions directly calling for its repeal. In its submission, the Office of the Director of Public Prosecutions summarised the reasons why the law is contentious:

Section 93X is a controversial offence for a number of reasons including:

- that it can criminalise otherwise innocent behaviour
- it seeks to control future conduct
- it potentially has a widespread impact as a significant proportion of the NSW population has been convicted of an indictable offence
- it may impinge upon the rehabilitation and privacy of convicted persons
- there is no available review process for persons issued with a warning
- a defence of reasonable excuse is not available
- once a warning is made it is made indefinitely, and
- the Police officer is not required to have a reasonable belief that issuing a warning will deter future criminal activity.¹⁰⁶

In order to provide the Parliament, the Attorney General and the Commissioner of Police with relevant information to assist decision-making regarding the consorting law, we outline the primary concerns expressed to us about the law in this chapter. Part of the discussion in the remainder of this report will address the extent to which these concerns were realised.

5.1 The potential criminalisation of everyday interactions between people

The criminal justice system traditionally responds to, investigates and punishes criminal conspiracies and acts, as they occur.¹⁰⁷ With prevention as its objective, the consorting law stretches these traditional boundaries by attempting to intervene before any criminal conspiracy or act has occurred. The consorting law provides police with broad discretion to proscribe relationships between people to prevent them socialising or communicating 'in a criminal milieu' and building or establishing criminal networks.

A common concern expressed in submissions is the potential impact of consorting laws on freedom of association. In its submission, the Rule of Law Institute explained the importance of interpersonal interactions by quoting the jurist Lord Bingham:

... man is a social animal, and for very many people the living of a contented and fulfilled life depends on the company and support of others, which they therefore should not be denied the opportunity to seek.¹⁰⁸

In addition, the right to freedom of association 'serves as a vehicle for the exercise of many other civil, cultural, economic, political and social rights – to meet for common purpose, to socialise, to assemble peacefully – and is therefore an essential component of any democratic society.'¹⁰⁹

106. Office of the Director of Public Prosecutions, Submission, *Consorting Issues Paper – Submission ODPP*, 28 February 2014, p. 1.

107. David Brown et al., *Criminal Laws: Materials and commentary on criminal law and process of New South Wales*, The Federation Press, 6th edition, 2015, p. 101.

108. Rule of Law Institute of Australia, Submission, *Review of the use of the consorting provisions by the NSW Police Force*, 26 May 2014, p. 2.

109. Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, p. 3.

A significant part of the controversy about the consorting law stems from the fact that police may issue consorting warnings without any requirement for a reasonable belief or suspicion that the associations or communications have a criminal purpose or will lead to criminal activity. Similarly, the offence of consorting does not require the prosecution to provide evidence that interactions or communications between individuals following a consorting warning had a criminal purpose. As a result, there is a widespread concern that the consorting law has the potential to criminalise otherwise innocent and everyday interactions.

Laws that limit associations between people to prevent future wrongdoing already exist, including apprehended violence orders and laws providing for the continued detention of high-risk offenders.¹¹⁰ Additionally, it is open to the courts to restrict the associations of people while on bail following a criminal charge¹¹¹, as part of a sentence¹¹² and while on parole.¹¹³ Although these laws aim to prevent future criminal conduct by limiting associations they can be distinguished from the consorting law insofar as they require police to provide submissions and evidence to a court about a specific risk linked to each individual before orders restricting communication or association can be made. In these circumstances, there is significant public concern that the consorting law has the potential to operate in an unreasonable manner and should therefore be repealed.

5.2 The ability of the consorting law to apply to a large proportion of the NSW population

The breadth of the consorting law attracted significant criticism¹¹⁴ and was generally described in submissions we received as 'extraordinary and unacceptable'.¹¹⁵

Any person, whether or not they have a criminal history, may be warned about consorting with a 'convicted offender' and subsequently charged under the consorting law. As outlined in chapter 4, 'convicted offender' is defined broadly in the law to include a person previously convicted of an indictable offence.

Indictable offences include most types of criminal activity; as a result, most people convicted of a criminal offence in New South Wales (NSW) will be included in the meaning of 'convicted offender' under section 93W, including those who have been convicted of relatively minor offences that may result in a small fine if proven.¹¹⁶

In many of the submissions we received and throughout the consultations we undertook, we were told that the consorting law should not be used to address these types of minor offences because they are not related to serious and organised crime or criminal gangs.¹¹⁷

5.3 Extent of police discretion

The intention of the consorting law was not to 'criminalise meetings where the defendant is not mixing in a criminal milieu or establishing, using or building up criminal networks'.¹¹⁸ Whether or not this occurs in practice may depend on the exercise of police discretion.

110. See, for example, *Crimes (Domestic and Personal Violence) Act 2007* and *Crimes (High Risk Offenders) Act 2006*.

111. *Bail Act 2013*, s. 25. Police also have the power to grant a person bail with a condition that restricts a person's associations: *Bail Act 2013*, s.43(2)(b).

112. *Crimes (Sentencing Procedure) Act 1999*, s.17A. Courts may make an intensive correction order enabling a correctional officer to direct a person not to associate with certain people: *Crimes (Administration of Sentences) Act 1999*, s.81 and *Crimes (Administration of Sentences) Regulation 2014*, cl. 187(d).

113. *Crimes (Sentencing Procedure) Act 1999*, s.51A. See also *Crimes (Administration of Sentences) Act 1999*, s.128A(2), which enables the Parole Authority to restrict the associations of people on parole.

114. NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 2; NSW Council for Civil Liberties Inc, Submission, *NSW Ombudsman Consorting Issues Paper: Review of the Use of the Consorting Provisions by the NSW Police Force Submission by the NSW Council for Civil Liberties*, 5 February 2014, p. 2; Office of the Director of Public Prosecutions, Submission, *Consorting Issues Paper – Submission ODPP*, 28 February 2014, p. 3.

115. NSW Young Lawyers, Submission, *Review of consorting provisions*, 7 March 2014, p. 4.

116. Public Interest Advocacy Centre Ltd, Submission, Submission in response to the *NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, p. 7.

117. Public Interest Advocacy Centre Ltd, Submission, Submission in response to the *NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, p. 7; Intellectual Disability Rights Service, Submission, *Review of the use of the consorting provisions by the NSW Police Force*, 7 March 2014, p. 5.

118. The Hon. David Clarke MLC, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Council, 7 March 2012, p. 9093.

The extent of police discretion was observed by Chief Justice French in *Tajjour v New South Wales* (in a dissenting judgment). He noted the capacity of the consorting law to apply 'to entirely innocent habitual consorting'.¹¹⁹ His Honour reasoned that while the 'actual application may be limited by the sensible exercise of the police discretion to issue an official warning',¹²⁰ section 93X itself 'does not discriminate between cases in which the purpose of impeding criminal networks may be served, and cases in which patently it is not'.¹²¹

Apart from the defences set out in section 93Y, there is nothing in the consorting law itself to guide police discretion, and evidence that the consorting in question did not involve 'establishing, using or building up criminal networks' is not relevant in any determination of guilt. Police are not required to suspect or prove any belief that the person targeted for consorting was in fact 'building criminal networks'. In a prosecution under section 93X, the magistrate must instead make a determination on the basis of whether the elements of the offence have been established - irrespective of any purpose attached to the conduct.

A number of submissions we received stated concerns about the reliance on police discretion for appropriate use, given that no assessment of risk is required, no evidence or suspicion of planning or undertaking criminal activity is necessary, and the consorting law contains no method of judging what use is appropriate.¹²²

Associate Professor Alex Steel remarked in 2003 in relation to an earlier version of the consorting law (with the same scope as the new law):

The degree of discretion granted to police and the extremely wide net cast by this offence creates an extremely fertile ground in which corrupt conduct and practices can flourish. It is in the interests of both the community and the police that the laws should provide both a sound and detailed basis for the exercise of police powers.¹²³

5.4 Unintended consequences on vulnerable or disadvantaged people

Kingsford Legal Centre submitted:

Targeting 'convicted offenders' for consorting, without needing to demonstrate that they are involved in organised crime, has the effect of entrenching discrimination against people who are already marginalised in our communities due to their interaction with the criminal justice system, as well as criminalising people who have not had any prior interaction with the criminal justice system.¹²⁴

The well recognised over-representation of Aboriginal or Torres Strait Islander (Aboriginal) people in the criminal justice system creates a substantially increased potential for Aboriginal people to be subject to the consorting law. The nature of relationships in Aboriginal communities, in combination with this over-representation, means that Aboriginal people are more likely to associate with friends, neighbours and other community members who have criminal convictions. Significant concern was expressed to us that the consorting law's potential to criminalise these relationships may work to further marginalise Aboriginal people.¹²⁵

To identify consorting, police generally must observe people associating with each other in public areas. The potential for consorting to disproportionately impact on people and groups who occupy public space is therefore significant. A number of organisations expressed concern to us about this issue. For example, Legal Aid NSW observed:

Consorting provisions rely on public space surveillance for their application. As a consequence, public space communities will be more frequently targeted by police under these provisions than other parts of our community.¹²⁶

119. *Tajjour v New South Wales*; *Hawthorne v New South Wales*; *Forster v New South Wales* [2014] HCA 35 at 45.

120. *Tajjour v New South Wales*; *Hawthorne v New South Wales*; *Forster v New South Wales* [2014] HCA 35 at 44.

121. *Tajjour v New South Wales*; *Hawthorne v New South Wales*; *Forster v New South Wales* [2014] HCA 35 at 45.

122. Community Legal Centres NSW, Submission, *Legislative review of the consorting provisions*, 23 March 2014, p. 7; UTS: Jumbunna, Submission, *Consorting Issues Paper: Review of the use of consorting provisions by the NSW Police Force: Division 7, Part 3A of the Crimes Act 1900*, 4 March 2014, p. 2; Women in Prison Advocacy Network, Submission, *Submission in Response to NSW Ombudsman Consorting Issues Paper*, 21 March 2014, p. 4.

123. Alex Steel, 'Consorting in New South Wales: Substantive offence or police power?', *University of New South Wales Law Journal*, 26, 2003, pp. 567 and 598.

124. Kingsford Legal Centre, Submission, *Legislative review of the consorting provisions*, 25 February 2014, p. 2.

125. Warringa Baiya, Submission, *Review of the new consorting provisions contained within Division 7, Part 3A of the Crimes Act 1900*, 21 March 2014, pp. 1-2; Consultation with Aboriginal Legal Service, 17 September 2014.

126. Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, p. 9.

Young people and people experiencing homelessness tend to spend time in public spaces and may be readily identified by police as consorting targets.¹²⁷ Additionally, people experiencing homelessness rely on community networks for support. Concern was expressed to us about the capacity of the consorting law to dismantle these networks and further marginalise people in these groups.¹²⁸

Many of the submissions we received noted that offenders rely on social connections to successfully reintegrate into the community.¹²⁹ The consorting law may prevent the formation or continuation of rehabilitative and protective relationships,¹³⁰ which in turn may work to further marginalise offenders and inhibit rehabilitation.¹³¹

In *Tajjour v New South Wales*, Chief Justice French of the High Court observed that:

[p]ersons could be convicted of habitual consorting even if their consorting was with ex-prisoners for the purposes of agitation for reform of the laws relating to consorting, sentencing, parole, prison conditions or the provision of post-prison rehabilitation services or half-way houses.¹³²

Further, the consorting law does not differentiate between people who committed an offence many years ago and current habitual offenders. This means that people who have gone on to contribute positively to society may be captured by the consorting law, by having their friends and associates warned about them, despite no longer having any involvement in criminal activity.¹³³

The consorting law may work to impede efforts by community organisations and government agencies to rehabilitate and reintegrate people into the community following imprisonment or detention. The Shopfront Youth Legal Centre commented:

People with criminal convictions already face barriers integrating into mainstream society ... Criminalising contact with convicted offenders may effectively require such offenders to be ostracised from the community, and may severely restrict their ability to form beneficial associations with non-offending peers. Particularly in the case of young offenders, this is extremely detrimental to their rehabilitation prospects, and ultimately detrimental to the community.¹³⁴

The reasons behind offending are complex. However, limited access to social supports can act as a barrier to successful reintegration into the community and is linked to a higher probability of reoffending.¹³⁵ We received several submissions that highlighted the importance of peer-mentoring programs in reducing reoffending and facilitating effective reintegration into the community. The consorting law could criminalise these types of associations and increase the social isolation of people who are already vulnerable.¹³⁶

The Brotherhood Christian Motorcycle Club submitted, in relation to a person who has been convicted of an indictable offence, that the consorting law effectively acts as a 'constant threat that any of their personal relationships can be terminated if a friend is given a warning',¹³⁷ impacting on the person's capacity for full and meaningful participation in the community.

127. Community Legal Centres NSW, Submission, *Legislative review of the consorting provisions*, 23 March 2014, p. 12; Homelessness NSW, Submission, *Submission to NSW Ombudsman regarding NSW consorting law*, February 2014, p. 3.

128. Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, p. 13; Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, p. 10; Intellectual Disability Rights Service, Submission, *Review of the Use of the Consorting provisions by the NSW Police Force*, 7 March 2014, p. 2; Kingsford Legal Centre, Submission, *Legislative review of the consorting provisions*, 25 February 2014, p. 2.

129. Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, p. 4; Women in Prison Advocacy Network, Submission, *Submission in Response to NSW Ombudsman Consorting Issues Paper*, 21 March 2014, p. 2.

130. Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, p. 15; Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, p. 7; NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 3.

131. Women in Prison Advocacy Network, Submission, *Submission in Response to NSW Ombudsman Consorting Issues Paper*, 21 March 2014, p. 3; Women's Legal Service NSW, Submission, *Consorting Issues Paper: Review of the use of consorting provisions by the NSW Police*, 14 March 2014, p. 1.

132. *Tajjour v New South Wales*; *Hawthorne v New South Wales*; *Forster v New South Wales* [2014] HCA 35 at 38.

133. Intellectual Disability Rights Service, Submission, *Review of the Use of the Consorting provisions by the NSW Police Force*, 7 March 2014, pp. 1–2.

134. The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 2.

135. NSW Parliamentary Research Service, *Reducing adult reoffending*, Briefing Paper No. 2/2015, February 2015, pp. 6–7.

136. NSW Young Lawyers, Submission, *Review of consorting provisions*, 7 March 2014, p. 6; Women in Prison Advocacy Network, Submission, *Submission in Response to NSW Ombudsman Consorting Issues Paper*, 21 March 2014, p. 2; Justice Action, Submission, *Review of the use of the consorting provisions by the NSW Ombudsman*, 27 February 2014, pp. 1, 6 and 8.

137. Brotherhood Christian Motorcycle Club, Submission, *Submission to the NSW Ombudsman regarding the NSW consorting laws*, 16 February 2015, p. 3.

5.5 Relevant legal avenues to protect human rights

The validity of the new consorting law was subject to a constitutional challenge that was finalised in October 2014 when the High Court, by majority, held the law to be valid. It was not the role of the High Court to assess the merits or fairness of the consorting law. Justices Crennan, Kiefel and Bell noted that '[t]he desirability of consorting provisions such as this is not relevant to the task before the Court'.¹³⁸ The High Court's assessment of the new law was limited to determining whether section 93X contravened implied rights protected under the Constitution.

There are only a small number of rights explicitly protected under the Constitution, such as the right to vote.¹³⁹ Some additional rights have been implied previously by the High Court on the basis of the Constitution's language and structure.¹⁴⁰ Of relevance is the High Court's previous recognition of the existence of an implied freedom of political communication that acts as a limitation on Commonwealth and State legislative power.¹⁴¹ However, while the High Court in *Tajjour v New South Wales* accepted that the new consorting law burdens this implied freedom of political communication, the majority found this burden to be 'reasonably appropriate and adapted' to serve a legitimate end, that is, the prevention of crime.¹⁴²

In submissions to the High Court it was also argued that Australia's human rights obligations as a signatory under the International Covenant on Civil and Political Rights (ICCPR) could provide the basis for finding the consorting law invalid. As a party to international human rights conventions, Australia has agreed to observe the rights they contain,¹⁴³ and the ICCPR guarantees the protection of human rights including freedom of expression, freedom of association and the presumption of innocence.¹⁴⁴ However, the protection of international human rights in Australia is limited where these rights have not been formally incorporated in domestic law.¹⁴⁵ Consequently, the High Court held that the right to association guaranteed under the ICCPR 'imposes no constraint upon the power of a State Parliament to enact contrary legislation'.¹⁴⁶

In the submissions we received, human rights concerns relating to the consorting law were generally discussed in the context of Australia's human rights obligations under the ICCPR. While there may be no foundation for the protection of the right to freedom of association in Australian law, the infringement of this freedom remained a concern to many people and organisations who provided submissions to this office during the review period.¹⁴⁷

138. *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 at 112.

139. Australian Constitution, s.41. Other rights in the Constitution include the protection against unjust acquisition of property, the right to trial by jury, freedom of religion, and prohibition of discrimination on the basis of state of residency: Australian Constitution, ss.51(xxxi), 80, 116 and 117.

140. Australian Human Rights Commission, *How are human rights protected in Australia?*, www.humanrights.gov.au/how-are-human-rights-protected-australian-law, viewed 24 February 2015.

141. *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

142. *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 at 133.

143. Australian Human Rights Commission, *Australia's Human Rights Obligations*, www.humanrights.gov.au/publications/last-resort-national-inquiry-children-immigration-detention/4-australias-human-rights, viewed 11 March 2015.

144. *International Covenant on Civil and Political Rights*, [1980] ATS 23, articles 14(2), 19 and 22.

145. *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 at 96.

146. High Court of Australia, Judgment summary, 8 October 2014; see also *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 at 4, 48, 96, 136 and 249.

147. Rule of Law Institute of Australia, Submission, *Review of the Use of the Consorting Provisions by the NSW Police Force*, 26 May 2014, p. 2.

Chapter 6. Statistical overview of the operation of the consorting law

In this chapter, we provide a statistical overview of the operation of the new consorting law for the three years between 9 April 2012 and 8 April 2015, including which police commands used the law, who was warned, who had others warned about them, and who was charged.

In this report, a person is described as being 'subject to the consorting law' if they were either issued with a consorting warning or had someone warned about consorting with them, or both. More than 3,300 people were subject to the consorting law on approximately 1,800 occasions. Analysis of police consorting records reveals that on these occasions more than 9,100 warnings were issued by police to 2,800 people, and 42 people were charged with the offence of consorting. The majority of people who were issued with a consorting warning also had others warned about consorting with them.

Nearly all Local Area Commands (LACs) used the consorting law on at least one occasion; however, sustained use was rare. The biggest single user of the consorting law was the NSW Police Force's Gangs Squad, which was responsible for half of all warnings and the majority of charges.¹⁴⁸

6.1 Data analysis methodology

In order to understand the extent to which the new consorting law was used to target organised crime and criminal gangs as contemplated during the second reading speech, we analysed use of the law by general duties police officers (sorted by LAC and region) separately from use by specialist squads tasked with investigating serious and organised crime and criminal gangs.¹⁴⁹ It is not possible to quantify the extent to which the consorting law has been used in relation to organised crime or criminal gangs by, for example, analysing individuals' criminal histories. This is because there are very few 'organised crime offences' as such; rather, people involved in organised crime may be charged with a range of criminal offences depending on their alleged criminal activity and the available evidence.

Our analysis, coupled with advice from general duties officers about the types of criminal activity they were attempting to address with the consorting law, provides insight into the extent to which the new consorting law has been used to target organised crime and criminal gangs. Underlying our approach is the assumption that specialist squads such as the Gangs Squad work within their operational remit and focus their resources exclusively on people suspected of involvement in criminal gangs.

Breaking down the data according to which commands used the consorting law provides a more informed picture of the law's operation and reveals notable differences in its use by different parts of the NSW Police Force. It also helps to inform discussion regarding use of the consorting law that has affected people from disadvantaged and vulnerable groups and use specifically targeting high-risk criminal gangs.

The new consorting law commenced operation before the NSW Police Force was able to implement modifications to the Computerised Operational Policing System (COPS) to enable effective computerised record-keeping of use. As a result, there are three different formats used by officers in the review period to electronically record each use in COPS. These are:

- information reports
- COPS Events (up to 23 June 2013)
- COPS Events (from 24 June 2013 onwards)

Each of these formats contains a 'narrative' or free-text section completed by the officer creating the record. The narrative contains a written description of the details of the interaction between the officer(s) and the member(s) of the public. For example, an officer will usually describe verbatim the content of the consorting warning given and the person's reply. The narrative may also include details of police observations at the time likely to be relevant to any future

148. The Gangs Squad leads the NSW Police Force's response to 'serious and organised gang related crime, particularly those involving Outlaw Motor Cycle Gangs and other Organised Crime Networks': NSW Police Force, *State Crime Command*, Intranet Bulletin, 24 December 2014.

149. We do not have information relating to the identity of the command responsible for issuing consorting warnings in 18 interactions. These interactions involve 21 unique people and have not been included in our analysis.

prosecutions such as whether or not the relevant people were engaged in conversation, how long they were under police observation, and where they were at the time. It will commonly include a reference to other police powers used at the time, such as personal search powers.

Our calculations of key data points in this report are based on an analysis of each record's narrative section. We have adopted this methodology on the assumption that the narrative most accurately reflects what occurred during the police interaction and because it allows comparison of information across the three formats used in the review period. As part of this process, we were able to identify any discrepancies between the COPS Event narratives and other data fields that form part of the whole record of an interaction. These discrepancies and other errors in record-keeping are discussed in chapter 9. In circumstances where the consorting Event narrative did not match the other data fields relevant to the interaction, for example, by failing to list all warnings issued, we presumed that the information recorded in the narrative was correct. In other cases, the consorting Event narrative did not provide enough information to determine what had occurred and we have relied on information available in other data fields. In relation to the charges of consorting, we received some briefs of evidence, analysed all facts sheets and either attended court hearings or scrutinised court transcripts.

The statistical overview presented here is based on our analysis of 1,968 consorting records from COPS. This comprises of 125 information reports, 939 Event records (up to 23 June 2013) and 904 Event records (from 24 June 2013 onwards).

In section 6.8 of this chapter we present analysis regarding the demographic information and conviction histories of people subject to use of the consorting law. Demographic information and conviction histories have been provided by the NSW Police Force. We have reported each person's age at the time they were first subject to the law and classified a person to be Aboriginal or Torres Strait Islander if the NSW Police Force has ever created a record where the person has identified themselves to police in this way.

Our criminal history analysis is based on each person's conviction history, not their charge history, and is reliant on COPS records from 1998 onwards. Our analysis is limited to charges that were proven and finalised on or before 7 May 2015, and does not include convictions that were quashed on appeal. We have analysed each person's conviction history at the date when they were first subject to use of the consorting law. In particular, we sought to establish the number of people with no criminal convictions, those with only minor criminal convictions and those with serious or extensive criminal conviction histories. We have also reported on the recency and type of convictions present in people's histories.

6.2 An outline of the relevant NSW Police Force organisational structure

At the time of writing, New South Wales (NSW) was divided into 76 LACs.¹⁵⁰ These LACs are organised into six policing regions. A map of NSW indicating the geographic borders and the names of the LACs for each region is included in Appendix 4. Each LAC is responsible for preventing crime, responding to all criminal activity, and other policing and community issues within the geographic borders of the command. Throughout this report police officers attached to these LACs are referred to as general duties police officers.¹⁵¹

There are many specialist commands and squads within the NSW Police Force that complement and support the work of the LACs. Of particular relevance to this report are the 12 specialist squads housed in the Organised Crime Directorate and the Serious Crime Directorate of the State Crime Command. These 12 squads are specifically tasked with investigating serious and organised crime and criminal gangs. They have a state-wide remit, conduct overt and covert investigations into their specialist areas, and provide operational support and intelligence to LACs as needed. Only two of these specialist squads have used the consorting law beyond a single use. These are the Gangs Squad and the Middle Eastern Organised Crime Squad (MEOCS). The Gangs Squad has a significant focus on high-risk Outlaw Motorcycle Gangs (OMCGs). The MEOCS targets 'Middle Eastern Organised Crime groups including those who have a propensity for violence'.¹⁵² Both of these squads have considerable proactive teams whose work complements specialist investigative and intelligence teams.

150. During the review period, nine LACs either changed their name or amalgamated. We refer to these commands by their current names. Eastwood and Gladesville LACs were amalgamated into Ryde LAC, Manly and Northern Beaches LACs were amalgamated into Northern Beaches LAC, Hurstville and St George LACs were amalgamated into St George LAC, City Central and The Rocks LACs were amalgamated into Sydney City LAC, and Goulburn LAC is now called The Hume LAC. At the time of writing, the Firearms and Organised Crime Squad in the State Crime Command changed its name to the Firearms Squad.

151. 'General duties police' refers to all regional commands (including South West Metropolitan Operations, Central Metropolitan Operations and North West Metropolitan Operations), Traffic and Highway Patrol, Police Transport Command and specialist units responsible for public order issues (including Major Events and Incidents Group, and Public Order and Riots Squad).

152. NSW Police Force, *State Crime Command*, Intranet Bulletin, 24 December 2014.

6.3 Summary of all use of the consorting law by NSW police officers

In section 3.7 of chapter 3, we reported that the NSW Police Force made a policy decision not to limit use of the consorting law to serious and organised crime and/or criminal gangs. The consorting data and our police consultations reflect this policy decision. In this section we will provide an overview of all use of the consorting law in the review period. In following sections we provide separate analyses of use of the consorting law by general duties police attached to LACs and by specialist squads in the State Crime Command tasked with policing serious and organised crime and criminal gangs.

Overall, 3,310 people were subject to the consorting law:

- 85% of these people were issued with at least one consorting warning (n=2,824)
- 77% of these people had others warned about consorting with them (n=2,545), and
- 62% of these people were both issued with a warning and had others warned about them (n=2,059).

Table 1 provides an overview of the use of the consorting law by all police during the review period.

Table 1. Summary of all use of the consorting law during the review period

Category	Total
Separate consorting interactions	1,818
Official consorting warnings recorded by police	9,155
Consorting charges	46

Source: NSW Police Force – COPS (Consorting merged dataset, 9 April 2012 to 8 April 2015).

Three quarters of these people were subject to use of the consorting law on a single occasion (n=2,486). Over half of the people who were issued with warnings only received one warning (n=1,487), and half of the 'convicted offenders' only had one person warned about consorting with them (n=1,274).

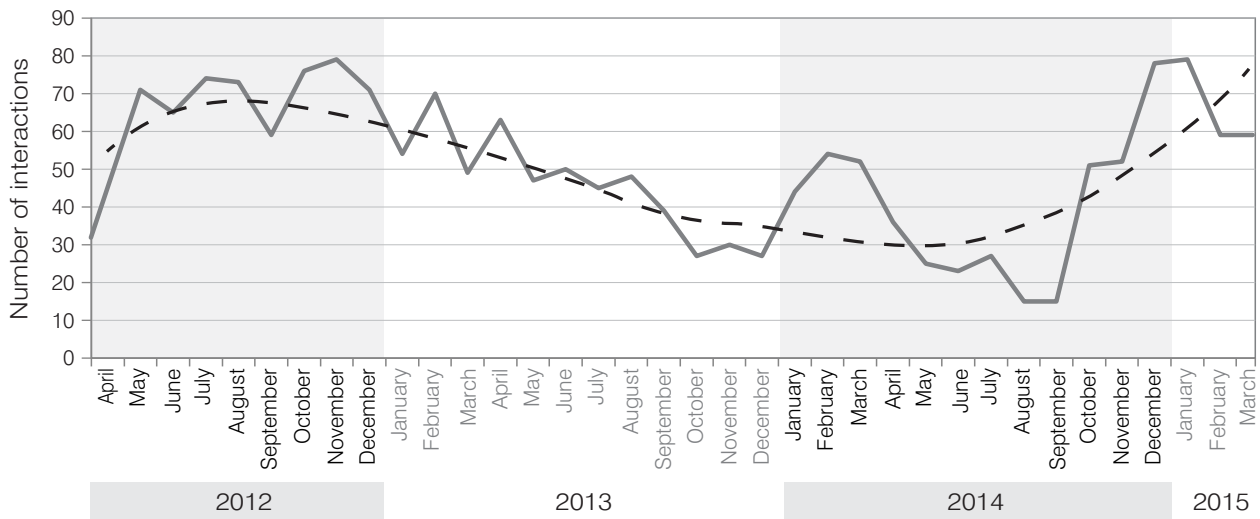
A small subset of people appears repeatedly in the data. For example:

- 12% appear in three or more separate recorded occasions of use (n=384)
- 5% appear in five or more separate recorded occasions of use (n=171).

Figure 1 shows that there was relatively high use of the consorting law when it commenced in April 2012 with a peak toward the end of that year. There was a consistent decrease in use throughout 2013 and 2014 until the constitutional challenge in the High Court was finalised in October 2014. Use increased following the finalisation of the High Court proceedings. This demonstrates the dampening effect of the constitutional challenge on the operation of the consorting law. This will be discussed further in chapter 7.

We were told by police that the use of the consorting law was impacted by recording issues that made it difficult to track use prior to the implementation of the modifications to COPS in June 2013. We discuss this further in chapter 9. Finally, some officers stopped using the consorting law after an initial period because they found it to be resource intensive with little tangible effect.

Figure 1: Number of consorting interactions by month



Note: April 2012 does not include the first eight days and March 2015 also includes the first eight days of April 2015.

Source: NSW Police Force – COPS (Consorting merged dataset, 9 April 2012 to 8 April 2015).

6.3.1. Warning type

Official consorting warnings may be written or spoken.¹⁵³ The majority of warnings given during the review period were spoken. Police provided written warnings in less than 3% of all occasions of use (n=49).

As explained in chapter 4, police can issue pre-emptive warnings and retrospective warnings. Pre-emptive warnings involve issuing a warning to a person that a certain individual is a ‘convicted offender’ and that consorting with him or her in the future may be an offence. We found that pre-emptive warnings were used in 4% of occasions of use (n=69); however, 29% of all warnings were pre-emptive (n=2,665).

Retrospective warnings are warnings given to people at a time subsequent to the alleged incident of consorting with a named individual. Overall, we found that there were 24 occasions of use involving 83 retrospective warnings. This amounts to less than 1% of all official consorting warnings.

6.3.2. Electronic consorting

One of the features of the new consorting law is that it now extends to consorting by electronic or other forms of communication.¹⁵⁴

Eight occasions of use involved a warning based on electronic consorting - less than 0.5% of all occasions. The Gangs Squad relied on electronic consorting on a single occasion.¹⁵⁵ No other squads issued warnings based on electronic consorting, and the remaining seven occasions of use involved general duties police.

6.4 Summary of all use of the consorting law by general duties police

General duties police attached to LACs were responsible for issuing 4,401 official warnings during the review period, amounting to approximately half the total number of warnings issued by police. These warnings were issued to 2,268 different people on 1,538 separate occasions. Overall, 2,601 different people were subject to use of the consorting law by general duties police officers, amounting to 79% of all people subject to use of the consorting law by all police.¹⁵⁶

153. *Crimes Act 1900*, s. 93X(3).

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

155. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

156. This includes 108 people who have also been targeted by a specialist squad.

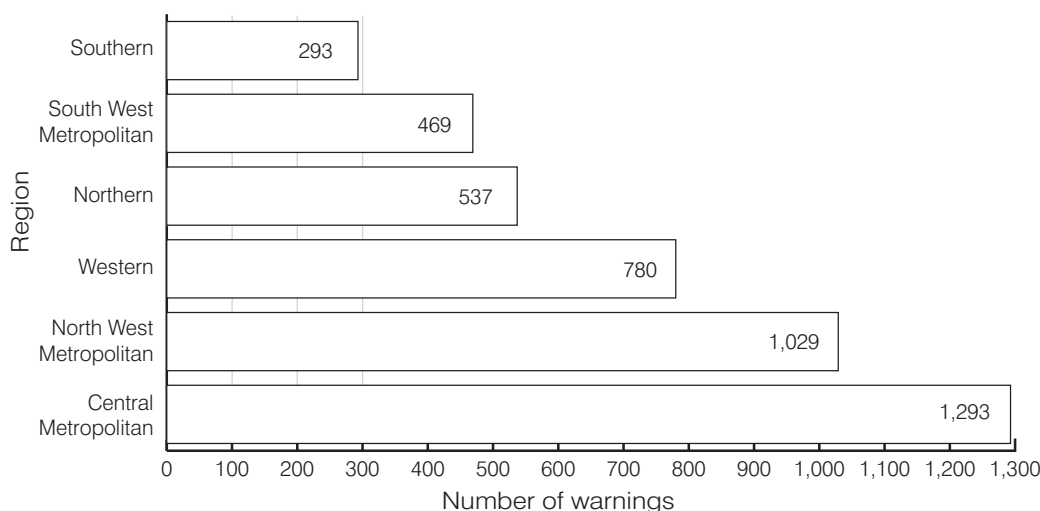
6.4.1. Spread and location of use by general duties police¹⁵⁷

While nearly every LAC used the consorting law on at least one occasion, use was concentrated in two Sydney metropolitan regions.¹⁵⁸ Just over half (53%) of all warnings issued by general duties police were issued by officers attached to LACs in the Central Metropolitan and North West Metropolitan regions (n=2,322). Additionally, use within these two regions was concentrated in a small number of LACs. Northern Beaches LAC was responsible for 62% of all the North West Metropolitan Region warnings (n=634), and Eastern Beaches LAC was responsible for 42% of all Central Metropolitan Region warnings (n=537).

The Western Region had the third highest number of warnings of the six regions. Again, this was led significantly by one LAC, Barwon, which was responsible for nearly half of all Western Region warnings (47%, n=368).

The least use occurred in the Southern Region. Wagga Wagga and Griffith LACs were together responsible for 40% of the total warnings issued by officers attached to Southern Region LACs (n=116).

Figure 2: Consorting warnings issued by general duties police according to region



Source: NSW Police Force – COPS (Consorting merged dataset, 9 April 2012 to 8 April 2015).

6.4.2. Characteristics of use by general duties police

The most common scenario for use by general duties police officers involved two people subject to the consorting law in one interaction with police (73%, n=1,121). The majority of these involved two people being warned about consorting with each other (70%, n=782).

Situations where more than five people were subject to the consorting law on one occasion were very rare (1% n=17). These few examples were most often characterised by general duties police officers targeting alleged OMCG members and their associates in groups.¹⁵⁹

Three quarters of all people subject to use of the consorting law by general duties police were only involved in one interaction with police (n=1,941). Less than two thirds of those issued with warnings were only ever warned once (n=1,223), and 68% of people who were warned were issued with two or fewer warnings (n=1,523). This means that the majority of people targeted by general duties police only came to police attention on one occasion for consorting and did not meet the threshold to be charged.

Use of the law was not uniform across the state. Table 2 indicates some regional differences. For example, nearly all people issued with warnings by Western Region officers also had their associates warned about them. A number of Western Region officers advised us that they chose to limit their use of consorting warnings to associations involving 'convicted offenders' spending time with other 'convicted offenders'.

¹⁵⁷. This analysis is based on 'submitting LAC', being the LAC that created the consorting COPS record.

¹⁵⁸. 74 out of the total of 76 LACs in NSW used the law at least once during the review period.

¹⁵⁹. 11 out of 17 are OMCG-related.

Table 2. Use by general duties police according to region

NSWPF Region	No. of warnings	No. of interactions	No. of people warned	No. of people warned about	No. of people both warned and warned about	Total no. of people	Average no. of warnings per person warned
Southern	293	128	202	202	172	232	1.5
South West Metropolitan	469	169	311	286	254	343	1.5
Northern	537	205	312	307	256	363	1.7
Western	780	269	337	326	305	358	2.3
North West Metropolitan	1,029	273	427	392	352	467	2.4
Central Metropolitan	1,293	494	736	678	519	895	1.8
Total	4,401	1,538	2,268	2,135	1,802	2,601	1.9

Note: The number of people is not mutually exclusive across all regions.

Source: NSW Police Force – COPS (Consorting merged dataset, 9 April 2012 to 8 April 2015).

6.4.3. Warning types used by general duties police

General duties police officers issued a spoken warning in 98% of the 1,538 consorting interactions. Although we were unable to count the total number of written warnings, we have identified only 25 occasions when written warnings were issued, amounting to only 1.6% of the total occasions of use by general duties officers.

Use of pre-emptive and retrospective warnings by general duties officers was also uncommon. Police officers attached to LACs issued a total of 99 pre-emptive warnings, to 37 individuals on 31 different occasions. Pre-emptive warnings were only used in 1% of all consorting interactions.

Retrospective warnings were even less commonly used by general duties police, with only 49 retrospective warnings issued in a total of 20 different occasions. These were issued to 23 individuals.

6.5 Summary of use of the consorting law by specialist squads

As outlined earlier in this chapter, there are 12 specialist squads whose remit is to investigate serious and organised crime and criminal gangs in NSW. Five of these specialist squads used the consorting law in the review period; however, three of these squads only used it on a single occasion. The significant users of the consorting law were the Gangs Squad and the MEOCS. Use by the MEOCS declined throughout the review period, and the reasons for this are discussed in chapter 7. The data indicate significant and sustained use by the Gangs Squad.

There were 796 people subject to use of the consorting law by officers from the specialist squads. In total, 4,701 official consorting warnings were issued by these officers during the review period. This amounts to just over half (51%) of the total number of official warnings issued by all police officers. These warnings were issued to 637 different individuals on 262 separate occasions.

Of the 796 people who were subject to use of the consorting law by officers from specialist squads:

- 80% were issued with at least one consorting warning (n=637)
- 61% had others warned about consorting with them (n=486), and
- 41% were both issued with a warning and had others warned about consorting with them (n=327).

Use by the Gangs Squad far outstripped use by any other squad or command within the NSW Police Force. The Gangs Squad was responsible for 4,527, or 49% of all consorting warnings issued by police, while the MEOCS was responsible for 158 warnings. Three other specialist squads issued 16 warnings between them. Gangs Squad officers issued warnings to people in larger groups compared to other squads and to general duties police officers. The Gangs Squad issued a significantly higher number of warnings per occasion, as indicated in table 3.

Table 3. Use by specialist squads in the State Crime Command

Specialist squad	No. of warnings	No. of occasions	No. of unique people warned	No. of unique people warned about	No. of unique people both warned and warned about	Total no. of unique people	Average no. of warnings per person warned
Gangs Squad	4,527	204	545	409	272	682	8.3
Middle Eastern Organised Crime Squad	158	55	108	92	69	131	1.5
Other State Crime Command squadst	16	3	7	7	7	7	2.3
Total	4,701	262	637	486	327	796	7.4

†Other State Crime Command squads include the Homicide Squad, the Firearms Squad and the Child Abuse Squad.

Note: The number of people is not mutually exclusive across all units.

Source: NSW Police Force – COPS (Consorting merged dataset, 9 April 2012 to 8 April 2015).

6.5.1. Characteristics of use by specialist squads

Gangs Squad

The most common scenario involved Gangs Squad officers stopping alleged OMCG members and associates travelling together on motorbikes or in vehicles (n=56).

The second most common scenario for use by the Gangs Squad involved officers approaching OMCG members and their associates in groups of two to four people in public places, restaurants and/or licensed premises and warning those present about consorting with each other (n=50).

In 9% of occasions of use, officers issued warnings to numerous people as they exited or entered premises alleged by police to be OMCG clubhouses (n=18).

On one occasion, Gangs Squad officers approached more than 30 alleged OMCG members and their associates in a licensed venue. More than 1,100 warnings were issued to the people present about each other, as well as pre-emptive warnings in relation to other known associates who were not present at the time.

In approximately one out of every five occasions of use (19%), officers from the Gangs Squad also issued pre-emptive warnings to alleged gang members present about consorting with other suspected gang members who were not present (n=38).

In nearly all use by the Gangs Squad, it is clear from the consorting Event narrative that police held the view that at least one of the people present was an OMCG member.

Middle Eastern Organised Crime Squad

Almost two thirds of all occasions when MEOCS officers used the consorting law involved stopping a vehicle on a public road and issuing warnings to the occupants about consorting with each other (n=35). The group usually involved two or three people.

The next two most common scenarios for use by MEOCS officers involved issuing warnings to people associating together in licensed premises and food outlets, as well as to people attending correctional centres to visit inmates (n=14).

6.5.2. Warning types used by specialist squads

Gangs Squad

A noteworthy difference between use of the consorting law by the Gangs Squad and use by other squads and LACs is the Gangs Squad's use of pre-emptive warnings. The Gangs Squad used pre-emptive warnings in 19% of all occasions of use (n= 38), involving 2,566 warnings. This means that more than half of all the warnings issued by the Gangs Squad were pre-emptive (57%). Pre-emptive warnings were often written, contained names and photographs of the relevant 'convicted offenders' and were given to people at times when they were not in the company of the people they were being warned about. On occasions where the Gangs Squad issued pre-emptive warnings, the average number given was 68.

Officers from the Gangs Squad issued retrospective warnings on only four separate occasions, totalling 34 warnings. Written warnings were used by the Gangs Squad on 24 occasions; 22 of these involved pre-emptive warnings, and two did not.

Middle Eastern Organised Crime Squad

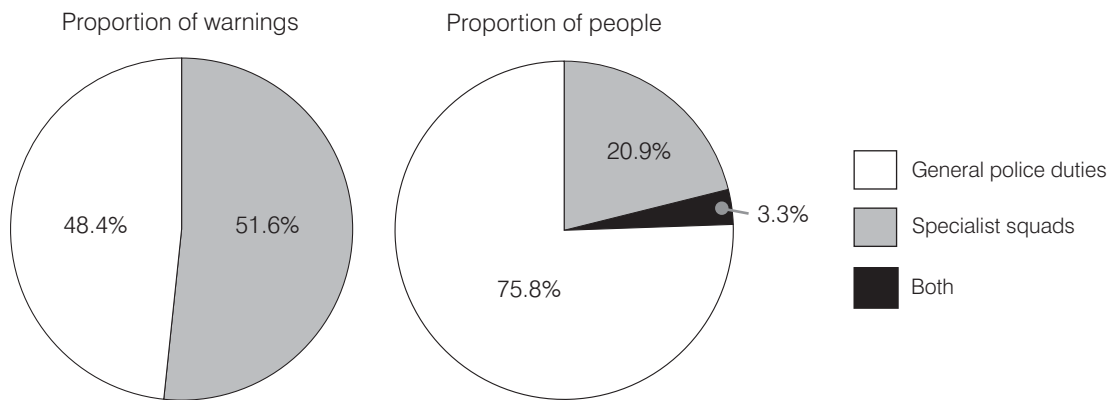
Officers attached to the MEOCS did not issue any written warnings, retrospective warnings or pre-emptive warnings. All 158 of the warnings issued by MEOCS officers were given orally and at the time of the police interaction and in relation to people present at the location.

6.6 Comparison of use by specialist squads and general duties police

There was an approximately even split between the number of warnings issued by general duties police officers compared to the number issued by the specialist squads. However, three quarters of all people subject to use of the consorting law, were affected only as a result of an interaction with general duties police, compared to one quarter affected as a result of being targeted by the squads.

There were 108 people who were subject to use of the consorting law by both specialist squads and general duties officers. For the purposes of this analysis, we have classified these 108 people into both groups. There are also 18 interactions, involving 21 individuals where we were unable to identify which NSW Police Force organisational unit created the record. Figure 3 illustrates this significant difference.

Figure 3: Proportion of all warnings issued and all people subject to use of the consorting law by specialist squad and general duties police



Source: NSW Police Force – COPS (Consorting merged dataset, 9 April 2012 to 8 April 2015).

The difference between the proportion of warnings issued and the proportion of people subject to use of the consorting law depicted above can be explained by the following:

- the tendency for the Gangs Squad to target individuals on more than one occasion
- the Gangs Squad’s use of the consorting law in relation to larger groups
- the Gangs Squad’s use of pre-emptive warnings.

These characteristics have resulted in high numbers of warnings being issued by the Gangs Squad per occasion and more people being warned on more than one occasion.

For example, 75% of the 2,601 people targeted by general duties police officers were only involved in one consorting interaction with police (n=1,941). This is compared to 66% of the 796 people targeted by the specialist squads (n=524). Conversely, only 5% of people (n=124) subject to use of the consorting law by general duties police appear in five or more interactions; compared to 12% of people subject to the consorting law by specialist squad officers (n=94). See table 4.

Table 4. Comparison of frequency with which each person is targeted

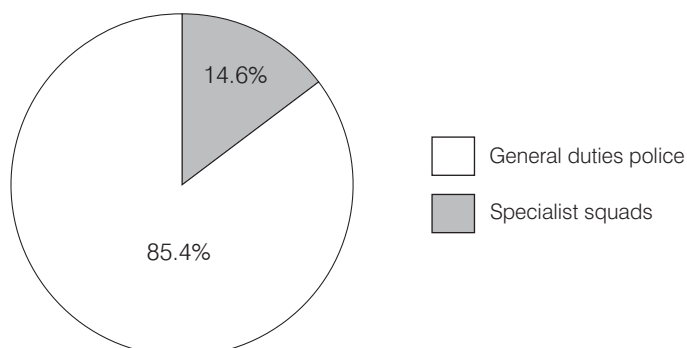
Scenario	General duties police (n=2,601)		Specialist squad (n=796)	
	No. of people	% of people	No. of people	% of people
Person appears in only one interaction	1,941	75%	524	66%
Person appears in five or more interactions	124	5%	94	12%

Note: The number of people is not mutually exclusive between specialist squads and general duties police.

Source: NSW Police Force – COPS (Consorting merged dataset, 9 April 2012 to 8 April 2015).

In addition, the number of occasions when the consorting law was used by general duties officers was almost six times more than that of specialist squads (see figure 4), despite an almost even split in the number of warnings issued (see figure 3).

Figure 4: Proportion of all occasions of use by specialist squads and general duties police



Source: NSW Police Force – COPS (Consorting merged dataset, 9 April 2012 to 8 April 2015).

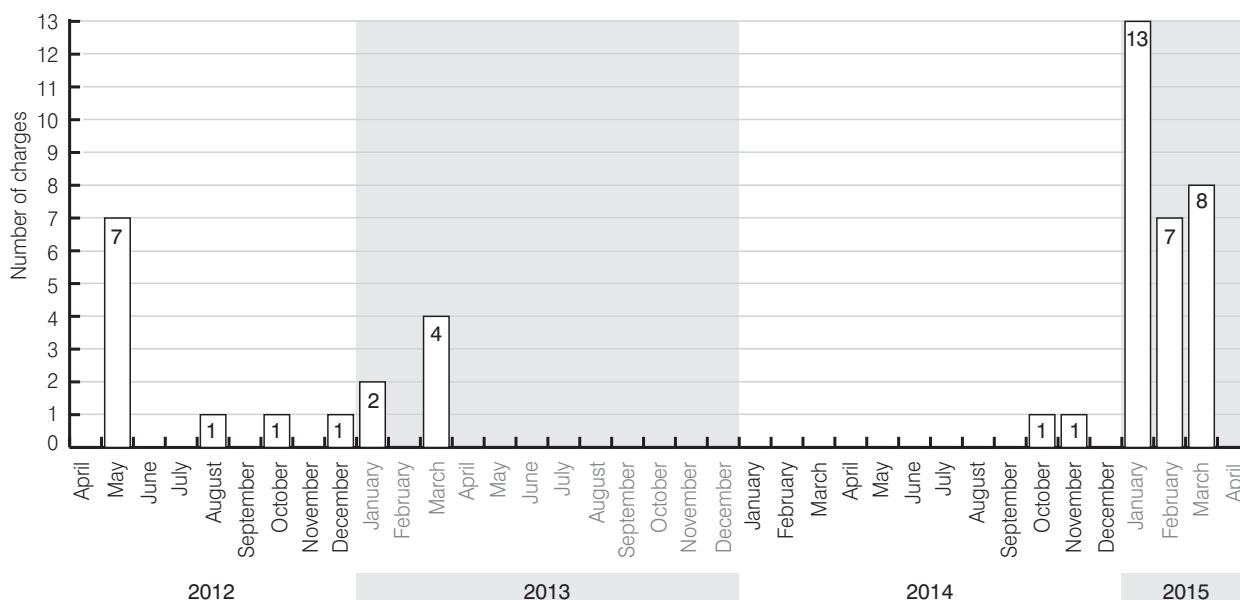
6.7 Consorting charges, prosecutions and outcomes

As at 8 April 2015, being the last day of the review period, 42 people had been charged with 46 charges of habitually consorting under section 93X of the Crimes Act. The majority of charges were brought by the Gangs Squad.

6.7.1. Timing and pattern of all consorting charges

Most of the charges for consorting were brought towards the end of the review period. Of the 46 charges, 28 were laid in the final three months of the review period, all by the Gangs Squad. No charges were brought between April 2013 and September 2014. Figure 5 shows the timing and pattern of consorting proceedings commenced over the review period.

Figure 5: Number of consorting charges by month during the review period



Note: April 2012 does not include the first eight days and April 2015 only includes the first eight days.

Source: NSW Police Force – COPS (Consorting charges, 9 April 2012 to 8 April 2015).

The challenge to the constitutionality of the consorting law, commenced in late 2012, appears to have had a significant impact on the number and timing of charges brought. Police told us that they were reluctant to commence proceedings at a time when the future existence of the law was in question. As demonstrated in figure 5, most of the charges were brought following the resolution of the challenge by the High Court in October 2014.

6.7.2. Which commands charged people

The Gangs Squad was responsible for charging 30 of the 42 people charged with consorting. In total, Gangs Squad officers brought 34 charges, with three people being charged multiple times.

The remainder of the charges were brought by the following LACs:

- Northern Beaches LAC charged five people
- Canobolas LAC charged three people
- Parramatta LAC charged two people
- New England LAC charged one person, and
- Sutherland LAC charged one person.

6.7.3. Characteristics of the Gangs Squad consorting prosecutions

All of the people charged by Gangs Squad officers were alleged OMCG members, nominees, former members or associates linked to one of three gangs. Of these, 25 were linked to the Nomads OMCG. In all proceedings, the 'convicted offenders' with whom the Gangs Squad officers allege the defendants consorted were also OMCG members or alleged to have direct links to a gang.

Prosecutions by the Gangs Squad, particularly the 27 commenced after the finalisation of the constitutional challenge, tended to rely on significantly higher numbers of official warnings and associations than the minimum required by the consorting law.¹⁶⁰ In some cases, police relied on up to nine associations with up to 10 'convicted offenders'.¹⁶¹

The people charged by the Gangs Squad with consorting were warned about consorting with people who had been convicted of a range of relatively serious and/or violent offences, including manslaughter, aggravated robbery, assault, intimidate police officer, and possession of a prohibited firearm.

Three people charged by the Gangs Squad had no criminal conviction history. However, one person without a previous criminal conviction, for example, was the alleged president of a Sydney Chapter of an OMCG when charged.

All the people charged by the Gangs Squad were men aged between 20 and 59 years, and three were Aboriginal.

6.7.4. The characteristics of general duties consorting prosecutions

During the review period, general duties police charged 12 people with consorting, each with a single charge. Three of these people were alleged to be OMCG nominees or associates and were charged with consorting with other alleged OMCG members by one LAC. These three charges followed joint work by that LAC and the Gangs Squad. The remaining nine defendants do not have any alleged links to organised crime or criminal gangs.

General duties police also attempted to prosecute one person with consorting via a Court Attendance Notice but were unable to locate him to serve the notice. COPS records indicate that he spent approximately six weeks in an acute care psychiatric unit at a local hospital around the time the service was attempted. The first person sentenced in NSW for consorting under the new law was a homeless man with terminal illness.¹⁶² Use of the consorting law with respect to people experiencing homelessness is discussed in greater detail in chapter 8.

Prosecutions by general duties police tended to rely on fewer occasions of consorting with fewer 'convicted offenders' than was the case for prosecutions commenced by the Gangs Squad. Four prosecutions relied on the

160. Section 93X(2) of the *Crimes Act 1900* requires consorting with a minimum of two 'convicted offenders' on at least two occasions with each 'convicted offender'.

161. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

162. See case study 7: *R v B*, Manly Local Court in section 8.2.4 of this report. A different person was sentenced earlier, however, that matter was the subject of a successful appeal.

minimum number of occasions of consorting with the minimum number of 'convicted offenders'.¹⁶³ The remaining five prosecutions relied on associations with just one additional 'convicted offender' or one additional association, for example, associating with three 'convicted offenders' on two occasions each.¹⁶⁴

The people charged with consorting by general duties police had been warned about consorting with people who had been convicted of offences such as stealing, malicious damage and larceny.

6.7.5. Outcomes in relation to consorting charges

At the time of writing, 34 of the 46 consorting charges had been finalised; 25 of these were brought by the Gangs Squad and the remaining nine charges were brought by general duties police. Section 93Y defences were not raised by any defendants.

Outcomes for Gangs Squad charges

Of the 25 finalised charges brought by the Gangs Squad, 22 charges were proven and three charges were not proven. Two of the unproven charges were withdrawn and the facts were combined in an alternative charge.¹⁶⁵ One person was found not guilty on the basis that the number of associations did not amount to consorting under the new law.¹⁶⁶

The majority of Gangs Squad prosecutions were found proven as a result of a guilty plea.¹⁶⁷ In 19 of the 22 charges proved in court, the court ordered people to enter into a good behaviour bond, typically for a period of 12 or 18 months. In four cases, the court made these orders without recording a conviction against the person, pursuant to section 10 of the *Crimes (Sentencing Procedure) Act 1999*. Three of these people had no prior convictions.¹⁶⁸ The majority of the good behaviour bonds were ordered under section 9 of the *Crimes (Sentencing Procedure) Act*. In six cases, the court fined people in addition to ordering that they enter into section 9 good behaviour bonds. These fines ranged from \$500 to \$2,500.

One person was sentenced to seven months' imprisonment, but this sentence was suspended. Another two people were sentenced to periods of imprisonment of less than six months.¹⁶⁹

In relation to 17 of the 22 proven charges, the court also made non-association orders as part of the sentence imposed upon the person. In addition, the court prohibited four people from visiting specified places, generally OMCG clubhouses. These non-association and place restriction orders followed requests to the court from the prosecution.

Outcomes for general duties charges

Of the nine finalised charges brought by general duties police, four were proven and five were not proven.

Three of the nine charges were withdrawn at court due to police error. The charges against two 16 year old boys were among the charges required to be withdrawn.¹⁷⁰

One person was found not guilty in the Local Court and another had his conviction quashed in the District Court. Both of these matters involved successful arguments that the associations alleged to be consorting involved coincidental or chance meetings.¹⁷¹

Of the four proven charges, two people pleaded guilty, and the court found two others guilty after defended hearings.¹⁷² Sentencing involved the court variously imposing a good behaviour bond,¹⁷³ a fine of \$100, a community service order of 100 hours, and a 12 month term of imprisonment. At the time of writing, the charge that resulted in a term of imprisonment was subject to appeal in the NSW Supreme Court.¹⁷⁴

163. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

164. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

165. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

166. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

167. Fourteen of the 22 Gangs Squad charges were proven as a result of guilty pleas. The pleas in relation to the remaining eight charges are unknown.

168. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

169. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

170. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

171. *R v Crowe* (unreported, Downing Centre Local Court, Magistrate Stapleton, 22 July 2013); *Green v R*, (unreported, District Court of New South Wales, Flannery J, 3 March 2014).

172. *R v O'Brien* (unreported, Manly Local Court, Magistrate Brydon, 7 November 2012), p. 3; *R v Forster* (unreported, Inverell Local Court, 2014).

173. *Crimes (Sentencing Procedure) Act 1999*, s.9.

174. In the matter of *R v Forster* (unreported, Inverell local court, 2014).

6.8 Overview of people subject to the consorting law

In order to gauge the proportion of people in NSW who fall within the definition of 'convicted offender', we asked the NSW Bureau of Crime Statistics and Research (BOCSAR) about the number of adults who were convicted of an indictable offence in NSW in the 10 years up to 30 June 2014. We also obtained NSW population data from the Australian Bureau of Statistics. Table 5 outlines the result of this analysis. More than 205,000 people in NSW are 'convicted offenders' for the purposes of the consorting law.¹⁷⁵

Table 5. Numbers and proportion of adult population in NSW convicted of an indictable offence over a 10 year period (30 June 2004 to 30 June 2014)

Age at 30 June 2014	Women		Men		Total	
	No. of people	% of NSW population for cohort	No. of people	% of NSW population for cohort	No. of people	% of NSW population for cohort
18-29 years	10,525	1.7%	48,457	7.6%	58,982	4.7%
30 years and over	27,793	1.2%	118,406	5.3%	146,199	3.2%
Total	38,318	1.3%	166,863	5.9%	205,181	3.5%

Source: NSW Bureau of Crime Statistics and Research, NSW Criminal Courts Re-offending Database June 2004 to June 2014, Adults convicted of an indictable offence, excluding those dealt with under s.10 *Crimes (Sentencing Procedure) Act 1999*, appearances in Children's Court and people aged under 18 at finalisation, unpublished data; Australian Bureau of Statistics, *Population Projections, Australia, 2012 (base) to 2101*, 'Table B1. Population projections, By age and sex, New South Wales – Series B', time series spreadsheet, cat. No. 3222.0, ABS Canberra, 2013, viewed 28 October 2014, [www.abs.gov.au/AUSSTATS/ABS@Archive.nsf/log?openagent&32220b1.xls&3222.0&Time%20Series%20Spreadsheet&8F704506C0ACEEDFCA257C310019E7CA&0&2012%20\(base\)%20to%202101&29.11.2013&Latest](http://www.abs.gov.au/AUSSTATS/ABS@Archive.nsf/log?openagent&32220b1.xls&3222.0&Time%20Series%20Spreadsheet&8F704506C0ACEEDFCA257C310019E7CA&0&2012%20(base)%20to%202101&29.11.2013&Latest).

In order to further understand the operation of the consorting law, we sought information about the demographics and criminal convictions from the NSW Police Force of the 3,310 people subject to the consorting law during the review period.

We compared the demographic and criminal conviction histories of people who were subject to use of the consorting law by general duties police, with those targeted by specialist squads. This comparison revealed some differences that are outlined below.

6.8.1. Demographic information

We do not have demographic information for 94 people and they are therefore excluded from this analysis.

Gender

More than 90% of people subject to use of the consorting law during the review period were male (2,966 males, compared to 249 females).

Age

Some people were subject to use of the consorting law on multiple occasions. Because the review period spans three years, some people who were initially identified as young people are now over 18 years of age. When discussing age in this report, we refer to the age at the time the person was first subject to use of the consorting law. In circumstances where the data show conflicting dates of birth, we have used the date of birth from the most recent record created by the NSW Police Force.

People subject to the consorting law were aged between 13 and 69 years at the time of their first consorting interaction with police.¹⁷⁶ Most people were aged between 18 and 30 years (52%). There was no significant difference between the median ages of those issued a consorting warning and those who had others warned about consorting with them.¹⁷⁷

175. Excluding people who permanently leave NSW or who are now deceased.

176. Police records indicate that one person was four years old and another was 114 when first subject to the consorting law. We consider these to be record keeping errors and have not included information about the ages of these people in our analysis. Therefore we do not have information relating to the ages of 96 people.

177. The median age for people who have received a warning is 28; the median age for people who have been warned about is 29.

Of the 3,310 people who were subject to the consorting law, 201 were aged between 13 and 17 years (6%). For the purposes of this report we have defined children and young people as those aged 10 to 17 years. There were 325 consorting warnings issued to children and young people and 251 warnings issued about children and young people to their friends and associates. More than three quarters of the warnings issued about children and young people were unlawful as they relied on a mistaken belief that the person was a 'convicted offender' at the time. This high error rate is discussed in chapter 8.

The consorting law was used in relation to children and young people in 57 different LACs across the state; however most of this use was concentrated in a handful of commands. Four LACs each issued over 20 warnings to children and young people, comprising more than one third of the total warnings for this cohort (n=120). These four LACs are all Sydney metropolitan LACs, with two in the Central Metropolitan Region and two in the South West Metropolitan Region.

The use of the consorting law in relation to children and young people by specialist squads was significantly lower than that by general duties police. Just seven of the people targeted by specialist squads were under 18 years of age.

Aboriginal and Torres Strait Islander status

People are classified as Aboriginal for the purposes of this review if the NSW Police Force has ever created a record where that person has identified themselves as Aboriginal. Aboriginal people comprise 2.5% of the total NSW population.¹⁷⁸ However, 37% of people who were subject to the consorting law were Aboriginal (n=1,193).¹⁷⁹ The proportion of women, children and young people subject to the consorting law who were Aboriginal is especially high.

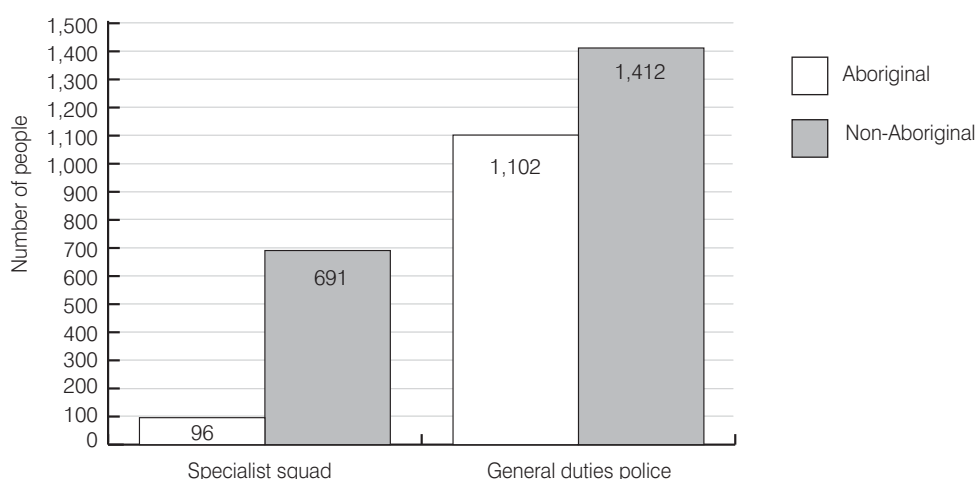
Of the 201 children and young people in the consorting dataset, 118, or nearly 60%, were Aboriginal.

A third of the adult men subject to the consorting law were Aboriginal (n= 962), whereas half of the adult women subject to the consorting law were Aboriginal (n=122).

Aboriginal people were also more likely to have others warned about consorting with them. Aboriginal people accounted for 38% of all people who were issued with an official warning for consorting (n= 1,057), and 42% (n=1,036) of all people who had an official consorting warning issued about.

We found a significant difference between the use of the consorting law in relation to Aboriginal people by specialist squads compared to general duties officers. Relatively few of the people subject to use of the consorting law by specialist squads were Aboriginal. See figure 6. Only 12% of those subject to use of the consorting law by specialist squads were Aboriginal compared to 44% of those targeted by general duties officers.

Figure 6: Comparative use between specialist squads and general duties police by Aboriginal status



Note: The number of people is not mutually exclusive between specialist squads and general duties police.

Source: NSW Police Force – COPS (Consorting merged dataset, 9 April 2012 to 8 April 2015).

178. 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.

179. This is based on whether a person has ever been identified as Aboriginal by the NSW Police Force. We do not have information in relation to the Aboriginal status of 95 people and they are therefore excluded from this analysis.

In addition, there was significant variation between regions and commands in the use of the consorting law by general duties police in relation to Aboriginal people. Table 6 below sets out this variation. The Central Metropolitan Region was responsible for use in relation to the highest number of Aboriginal people. However, this is also the region responsible for use against the highest number of people generally.

The Western and Southern Regions have the highest proportional use with respect to Aboriginal people. More than three quarters of those subject to use of the consorting law in the Western Region were Aboriginal, and 57% of those subject to use of the consorting law in the Southern Region were Aboriginal.

Table 6. Number of people subject to use of the consorting law by general duties police according to region and Aboriginal status

Region	No. of people who are Aboriginal	No. of people who are non-Aboriginal	Total people	% of people who are Aboriginal
Western	274	79	353	77.6%
Southern	127	96	223	57%
Northern	165	191	356	46.3%
Central Metropolitan	337	501	838	40.2%
North West Metropolitan	129	331	460	28%
South West Metropolitan	86	255	341	25.2%
Total	1,102	1,412	2,514[†]	43.8%

[†]We do not have demographic information for 85 people who have been targeted by general duties officers.

Note: The number of people is not mutually exclusive across all regions.

Source: NSW Police Force – COPS (Consorting merged data set, 9 April 2012 to 8 April 2015).

Use of the consorting law in relation to Aboriginal people is discussed further in chapter 8.

6.8.2. Analysis of the criminal convictions of people subject to the consorting law

Our criminal history analysis is based on each person's conviction history, not their charge history, and is reliant on COPS records from 1998 onwards. It is limited to charges that were proven and finalised on or before 7 May 2015, and does not include convictions that were quashed on appeal. We have analysed each person's conviction history at the date when they were first subject to the consorting law. In particular, we sought to establish the number of people with no criminal convictions, those with only minor criminal convictions and those with serious or extensive criminal conviction histories. We have also reported on the recency and type of convictions in people's histories.

As with the demographic analysis, there is insufficient information available in relation to 94 of the 3,310 people subject to use of the consorting law and these people have been excluded from this analysis. Our criminal conviction analysis therefore is based on 3,216 people.

Additionally, this analysis has assisted this office to determine the number of errors made by police in determining a person's 'convicted offender' status and therefore whether or not consorting warnings issued were valid. This is reported separately in chapters 8 and 9.

The consorting law is intended to be a crime prevention tool. Accurately preventing future offending is problematic, as the reasons people offend are complex and vary depending on age, gender, offence type and other factors. There is an enormous breadth of research on criminal behaviour and reoffending, however, there is no generally accepted theory of crime.¹⁸⁰ Notwithstanding this, there is support for the view that a general risk factor for future offending is past offending. BOCSAR publishes information about reoffending in NSW based on analysis of the NSW Reoffending Database.¹⁸¹ According to that research, 28% of adults convicted of a criminal offence in NSW in 2012 were convicted of a further offence within two years. The percentage of people exiting prison in 2012 who reoffend within the next two years was significantly higher, at 42%.¹⁸²

180. Don Weatherburn, *Arresting incarceration: Pathways out of Indigenous imprisonment*, Aboriginal Studies Press, 2014, p. 74.

181. NSW Bureau of Crime Statistics and Research, *Re-offending statistics for NSW*, www.bocsar.nsw.gov.au/Pages/bocsar_pages/Re-offending.aspx, viewed 1 September 2015.

182. NSW Bureau of Crime Statistics and Research, *Re-offending statistics for NSW*, www.bocsar.nsw.gov.au/Pages/bocsar_pages/Re-offending.aspx, viewed 1 September 2015.

Information regarding the conviction histories of people subject to the consorting law may indicate the potential risk of future offending by people within the cohort, but it does not establish whether use of the consorting law against these people has had any effect on that risk. A qualitative analysis of the effect of the consorting law follows in chapter 7.

Differences in the conviction histories between people who were issued with warnings and those who had their associates warned about them.

There are only minor differences between the conviction histories of the subset of people who were issued consorting warnings when compared to those of the subset of people who had their associates warned about them. The comparison between these two subsets is represented in table 7 below. This is because 62% of people fall into both categories.

Table 7. Severity of conviction for people who were issued consorting warnings and people warned about

Severity	No. of people issued at least one consorting warning	No. of people warned about on at least one occasion
Strictly indictable	538	610
Indictable - other	1,369	1,473
Summary only	286	145*
No convictions	609	233*
Total	2,802	2,461

* These people appear to have been incorrectly identified by police as 'convicted offenders'.

Source: NSW Police Force – COPS (Criminal history data as at 7 May 2015, received on 21 May 2015).

Due to the significant overlap between these two subsets we have generally reported our conviction history analysis of those subject to use of the consorting law as a whole.

We identified 378 people who appear to have been incorrectly identified by police as 'convicted offenders' and had their associate(s) warned about consorting with them. This is discussed in greater detail in relation to children and young people in section 8.3 of chapter 8 and more broadly in section 9.2 of chapter 9.

The presence and seriousness of convictions

Table 8 summarises the conviction histories (by severity) of all people subject to the use of the consorting law. Just under 30% of the 3,216 people subject to the consorting law had not been convicted of an indictable offence prior to their first contact with police in relation to the consorting law (n=933). This is made up of 635 people with no convictions at all and 298 people with a conviction for a summary offence only.

Conversely, around 70% of people subject to the consorting law had been convicted of an indictable offence at some time before the first occasion on which they were either issued a consorting warning or had others warned about them (n=2,283). Of these people, 649 people had previously been convicted of a strictly indictable offence. Strictly indictable offences are the most serious class of criminal offences in NSW.

Table 8. Summary of conviction histories by severity

Severity	No. of people	% of people
Strictly indictable	649	20.2%
Indictable - other	1,634	50.8%
Summary only	298	9.3%
No convictions	635	19.7%
Total	3,216	100%

Source: NSW Police Force – COPS (Criminal history data as at 7 May 2015, received on 21 May 2015).

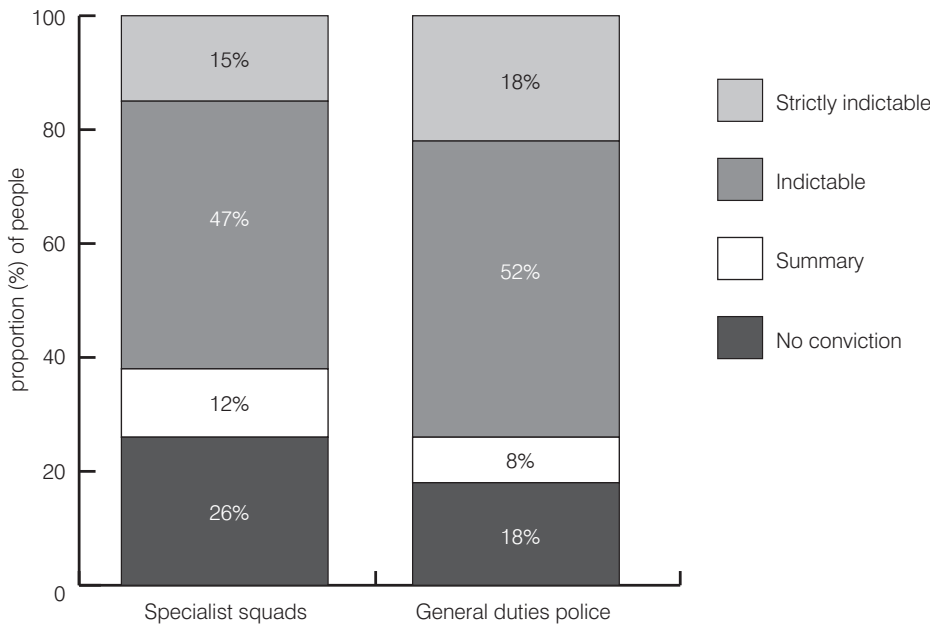
We also found that 55% of the people subject to the consorting law had served a term of imprisonment (n=1,782).

Comparison of the presence and seriousness of conviction histories

As shown in figure 7, there are higher proportions of people with either nil or summary convictions only, among those targeted for consorting by the specialist squads in comparison to those targeted by general duties police. In addition, the proportion of people with a conviction for a strictly indictable offence is lower among those targeted by the squads compared to those targeted by general duties police.

We analysed the interactions involving specialist squad police and found that two thirds of those people without a criminal conviction were subject to the consorting law when part of a group of five or more people (n=194) and many only ever appeared in the consorting data on that one occasion (n=151). These interactions often occurred in public places or in a motor vehicle with known OMCG members present. Many of the people without criminal convictions who are present in the Gangs Squad consorting data appear to have subject to use of the consorting law as part of large sweeps by the Gangs Squad at specific events or locations.

Figure 7: Proportion of people targeted by specialist squads and general duties police by severity of conviction history

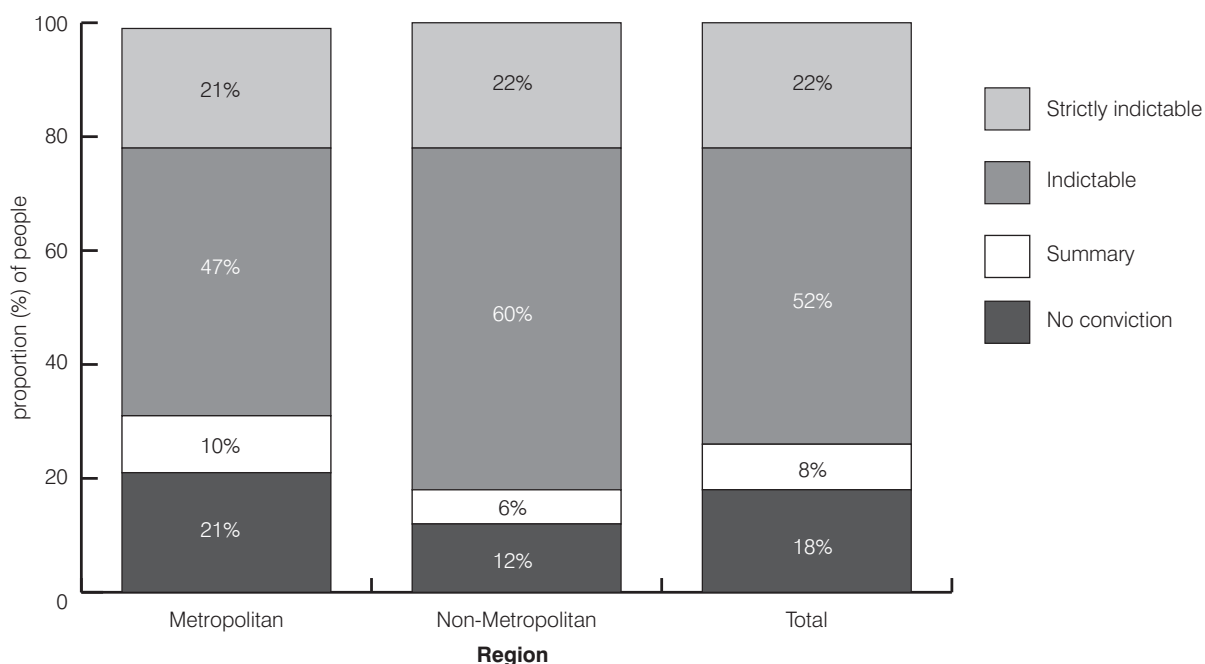


Note: The number of people is not mutually exclusive between specialist squads and general duties police.
Source: NSW Police Force – COPS (Criminal history data as at 7 May 2015, received on 21 May 2015).

Comparison of the presence and seriousness of convictions between regions

Almost one in five people subject to use of the consorting law by general duties officers have never been convicted of a criminal offence (n=446, 18%), and a further 8% have only ever been convicted of a summary offence (n=213). Nearly three quarters have indictable convictions (74%, n=1,857), with 22% having convictions for strictly indictable offences (n=541).

We compared the criminal conviction histories of people subject to the consorting law in the different police regions. We found the proportion of people with either no convictions or only summary convictions was lower in the non-metropolitan regions compared to the metropolitan regions.

Figure 8: Proportion of people targeted by general duties police by region and by severity of conviction history

Note: The number of people is not mutually exclusive across all regions.

Source: NSW Police Force – COPS (Criminal history data as at 7 May 2015, received on 21 May 2015).

While non-metropolitan regions such as the Western Region have very high proportions of Aboriginal people in their consorting data, they also have the lowest proportion of people with summary or no convictions.

Recency of convictions

Over a third of all people subject to the consorting law had been convicted of an indictable offence relatively recently. Thirty-seven per cent of all people subject to the consorting law had been convicted of an indictable offence within a two year period prior to their first contact with police in relation to consorting (n=1,184). Over half of all people were convicted of an indictable offence within four years prior to being targeted for consorting (53%, n=1,696).

Multiple convictions

More than half of all people subject to the consorting law can be described as repeat offenders with 55% of people having more than one indictable conviction in the 10 years prior to being issued with a consorting warning or being warned about (n=1,775). Just over a quarter of all people subject to the consorting law had than five indictable convictions within the previous 10 years (n=835).

Most serious conviction

Table 9 below outlines the most serious offence of which each person subject to the consorting law has been convicted. The offences have been categorised according to the Australia and New Zealand Standard Offence Classification (ANZSOC) system developed by the Australian Bureau of Statistics to provide a 'uniform national statistical framework for classifying criminal behaviour in the production and analysis of crime and justice statistics'.¹⁸³ Each person's most serious conviction has been determined by reference to the National Offence Index 2009.¹⁸⁴ For 35% of the cohort, their most serious conviction involved a type of assault other than sexual assault.

183. The Australian and New Zealand Standard Offence Classification (ANZSOC) (cat. no. 1234.0) provides a basis for the standardised analysis and dissemination of criminal offence data. The ANZSOC is a classification with three levels: Divisions (the broadest level), Subdivisions (the intermediate level) and Groups (the finest level): Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification (ANZSOC), 2011*, cat. no. 1234.0, ABS, Canberra, 2011. www.abs.gov.au/ausstats/abs@.nsf/mf/1234.0.

184. The National Offence Index (NOI) is a tool which provides an ordinal ranking of the offence categories in the Australian and New Zealand Standard Offence Classification (ANZSOC) according to perceived seriousness in order to determine a principal sentence. The purpose of the NOI is to enable the representation of an offender by a single offence in instances where multiple offences occur within the same incident or where defendants have multiple charges dealt with in a single proceeding. Australian Bureau of Statistics, *National Offence Index, 2009*, cat. no. 1234.0.55.001, ABS, Canberra, 2009. www.abs.gov.au/ausstats/abs@.nsf/Products/1234.0.55.001~2009~Main+Features~Overview?OpenDocument.

Table 9. Principal conviction by ANZSOC Division

ANZSOC Division	No. of people	% of people
1 - Homicide and related offences	13	0.4%
2 - Acts intended to cause injury	1,133	35.2%
3 - Sexual assault and related offences	56	1.7%
4 - Dangerous or negligent acts endangering persons	151	4.7%
5 - Abduction and related offences	27	0.8%
6 - Robbery, extortion and related offences	178	5.5%
7 - Unlawful entry with intent/Burglary, break and enter	83	2.6%
8 - Theft and related offences	141	4.4%
9 - Deception and related offences	74	2.3%
10 - Illicit drug offences	398	12.4%
11 - Weapons and explosives offences	72	2.2%
12 - Property damage and environmental pollution	38	1.2%
13 - Public order offences	49	1.5%
14 - Road traffic and motor vehicle regulatory offences	132	4.1%
15 - Offences against justice procedures, Govt. security & Govt. operations	23	0.7%
16 - Miscellaneous Offences	13	0.4%
No convictions	635	19.7%
Total	3,216	100%

Source: NSW Police Force – COPS (Criminal history data as at 7 May 2015, received on 21 May 2015).

Most common convictions

In addition to determining people's most serious conviction, we also determined the most common offences appearing in the criminal conviction histories of those subject to the consorting law. The five leading categories are represented in table 10. Just under half of the people subject to the consorting law have at least one conviction for an offence within the ANZSOC Division 'acts intended to cause injury'. Around two in every five people subject to the consorting law have at least one conviction for 'theft and related offences', 'illicit drug offences' or 'public order offences'.

Table 10. Most common convictions by ANZSOC Division

ANZSOC Division	No. of people subject to the consorting law by conviction type	% of total people subject to the consorting law by conviction type
2 - Acts intended to cause injury	1,431	44.5%
8 - Theft and related offences	1,345	41.8%
10 - Illicit drug offences	1,205	37.5%
13 - Public order offences	1,396	43.4%
14 - Road traffic and motor vehicle regulatory offences	1,619	50.3%

Note: The number of people is not mutually exclusive across ANZSOC Divisions.

Source: NSW Police Force – COPS (Criminal history data as at 7 May 2015, received on 21 May 2015).

Incidence of people with nil, traffic or minor convictions only

In order to explore the extent to which people with only relatively minor or no criminal convictions were subject to the consorting law, we further analysed the principal offence conviction data in table 9. Table 9 presents an analysis of people's most serious conviction (determined by the National Offence Index ranking) and classified by ANZSOC Division, being the broadest level of classification.

Table 11 below presents a further analysis of the same data, focusing on the least serious convictions according to the National Offence Index. We have also broken the analysis down into the subset of people who were issued with warnings and the subset of people who had others warned about consorting with them. These categories of people are not mutually exclusive, as the majority of people subject to the consorting law were both issued with a warning and had others warned about them. The analysis that results is detailed and is included in full at Appendix 6. Table 11 is a summary that indicates the incidence of people with no convictions at all, with only traffic offences, or whose most serious conviction is relatively minor.

As can be seen in table 11 below, there are 371 adults whose associates were warned about consorting with them who had either no convictions or convictions for traffic or relatively minor offences only. This amounts to 15% of all those people who had others warned about consorting with them.

Table 11. Summary of adults subject to the consorting law with nil, minor or traffic offences as their most serious conviction

National Offence Index number and title	No. of unique adults ever issued a warning*	No. of unique adults ever warned about*
74 - Theft from retail premises	35	31
75 - Theft (except motor vehicles), and related offences	38	35
77 - Receive or handle proceeds of crime	32	27
83 - Exceed the prescribed content of alcohol or other substance limit	56	27
84 - Graffiti	3	3
85 - Property damage, and related offences	25	28
95 - Transport regulation offences	2	1
97 - Licit drug offences	9	5
103 - Offences against justice procedures, and related offences	5	5
113 - Breach of violence order	7	3
115 - Breach of community based order, and related offences.	1	1
124 - Possess illicit drugs	44	31
127 - Other illicit drug offences, and related offences	2	2
129 - Trespass	10	9
130 - Offensive language	10	7
131 - Offensive behaviour	9	4
132 - Criminal intent	1	2
135 - Liquor and tobacco offences	1	0
141 - Drive while licence disqualified or suspended	32	9
142 - Drive without a licence	20	8
143 - Driver licence offences, and related offences	1	1
145 - Registration offences	5	2
150 - Regulatory driving offences, and related offences	7	1
155 - Other miscellaneous offences and related offences.	1	0
No Convictions	450	129
Total people	806	371

* These are not mutually exclusive. The majority of people subject to use of the consorting law were both issued a consorting warning and had others warned about consorting with them.

Source: NSW Police Force – COPS (Criminal history data as at 7 May 2015, received on 21 May 2015).

Chapter 7. Discussion of the use of the new consorting law

The data reported in chapter 6 indicate spikes in use of the consorting law in some locations as well as regular use by a minority of commands. In this chapter we report on the various rationales for use, the type of criminal activity that use of the consorting law was intended to prevent, and police officers' views regarding its impact and effectiveness. These issues were explored directly with operational police officers throughout New South Wales (NSW) in a series of state-wide consultations.

7.1 Consultations with NSW Police Force officers

During the review period, we attempted to speak to each police command where the data indicated that the consorting law had been used in a significant way. We provide details of our police consultation strategy in chapter 2.

As outlined previously, we conducted a total of 47 consultations with police across NSW, speaking to officers from the rank of Senior Constable to Chief Superintendent. These consultations included rural, regional and metropolitan commands. Commands consulted included those with sustained high use of the consorting law, those with little or no use, and those where the consorting data indicated a temporary spike in use. During these consultations, we explored:

- the rationale for use, including whom, where and/or what police were attempting to target or address with their use of the consorting law
- police officers' views regarding the impact and effectiveness of their use of the law, and
- operational issues arising from this use.

Police officers advised that the consorting law was used for a range of reasons and to target a variety of types of suspected criminal activity and policing issues.

7.2 Implementation of the new consorting law by the NSW Police Force

As we have previously discussed, the intent of the amending Act that introduced the new consorting law was to provide police with the tools they need to tackle organised crime. However, the second reading speech that introduced the new consorting law also outlined a broader intention for the consorting amendments: to 'deter people from associating with a criminal milieu' and prevent people from 'establishing, using or building up criminal networks'.¹⁸⁵

Police publications at the time the law was introduced discussed how it was 'specifically aimed at organised crime'¹⁸⁶ and was introduced against a background of shootings in South West Sydney, but also suggested:

These new powers will be a valuable tool for frontline police when targeting high risk and recidivist offenders within their LACs.¹⁸⁷

We observed police training sessions where officers were encouraged to use the consorting law as a preventive tool in relation to suspected criminal activity, not limited by type, within their command. It was emphasised that the law is not just for use by specialist squads, but may be useful to all police, as are search and move-on powers.

The training also taught officers that as they do not have the power to detain a person or to require a person's identification when giving an official consorting warning, the use of the new consorting law is therefore best suited to people well known to police.

Our analysis of the consorting records indicates that there is some confusion regarding the details of the law. This confusion appears to have led to significant error in both use and record-keeping. These issues are discussed in chapters 8 and 9.

7.2.1. Effect of the constitutional challenge on implementation

A constitutional challenge to the consorting law was initiated at the end of 2012 in the NSW Supreme Court and was not resolved until October 2014, when the High Court delivered its decision. Police use of the new law was affected by these court proceedings for the majority of the review period.

185. The Hon. David Clarke MLC, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Council, 7 March 2012, pp. 9092–9093.

186. A/Assistant Commissioner Lanyon, Commander, State Crime Command in NSW Police Force, 'Consorting powers target organised crime', *Police Monthly*, April 2012, p. 11.

187. Detective Superintendent Katsogiannis in NSW Police Force, 'Consorting powers target organised crime', *Police Monthly*, April 2012, p. 11.

The NSW Police Force sought advice from the Crown Solicitor's Office regarding use of the consorting law while the constitutional challenge was on foot. It was advised that officers could continue to issue consorting warnings and to charge but should not proceed by way of arrest. This advice was disseminated to officers state-wide.

The impact of the constitutional challenge is most stark in relation to consorting charges. As outlined in chapter 6, no consorting charges were laid between April 2013 and September 2014. In the six months between October 2014 and the end of the review period, 30 charges were laid, all against alleged Outlaw Motorcycle Gang (OMCG) members or associates.¹⁸⁸ Officers from the Gangs Squad advised that they were reluctant to devote the resources required to charge a person and prepare the requisite brief of evidence when the law's future was uncertain.

The impact of the constitutional challenge can also be seen in the analysis of the number of occasions when police issued consorting warnings throughout the review period. The number of occasions of use peaks at the end of 2012 and the beginning of 2013, and then decreases until the High Court decision in October 2014. From October 2014 onwards, occasions of use increase.

The constitutional challenge also influenced the resources the NSW Police Force devoted to promoting the use of the consorting law, supporting training and preparing additional education materials. Following a significant push when the consorting law was first introduced in April 2012, the NSW Police Force reduced or delayed further internal promotion of the consorting law.

Some commands continued to use the consorting law while the constitutional challenge was ongoing, and any advice needed was available upon request from the NSW Police Force Operational Advice Legal Unit. In our final round of police consultations between October 2014 and March 2015, we found many officers calling for the reinstatement of training. The NSW Police Force Consorting Standing Committee has now prepared the Consorting Strategic Plan 2015-2017, a high-level document designed to govern how the consorting law will be used in the future.

7.3 Measuring the effectiveness of use of the consorting law by police

The NSW Police Force has a vast range of tools and powers available to it to reduce or prevent crime. In many cases, a number of different strategies will be used simultaneously to tackle particular policing issues or criminal activities. Additionally, the reasons people commit crime or stop offending are complex and varied and often interwoven with personal circumstances that police have no influence over. This makes quantitative measurement of the impact of use of the consorting law on the prevention of criminal activity within the review period difficult. This difficulty was acknowledged by operational police during our consultations.

In response to our issues paper, the NSW Police Force submitted:

Measuring the effectiveness of policing consorting would not be a simple exercise. While it is possible to measure the number of consorting warnings recorded on the Computerised Operational Policing System (COPS) across NSW and break this down by command, this measure does not provide a meaningful assessment of the impact on the individuals warned for consorting.

The impact of such warnings on persons will vary from individual to individual in that they may choose to adhere to the warning and cease consorting; to ignore the police warning and continue to consort in the same area; or alternatively move to a different area (including a private premise) and continue to consort.¹⁸⁹

Accordingly, our discussion of the impact and effectiveness of use of the consorting law is qualitative and anecdotal and based on our extensive police consultation.

7.4 Use of the consorting law in relation to organised crime and criminal gangs

As reported in chapter 6, we cannot quantify the extent to which the consorting law has been used by NSW police officers to target people suspected of involvement in serious and organised crime and criminal gangs. However, we are able to quantify use by specialist squads whose role it is to address these sorts of criminal activity.

The Gangs Squad used the consorting law extensively. There was also some use by the Middle Eastern Organised Crime Squad (MEOCS), but there was little or no use by the other specialist squads. Table 12 below sets out the use of the consorting law by each of the specialist squads who used it during the review period.

188. Of these charges, the Gangs Squad was responsible for 27. The remaining three charges were laid by Canobolas Local Area Command.

189. NSW Police Force, Submission, *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*, 12 March 2014, p. 13.

Table 12. Use of the consorting law by specialist squads of the State Crime Command

Specialist squad	Consorting interactions	Consorting warnings	Consorting charges
Gangs Squad	204	4,527	34
Middle Eastern Organised Crime Squad	55	158	0
Firearms Squad	1	12	0
Homicide Squad	1	2	0
Child Abuse Squad	1	2	0

Note: The number of people is not mutually exclusive across all squads.

Source: NSW Police Force – COPS (Consorting merged data set, 9 April 2012 to 8 April 2015).

7.5 Use by the Gangs Squad

Officers attached to Strike Force Raptor, a unit within the Gangs Squad, were responsible for all of that squad's use of the consorting law. Strike Force Raptor undertakes proactive operations and provides operational support, intelligence and advice to Local Area Commands (LACs) across NSW in relation to OMCG activities.

Officers from Strike Force Raptor advised us that the consorting law is effective in relation to the high-risk OMCGs they focus on. One officer described their use of the consorting law as 'having a huge impact'.¹⁹⁰ Another officer stated: 'It's incredible. We can't put a price on it.'¹⁹¹

The suitability and effectiveness of the consorting law for policing in this context stems largely from the cultural characteristics of OMCGs.

7.5.1. The involvement of some members of Outlaw Motorcycle Gangs in criminal activities

The involvement of some members of high-risk OMCGs in criminal activities provides the basis for the police expectation that targeting these members and their associates with the consorting law is likely to assist to prevent or disrupt crime.

The link between some OMCG members and criminal activities has been well documented. According to the Australian Crime Commission, OMCGs remain one of the 'most high profile manifestations of organised crime'¹⁹² and have a presence in all Australian states and territories. In July 2013, there were more than 40 OMCGs operating in Australia with about 6,000 patched members, and the total club and membership numbers were rising.¹⁹³ Small numbers of members will conspire with other criminals in a range of criminal activities.

Most OMCG chapters do not engage in organised crime as a collective unit. Rather, their threat arises from small numbers of members conspiring with other criminals for a common purpose. These criminally involved members are able to leverage off the OMCG to aid their criminal activities, ranging from social nuisance in residential communities through to their involvement in some of the most significant criminal syndicates in Australia.¹⁹⁴

The Australian Crime Commission has reported that OMCG members play a prominent role in the production of methylamphetamine ('ice')¹⁹⁵ and other drugs, vehicle re-birthing, firearms trafficking, extortion, prostitution and fraud, among other things.¹⁹⁶ OMCGs are recognised internationally as organised crime groups by law enforcement agencies such as the Royal Canadian Mounted Police, the United States Department of Justice, the Federal Bureau of Investigation and Europol.¹⁹⁷

190. Consultation with the Gangs Squad, 25 February 2015.

191. Consultation with the Gangs Squad, 25 February 2015.

192. Australian Crime Commission, *Crime Profile Series – Outlaw Motorcycle Gangs*, July 2013, p. 1.

193. Australian Crime Commission, *Crime Profile Series – Outlaw Motorcycle Gangs*, July 2013, p. 2.

194. Australian Crime Commission, *Crime Profile Series – Outlaw Motorcycle Gangs*, July 2013, p. 2.

195. Australian Crime Commission, *The Australian Methylamphetamine Market: The national picture*, 2015, p. 11.

196. Australian Crime Commission, *Crime Profile Series – Outlaw Motorcycle Gangs*, July 2013, p. 2.

197. Royal Canadian Mounted Police, 'Bikers beware: Strategy targets motorcycle gangs in Atlantic Canada', *Gazette Magazine*, vol. 76, no. 2, July 2014, p. 10; United States Department of Justice, *Organized Crime and Gangs*, www.justice.gov/criminal-ocgs, viewed 11 June 2015; Federal Bureau of Investigation, *2013 National Gang Report*, 2013, p. 18; Europol (European Law Enforcement Agency), *Review 2013*, 2014, p. 36.

From 2012 to 2014, the Attero National Task Force focussed on investigating the Rebels OMCG, resulting in approximately 3,000 arrests of Rebels members and associates on more than 4,200 charges nationally.¹⁹⁸ It was reported that:

In November [2014] alone, more than a dozen Rebels members have been charged in NSW with serious offences including extortion, kidnapping and assault.¹⁹⁹

In 2014, the Australian Crime Commission set up a national multi-agency task force named Operation Morpheus expanding the focus of Attero beyond the Rebels to target the highest-risk OMCGs in Australia and their members.²⁰⁰

Prioritising of high-risk gangs suspected of involvement in current and serious offending

Strike Force Raptor prioritises the investigation of particular OMCGs and chapters based on intelligence about suspected criminal activities and the direct links of individual members to serious, often violent incidents. The Commander of the Gangs Squad stated:

When we identify an increase in gang violence or an increase in visible criminal activity, we will develop strategies to prohibit that.²⁰¹

Officers from Strike Force Raptor have described this intelligence-driven and consequence-based policing as underpinning their use of the consorting law:

That is, if they participate in violent criminal activity then targeting them and their associates will become a priority for us.²⁰²

The prioritising of certain gangs can be seen in the consorting charge data. For example, of the 30 OMCG members and associates charged with consorting by Strike Force Raptor during the review period, only three gangs are represented. Twenty-five of these men are members or associates of one OMCG and collectively face 29 consorting charges. Three of these men, including the alleged national president, were charged more than once with consorting.

Case Study 1. Prioritising high-risk Outlaw Motorcycle Gangs

On 30 January 2015, in a joint operation by Strike Force Raptor and Fairfield LAC, a search warrant under the *Restricted Premises Act 1943* was executed at an industrial estate in Wetherill Park that NSW Police allege was the clubhouse of an OMCG. Members wearing the 'colours' of a particular gang were warned for consorting with the 'convicted offenders' present as well as being issued with pre-emptive warnings for a further 30 alleged members and associates who are 'convicted offenders' but who were not present at the location. Pre-emptive warnings were written and these included photographs of the relevant 'convicted offenders'. Warnings were video recorded by police.

Thirteen members of the gang were arrested and charged under section 93X of the Crimes Act for habitually consorting. Those charged included the alleged National President, the alleged National Vice-President and the alleged Sergeant-at-Arms of the Sydney chapter. Their alleged ranks were identified on their motorcycle jackets at the time of arrest. In total, 25 alleged members of this gang were charged with habitually consorting during the review period and three alleged office bearers faced multiple consorting charges.

7.5.2. Outlaw Motorcycle Gang members associate together in public and identify themselves as members

The consorting law allows police to disrupt a person's ability to associate (or communicate) with the same people on two or more occasions. Members of OMCGs tend to associate together in large social gatherings at clubhouses, or in public places like restaurants, travel together in the same vehicle and participate in annual motorcycle rides. Many OMCGs will maintain clubhouses and require regular attendance at these premises, known as 'church nights'.

198. Australian Crime Commission, Serious and Organised Crime Coordination Committee, *National task force to set its sights on OMCGs*, media release, 20 September 2014.

199. Lucy Carter, 'Police claim progress in war against Rebels, with bikie gang not holding annual national run', *ABC News* (online), 14 December 2014, viewed 27 May 2015.

200. This was set up by the Serious and Organised Crime Coordination Committee of the Australian Crime Commission. Australian Crime Commission, Serious and Organised Crime Coordination Committee, *National task force to set its sights on OMCGs*, media release, 20 September 2014.

201. Niki Burnside, 'Pressure effective on outlaw bikie gangs', *Parramatta Sun*, 2 April 2015.

202. NSW Police Force, 'Raptor takes down the one percenters', *Police Monthly*, May 2014, p.8.

On a practical level, these occasions provide police the opportunity to observe and record occasions of consorting. However, there is also a nexus between the tendency to associate in groups and the ability of some members to participate in criminal activities.

The Australian Crime Commission reports that OMCG members who are involved in criminal activities facilitate these activities by leveraging off the reputation of the gang.²⁰³ A gang's reputation is based, in part, on strength in numbers and its visible presence in the community. It follows that disrupting the gang's ability to publicly associate together may also affect its ability to assert a fearsome reputation. Strike Force Raptor advised us that disrupting the ability of OMCG members to meet freely and regularly in large groups has direct operational advantages for police:

The best thing about [the] consorting [law] is that OMCGs power and strength comes from the size and strength of the gang. This is undermined when the gang is broken up into individuals – it attacks the reputation of the gang as something that is strong and to be feared.²⁰⁴

The Commander of the Gangs Squad commented in relation to use of the consorting law in relation to gangs:

It certainly disrupts their ability to be together, which is significant because they rely on their ability to be in groups to either plan criminal activities or intimidate the community.²⁰⁵

Additionally, if members are unable to associate, individuals are less likely to remain members and OMCGs may also find recruiting more difficult:

They break apart easily if they are unable to associate. If a gang does not have its clubhouse, they are unable to recruit: you take away their power ... you can't recruit in a park.²⁰⁶

When participating in these group activities, individuals assert their membership of the OMCG through their clothing. This in turn, assists the OMCG to establish a visible presence in the community. Full members wear a three-piece cloth patch on the back of their motorcycle jacket. The centre piece of the patch displays the gang's emblem or logo, also known as the gang's 'colours'. Men who are deemed to be suitable for membership of an OMCG will generally go through a qualifying period of 12 to 24 months. During time spent as a 'prospect' or 'nominee', these men identify their link to the gang by wearing a part of the three piece patch. Non-members are not allowed to wear the 'patch' or 'colours' of an OMCG. Concern that police may incorrectly target individuals who have no link to an OMCG is reduced because of the rules governing the wearing of 'colours'. Our analysis of the Computerised Operational Policing System (COPS) records created by Strike Force Raptor officers to detail consorting warnings issued indicates that the people targeted were known to the officers as OMCG members or associates when targeted. On occasion the narrative description of the consorting interaction included a description of the 'colours' worn.

An example of the impact of Strike Force Raptor's use of the consorting law on the ability of OMCG's to associate publicly in large groups involves the 'national runs' or meetings where OMCGs gather in large groups and ride from one location to another across the country. An officer from Strike Force Raptor advised us that:

As a consequence of the consorting legislation, gang members now seldom travel on their motorcycles in large groups and they avoid travelling with convicted offenders. This has had a significant impact on the visible presence of OMCG.²⁰⁷

The following case study illustrates the effect the consorting law may have on an OMCG's national run.

Case Study 2. Rebels national run

It was reported in October 2014 that the Rebels OMCG planned to end their national run in Coffs Harbour on the NSW mid north coast. Police were expecting 600 to 1,000 OMCG members to arrive in Coffs Harbour after travelling across the state. Strike Force Raptor officers spoke directly to OMCG members entering NSW from other states at the relevant state borders and advised them if they entered NSW they would be subject to the consorting law. Around the same time, an alleged office bearer of a NSW-based chapter of the Rebels was charged with habitually consorting with three other alleged Rebels members with convictions including assault occasioning actual bodily harm, aggravated robbery and drug supply.²⁰⁸

203. Australian Crime Commission, *Crime Profile Series – Outlaw Motorcycle Gangs*, July 2013, p. 2.

204. Consultation with the Gangs Squad, April 2015.

205. Ashlee Mullany, 'Bikie crime crackdown: Clubbed-house', *The Daily Telegraph*, 8 June 2015.

206. Consultation with the Gangs Squad, 25 February 2015.

207. Correspondence to the NSW Ombudsman from a Gangs Squad Detective Inspector, dated 24 March 2015.

208. This person was convicted and sentenced to four months imprisonment.

Prior to October 2014, officers from Coffs Harbour LAC worked with the local community and businesses to provide relevant information and seek their views. The ABC reported that the Coffs Harbour Liquor Accord, a representative body for the 31 major pubs, clubs and restaurants in the area, voted unanimously to refuse entry of Rebels members into their licensed premises.²⁰⁹

As a result of a number of policing strategies used, including the threat of the use of the consorting law, the Rebels run into NSW did not go ahead.

Police advised us that there are multiple direct and indirect consequences related to these 'runs', such as:

- a cost to the community in terms of both reported and unreported crime, including acts of violence
- an increase in fear and intimidation in the local community
- a financial impact, including loss of business
- an increased cost in policing services, and
- either a loss of access to roads and traffic services, or an increase in traffic offences and intimidation where police are not present.

Following the decision of the High Court in *Tajjour v New South Wales* in October 2014 upholding the constitutionality of the consorting law, the Gangs Squad advised that many OMCGs cancelled runs that were planned to take place in NSW.²¹⁰

There are also many examples of use of the consorting law by Strike Force Raptor at licensed premises involving gatherings of OMCG members. One occasion in March 2015 saw more than 1,100 warnings issued to 31 alleged members of one OMCG. Members were warned in relation to 'convicted offenders' present at the premises as well as other known OMCG members who were not present.²¹¹

In addition, Strike Force Raptor reported that use of the consorting law, among other policing tools and strategies, assisted to avert an affray as well as to hinder OMCG recruitment. See case study 3.

Case Study 3. Avoiding an affray on licensed premises

In October 2014, officers from Strike Force Raptor attended licensed premises in a Sydney suburb where approximately 50 members and associates from two rival OMCGs were present in separate sections. Police believed a violent confrontation was imminent, given a recent history of animosity between the two OMCGs. Police secured the premises, and person searches were conducted where appropriate, which located a number of knives and other weapons. Charges were laid with respect to these weapons. A total of 469 official consorting warnings were issued to 17 people. Associates present were advised by police the two OMCGs were priority targets for Strike Force Raptor and that to continue to associate with OMCG members would continue to bring them to police attention and might result in consorting charges.

During these conversations, and after being warned for consorting, some of the associates advised police that they would no longer spend time with the OMCG for fear of being prosecuted for consorting. Police advise that these individuals have not been detected associating with the gang since the incident.

7.5.3. The hierarchical nature of Outlaw Motorcycle Gangs

There is an operational advantage to police being able to target the leadership group within a gang via the use of consorting warnings and charges because;

ostracising or removing a person holding power or a particular skill set [means] the group as a whole suffers.²¹²

OMCGs are hierarchical organisations with vertical structures and an identified leadership group.²¹³ This hierarchical nature determines that men in junior positions in the organisation are subject to the command of more senior members.

209. Coffs Harbour police move to stop large gathering of Rebels bikie gang', *ABC News* (online), 21 October 2014, viewed 27 May 2015.

210. Correspondence to the NSW Ombudsman from a Gangs Squad Detective Inspector, dated 24 March 2015.

211. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

212. Consultation with a Detective Inspector, Gangs Squad, April 2015.

213. The hierarchical nature and vertical structure have been observed and commented on by courts in NSW and other jurisdictions. See, for example, *R v Hawi* [2012] NSWSC 332 at 5 and *R v Cluse* [2014] SADC 97 at 33 and 62.

As outlined in chapter 6, Strike Force Raptor charged 30 OMCG members with 34 consorting offences during the review period. Police allege that seven of these people were office bearers at the time they were charged. They include National Presidents and Vice Presidents, Chapter Presidents and Sergeant-at-Arms in three different OMCGs.

7.5.4. Consorting prosecutions are not reliant on civilian witnesses

OMCGs enforce a culture of silence with respect to providing information or assistance to law enforcement agencies and will refuse to cooperate with police in circumstances where they are the victims of violence or other offending. In addition, we have been advised by officers there are occasions where potential civilian witnesses have been threatened or intimidated into not cooperating with police.²¹⁴ As a result, police may on occasion, struggle to bring criminal charges where the prosecution is reliant on the participation of OMCG members, or civilian witnesses to serious crimes. NSW Police advise us that a particular advantage in a prosecution for consorting is the fact that it is not reliant on any evidence from non-police witnesses.

7.5.5. Minimal use by the Gangs Squad in relation to vulnerable or disadvantaged people

It is noteworthy that the records detailing use of the consorting law by the Gangs Squad indicate significantly less use with respect to Aboriginal or Torres Strait Islander (Aboriginal) people when compared to use by general duties officers, and little or no use in relation to people experiencing homelessness, or children and young people. For example, just five of the people who were subject to use of the consorting law by officers from Gangs Squad were under 18 years of age. The records indicate no use by the Gangs Squad with respect to people experiencing homelessness. The 87 Aboriginal people subject to the consorting law in the Gangs Squad records comprise 13% of people targeted compared to 44% for general duties police (n=1,102). In almost all instances of use of the consorting law in relation to Aboriginal people by the Gangs Squad, it is clear from the Event narrative that the people targeted were in the company of OMCG members when targeted for consorting.²¹⁵

7.5.6. Support for use in relation to gangs linked to serious criminal activity

In consultations and submissions we received, some support was expressed for use of the consorting law with respect to individuals involved in criminal gangs and people suspected of involvement in serious and current criminal activity. This support is premised on the understanding that this use of the consorting law is clearly in line with Parliament's intention and those targeted are linked to recent or current, often serious criminal activity.

Nearly all the submissions asserted that use of the consorting law should be based on a reasonable belief in the person's involvement in current or suspected criminal behaviour. This is because:

it should not be acceptable to charge a person with consorting if there is no likely criminal behaviour the consorting will encourage.²¹⁶

It was also argued that the criminal behaviour should be serious in nature.²¹⁷ The NSW Bar Association explained:

At a minimum, the degree of restriction on a person's liberty of association represented by a consorting warning should not be greater than the likely restriction on liberty involved in conviction for the offence the consorting is said to encourage.²¹⁸

214. Consultations with Gangs Squad officers.

215. In just four of the 81 Events by the Gangs Squad involving at least one person who has ever been identified as Aboriginal, it was not clear whether the people targeted were in the company of OMCG members.

216. NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 4.

217. Community Legal Centres NSW, Submission, *Legislative review of the consorting provisions*, 23 March 2014, p. 7; Intellectual Disability Rights Service, Submission, *Review of the Use of the Consorting provisions by the NSW Police Force*, 7 March 2014; Kingsford Legal Centre, Submission, *Legislative review of the consorting provisions*, 25 February 2014, p. 2; Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, p. 4; NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 4; NSW Young Lawyers, Submission, *Review of consorting provisions*, 7 March 2014, p. 8; Office of the Director of Public Prosecutions, Submission, *Consorting Issues Paper – Submission ODPP*, 28 February 2014, p. 2; The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 3; Women's Legal Service NSW, Submission, *Consorting Issues Paper: Review of the use of consorting provisions by the NSW Police*, 14 March 2014, p. 5; NSW Council for Civil Liberties Inc, Submission, *NSW Ombudsman Consorting Issues Paper: Review of the Use of the Consorting Provisions by the NSW Police Force Submission by the NSW Council for Civil Liberties*, 5 February 2014, p. 9; Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, p. 7; Women in Prison Advocacy Network, Submission, *Submission in Response to NSW Ombudsman Consorting Issues Paper*, 21 March 2014, p. 5.

218. NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 4.

7.6 Use by the Middle Eastern Organised Crime Squad

As outlined in chapter 6, the only other specialist squad to use the consorting law on more than one occasion was the MEOCS. However, its use tapered off during the review period, and it is yet to charge anyone with consorting.

We consulted with senior officers from the MEOCS in June 2013 and again in February 2015. Officers advised they found the new consorting law to be administratively burdensome and cumbersome to use. Despite these concerns, some officers believed it had some value as a disruption strategy, as it can cause people to change the locations where they meet each other. Disrupting a criminal group's activities is advantageous to police, as a group or individuals may become vulnerable to detection by police as they seek new ways to do business.

The consorting law was also useful to the MEOCS uniformed Highway Patrol arm. However, as many of the investigations by the MEOCS are focused on suspected organised criminal activity committed by family groups, the defence of consorting with family members under section 93Y(a) of the Crimes Act reduced its utility in the majority of circumstances.

Additionally, officers advised us that their use of the consorting law was affected by the constitutional challenge during which they largely stopped using it.²¹⁹ However, there was no significant use in the six months following the finalisation of High Court proceedings, with only 12 consorting warnings issued by MEOCS officers between October 2014 and April 2015.

7.7 Lack of use by the majority of specialist squads targeting serious and organised crime and criminal gangs

We spoke with the Directors of the Organised Crime Directorate and the Serious Crime Directorate in order to understand why the consorting law had not been used by the specialist squads targeting serious and organised crime and criminal gangs other than the Gangs Squad and the MEOCS. The explanation varied for each squad but the following considerations provide some insight:

- The nature of the crimes being investigated, such as homicide and sexual assault, may involve individual offenders acting alone, are victim-based, and the investigations are largely reactive.
- Some offenders, while working together to commit crime, are clandestine in their activities and methods of communication. The absence of any public associating between people suspected of involvement in criminal activity means there is little benefit in using the consorting law in this context.
- Some squads tend to conduct long-term, covert investigations 'at arm's length' from the investigation targets. A proactive tool such as the consorting law that requires direct contact between police officers and a person of interest is inappropriate in such a context. For many of these covert investigations, the targets are unaware of the police investigation, and use of the consorting law would alert them to police interest in their activities.

7.8 Use by general duties police officers

As reported in chapter 6, approximately half of all warnings (n=4,401) and 85% of all occasions of use (n=1,538) involved general duties police²²⁰ attached to LACs across the state. The majority of people subject to use of the consorting law were affected as a result of an interaction with general duties police (n=2,601, 79%).

Like the Gangs Squad, general duties police use a variety of strategies and tools to address particular policing issues which makes the quantitative measurement of the impact of use of the new consorting law difficult. Our discussion regarding effectiveness is qualitative and anecdotal and based on our state-wide consultations with general duties police officers located in 26 LACs.

7.8.1. Use governed by command leadership and officer discretion

General duties police officers have a much broader role than those attached to specialist squads. Each LAC is responsible for preventing and responding to criminal offending within the geographic border of their command. Some policing issues are common across all LACs, such as the policing of domestic and family violence; however, each LAC will have a specific set of policing issues that relate to the characteristics of the communities and area for which they are responsible.

219. Consultation with the Middle Eastern Organised Crime Squad, 16 February 2015.

220. 'General duties police' refers to all regional commands (including South West Metropolitan Operations, Central Metropolitan Operations and North West Metropolitan Operations), Traffic and Highway Patrol, Police Transport Command and specialist units responsible for public order issues (including the Major Events and Incidents Group and the Public Order and Riots Squad).

We spoke with the Crime Manager in each LAC we consulted. In remote areas, advice about policing strategy was also sought from sector supervisors. We found that the use of the consorting law within a LAC was dependent on whether the Local Area Commander or Crime Manager viewed it as a suitable strategy for use in their command. The Crime Manager is responsible for the development and management of crime investigations and crime reduction strategies in accordance with the policing strategy of the Commander. Crime Managers advised us that their decision to encourage use of the consorting law by their officers depended on whether they saw it as an effective tool with respect to an identified local policing issue. The policing issues targeted varied significantly between LACs. Police views regarding the effectiveness of the consorting law as a crime prevention tool also varied.

If use of the consorting law is supported by the LAC leadership, the exercise of discretion by individual officers then becomes a significant factor in determining who is warned and in what circumstances. The role of officer discretion was acknowledged in a recent *Police Monthly Law Note* titled, *Consorting: A valid crime prevention tool*.²²¹ The Law Note reiterates the High Court's view that 'consorting is very broad in its application and is capable of being applied to a range of innocent activity' and quotes the Chief Justice (in dissent):

[the law] evidently relies on the exercise of police discretion for an appropriately narrow focus in its actual application.²²²

Discretion belongs to each individual police officer and is required to be exercised 'in good faith and be appropriate to the circumstances presented.'²²³ NSW Police Force training, guidelines and standard operating procedures (SOPs) provide a framework to support an officer when making these decisions but cannot lawfully direct how discretion must be exercised.

The Consorting SOPs currently provide three examples as guidance to officers when deciding whether or not to charge a person with habitual consorting:

- A person playing team sport where a number of players are 'convicted offenders' but the association is for the purposes of sport.
- In circumstances where children from different families regularly play together and a parent is a 'convicted offender'.
- A person catching public transport when travelling to work with a person who is a 'convicted offender' but appears to be no longer involved in criminal activity.²²⁴

Police officers advised that the list of defences in section 93Y of the Crimes Act has influenced the circumstances in which they will issue official consorting warnings. For example, consorting with family members is one of the defences listed in section 93Y.²²⁵ If police believe two people are family members they generally will not issue official warnings to them in relation to consorting with each other. Additionally, in the consorting data, we did not find significant numbers of official warnings issued in circumstances where people are associating while at work or while attending training. In this way, the defences listed in section 93Y function to shape officers' exercise of their discretion.

Officers' reticence to issue official warnings where a defence may be applicable stems from a concern that the warning may not be able to be relied on in future court proceedings for consorting. In chapter 10 we discuss what the defences do not cover and some of the concerns that have emerged in relation to police issuing warnings in these circumstances. Issuing warnings to people travelling together on public transport is discussed in section 7.8.4.

Of the total 1,538 occasions of use resulting in 4,401 official consorting warnings involving general duties police, there are some examples of consorting warnings being issued that appear to involve questionable exercise of discretion by individual officers. See case study 4.

Case Study 4. Officer discretion

Police and ambulance services were called to attend a location to search for two bush-walkers. The bush-walkers had contacted Emergency Services after becoming lost. Once the men had been found, police conducted checks and discovered that both men had convictions for indictable offences. One man had been convicted of drug supply (not

221. NSW Police Force, 'Law Notes: 5/15 Consorting: A valid crime prevention tool', *Police Monthly*, May 2015, p. 35.

222. NSW Police Force, 'Law Notes: 5/15 Consorting: A valid crime prevention tool', *Police Monthly*, May 2015, p. 35.

223. NSW Police Force, *Understanding LEPPRA: Power, Discretion and Responsibility*, 26 November 2014, p. 2.

224. State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures*, November 2014, pp. 15–16.

225. *Crimes Act 1900*, s. 93Y(a).

cannabis) almost 10 years earlier. There is nothing in the police records to indicate continued involvement in the supply of illicit drugs and the only police contact since that conviction involved traffic matters. The other man had been convicted of common assault five years earlier and is described in police records as a 'self-confessed cannabis user'. His police record also indicates concerns for his mental health. Neither man has ever been identified by police as a high-risk offender.

In speaking with the men individually, police were told that neither of them knew the other had been convicted of an offence. Police were also told that they were bushwalking and one man was showing the other Aboriginal rocks and boulders in the area. The men were each issued with a consorting warning. Police recorded a suspicion the pair may be involved in cultivating cannabis although officers did not locate anything on the men or nearby to support this suspicion.

Concern arises that such use of the consorting law in ambiguous circumstances may discourage the individuals involved from contacting emergency services again if needed.

Other occasions where the exercise of police discretion to issue a warning for consorting is arguably questionable are set out in section 8.2 of chapter 8 where we discuss the use of the consorting law in relation to people experiencing homelessness. In addition, in chapter 10 at 10.2.5, we discuss a matter that led to a charge when a person was issued with a consorting warning while travelling in a car with friends, two of whom were 'convicted offenders', to visit his brother who was in hospital following a serious traffic accident. As a result of the warning, the person was required to get to the hospital by other means of transport. The fact of his brother's hospital admission was verifiable in COPS at the time.²²⁶

Many consorting records contain no indication of why particular people were issued with warnings beyond their being in the company of a person convicted of an indictable offence. No reason is required by the consorting law; however, evidence of the context of the warnings appears to be of relevance to the court when sentencing. Sentencing outcomes are discussed in section 6.7.5 of chapter 6.

It is noteworthy that a number of officers we spoke with had introduced their own additional safeguards within which to exercise discretion. For example, a leading Senior Constable, based in a rural town and responsible for sustained use throughout the review period, only issued warnings to 'convicted offenders' associating with other 'convicted offenders'. A Sergeant in a remote town with a population of approximately 900 residents explained he would not issue consorting warnings to young people, as:

it would serve no purpose to include young people in a town like this because it is such a close-knit community – police are unable to be everywhere and you can't keep people away from each other.²²⁷

The Sergeant also commented, '16 and 17 year old Aboriginal kids have nothing but their friends to occupy them ... maybe it is their friends that are keeping them away from trouble.'²²⁸

7.8.2. Using the consorting law to target suspected violence and property crime

During our consultations, we found significant variation in relation to why police were using the consorting law, what or whom they were targeting, and police views regarding its effectiveness.

A number of LACs we consulted advised that they were using the consorting law with respect to people suspected of involvement in serious and violent crime. One metropolitan LAC had experienced a series of violent home invasions. A strike force set up to investigate the home invasions had not been able to lay any charges due to a lack of evidence although police advised they believed they were aware of the identity of the perpetrators. Consorting warnings, search powers and move-on powers were used in conjunction with covert strategies to target those suspected of involvement. Police advised that the home invasions stopped and the suspects 'stopped coming to police attention.'²²⁹

226. *R v Crowe* (unreported, Downing Centre Local Court, Magistrate Stapleton, 22 July 2013).

227. Consultation with LAC 3, Western Region, 19 January 2015.

228. Consultation with LAC 3, Western Region, 19 January 2015.

229. Consultation with LAC 1, South West Metropolitan Region, 29 January 2015.

In a different metropolitan LAC, police used the consorting law as part of a suite of strategies to address a spike in the incidences of cars being stolen and break, enter and steal offences. The consorting law was also used as part of their approach to the policing of individuals with convictions for indictable offences identified by intelligence officers to be high-risk offenders residing within the LAC. When these individuals were seen in the company of others whom police suspected of involvement in current or recent criminal activity, consorting warnings were issued. No consorting charges have been laid by this LAC, although 537 official consorting warnings were issued to 343 different people during the review period.²³⁰

In this LAC it was common for a person to be subject to a personal search, issued with a consorting warning, and issued with a move-on direction in the one interaction with police. The Crime Manager was familiar with the name of each person to whom officers within his command had issued consorting warnings, and the type of offending they were suspected of being involved in. The Crime Manager supported use of the consorting law only when officers suspected a relevant person was involved in current or recent criminal activity.²³¹

7.8.3. Using the consorting law to target suspected drug supply

Two LACs we spoke with used the consorting law as part of their strategy to address the suspected supply of illicit drugs from residences in their command. For example, see case study 5.

Case Study 5. Suspected drug supply from residence

In a remote town of fewer than 900 people, local police received a series of complaints from residents that drugs were being supplied from a local house. Police executed search warrants and searched vehicles leaving the address but only ever found small amounts of drugs that could not be linked to individuals, making prosecution difficult. Police continued conducting searches and started issuing consorting warnings to those who visited the address, warning them not to consort with one of the tenants as he was a 'convicted offender'. Complaints from the community ceased. While the supervisor thought the use of the consorting law appeared to contribute to the reduction in community complaints, he also thought ensuring the community understood and supported the rationale for use of the consorting law was paramount in the context of remote area policing:

It is hard to tell people in a town of this size that they cannot associate with people they've known for 20 or 30 years even if they are going to see a dealer – people got very upset about this.²³²

We spoke to police in a regional, coastal LAC who used the consorting law in the same way to address alleged drug dealing from a local address. They reported the same result. No charges of drug supply or consorting were laid, but complaints about drugs being dealt from the address stopped as the person police suspected of supplying drugs moved to another area.

7.8.4. The use of the consorting law in public seating areas, walkways and public transport hubs

A number of LACs used the consorting law in public seating areas and walkways and in and around public transport hubs. Generally, the impetus for this use came as a result of nuisance offending in these areas or complaints from local businesses about 'undesirable' people disrupting retail or hospitality enterprises. In two of these LACs, the people subject to the consorting law were attendees at local methadone clinics who then met up with friends to socialise following their visit.

230. LAC 1, Central Metropolitan Region.

231. Consultation with LAC 1, Central Metropolitan Region, 27 March 2013.

232. Consultation with LAC 3, Western Region, 19 January 2015.

We spoke to police from four metropolitan LACs in relation to this type of use. Three out of the four LACs discontinued use and advised they found their use of the consorting law in this context to be resource intensive with little tangible results. The record-keeping that necessarily accompanied the use of the law increased the police resources required. We were advised by officers that use of person search powers, move-on directions, drug detection dogs and high visibility policing, was more effective than using the consorting law. One Crime Manager stated that a 24 hour drug dog operation would have had a more significant impact than the month-long consorting operation. There was, in his view, 'a big push initially, then common sense kicked in.'²³³

A Law Note in *Police Monthly* explained:

It simply makes good sense to expend law enforcement resources strategically in a way that is most likely to disrupt or prevent crime rather than to use consorting rigidly in every circumstance to which it could apply.²³⁴

A number of officers in these commands discussed the propensity for the consorting law used in this context to capture disadvantaged and vulnerable people and questioned the appropriateness of this type of use.

Crime Managers in three of these LACs will consider using the law in the future if they encounter problems with OMCs or street gangs. One Detective Sergeant explained that they had issues with two crime gangs in recent times but these were 'broken up quickly through major investigations with the assistance of the State Crime Command'.²³⁵

The Police Transport Command increased its use of the consorting law towards the end of the review period. In total, 147 consorting warnings were issued to 127 people on 67 different occasions by officers from the Police Transport Command.²³⁶ No charges have been laid as a result of this use. On most occasions, the consorting law was used by police in conjunction with a person search and a move-on direction.²³⁷ On a number of occasions, people were initially approached by police for the purposes of determining whether they were travelling with a valid ticket; if not, they were issued with an infringement notice in addition to a consorting warning.²³⁸ Given these interactions also involved the use of multiple police powers, it is difficult to allocate any particular effect to use of the consorting law on the behaviour of people targeted by police in these circumstances.

Several other interactions involved police stopping people on trains or at train stations who told police that they had attended a local methadone clinic together. The consorting records generally note that the area is known for drug activity and crime. In relation to this use, the Commander explained that the people had had 'ample opportunity' to separate after attending the clinic and that the use of the consorting law was appropriate in this context.²³⁹ However, officers from other areas have queried the appropriateness of this use given the importance of access to public transport and supporting people to attend methadone clinics.

One Sydney metropolitan LAC thought their use of the consorting law was an effective crime prevention strategy. This LAC targeted people in open, public areas and seated on public benches or at bus stops, often during daylight hours. A number of homeless people were subject to the consorting law in this area. Police advised the aim was to 'clean up the CBD, to make it safer for everybody and discourage people from committing offences.'²⁴⁰ The Commander argued the LAC only targeted 'criminogenic homeless people' who were congregating in public spaces and engaging in 'petty crime' and use of the consorting law in this context was an effective crime prevention strategy.²⁴¹

Focused use of the consorting law such as that described above, coupled with personal searches and move-on directions, effectively deterred people subject to the consorting law from occupying the public areas in question. In this area we spoke to a major provider of services to disadvantaged and vulnerable people. The coordinator of this centre expressed concern that a number of the centre's clients were no longer accessing services as they did not wish to risk being warned again if they came into the area.

233. Consultation with LAC 2, Central Metropolitan Region, 2 February 2015.

234. NSW Police Force, 'Law Notes: 5/15 Consorting: A valid crime prevention tool', *Police Monthly*, May 2015, p. 35.

235. Consultation with LAC 3, North West Metropolitan Region, 9 February 2015.

236. Transport North West, Transport South West and Transport North/Central.

237. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

238. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

239. Correspondence received from Transport NSW Commander, dated 4 March 2015.

240. Consultation with a Detective Inspector, LAC 2, North West Metropolitan Region, 8 March 2013.

241. Consultation with a Detective Inspector, LAC 2, North West Metropolitan Region, 21 January 2015.

Throughout our consultations with community stakeholders and in submissions received, it was argued that only criminal behaviour that is serious in nature should be sought to be addressed by the consorting law.²⁴² Paradoxically, the use of the consorting law in attempts to prevent minor offending may result in a greater penalty than the actual offence, if established, would attract. For example, all summary offences, as well as some indictable offences, including common assault, carry a lesser maximum penalty than consorting.²⁴³ The NSW Bar Association submitted that:

the forms of criminal offending that a consorting warning can be aimed to prevent should be limited to a range of serious offences defined by statute. They should be limited to serious offences relating to drugs, firearms or organised group criminal activity. It should not be acceptable to charge a person with consorting if the offence involved is summary or one that is not likely to lead to significant imprisonment. At a minimum, the degree of restriction on a person's liberty of association represented by a consorting warning should not be greater than the likely restriction on liberty involved in conviction for the offence the consorting is said to encourage.²⁴⁴

Recommendations relevant to these issues are outlined in chapter 11.

7.8.5. The views of commands with little or no use of the consorting law in the review period

We spoke to general duties police from seven LACs who did not use the consorting law on more than a couple of occasions, if at all, during the three year review period.

A number of LACs expressed the view the law should be used 'as intended', by which they meant, for the policing of criminal gangs, and such policing issues either were not present in their command during the review period or were addressed through other policing strategies such as major and/or covert investigations.

Some remote commands advised that their known high-risk offenders were related to each other, and given the availability of the defence of associating with family members, officers had decided against using the consorting law in the circumstances. Two commands advised the cumbersome nature of the consorting law meant they preferred to rely on other available proactive tools such as search powers and move-on directions. One officer expressed the view that, 'It's a cumbersome process. Police are pragmatic. Where certain powers are too cumbersome, we'll use other powers.'²⁴⁵

One inner-city commander advised his officers were already stretched with significant drug operations almost daily, as a trial site for joint work with NSW Housing to tackle drug supply in public housing and as a leader in diversionary programs in relation to at-risk children and young people. He advised he could not see the value in use of the consorting law with respect to Aboriginal young people in particular as, 'bringing Aboriginal kids in front of the court means they just keep coming before the court'.²⁴⁶ Issuing consorting warnings to these young people would also limit their ability to engage in the diversionary programs for youth supported by the LAC and the local community.

7.8.6. The low numbers of consorting charges brought by general duties police

In order to be able to charge a person with habitually consorting under section 93X, there must exist a minimum of two occasions of alleged consorting with respect to two 'convicted offenders'. Official warnings by police must precede at least one of these occasions of consorting with respect to each offender.

242. Community Legal Centres NSW, Submission, *Legislative review of the consorting provisions*, 23 March 2014, p. 7; Intellectual Disability Rights Service, Submission, *Review of the Use of the Consorting provisions by the NSW Police Force*, 7 March 2014; Kingsford Legal Centre, Submission, *Legislative review of the consorting provisions*, 25 February 2014, p. 2; Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, p. 4; NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 4; NSW Young Lawyers, Submission, *Review of consorting provisions*, 7 March 2014, p. 8; Office of the Director of Public Prosecutions, Submission, *Consorting Issues Paper – Submission ODPP*, 28 February 2014, p. 2; The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 3; Women's Legal Service NSW, Submission, *Consorting Issues Paper: Review of the use of consorting provisions by the NSW Police*, 14 March 2014, p. 5; NSW Council for Civil Liberties Inc, Submission, *NSW Ombudsman Consorting Issues Paper: Review of the Use of the Consorting Provisions by the NSW Police Force Submission by the NSW Council for Civil Liberties*, 5 February 2014, p. 9; Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, p. 7; Women in Prison Advocacy Network, Submission, *Submission in Response to NSW Ombudsman Consorting Issues Paper*, 21 March 2014, p. 5.

243. *Crimes Act 1900*, s. 61.

244. NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 4.

245. Consultation with LAC 3, South West Metropolitan Region, 4 December 2014.

246. Consultation with LAC 4, Central Metropolitan Region, 19 May 2015.

In chapter 6 we reported that three quarters of all people subject to use of the consorting law by general duties police were only involved in one consorting interaction with police (n=1,941). Of these 1,941 interactions, 63% involved people only ever receiving one consorting warning (n=1,223). This means that the majority of people targeted by general duties police fall short of the threshold to charge.

There is a range of possible explanations that may be given for this, including:

- that the individuals subject to the consorting law stopped spending time together in public areas following receipt of a warning
- that the individuals subject to the consorting law were not in the habit of associating together in public areas regularly, and/or
- that the relevant LACs were not focused on detecting consorting or that they discontinued use of the consorting law.

It is noteworthy that many people targeted by the Gangs Squad for consorting appear repeatedly in the data. These individuals were targeted on more than one occasion as part of a particular strategy to focus on known members and associates of high-risk gangs. As a result, the Gangs Squad has been able to lay the most consorting charges of any command. One conclusion that may be reliably drawn from this is that concerted police attention with respect to specific individuals is required prior to the charge threshold for consorting being met.

7.9 Electronic consorting

One of the key changes to the consorting law introduced in 2012 was the extension of the definition of consorting to include modern, electronic forms of communication such as using a telephone, a computer and social media.²⁴⁷ The definition was extended to modernise the law and reflect the ways people interact with each other in contemporary society.

Out of approximately 1,800 occasions of use by police, there are only a handful that include reference to electronic forms of consorting.²⁴⁸ Some of these occasions involve an official consorting warning being issued following the consensual interrogation of a person's mobile phone while they were stopped by police. On two occasions, it appears that the history of phone or social media contact was intended to be used by police to negate any assertion that the face-to-face association was coincidental. Four occasions related to people on the Child Protection Register communicating electronically with each other. Several police officers we spoke to suggested that electronic consorting may be particularly useful in the context of associations between child sex offenders.²⁴⁹ See case study 6.

Case Study 6. Electronic consorting²⁵⁰

General duties police from a greater Sydney LAC issued warnings to three people about consorting with each other after becoming aware that they had been in regular communication by telephone. The three people had been convicted of a range of serious sex offences, and two were on the Child Protection Register. Other court documents reveal that police and other government authorities held serious concerns about the risk posed to the child of one of the men by his two associates.²⁵¹ For this reason, police monitored the three people and issued warnings in an attempt to prevent further associations.

Frontline police officers explained to us that their lack of use of electronic consorting arose from the evidentiary challenges attached to proving instances of electronic consorting. For example, if the alleged consorting involved contact between two people on social media, evidence will be required to establish the identities of the holders of the relevant social media accounts as well as evidence these individuals were the people logged on at the relevant time.

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

248. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

249. Consultation with LAC 4, Western Region, 16 September 2014; Consultation with LAC 3, Central Metropolitan Region, 30 July 2014.

250. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

251. *Munroe & Watson and Ors* [2014] FamCA 112 at 118–121 and 148–151.

All officers we spoke with were aware of these evidentiary challenges. The Consorting SOPs state that '[g]uidance about how to investigate and prosecute electronic occasions of consorting will be provided in other educational material'.²⁵² At the time of writing, this was yet to occur. Given the lack of use relating to electronic consorting and the complexities attached, there appears to be little operational urgency to provide this material.

We were advised that when given the choice, officers will rely on face-to-face associations as the basis for consorting warnings and prosecutions. On this basis, it seems reasonable to conclude that the extension of the definition of consorting to include electronic forms of communication has had almost no impact on the operation of the consorting law in the review period.

252. State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures*, November 2014, p. 5.

Chapter 8. Use in relation to disadvantaged and vulnerable people

The consorting law may criminalise associations that include a range of normal, everyday interactions between people that are otherwise unrelated to any criminal activity. The fact that the legislation provides police with broad discretion to issue warnings and to determine whether an interaction amounts to consorting creates the potential for the law to be applied in circumstances not intended by Parliament when it was enacted.

This chapter will discuss use of the consorting law in relation to disadvantaged and vulnerable people. This topic has caused the most concern to the individuals and organisations we consulted with and who provided submissions to this review. During parliamentary debate about the consorting law, the Government acknowledged the apprehension voiced by some at the time that the consorting law 'might be used to target marginal groups'.²⁵³

With little use of electronic consorting, the operation of the law has relied on police observations of people spending time together in places open to the public. As a result, the potential exists for people who spend a lot of time in areas open to the public to be subject to the consorting law to a greater degree than others. For example, the policing of public space has historically led to the over-representation of children and young people in criminal statistics.²⁵⁴

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

During the review period concerns have focussed on the impact of the consorting law on the following disadvantaged and vulnerable groups:

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

The issues that arise from the use of the consorting law are different for each of these groups. Accordingly, the possible solutions to problems may vary.

8.1 Use in relation to Aboriginal people

New South Wales (NSW) has the largest Aboriginal population in Australia, comprising almost 30% of the national total. Aboriginal people make up approximately 2.5% of the total NSW population. Almost 40% of Aboriginal people in NSW are under the age of 15 years.²⁵⁵

Although significant resources have been allocated to reduce the well-documented over-representation of Aboriginal people in the criminal justice system, this remains a problem for NSW and Australia more broadly. The Australian Government's 2014 report, *Overcoming Indigenous Disadvantage*, showed that justice outcomes have continued to decline for Aboriginal people. Adult imprisonment rates have worsened, while no change was reported in the high rates of juvenile detention and family and community violence.²⁵⁶

The difficult and complex history between police and Aboriginal people has been openly acknowledged by the NSW Police Force:

[The] NSW Police Force regrets this unfortunate part of our history and recognises the trauma inflicted on Aboriginal people as a result of past government policy and our actions as police. While not forgetting the past NSW Police Force wishes to move forward. We recognise that our unique role provides us with the opportunity to promote positive outcomes for Aboriginal people and we will work towards achieving the following in the spirit of reconciliation.²⁵⁷

253. The Hon. John Ajaka MLC, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Council, 7 March 2012, p. 9097.

254. Crime and Misconduct Commission, Queensland, *Policing Public Order: A review of the public nuisance offence*, Brisbane, May 2008, p. 80. For the purposes of this discussion, 'children' refers to people aged between 10 and 15 years, and 'young people' refers to those aged 16 and 17 years.

255. 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.

256. Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2014*, November 2014, p. 21.

257. NSW Police Force, *Aboriginal Strategic Direction 2012–2017*, updated 30 January 2015, p. 4.

8.1.1. Proportion of the Aboriginal population that falls within the definition of 'convicted offender'

The over-representation of Aboriginal people in criminal justice statistics creates a substantially increased potential for Aboriginal people, and people they spend time with, to become subject to the consorting law. Many people from this group will fall within the definition of 'convicted offender' in section 93W of the *Crimes Act 1900*.

In order to determine the proportion of the NSW Aboriginal population who are 'convicted offenders' for the purposes of the consorting law, we sought information from the NSW Bureau of Criminal Statistics and Research (BOCSAR) and compared this with population data from the Australian Bureau of Statistics in relation to the number of Aboriginal people convicted of an indictable offence in NSW in the past 10 years. As discussed in chapter 4, some convictions never become 'spent'. Accordingly, some Aboriginal people convicted more than 10 years ago will not be captured by the data but will still be considered a 'convicted offender' for the purposes of the consorting law.

Table 13. Proportion of the adult Aboriginal population in NSW convicted of an indictable offence over a 10 year period

Age at 30 June 2014	Aboriginal women		Aboriginal men		Total Aboriginal people	
	No. of people	% of population	No. of people	% of population	No. of people	% of population
18-29 years	2,543	10.6%	7,949	34.9%	10,492	22.4%
30 years and over	5,751	13.4%	15,956	40.2%	21,707	26.3%
Total	8,294	12.4%	23,905	38.2%	32,199	24.9%

Source: NSW Bureau of Crime Statistics and Research, 'NSW Criminal Courts Re-offending Database – July 2004 to June 2014, Adults convicted of an indictable offence, excluding convictions under s.10 *Crimes (Sentencing Procedure) Act 1999* and appearances in Children's Courts, unpublished data; Australian Bureau of Statistics, *Experimental Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 2001-2026*, 'Projected population, Aboriginal and Torres Strait Islander Australians, Australia, state and territories, 2011-2026', Series B, data cube, cat. no. 3238.0, ABS, Canberra, 2014, viewed 24 November 2014, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3238.02001%20to%202026?OpenDocument>; and Australian Bureau of Statistics, *Customised Report*, 'Table 1: Aboriginal and Torres Strait Islander population projections by sex and age (custom), New South Wales, 30 June 2014' (Source: *Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 2001-2026* (cat. no. 3238.0)), ABS, Canberra, 2014, unpublished data.

The data show that nearly 40% of all adult Aboriginal men in NSW have been convicted of an indictable offence in the past 10 years, compared to 5% of all adult men.²⁵⁸ This means that around four out of every 10 Aboriginal men will fall within the definition of 'convicted offender', and any person who associates with these men could be issued with a warning for consorting.²⁵⁹ In relation to women, 12% of adult Aboriginal women in NSW have been convicted of an indictable offence in the past 10 years, compared to just 1% of all adult women in NSW.²⁶⁰

8.1.2. Relevant NSW Police Force policy

The NSW Police Force has a general policy framework in place for the management of Aboriginal issues. In the NSW Police Force's *Aboriginal Strategic Direction 2012-2017*, Aboriginal people are recognised as the most disadvantaged group in Australian society and it is noted 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'.²⁶¹ The NSW Police Force also states its commitment to 'work with Aboriginal communities and other justice agencies to investigate the implementation of culturally appropriate policing strategies for Aboriginal communities and seek the cooperation of Aboriginal people in their promotion.' Successful implementation of the Aboriginal Strategic Direction in various commands is underpinned by strong relationships between police and local Aboriginal communities.²⁶²

258. See table 5: Proportion of adult population in NSW convicted of an indictable offence over a 10 year period (30 June 2004 to 30 June 2014), in chapter 6 of this report.

259. Apart from where associations fall within the narrow range of defences.

260. See table 5: Proportion of adult population in NSW convicted of an indictable offence over a 10 year period (30 June 2004 to 30 June 2014), in chapter 6 of this report.

261. NSW Police Force, *Aboriginal Strategic Direction 2012-2017*, updated 30 January 2015, p. 6.

262. NSW Police Force, *Aboriginal Strategic Direction 2012-2017*, updated 30 January 2015, p. 4.

There is no specific reference to the use of the new consorting law in relation to Aboriginal people in the *Consorting Standard Operating Procedures* (Consorting SOPs). There is also no guidance for officers in relation to whether they should consider kinship ties between Aboriginal people as falling within the definition of ‘family’ in section 93Y(a) of the Crimes Act. Kinship ties structure relationships between Aboriginal people and are generally broader than lineal or blood relationships. Accordingly, a narrow interpretation of ‘family’ in the context of Aboriginal people may not be appropriate. We discuss the implications of this further in section 10.3 of chapter 10.

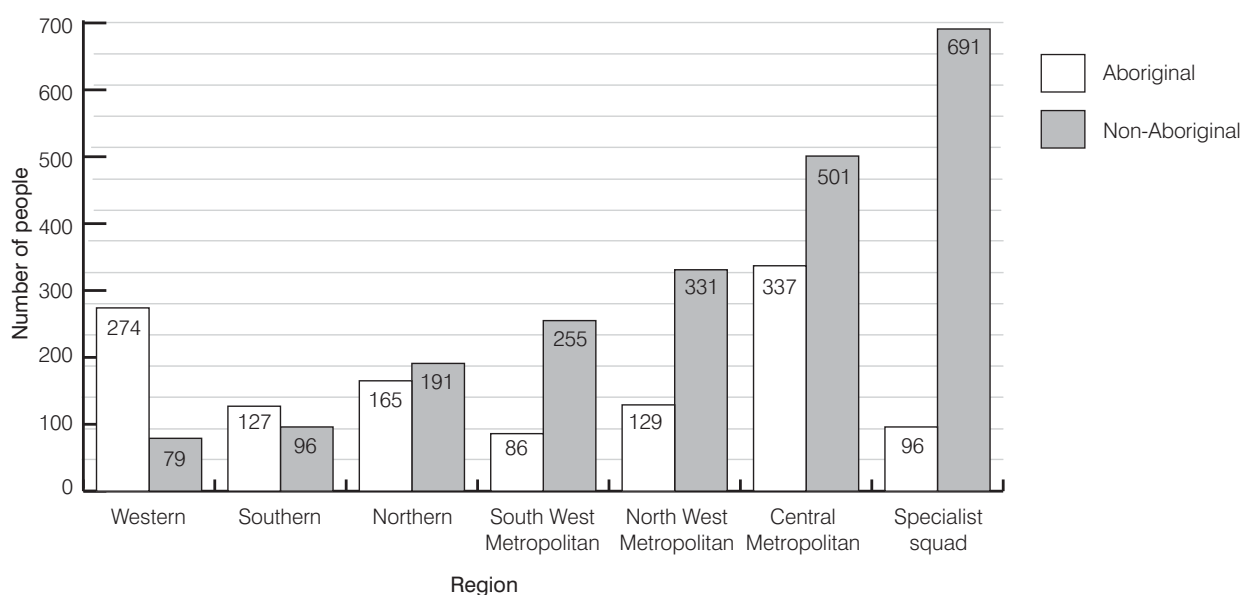
8.1.3. The operation of the consorting law in relation to Aboriginal people

In chapter 6, we explained that 37% of all people who were subject to the consorting law during the review period were Aboriginal (n=1,193).²⁶³

Aboriginal men comprised just over a third of all men who were subject to the consorting law during the review period, and Aboriginal women comprised around half of all women. In addition, around 60% of children and young people subject to the consorting law were Aboriginal.

There was some variation between locations and commands in the use of the consorting law in relation to Aboriginal people. Our analysis of data set out in chapter 6 reveals that specialist squads were significantly less likely to use consorting in relation to Aboriginal people than general duties police. Use by general duties police in relation to Aboriginal people varied significantly between Local Area Command (LACs). These differences are demonstrated in figure 9 below.

Figure 9: Number of people by Aboriginal status subject to the consorting law by region



Note: The number of people is not mutually exclusive across all regions.

Source: NSW Police Force – COPS (Consorting merged dataset, 9 April 2012 to 8 April 2015).

A partial explanation for regional differences in the proportion of Aboriginal people subject to the consorting law is found in the demographic makeup of the different communities featured in the data. For example, the proportion of Aboriginal people relative to non-Aboriginal people in the Western Region is four times higher than in NSW overall.²⁶⁴ In one of the remote towns featured in the Western Region data, Aboriginal people are 28% of the town’s population.²⁶⁵ The demographic makeup of the various communities needs to be considered when interpreting the statistics in figure 9.

263. A person has been classified as Aboriginal or Torres Strait Islander if the NSW Police Force has ever created a record where that person has identified themselves to police in this way.

264. NSW Police Force, *Population by NSW Police Force Local Area Command including Indigenous Population*, unpublished data based on the 2011 census. Aboriginal people account for almost 10% of the population in the Western region, compared to 2.5% of the total NSW population.

265. The town is located within LAC 3, Western Region.

8.1.4. What police and others told us about the consorting law in relation to Aboriginal people

We consulted with a range of commands in relation to the use of the consorting law in relation to Aboriginal people. Police consistently advised that individuals were targeted for consorting based on their suspected involvement in current offending, and not because of their Aboriginality.

We consulted with police officers from six Western Region LACs about their use of the consorting law.²⁶⁶ The majority of the use of the consorting law in this region was by officers in small, often remote towns. The operation of the consorting law in areas with small populations is different in many respects from its operation in metropolitan areas. Officers from the Western Region were particularly conscious of the importance of maintaining positive relationships with the community, and many officers recognised that 'misuse [of consorting] can undermine relationships between police and the community'.²⁶⁷

A number of these officers advised that they know most people in town and were able to make informed judgments about the context of certain associations. For example, they would not target people for consorting if they are related.²⁶⁸ Most officers also said that they would interpret 'family' as inclusive of kinship relations and supported adopting a culturally inclusive definition of 'family'.²⁶⁹

Officers from several commands indicated that the consorting law was of limited utility for them because of the extensive family and kinship ties between Aboriginal people in the community.²⁷⁰ In contrast, other officers considered that adopting a definition of 'family' that includes kinship relationships would be problematic and would undermine their use of the consorting law.²⁷¹

Western Region police reported that, among other strategies, they most commonly used the consorting law in relation to drug, theft, robbery, and break and enter offences.²⁷² These offences tend to involve several people in company with one another. Consorting targets were identified by LAC intelligence officers as high-risk offenders, or police identified people through information received from the community.²⁷³ In some LACs, consorting was valued as providing an additional proactive tool that could be used to approach and engage individuals.²⁷⁴ However, others advised us that existing police powers, such as conducting bail compliance checks, search powers and move-on directions, provided more effective and less cumbersome proactive tools.²⁷⁵

We met with an Aboriginal legal service provider in a rural town in the Western Region who described the relationship between police and the Aboriginal community as 'strained' and characterised by a significant lack of trust and cooperation. This legal service considered effective operation of the consorting law to be unlikely in their community, and in other small communities where 'everyone knows everyone' because, inevitably, all members of the community will be consorting at some point in time. They reported that Aboriginal people in their community already felt 'targeted by police'.²⁷⁶ The definition of 'convicted offender' captured some Aboriginal elders and community leaders and use of the consorting law might therefore hinder the ability of community leaders to engage with members of their own community. This engagement was considered especially important for diverting young people from the criminal justice system. It was feared that the use of consorting would aggravate the existing problems within the community. Further, there was significant concern that many Aboriginal people in the community might have difficulty understanding a consorting warning, but would not make this known to police.²⁷⁷

We also consulted with a Sydney metropolitan command with high use of the consorting law in relation to Aboriginal people. The Commander explained that the consorting law was used as one of several policing strategies to target local crime issues such as motor vehicle theft, and homes being broken into. He also noted that individuals were only targeted

266. Barrier LAC, Darling River LAC, Lachlan LAC, Barwon LAC, New England LAC, and Oxley LAC.

267. Consultation with LAC 3, Western Region, 19 January 2015.

268. Consultation with LAC 2, Western Region, 21 January 2015.

269. Consultation with LAC 4, Western Region, 16 September 2014; Consultation with LAC 1, Western Region, 17 September 2014.

270. Consultation with LAC 5, Western Region, August 2013; Consultation with LAC 6, Western Region, 13 April 2013.

271. Consultation with LAC 3, Western Region, 13 June 2013.

272. Consultation with LAC 6, Western Region, 13 April 2013; Consultation with LAC 4, Western Region, 16 September 2014; Consultation with LAC 3, Western Region, 13 June 2014 and Consultation with LAC 1, Western Region, 17 September 2014.

273. Consultation with LAC 4, Western Region, 16 September 2014; Consultation with LAC 3, Western Region, 13 June 2014. The Suspect Targeting Management Plan II is designed to identify and target repeat offenders who are responsible for serious and volume crime in the community.

274. Consultation with LAC 4, Western Region, 16 September 2014.

275. Consultation with LAC 6, Western Region, 13 April 2013.

276. Consultation with an Aboriginal legal service provider, western NSW, 17 September 2015.

277. This is because of factors including higher rates of hearing problems and lower IQ levels: Consultation with an Aboriginal legal service provider, western NSW, 17 September 2015.

for consorting when police suspected them of involvement in current or recent criminal activity. According to police in this LAC, individuals to be targeted for consorting were nominated on the basis of 'assessed and validated information'.²⁷⁸ The Commander further explained that Aboriginal males between 16 and 20 years of age represented the most problematic demographic for the command and the Aboriginal community was 'sick of a small core of kids who are engaging in crime'.²⁷⁹ The Commander believed the use of the consorting law had been effective and that this was reflected in the reduced rates of relevant crimes.²⁸⁰ However, we note again that in circumstances where several policing strategies are employed, linking any one strategy to a reduction in crime is problematic. It is also true that a LAC with no use of the consorting law at all, such as Redfern LAC, has advised of a reduction in offending by the same demographic.²⁸¹

We consulted with a community legal centre in the same Sydney metropolitan area, who explained that social isolation is a significant problem within the local Aboriginal community. The potential for the consorting law to further dismantle fractured communities and isolate people was of great concern. In their view, the consorting law ignores the unique dynamics within Aboriginal communities. These dynamics mean that isolating 'convicted offenders' from other people may exacerbate rather than limit offending behaviour.²⁸² In their experience, criminal behaviour is best resolved 'by connecting us all, not by separating us'.²⁸³ It was suggested that, by isolating people from the community, the consorting law has the potential not only to increase the risk of offending, but also to put people at risk of health issues, including depression and anxiety.²⁸⁴

8.1.5. What others told us about the impact of the consorting law in relation to Aboriginal people and communities

The submissions we received expressed significant concern about the impact of the consorting law on Aboriginal people and communities. Many submissions argued that the context in which the consorting law is used in relation to Aboriginal people is not aligned with the purpose of the consorting law, and that this use is therefore inappropriate.²⁸⁵

The concern that Aboriginal people are more exposed to the operation of the consorting law was reiterated to us throughout the submissions and in consultations. The Aboriginal Legal Service (NSW/ACT) commented that 'Aboriginal people are more likely to socialise and congregate in public spaces because of a range of cultural and socio-economic factors'.²⁸⁶ Additionally, the nature of social and kinship relations between Aboriginal people 'make them more likely to be in contact with other members of the community, and make avoidance of members of their community more difficult'.²⁸⁷ The impacts of the consorting law on a community with high incarceration rates are amplified. It is inevitable that Aboriginal people will be considered to be consorting at some point in time, and people with a conviction may be ostracised from their own community.²⁸⁸ Others explained that the Aboriginal community 'craves interaction and viewed being ostracised as punishment'.²⁸⁹

The defences listed in section 93Y of the Crimes Act, were widely considered inadequate for Aboriginal people in several respects. Women's Legal Service NSW pointed out that the current list of defences is so narrow that, in effect, important cultural and social interactions between Aboriginal people are potentially criminalised.²⁹⁰ There is no defence, for example, for an Aboriginal person participating in Sorry Business, where it is important to be around community and fulfil cultural roles and responsibilities. We were also told that Aboriginal young people are more likely to live with members of the community on an informal basis because of the high rates of out-of-home care and adult imprisonment.²⁹¹

278. By the LAC Intelligence Officer.

279. Consultation with LAC 1, Central Metropolitan Region, 24 June 2014.

280. Consultation with LAC 1, Central Metropolitan Region, 24 June 2014.

281. Consultation with Redfern LAC, Local Area Commander, 19 May 2015.

282. Consultation with Kingsford Legal Centre, 3 July 2014.

283. Consultation with Kingsford Legal Centre, 3 July 2014.

284. Consultation with Aboriginal Cultural Support Officer, Corrective Services NSW, 26 September 2014.

285. See, for example, Aboriginal Legal Service (NSW/ACT) Ltd, Submission, *NSW Ombudsman Consorting Issues Paper Response by Aboriginal Legal Service (NSW/ACT) Limited*, 28 February 2014, p. 3; UTS: Jumbunna, Submission, *Consorting Issues Paper: Review of the use of consorting provisions by the NSW Police Force: Division 7, Part 3A of the Crimes Act 1900*, 4 March 2014, p. 4.

286. Aboriginal Legal Service (NSW/ACT) Ltd, Submission, *NSW Ombudsman Consorting Issues Paper Response by Aboriginal Legal Service (NSW/ACT) Limited*, 28 February 2014, pp. 2–3.

287. Aboriginal Legal Service (NSW/ACT) Ltd, Submission, *NSW Ombudsman Consorting Issues Paper Response by Aboriginal Legal Service (NSW/ACT) Limited*, 28 February 2014, pp. 2–3.

288. Consultation with Aboriginal Cultural Support Officer, Corrective Services NSW, 26 September 2014.

289. Consultation with Aboriginal Cultural Support Officer, Corrective Services NSW, 26 September 2014.

290. Women's Legal Service NSW, Submission, *Consorting Issues Paper: Review of the use of consorting provisions by the NSW Police*, 14 March 2014, p. 8. Similar concerns were raised by Wirringa Baiya, Submission, *Review of the new consorting provisions contained within Division 7, Part 3A of the Crimes Act 1900*, 21 March 2014, pp. 7–8.

291. Consultation with Youth off the Streets Maroubra, 16 July 2014; Consultation with Kingsford Legal Centre, 3 July 2014.

We spoke with several Corrective Services NSW (Corrective Services) officers who were concerned about the impact of the consorting law on Aboriginal people.²⁹² In their experience, the most effective tool in reducing reoffending for this group is supporting positive social networks and relationships, rather than dismantling relationships and segregating 'convicted offenders' from other people.²⁹³ There was particular concern that the consorting law would be viewed as a type of 'social control'²⁹⁴ that would act as a reminder of historical social control measures placed on Aboriginal people: 'Aboriginal people have been oppressed by policies for years. This is just another one.'²⁹⁵

8.1.6. Conclusion

There is no evidence that police are using the consorting law to intentionally discriminate against Aboriginal people or that the use of the consorting law is racially influenced. Rather, it is likely that the proportionally high rates of use against Aboriginal people reflect both, the over-representation of this group in the criminal justice system as a whole and cultural factors that mean Aboriginal people more commonly occupy public space. However, stakeholders such as Homelessness NSW submitted that the high proportion of Aboriginal people in the consorting data remains 'difficult to reconcile with the stated intent of the powers'.²⁹⁶

Nonetheless, the impacts of the consorting law on Aboriginal people and communities are significant and arguably undermine other measures that attempt to improve relationships between Aboriginal people and police and reduce rates of involvement in the criminal justice system for Aboriginal people.

The fact that the Gangs Squad data contain the lowest proportion of use in relation to Aboriginal people is noteworthy given the references to tackling organised crime and criminal gangs in the second reading speech when the new consorting law was introduced.

The protections that may be put in place to ensure that Aboriginal people are not unfairly affected or further marginalised as a result of the operation of the consorting law will be discussed further in chapters 10 and 11.

8.2 Use in relation to people experiencing homelessness

There was no support for use of the consorting law in relation to people experiencing homelessness, among organisations that provided submissions in response to our Consorting Issues Paper. During consultations, concern was repeatedly expressed to us about the capacity for the consorting law to be used as a 'street-sweeping mechanism', discouraging people from lawfully occupying public space. This concern stems from the desire to avoid further marginalisation of vulnerable people that may arise from use of the consorting law, and the apparent divergence of this type of use from Parliament's intention.²⁹⁷

Concerns of this nature were foreshadowed in the Parliamentary debates when the consorting law was introduced in 2012. The Hon. John Ajaka MLC stated 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'.²⁹⁸

The issues surrounding homelessness and criminal activity are complex. In their submission to this review, Homelessness NSW, a peak body representing individuals and organisations with an interest in homelessness, stated:

the reality is that homeless people are more likely to be the victim of a crime than housed people, and this rate is increasing. Despite this many people sleeping rough will have criminal convictions, often for minor offences. Research has indicated on occasion this has arisen as a route off the street. It should not surprise that people will commit an offence to ensure accommodation and food.²⁹⁹

292. These officers provided their views on the consorting laws in their personal capacity.

293. Consultation with Corrective Services NSW officer, 8 October 2014; Consultation with Aboriginal Cultural Support Officer, Corrective Services NSW, 26 September 2014.

294. Consultation with Aboriginal Cultural Support Officer, Corrective Services NSW, 26 September 2014; Consultation with Kingsford Legal Centre, 3 July 2014.

295. Consultation with Aboriginal Cultural Support Officer, Corrective Services NSW, 26 September 2014.

296. Homelessness NSW, *Submission to NSW Ombudsman regarding NSW consorting laws*, February 2014, p. 3.

297. Community Legal Centres NSW, Submission, *Legislative review of the consorting provisions*, 23 March 2014, p. 12; Intellectual Disability Rights Service, Submission, *Review of the Use of the Consorting provisions by the NSW Police Force*, 7 March 2014, p. 2; Office of the Director of Public Prosecutions, Submission, *Consorting Issues Paper – Submission ODPP*, 28 February 2014, p. 3; Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, p. 10; NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 7; NSW Young Lawyers, Submission, *Review of consorting provisions*, 7 March 2014, pp. 10-11; The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 8.

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

299. Homelessness NSW, Submission, *Submission to NSW Ombudsman regarding NSW consorting laws*, February 2014, p. 3.

The reasons why some people experience homelessness are similarly complex. Factors that may place a person at increased risk of homelessness include family violence, financial difficulty, disability, transitioning from custody or care, and alcohol or other drug abuse.³⁰⁰ Mental health issues can also greatly increase a person's risk of experiencing homelessness:

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.³⁰¹

People experiencing homelessness are potentially more vulnerable to the consorting law because of both their visibility to police in public spaces, and the higher numbers of homeless people who are 'convicted offenders'. One submission stated:

It is unrealistic and unfair to expect homeless people to further isolate themselves by avoiding contact with peers who may have criminal histories. Given the notoriously high rate of homelessness among ex-prisoners, and the barriers faced by ex-offenders in integrating into mainstream society, a homeless person is highly likely to encounter peers who are convicted offenders.³⁰²

One of the key aims of many support services working with people experiencing homelessness is to create community and reduce the social isolation of their clients. People experiencing homelessness tend to rely on community networks for rehabilitation and shelter,³⁰³ and support networks are more likely to include friends, rather than family members.³⁰⁴

8.2.1. What is homelessness?

The Australian Bureau of Statistics and key government policy documents adopt a definition of homelessness that may be broken down into three types:

- Primary homelessness involves 'sleeping rough' in parks, squats or derelict buildings.
- Secondary homelessness applies to people who have no accommodation of their own and therefore live in emergency accommodation, refuges, 'couch-surf' or stay with relatives or friends.
- Tertiary homelessness describes people who live in circumstances where they share facilities such as a kitchen and bathroom and do not have the security of a lease. This can also include people living in caravan parks or boarding houses for the medium or long term.³⁰⁵

8.2.2. Relevant policy

The NSW Police Force is a signatory to the Protocol for Homeless People in Public Places. The Protocol was introduced by the NSW Government 'to help ensure that homeless people are treated respectfully and appropriately and are not discriminated against on the basis of their homeless status'.³⁰⁶ It notes that:

Experiencing past or current trauma is an important factor that contributes to homelessness. People experiencing homelessness report a disproportionate level of victimisation, including repeated experiences of childhood abuse, domestic and family violence, rape, physical and sexual assault, and robbery. A new episode of violence or abuse can trigger someone to leave their accommodation and become homeless again. However, being homeless carries a high-risk of violence that can exacerbate mental disorders and further entrench a cycle of moving between temporary accommodation, sleeping rough and hospitalisation.

Officials approaching homeless people in public places should recognise the impact that these issues may be having on the person's behaviour. The Protocol encourages a non-discriminatory response and, if possible, a referral of that person to services with relevant expertise. This response is particularly important when the official considers that the person is at risk of harming themselves or other people.³⁰⁷

The Consorting SOPs provide no specific guidance to officers in relation to people experiencing homelessness.

300. Homelessness Australia, *Keeping a home among the gumtrees: Exploring risk of homelessness in 21st Century Australia: Who is 'at risk' and how are services working to mitigate that risk and keep people housed?*, 2012, pp. 8–16.

301. Family & Community Services, Housing NSW, *Protocol for Homeless People in Public Places, Guidelines for Implementation*, NSW Government, October 2012, p. 9.

302. The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 8.

303. Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, p. 13.

304. NSW Young Lawyers, Submission, *Review of consorting provisions*, 7 March 2014, p. 10; The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 8.

305. NSW Government, *A Way Home: Reducing Homelessness in NSW, NSW Homelessness Action Plan 2009-2014*, 2009, p. 5.

306. NSW Police Force, *Homelessness*, 11 November 2013, www.police.nsw.gov.au/community_issues/homelessness, viewed 9 April 2015.

307. Family & Community Services, Housing NSW, *Protocol for Homeless People in Public Places, Guidelines for Implementation*, NSW Government, October 2012, p. 9.

8.2.3. Homelessness issues in police consorting data

We are unable to reliably determine the extent of the use of the consorting law in relation to people experiencing homelessness. However, we have identified instances in the consorting data where people experiencing homelessness have been charged with habitually consorting, issued consorting with warnings and had their associates warned about consorting with them.

It is not possible to measure the total number of people experiencing homelessness in the consorting data, because police officers do not always collect and record accurate information about a person's housing status, nor do people always provide police with accurate address details when requested.

As a result, our analysis is qualitative. We identified clusters of use of the consorting law in relation to people experiencing homelessness. These were identified by interrogating the transcripts of sentencing hearings, narratives of the relevant consorting records, and the address details of people subject to the consorting law recorded by police in particular areas. We also met with police and homeless services providers.

8.2.4. Use in relation to people experiencing homelessness in metropolitan Local Area Commands

One of the first people charged under the new consorting law in NSW was a homeless man.³⁰⁸ He pleaded guilty and was sentenced on 7 November 2012. See case study 7.

Case Study 7. *R v B*, Manly Local Court

B is a homeless man with terminal and chronic pancreatitis. 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. At his sentencing hearing, the locations were described by his lawyer as 'areas where homeless people hang out'.³⁰⁹

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 [the prosecution] have all the elements there and that's why we've entered the plea.³¹⁰

The magistrate noted that the criminal histories of the three people B had been warned about consorting with did not contain serious indictable offences.³¹¹ 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 in, as he was so unwell, at a time when he was sleeping in a park. 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. B was not identified by the LAC as a high-risk offender at the time he was warned or charged.

In our issues paper we reported on a group of five men subject to the consorting law. According to police records, three of the men were 'sleeping rough' and two were residing in a local men's refuge. Police records with respect to these individuals indicate numerous examples of public intoxication and mental health reports such as self-harm incidents. All were 'convicted offenders'. These five men received 12 consorting warnings between them. All five men were both issued consorting warnings and had others warned about consorting with them. Police sought to charge one of these men with habitually consorting: see case study 8 below.

308. NSW Ombudsman, *Consorting Issues Paper: Review of the use of the consorting provisions by the NSW Police Force*, November 2013, p. 37.

309. *R v O'Brien* (unreported, Manly Local Court, Magistrate Brydon, 7 November 2012), p. 3.

310. *R v O'Brien* (unreported, Manly Local Court, Magistrate Brydon, 7 November 2012), p. 2.

311. *R v O'Brien* (unreported, Manly Local Court, Magistrate Brydon, 7 November 2012), p. 4.

Case Study 8. Attempt to charge homeless man with habitually consorting

D was a middle-aged man with two children. He had close to 30 convictions, mainly in relation to drug use, offensive behaviour and property crimes. The majority of these convictions were for summary offences and all matters were dealt with in the Local Court. In relation to each of the convictions, the Local Court had ordered D to pay a small fine or to be of good behaviour for 12 months.

Police records indicate that D had been homeless for several years, and was regularly observed sleeping rough in public parks with other homeless people. The records also indicate that over the years D had been in psychiatric hospitals on numerous occasions as a consequence of his drug use and mental health. In mid-2012, D was in hospital for close to three months.

When the new consorting law commenced, D received numerous consorting warnings. Each warning followed D having short conversations in public places with people who also appeared to be homeless. On one occasion when D was issued with a consorting warning, he had been having a conversation with two other people in a park, while he was packing up his sleeping bag.

In August 2012, police issued D with a Court Attendance Notice for habitually consorting under section 93X of the Crimes Act. They were unable to locate him to serve the notice and it was withdrawn in 2013 when D died.

The incidents of alleged consorting by this group of five men often involved sitting in public places such as parks, drinking and talking with each other. Police records indicate that members of this group were repeatedly searched or issued with move-on directions, all of which were complied with. No charges arose from these personal searches.

We analysed police records for the five individuals over an 18 month period. During this time one man was charged with domestic violence related offences, and one man was charged with the previous offence of consorting (section 546A of the Crimes Act). While the police records contain numerous examples of intoxication in public areas and there is some indication of personal drug use, there is no suspicion recorded by police of involvement in other criminal activities.

Organisations involved in providing supports and services to vulnerable people in the area raised concerns with us about this use of the consorting law. They told us that a number of their clients had stopped attending the support services offered out of fear that they might be charged with habitually consorting if they entered the locality.

When contacted, police from this command stated their concern about the potential involvement of some people experiencing homelessness in criminal activities such as drug use and noted that members of the public had complained to police about homeless people congregating in local parks and damaging facilities, leaving rubbish and being noisy. Local police explained they aimed to make the area feel safer for the whole community.

Responding to concerns from parts of the community

The consorting data contain other occasions of use where police have responded to local community concerns resulting in consorting warnings issued to people experiencing homelessness. The behaviour complained of ranged from offensive conduct to property damage and safety issues. One example involved homeless men shouting at passers-by: see case study 9.

Case Study 9. Shouting at passers-by

Police received reports of two men shouting at people passing by. Police identified that the men were homeless and issued them both with a consorting warning in relation to each other. The men told police they were not aware it was an offence to associate with one another. One of the men also told police that the other person was his 'only friend'. They were also issued with move-on directions.³¹²

312. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

In NSW there exists a range of minor, summary offences that police may rely on to address behaviour such as offensive conduct, offensive language, continuing to be intoxicated in public following a move-on direction, and violent disorder.³¹³ These offences involve penalties ranging from a small fine to a maximum of six months imprisonment. Use of the consorting law, an indictable offence punishable by a maximum \$16,500 fine and/or three years imprisonment, in lieu of summary offences or move-on directions, appears to circumvent the level of seriousness attributed to this type of conduct by Parliament.

Another example in the consorting data involved people squatting in a deserted building: see case study 10.

Case Study 10. Squat house

Police were conducting patrols at a known squat house. They found 12 people in the house and some drug paraphernalia located 'in a social area.' All people in the house were searched but nothing illegal was found. The squatters were each given a warning for trespass and were issued with a move-on direction. In addition, they were all issued with a warning for consorting.³¹⁴

People squatting in deserted buildings and using illicit drugs raises a number of interwoven issues for police. Commanders will be answerable to sections of the community for property damage, and risk of fire and harm to people living in the 'squat' as well as to neighbouring residents. However, as case study 10 shows, police have powers to address trespass and to move people on in certain circumstances. Additionally, offences exist in relation to drug possession and property damage. Use of the consorting law to attempt to break up a group of squatters, does not appear to be within the use contemplated by Parliament when it enacted the consorting law.

While these examples involve use of the consorting law against people experiencing homelessness, they are also indicative of the competing community concerns that police are required to manage on a regular basis. The NSW Police Force has a range of strategies and powers available to it to deal with public disorder, including relevant summary offences, criminal offences relating to property damage and laws against trespass. Whether it is appropriate or reasonable to use the consorting law in addition to these powers in these contexts is contentious. In chapter 11 we outline our recommendations in relation to the use of the consorting law to address or prevent minor offending.

Use of the consorting law in relation to co-residents of refuges

Case Study 11. Co-residents of refuges

In a metropolitan LAC we identified use of the consorting law in relation to several people experiencing homelessness. Police records confirmed these men were homeless at the time they were issued with consorting warnings. Some people who were subject to the consorting law were staying a local refuge which provides crisis accommodation, while others advised police that they were living on the streets. Some people residing at the same refuge were issued with warnings in relation to consorting with each other.

Police said they received reports in relation to assaults and robberies in the area surrounding the refuge. People residing at the refuge were suspected of congregating outside the refuge and committing offences against people passing by. We spoke with police from this command in relation to their use of the consorting law in these circumstances. Police felt that this use was appropriate and explained that their use of the consorting law was necessary in the circumstances to prevent or disrupt crime.³¹⁵

Some refuges and temporary accommodation facilities enforce a 'lock-out' period for some time during the day. Given that people accessing these facilities have limited financial resources, there are few options for where they can spend this time and they will likely occupy public areas nearby.

313. *Summary Offences Act 1988*, Part 2, Division 1. Offences in this Division include offensive conduct, offensive language, continued intoxicated and disorderly behaviour, and possession of liquor by minors: *Summary Offences Act 1988*, ss. 4, 4A, 9 and 11A.

314. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

315. Consultation with LAC 3, Central Metropolitan Region, 30 July 2014.

Measuring the consequences of this use of the consorting law is difficult. Clearly, prohibiting associations between people staying in the same refuge will compromise their ability to access that accommodation. However, the impact on any offending, if residents were in fact involved, is significantly more difficult to ascertain.

8.2.5. Defences

Chapter 10 of this report discusses issues and makes recommendations in relation to the defences to consorting set out in section 93Y of the Crimes Act. However, an issue raised with us throughout the review period is the lack of a defence to consorting for a person seeking to access supports and services such as those required by people experiencing homelessness. For example, concerns were raised by a neighbourhood centre in a Sydney metropolitan area that offers a wide range of services to people experiencing homelessness, including meals, dental services, showers and laundry facilities, computer access and hairdressing. The centre also runs a regular games morning, breakfasts and barbecues for the community. The services provided are understood to be crucial in reducing social isolation and building a cohesive community. The centre was concerned that association between people in the context of accessing these services could be considered consorting, despite the clear benefits for people experiencing homelessness in accessing these services. The importance of productive relationships between police and community service providers, who will typically encounter the same people on a regular basis, was highlighted in these circumstances.

If people accessing accommodation services are unable to associate with each other, they may be forced into primary homelessness or 'sleeping rough'. Several submissions argued that an additional defence should apply in relation to associations between people living together on a temporary basis, including living in refuges or crisis accommodation, or in open and public spaces.³¹⁶

8.2.6. Conclusion

Although the data did not suggest widespread use of the consorting law in relation to people experiencing homelessness, the examples we have identified demonstrate the breadth of circumstances within which the consorting law may be used and highlight the importance of adequate supervision and oversight of use. Many police officers we spoke to felt that it was not appropriate to use the consorting law in relation to people experiencing homelessness and viewed some of the case studies outlined in this section as examples of poor use of the consorting law.³¹⁷ The ways in which police policy may be able to address any unreasonable use of the consorting law in relation to people experiencing homelessness will be discussed in chapter 11.

8.3 Children and young people

For the purposes of this report, we have defined children and young people as those aged between 10 and 17 years.³¹⁸ The use of the consorting law in relation to this group raises a range of issues that arise from its special vulnerabilities. These vulnerabilities are recognised in the legal framework set up in NSW to respond to youth offending.

In 2011, the NSW Department of Attorney General and Justice reported:

Relatively high rates of offending by children and young people are often explained by reference to adolescent brain development. Middle adolescence is a time during which the brain's development trajectory biases a young person to risk-taking and sensation-seeking behaviours.³¹⁹ Young people tend to be impulsive, short-sighted and easily influenced by others.³²⁰

It is now widely accepted that these factors, as well as children's vulnerability, immaturity and lack of experience more generally, necessitate a different criminal justice response to offending by children.³²¹

316. NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 7; Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, p. 13.

317. Consultation with LAC 1, Western Region, 17 September 2014; Consultation with LAC 3, Western Region, 19 January 2015.

318. There were no children aged 10, 11 or 12 years in the consorting dataset.

319. Linda Van Leijenhorst, Kiki Zanolie, Catharina Van Meel, P. Michiel Westenberg, Serge A.R.B. Rombouts, and Eveline A. Crone, 'What motivates the adolescent? Brain regions mediating reward sensitivity across adolescence', *Cereb. Cortex* (2010) 20(1), pp. 61–69, as cited in NSW Department of Attorney General and Justice, *Review of the Young Offenders Act 1997 and the Children (Criminal Proceedings) Act 1987: Consultation Paper*, October 2011.

320. L. Steinberg, 'Should the science of adolescent brain development inform public policy?' *American Psychologist*, (2009) 64(8), 739–750, as cited in NSW Department of Attorney General and Justice, *Review of the Young Offenders Act 1997 and the Children (Criminal Proceedings) Act 1987: Consultation Paper*, October 2011.

321. NSW Department of Attorney General and Justice, *Review of the Young Offenders Act 1997 and the Children (Criminal Proceedings) Act 1987: Consultation Paper*, October 2011, p. 5.

8.3.1. Use of the consorting law in relation to children and young people

The NSW Police Force made the policy decision that consorting charges should not be brought against children under the age of 16 years 'except in exceptional circumstances'.³²² In relation to young people, the Consorting SOPs state:

You should exercise discretion when dealing with young people aged 16 - 17 years and remember that the *Young Offenders Act 1997* applies.³²³

This approach was emphasised and expanded on by the NSW Police Force in its submission to this review:

In the Consorting SOPs, police officers are advised to consider dealing with young people aged 16 and 17 years who may be charged with consorting under section 93X of the Crimes Act via the diversionary scheme put in place by the *Young Offenders Act 1997*. In this case, the young people aged 16 and 17 years are more likely to benefit from State Government initiatives such as Youth on Track, an early intervention scheme for young people that provides integrated case management services responding to offending behaviour.³²⁴

The need for the presence of 'exceptional circumstances' when considering using the consorting law in relation to children and young people was also reinforced in training to officers.³²⁵

Despite the policy, procedures and training implemented by the NSW Police Force, 201 children and young people aged between 13 and 17 years were subject to use of the consorting law during the review period. Forty-one of these people were aged 13 to 15 years, and the remainder were aged 16 or 17 years. Three quarters of the 201 children and young people were only subject to the consorting law on one occasion.

Nearly all of the 201 children and young people were issued with a consorting warning (n=187), and two thirds had their friends or associates warned about consorting with them (n=133). Around 60% of these children and young people were both issued a warning and had others warned about consorting with them (n=119).³²⁶

More than three quarters of the consorting warnings issued about children and young people were unlawful (n= 195) as they were based on the mistaken belief the person was a 'convicted offender' when in fact there was no indictable conviction formally recorded in his or her criminal record. This is discussed in section 8.3.4 below.

Overall, 325 official consorting warnings were issued to children and young people, and 251 warnings were issued about children and young people. Table 14 provides a breakdown of these figures by age.

Table 14. The number of consorting warnings issued to and about children and young people

	13-15 years	16-17 years	Total
Warnings issued to young people	55	270	325
Warnings issued about young people	46	205	251

Source: NSW Police Force – COPS (Consorting merged dataset, 9 April 2012 to 8 April 2015).

Nearly 60% of the children and young people subject to the consorting law were Aboriginal (n=118). This is significantly higher than the proportion of Aboriginal people in the overall consorting data (37%). The highest proportion of Aboriginal people is in the youngest category of children and young people subject to the consorting law. Table 15 below shows that 29 of the 41 children aged 13 to 15 years were Aboriginal, comprising 71% of that cohort and compared to 56% of the 16 - 17 year olds (n=89).

Children and young people were warned about consorting with other children and young people or young adults up to the age of 24 years (with a handful of exceptions).³²⁷

322. State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures*, November 2014, p. 15.

323. State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures*, November 2014, p. 15.

324. NSW Police Force, Submission, *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*, 12 March 2014, p. 6.

325. NSW Police Force consorting training delivered by Inspector Kennedy on 16 August 2012, Police Training Facility, Hurstville.

326. This does not include information about young people who were also subject to the consorting law after they turned 18.

327. As discussed previously, the modifications to COPS in June 2013 meant that consorting warnings about people who were not 'convicted offenders' were no longer able to be recorded in COPS. This has had the effect that the only unlawful warnings we are able to identify past June 2013 involve occasions when the unlawful warning is mentioned in the COPS Event narrative that accompanies other, lawful consorting warnings. It follows that warnings to children about adults are more likely to be present in the consorting data after June 2013 as warnings where the subject of the warning is an adult are more likely to be lawful.

Table 15. Summary of the use of the consorting law against children and young people by age, Aboriginal status and involvement type

Involvement type	13-15 years			16-17 years			Total		
	Aboriginal	Non-Aboriginal	Total	Aboriginal	Non-Aboriginal	Total	Aboriginal	Non-Aboriginal	Grand Total
Issued at least one warning	27	11	38	85	63	148	112	74	186
Warned about on at least one occasion	24	3	27	68	37	105	92	40	132
Only ever issued a warning	5	9	14	21	33	54	26	42	68
Only ever warned about	2	1	3	4	7	11	6	8	14
Both warned and warned about	22	2	24	64	30	94	86	32	118
No. of people	29	12	41	89	70	159	118	82	200*

* The Aboriginal status for one young person is unknown.

Source: NSW Police Force – COPS (Consorting merged data set, 9 April 2012 to 8 April 2015).

The consorting law was used in relation to children and young people by police from 57 LACs and squads across the state; however, the majority of this use was concentrated in a handful of commands.

Four LACs were responsible for issuing more than one third of the total warnings (n=120) to children and young people. Each LAC issued more than 20 warnings. These four LACs are all Sydney metropolitan LACs, with two in the Central Metropolitan Region and two in the South West Metropolitan Region.

Another four LACs were responsible for issuing 30% of the total warnings about children young people (n=76). Again, all are Sydney metropolitan LACs.³²⁸

Children and young people did not feature in any significant way in the use of the consorting law by the specialist squads targeting serious and organised crime or criminal gangs. In the review period, only seven of the people targeted by these specialist squads were under the age of 18 years. Of the 682 people subject to use of the consorting law by the Gangs Squad, only four were aged less than 18 years and none was younger than 16 years. This amounts to 0.6% of the people targeted by the Gangs Squad.

8.3.2. Youth offending in NSW and the legal framework for addressing it

Youth offending is recognised as a significant criminal justice issue, and the reduction of juvenile reoffending featured as a key target in the recently replaced 10 year plan for the state.³²⁹

Data from the NSW Bureau of Crime Statistics and Research (BOCSAR) establish a downward trend in the rate of 10 - 17 year olds proceeded against by police in relation to serious assaults, break and enter offences, motor vehicle thefts and robberies in the five years to 2012.³³⁰

328. Two in the South West Metropolitan Region and two in the Central Metropolitan Region.

329. Goal 17 in NSW Government, *NSW 2021 A plan to make NSW number one*, 6 September 2011, p. 35. This plan was replaced in September 2015 by 12 State Priorities outlined on www.nsw.gov.au/making-it-happen, accessed 2 November 2015.

330. Don Weatherburn, Karen Freeman and Jessie Holmes, NSW Bureau of Crime Statistics and Research, *Young but not so restless: Trends in the age-specific rate of offending*, Issue paper no. 98, September 2014; see tables A1–A4 in the Appendix on p. 6. A person is 'proceeded against' if they have been given a formal caution, referred to a youth justice conference or charged.

In 2013, BOCSAR reported:

The recorded number of juvenile offenders proceeded against by the NSW Police Force for violent offences fell by 7.1 percent on average each year over the five years ending December 2013. Similarly, over the same time, the number of juvenile offenders proceeded against for property offences fell by 9.8 percent on average each year.³³¹

In NSW there is a separate children's court system for dealing with young offenders engaged in more serious crime, and a diversionary scheme under the *Young Offenders Act 1997* for less serious offending.

The fundamental principle underlying the work of the Children's Court in its criminal jurisdiction is 'to attempt to rehabilitate young offenders and divert them from a life defined by criminal offending and involvement in the criminal justice system.'³³²

The scheme created by the Young Offenders Act attempts to divert children and young people from the criminal justice system via the use of a system of formal warnings, cautions and youth justice conferences for less serious matters where the child or young person admits responsibility.³³³ Several key principles underpin the scheme, including the following:

- The least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence, having regard to matters required to be considered under the Act.³³⁴
- Criminal proceedings are not to be instituted against a child or young person if there is an alternative and appropriate means of dealing with the matter.³³⁵
- If it is appropriate in the circumstances, children or young people who are alleged to have committed an offence should be dealt with in their communities in order to assist their reintegration and to sustain family and community ties.³³⁶

In addition, the objects of the Young Offenders Act include addressing the 'over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system'.³³⁷ Recent statistics establish that 48% of children and young people in the custody of Juvenile Justice NSW (Juvenile Justice) are Aboriginal.³³⁸

8.3.3. Policing of children and young people who reoffend and successful interventions in their offending

Offending by children and young people is common, although most people grow out of it, with offending rates usually peaking in late adolescence and declining in early adulthood. However, a small proportion of children and young people continue to offend into adulthood and are responsible for a disproportionate amount of crime.³³⁹ There are a number of risk factors that tend to be present in the childhoods of this group. Research into the health and life experiences of children in the custody of Juvenile Justice established that young people in custody 'come from highly disadvantaged backgrounds with high rates of child abuse, trauma, neglect, and a significant proportion have parents with a history of incarceration, drug and alcohol dependence and low socio-economic status'.³⁴⁰ On many measures, the risks are higher for Aboriginal young people in custody.³⁴¹

331. Bureau of Crime Statistics and Research, *Is juvenile crime increasing?*, www.bocsar.nsw.gov.au/Pages/bocsar_fastfact_03.aspx, accessed 14 July 2015.

332. Children's Court, *History of the Children's Court*, www.childrenscourt.justice.nsw.gov.au/Pages/childrenscourt_aboutus/history.aspx, accessed 16 July 2015.

333. *Young Offenders Act 1997*, s. 3(a).

334. *Young Offenders Act 1997*, s. 7(a).

335. *Young Offenders Act 1997*, s. 7(c).

336. *Young Offenders Act 1997*, s. 7(e).

337. *Young Offenders Act 1997*, s. 3(d).

338. NSW Government, Justice, *Young people in Custody: Key services measures for 2013–2014 – Custody*, www.juvenile.justice.nsw.gov.au/Pages/Juvenile%20Justice/aboutdjj/statistics_custody.aspx, accessed 16 July 2015. In the year to 30 June 2014, the average daily proportion of young people in the custody of Juvenile Justice NSW who were Aboriginal and/or Torres Strait Islander was 48%.

339. Kelly Richards, Australian Institute of Criminology, 'What makes juvenile offenders different from adult offenders?', *Trends & issues in crime and criminal justice*, no. 409, February 2011, p. 2.

340. Devon Indig et al., Department of Human Services and NSW Health, *2009 NSW Young People in Custody Health Survey: Full Report*, March 2011, p. 162.

341. For instance, Aboriginal detainees are much more likely to have been placed in care before the age of 16 years (38% Aboriginal, compared to 17% non-Aboriginal), had a parent in prison (61% Aboriginal, 30% non-Aboriginal), or a possible intellectual disability (20% Aboriginal, 7% non-Aboriginal): NSW Ombudsman, *Responding to Child Sexual Assault in Aboriginal Communities*, December 2012, p. 178.

These factors cannot be considered prescriptive or causal of criminal offending by young people but are just some of the conditions of disadvantage that tend to characterise the early lives of those who come to repeated police attention. Without intervention, treatment or support to address the underlying causes of their involvement in crime, many of these young offenders continue offending well into adulthood.³⁴²

In a number of recent reports and submissions prepared by this office we have argued for the need for human services agencies to take an 'intelligence-driven' approach to the early identification of vulnerable children and young people who are 'at-risk', for the purpose of undertaking integrated case management aimed at supporting them and their families. We have argued that this should involve holistically assessing individual needs and directly facilitating access to a range of services.³⁴³

The NSW Government has adopted a number of initiatives based on this approach. In the criminal justice sector, for example, the Youth on Track scheme attempts to 'address criminogenic risk and needs' and takes a holistic approach to offending by children and young people. Under the scheme, interventions aimed at addressing a young person's involvement in crime are targeted and individualised and may include family intervention, engagement with education or referrals to additional programs and services.³⁴⁴ The scheme is now available in eight commands on the Mid North Coast, and in Newcastle and Blacktown. Recent evaluation of the Youth on Track scheme has shown that it has had a positive impact on offending risks and contact with police.³⁴⁵

The 'Premier's priorities' that outline 12 key areas the NSW government is focussing on include children and young people who are in contact with the child protection system. The NSW government has set a key target being to 'decrease the percentage of children and young people re-reported at-risk of significant harm by 15%.³⁴⁶ The priorities also include a focus on reducing youth homelessness with the government pledging to 'work with the non-government and not-for-profit sectors to support the most vulnerable young people to maintain stable accommodation and break the cycle of chronic homelessness.'³⁴⁷

This context is recognised in overarching NSW Police Force policy in relation to children and young people. The NSW Police Force *Corporate Plan 2012–2016* explicitly endorses prevention and early intervention strategies for young offenders and has set a target of diverting at least 58% of young offenders from court. The NSW Police Force *Youth Strategy 2013 - 2017* provides a high-level framework for interactions between police officers and young people. The document states that positive outcomes for young people and the community are best achieved through a collaborative, whole-of-government approach.³⁴⁸ Among its objectives are improving strategies for addressing antisocial behaviour and engaging in early intervention initiatives that divert children and young people away from the criminal justice system.³⁴⁹

In addition, the NSW Police Force lists addressing Aboriginal youth offending as one of four key priorities in its *Aboriginal Strategic Direction 2012-2017*.³⁵⁰ This policy includes outcomes such as promoting the diversion of Aboriginal young people from the criminal justice system through initiatives such as the *Cautioning Aboriginal Young People Protocol* and reducing rates of youth homelessness.³⁵¹

The NSW Police Force is both a signatory and significant contributor to the development of the 2015 *Joint Protocol to Reduce the Contact of Young People in Residential Out-of-Home Care with the Criminal Justice System*, prepared by this office.³⁵² The protocol applies to children and young people who are living in residential out-of-home care.³⁵³ The central purpose

342. Terrie E. Moffitt, 'Adolescent-limited and life-course persistent antisocial behaviour: A developmental taxonomy', *Psychological Review*, (1993) 100, pp. 674–701, as cited in NSW Department of Attorney General and Justice, *Review of the Young Offenders Act 1997 and the Children (Criminal Proceedings) Act 1987: Consultation Paper*, October 2011, pp. 4–5.

343. NSW Ombudsman, *Inquiry into service provision to the Bourke and Brewarrina communities*, December 2010, p. ix; NSW Ombudsman, *Responding to Child Sexual Assault in Aboriginal Communities*, December 2012, pp. 26–27.

344. NSW Department of Justice, *Youth on Track and the criminal justice system*, 18 March 2015, www.youthontrack.justice.nsw.gov.au/Pages/yot/about_us/yot_cjs.aspx, viewed 13 April 2015.

345. NSW Department of Justice, *Youth on Track, News and Media*, 18 March 2015, www.youthontrack.justice.nsw.gov.au/Pages/yot/news.aspx, viewed 10 April 2015.

346. NSW Government, *State priorities*, www.nsw.gov.au/making-it-happen accessed 2 November 2015, p. 7.

347. NSW Government, *State priorities*, www.nsw.gov.au/making-it-happen accessed 2 November 2015, p. 8.

348. NSW Police Force, *Youth Strategy 2013–2017*, November 2013, p. 8.

349. NSW Police Force, *Youth Strategy 2013–2017*, November 2013, p. 10.

350. NSW Police Force, *Aboriginal Strategic Direction 2012-2017*, updated 30 January 2015, p. 15.

351. NSW Police Force, *Aboriginal Strategic Direction 2012-2017*, updated 30 January 2015, pp. 28–29.

352. The protocol was prepared by the NSW Ombudsman based on extensive consultation with relevant stakeholders, in particular the Western Sydney subgroup of the Western Sydney Residential Providers Forum. The significant contributions of the NSW Police Force Youth Corporate Sponsor, Assistant Commissioner Jeff Loy, the NSW Police Force Operational Programs Command, Legal Aid NSW, the Association of Children's Welfare Agencies and Residential Care Providers Network, and Family and Community Services are also acknowledged.

353. Out-of-home care is one of a range of services provided to children who are in need of care and protection. This can include a variety of care arrangements other than with their parents, such as foster care, placements with relatives of kin, and residential care.

of the protocol is to 'reduce unnecessary police contact with young people'. The guiding principles acknowledge the complex needs arising from the traumatic backgrounds experienced by these young people and that behaviours are often 'best managed using trauma-informed approaches consistent with principles of therapeutic care.'³⁵⁴ The protocol outlines a multi-agency approach with key roles for the NSW Police Force and Family and Community Services, among others.

8.3.4. Issues and concerns about the use of the new consorting law in relation to children and young people

The majority of submissions we received and people we consulted throughout the review period expressed the view that children and young people should be excluded from the operation of the consorting law.³⁵⁵

Stakeholders were broadly concerned about the potential for the consorting law to criminalise children and young people with no previous criminal history as well as those who had previously offended. For example, the Shopfront Youth Legal Centre submitted that exposing children and young people to the consorting law carries with it the risk that a young person with no criminal history will be drawn into the criminal justice system or that a child or young person with a history of offending will become further entrenched in the system.³⁵⁶

There were a range of other concerns, primarily related to an incongruity between the consorting law and the existing legal framework in which police deal with young offenders. The consorting data also revealed a particular practical implementation issue with the use of the consorting law in relation to young people.

In this section we discuss each of the following concerns in greater detail:

- 1) The consorting law will not achieve the purpose of reducing reoffending by young people.
- 2) The diversionary measures under the Young Offenders Act are not well suited to dealing with the offence of consorting.
- 3) Giving consorting warnings about a young person requires police to breach the person's privacy by revealing to another person that he or she has been convicted of an indictable offence.
- 4) The legal framework governing the status of a young person's criminal history has resulted in police issuing a large number of invalid warnings.

The consorting law will not reduce reoffending by young people

In a consultation to discuss the operation of the consorting law, a Regional Director at Juvenile Justice expressed to us the view that, if the purpose of the consorting law is to reduce offending, then it is unlikely to achieve its purpose with respect to young people. She explained:

Associating with antisocial peers is a risk for recidivism, but managing it by penalty does not result in a reduction of that risk.³⁵⁷

354. *Joint Protocol to Reduce the Contact of Young People in Residential Out-of-Home Care with the Criminal Justice System*, 2015, p. 2.

355. Office of the Director of Public Prosecutions, Submission, *Consorting Issues Paper – Submission ODPP*, 28 February 2014, p. 3; Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, p. 13; Aboriginal Legal Service (NSW/ACT) Ltd, Submission, *NSW Ombudsman Consorting Issues Paper Response by Aboriginal Legal Service (NSW/ACT) Limited*, 28 February 2014, p. 3; Community Legal Centres NSW, Submission, *Legislative review of the consorting provisions*, 23 March 2014, p. 12; Intellectual Disability Rights Service, Submission, *Review of the Use of the Consorting provisions by the NSW Police Force*, 7 March 2014, p. 13; Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, p. 8; NSW Council for Civil Liberties Inc, Submission, *NSW Ombudsman Consorting Issues Paper: Review of the Use of the Consorting Provisions by the NSW Police Force Submission by the NSW Council for Civil Liberties*, 5 February 2014, p. 13; NSW Young Lawyers, Submission, *Review of consorting provisions*, 7 March 2014, p.10; The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 5; Youth Justice Coalition, Submission, *Review of the New Consorting Provisions*, 5 March 2014, p. 3.

356. The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 7; Youth Justice Coalition, Submission, *Review of the New Consorting Provisions*, 5 March 2014, p. 3; NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 7; Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, p. 9; Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, p. 12.

357. Consultation with Juvenile Justice NSW, 17 November 2014.

This view was reiterated in a number of submissions, including that from The Shopfront Youth Legal Centre, a specialist centre which provides legal services for homeless and disadvantaged youth.³⁵⁸

Concern was also expressed by a number of organisations and individuals involved in frontline service delivery about the capacity of at-risk children and young people to comply with a consorting warning. The Shopfront Legal Centre advised:

It is generally accepted that, unlike most adults, children and adolescents have very little control over their environment. As well as being more impulsive and less able than adults to perceive and understand the long term consequences of their actions, children are less able to make choices about where they live and who they associate with.³⁵⁹

Additionally, concern about the potential for the consorting law to exacerbate, rather than reduce, offending behaviour was expressed by specialist youth support services and youth workers. We spoke to a youth support service in a Sydney metropolitan area that provides a range of specialised services to marginalised, homeless and at-risk youth. Several clients accessing their service reported that they had been issued consorting warnings while spending time with friends in public areas, including parks and outdoor seating areas. The service felt that these consorting warnings had had a detrimental impact on their clients and, negated some of the positive work undertaken to support their young clients. They provided the following insight into the impact of the consorting law on one of their clients.

Case Study 12. At-risk young person

E is a young person who accesses the youth service regularly. In his teens, E was hit by a train and acquired a brain injury. Among other effects, the acquired brain injury resulted in limited impulse control. E has been homeless since the age of 13 and, given his tendency to occupy public areas, has had regular contact with police. In some instances, this contact led to charges including resisting arrest and offensive language charges. E was issued with several consorting warnings for associating with his peers in public areas such as the local mall. After receiving these warnings, he would become upset and confused, stating that he had not committed any crime and that he lives with the people he had been warned about consorting with. The appropriateness of issuing consorting warnings in these circumstances was raised by youth service staff at an Integrated Case Management Panel meeting, involving Corrective Services, NSW Police, Juvenile Justice and NSW Housing and attended by the Commander of the relevant LAC. E was not issued with any further consorting warnings after this time.

Other youth services and youth support workers similarly felt that while the effectiveness of the consorting law in terms of preventing further offending is not established, the likelihood that it will have negative repercussions for the friendships of young people in circumstances where their friendships are often important protective factors was more certain.³⁶⁰

As almost 60% of the children and young people subject to the use of the consorting law had been both warned and warned about, it appears that police have largely used the consorting law in situations involving young offenders associating with other offenders, and less for the purpose of warning children and young people with no criminal history against associating with people who had a criminal history. In order to identify whether the children and young people subject to the consorting law had disadvantaged life experiences, consistent with the research into the broader cohort of children and young people who continue to offend, we analysed the police records of 101 children and young people in the consorting data to determine how many of them could be described as vulnerable or 'at-risk'. This sample was randomly selected and comprised half of the total number of children and young people subject to the consorting law during the review period.

358. The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014.

359. The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, pp. 6–7. See also Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, p. 12.

360. Consultation with Children's Court Support Worker, 20 March 2013; Consultation with a rural Family Support Service, 16 September 2014.

We looked for police records that indicated homelessness, mental health issues, experience of domestic violence, the use of alcohol and other drugs, and whether a 'risk of harm' or 'risk of significant harm' report was made by police to the Department of Family and Community Services (FACS) in relation to the young person's safety or welfare.³⁶¹ We found that all but two of the children and young people had at least one risk factor present in their police records. There were three or more risk factors present in the police records of 71% of the group (n=72). Analysis of the police records of the 101 young people revealed:

- police had made at least one 'risk of harm' or 'risk of significant harm' report to FACS in relation to 78 children and young people at some point in their lives³⁶²
- 37 of the children and young people's police records contained a reference to that person experiencing mental health issues
- nearly all of the children and young people's police records contained a reference to their use of alcohol or other drugs (n=97), and
- around two thirds of the children and young people appear in the police records as victims of domestic violence (n=65).

We also analysed the FACS database – the Key Information and Directory System (KiDS) - in relation to the same sample of children and young people. FACS receives 'risk of significant harm' reports in relation to vulnerable children and young people from individuals, organisations and agencies if there are reasonable grounds to suspect a child or young person is at risk of significant harm. We conducted a simple count of the number of 'risk of harm' and 'risk of significant harm' reports for each young person in the cohort. We looked at their KiDS records either to their 18th birthday or prior to 9 April 2015 (the end of the review period), whichever came first.³⁶³

This revealed that 82 of the 101 children and young people had been brought to the attention of FACS as being at 'risk of significant harm'. Half of these children and young people had been reported to FACS on 16 or more occasions, and 11 children and young people had been reported on more than 50 occasions. There were three young people who had been reported to FACS on more than 100 occasions. The average number of 'risk of significant harm' reports for children and young people in the cohort was 22.

This analysis suggests the children and young people subject to the use of the consorting law during the review period fall within the cohort of young offenders for whom use of the consorting law may have counterproductive results and who instead require support to address the underlying causes of their offending if they are to be diverted from continued involvement with the criminal justice system.

The diversionary measures under the Young Offenders Act are not well suited to dealing with the consorting offence

The majority of the submissions we received raised concerns that the consorting law may operate at cross-purposes to the principles and objectives of the Young Offenders Act.

At a practical level, the alternatives to charging available under the Young Offenders Act do not appear to be well suited to dealing with the offence of consorting. Consorting is one of the indictable offences to which the Young Offenders Act can apply.³⁶⁴ This means that if police wish to proceed against a young person under the Young Offenders Act for the offence of consorting, police can instead issue the child or young person with a formal caution or refer them for a youth justice conference if the person meets a number of statutory restrictions and police (or other relevant people) believe it is appropriate for the young person to be dealt with under the Young Offenders Act. The child or young person must also admit the offence.³⁶⁵

361. Police officers who suspect that a child or young person is at risk of significant harm are required to report this to the Department of Family and Community Services in accordance with the *Children and Young Persons (Care and Protection) Act 1998*, ss.23 and 27.

362. The threshold for reporting was increased to 'significant harm' following recommendations by the Wood Special Commission of Inquiry into Child Protection Services in NSW in 2010. This resulted in fewer reports but reports made were considered to be more serious. Part 2 of the *Children and Young Persons (Care and Protection) Act* outlines the relevant statutory framework, and section 23 of this Act outlines the circumstances to be considered to determine whether a child or young person is at risk of significant harm.

363. Records relied on in this analysis were generated on 11 and 12 January 2016.

364. Section 8 of the *Young Offenders Act 1997*, provides that indictable offences that may be dealt with summarily under chapter 5 of the *Criminal Procedure Act 1986*, may be dealt with according to the *Young Offenders Act 1997*. The offence of consorting is included in Schedule 1, Table 2 of the *Criminal Procedure Act 1986*, in Part 2A, at 4E.

365. Section 13 of the *Young Offenders Act 1997* provides that only summary offences may be dealt with via a warning; section 18 of the *Young Offenders Act 1997*, establishes that indictable offences covered by the Act, such as consorting, may be dealt with via formal caution. Section 35 provides that consorting may be dealt with via a conference. See also sections 20 and 37, which outline additional considerations in relation to whether a young person is entitled to be dealt with via a caution or conference respectively.

Ordinarily, whether or not a child or young person is to be dealt with using the alternatives to charging of a formal caution or participation in a youth justice conference may be determined by consideration of the seriousness of the offence, the degree of violence involved, the harm caused to the victim, the young person's previous offending and any other appropriate circumstances, and the number of previous occasions the young person has been dealt with under the Young Offenders Act.³⁶⁶ The nature of the activity that the consorting offence criminalises – social interactions between two people – does easily lend itself to the application of the restorative justice principles that underpin youth justice conferences. In our consultation with Juvenile Justice, staff explained why applying this process in relation to the offence of consorting did not make sense. They said:

In a conference you need to admit and discuss what you did wrong. What did they do that was wrong with consorting? Additionally, there needs to be a victim - there is no victim with consorting... consorting punishes a person for who they spend time with, not the criminal activity they undertake.

At a youth justice conference, a young person comes face-to-face with their victim to discuss the crime they have committed and how people have been affected. It is a good opportunity for the young person to reflect on the consequences of their behaviour. Consorting may dilute the effectiveness of interventions if they are just sitting there talking about consorting because they were just hanging out with their friends [and there is no victim].³⁶⁷

Breaching a young person's privacy by disclosing that they have been previously convicted of an indictable offence

Particular privacy issues arise in relation to 'convicted offenders' who are children or young people. The disclosure that a young person has a criminal record required when a police officer issues a consorting warning about them appears to run counter to a range of NSW laws that afford privacy protections to children and young people who become involved in the criminal justice system.

Under the *Children (Criminal Proceedings) Act 1987*, for example, it is an offence 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.³⁶⁸ The Young Offenders Act similarly prohibits publication of the identities of children and disclosure of relevant records without a lawful excuse.³⁶⁹ The underlying rationale for these protections is that naming juvenile offenders is likely to lead to stigmatisation and ultimately to interfere with a young person's rehabilitation. It may also negatively affect a young person's family. The issues relating to this were analysed by the NSW Legislative Council Standing Committee on Law and Justice in 2008. The Committee concluded the prohibition on identifying young offenders should be reaffirmed as it:

reflects Australia's endorsement of various United Nations instruments relating to the differential treatment of children in the criminal justice system, and recognises their cognitive and emotional immaturity and increased vulnerability compared to adults.³⁷⁰

In its submission to our review, the NSW Police Force explained that young people 'often form in regular groups and it is likely that their associates are already aware of their offending history.' In circumstances where this information is not known, police commented:

It might be in the best interests of the young person issued the official warning to be made aware that their peer is a 'convicted offender'. This would provide the young person with an opportunity to consider their association with this peer, reducing the likelihood of their involvement in offending behaviour.³⁷¹

The Consorting SOPs are silent in relation to ways police officers may minimise the breach of the child or young person's privacy when issuing consorting warnings by, for example, ensuring that only the person being warned, and not other people who are present, is advised of the young person's indictable conviction. We discuss the privacy implications involved in the issuing of consorting warnings in section 9.6 of chapter 9, and recommend amendments to the Consorting SOPs in this regard at the end of that chapter.

366. See *Young Offenders Act 1997*, in particular ss. 20(3) and 37(3).

367. Consultation with Juvenile Justice NSW, 17 November 2014.

368. *Children (Criminal Proceedings) Act 1987*, s. 5A.

369. *Young Offenders Act 1997*, ss. 65 and 66.

370. New South Wales Parliament, Legislative Council Standing Committee on Law and Justice, *The prohibition of the publication of names of children involved in criminal proceedings*, Sydney, p. ix.

371. NSW Police Force, Submission, *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*, 12 March 2014, p. 7.

Exceptionally high level of police error resulting from legal complexity

Our analysis of the consorting data reveals an exceptionally high level of police error when issuing consorting warnings about children and young people. Of the 133 children and young people in the consorting data whose associates or friends were warned about consorting with them, 105, or 79%, were incorrectly identified by police as 'convicted offenders'. There were 195 unlawful warnings issued as a result, over half of which were issued to other children and young people (57%, n=111).

It appears that police are issuing consorting warnings in relation to children and young people who are known to them through repeated police contact and that these mistakes have arisen from a lack of understanding by police officers of the restrictions on the Children's Court's ability to record convictions. The legal complexities in this regard are outlined in section 4.5 in chapter 4.

In addition, two 16 year old youths were charged under section 93X of the Crimes Act with habitually consorting. Both of these charges were based on unlawful warnings. See case study 13.

Case Study 13. Two young people wrongly charged with consorting

On 28 January 2013, two 16 year old males were charged with habitually consorting with each other 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 was a 'convicted offender' and therefore the charges appeared to have been wrongly laid. Of further concern was that one of the young people appeared to be in custody due to breaching bail conditions in place relating to the consorting charge. We contacted the Commander of the Prosecutions Command, who confirmed that a variety of errors had been made, including the mistake about the 'convicted offender' status of both young people. The charges were then withdrawn. In an interview with the ABC, Jane Sanders, principal solicitor for The Shopfront Legal Centre, said that one of the young people, who was a client of the centre, had experienced periods of homelessness and had 'spent a lot of time out on the streets'.³⁷²

The wrongful charging outlined in the case study 13 is no longer possible due to the modifications to the Computerised Operational Policing System (COPS) implemented by the NSW Police Force on 24 June 2013. Since that date, an officer is unable to electronically generate an indictment for a consorting charge without the minimum number of lawful warnings being previously recorded. The changes to COPS were designed to reduce police officer error and increase compliance with police policy in relation to use of the consorting law against children and young people, among other things. Unless a child is convicted of a very serious offence in the District or Supreme Courts, police officers are no longer able to save a record of a consorting warning in COPS about that child and COPS now includes an authentication process and 'will validate whether a person is a convicted offender prior to permitting a consorting warning to be recorded'.³⁷³

In addition to this, and following our advice in 2013 to the NSW Police Force regarding these errors, the NSW Police Force generated a state-wide email to assist investigators understand the factors determining 'convicted offender' status, developed a short and targeted training scenario for officers, published articles in relation to the issue, and contacted each command and officer where an error had occurred.

In relation to the individuals we identified as having been issued invalid warnings, we were advised that each person was contacted where possible, advised that the warning was not valid and had any relevant COPS record deleted.

Despite the modifications to COPS in 2013 and the NSW Police Force's efforts to correct the errors that occurred and train officers to avoid them in the future, there is evidence that the errors have continued to occur in the field. We have only been able to identify the errors after June 2013 because a description of the warnings is included in the Event narratives of otherwise lawful consorting interactions. That is, during the interaction, police have also issued at least one lawful consorting warning.

372. ABC, *PM*, 'Revived NSW consorting laws marred by legal battles', 19 March 2013, viewed 20 June 2013; NSW Ombudsman, *Consorting Issues Paper: Review of the use of the consorting provisions by the NSW Police Force*, November 2013, p. 35.

373. Correspondence from Mr N. Kaldas APM, Deputy Commissioner, Field Operations, NSW Police Force, dated 17 October 2013.

Between 24 June 2013 and the end of the review period, we identified 22 children and young people whose associates were warned about consorting with them. Separate analysis of the relevant criminal histories revealed that 13 of these children and young people were not 'convicted offenders' when others were issued consorting warnings about them. A total of 18 warnings, all of which are invalid, were issued about these children and young people.³⁷⁴ While a consorting charge cannot be based on these invalid warnings; the warning recipients do not appear to be aware that the warnings were issued in error. In addition, incorrect information about these young people's criminal histories has been disclosed. The changes to the recording mechanism in COPS do not function as a complete safeguard against police officers issuing invalid consorting warnings. This is because it is the recording of the warning in COPS that alerts the officer to his or her mistake and this recording necessarily occurs sometime after the consorting warning has been issued.

Finally, our analysis of the consorting data in relation to children and young people's criminal histories identified a number of additional anomalies that appear to have resulted in the recording of unlawful consorting warnings about young people.

These include the following instances:

- 1) A young offender was convicted in the Children's Court in his absence; a warrant was issued to bring him before the court for sentencing. Two weeks later, when he was brought before the Children's Court, a decision was made for the matter to be dealt with under the Young Offenders Act. It appears that a conviction remained recorded in COPS despite the court ordering the matter to be dealt with via a youth justice conference.³⁷⁵
- 2) Three young offenders separately appealed their matters in the Children's Court to the District Court. In all three cases, the Children's Court found the offences proved but did not record a conviction. The District Court dismissed their appeals but COPS inaccurately indicates it 'confirmed conviction(s)'.³⁷⁶

As part of their response to our identification of errors made by officers with respect to the 'convicted offender' status of people about whom consorting warnings were issued, the NSW Police Force amended the Consorting SOPs. The SOPs now provide the following guidance to officers:

If, when upon entering the information in WebCOPS, it becomes evident that the person named is not a convicted offender and the subsequent warning you issued to the Person of Interest is invalid, you will need to do the following:

- 1) make arrangements to have the consorting incident deleted/updated, as appropriate
- 2) contact the person/s warned and inform them the consorting warning was invalid and the information you gave regarding associating with the person named was inaccurate.³⁷⁷

In December 2015, we provided the NSW Police Force with a complete list of the details of all apparent errors in relation to consorting warnings made during the review period. This included errors that followed the modifications to COPS in June 2013. In correspondence dated 11 February 2016, the Commissioner of Police outlined the actions to be taken in response to these additional errors. Actions include amending or deleting the relevant COPS record, advising and educating the officer responsible for the error, and 'any such action necessary ... to address incorrect information that has been given to any person'.³⁷⁸ The Commissioner's office is coordinating the response and will advise us accordingly.

The NSW Police Force has acknowledged the complexities contained in the definition of 'convicted offender' in relation to children and young people and their possible impact on the usefulness of the consorting law. In its submission to our review, the NSW Police Force stated:

It does appear incongruous that the Children's Court dealing with a young person aged 17 for a serious indictable offence such as robbery may impose a custodial penalty (a control order) and yet the offender does not come within the definition of 'convicted offender'. It is only on those rare occasions that the Children's Court imposes a conviction that a person dealt with in that jurisdiction may be a convicted offender.

This may have the capacity to limit the effectiveness of consorting provisions as a tool to prevent or deter the commission of further crimes. The potential risk of further offending linked to habitual association with convicted offenders arises from proven commission of offences by the convicted offender, not from the court imposing a conviction after establishing guilt.

This must be balanced against well established policy reasons to deal with juvenile offenders under a different legislative regime, which mitigate against wholesale inclusion of all indictable offences found in the Children's Court as being convictions for the purposes of determining who is a 'convicted offender'.³⁷⁹

374. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

375. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

376. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

377. State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures*, November 2014, p. 16.

378. Correspondence from Mr Andrew Scipione, Commissioner of Police, NSW Police Force, to Mr John McMillan, Acting NSW Ombudsman, dated 11 February 2016.

379. NSW Police Force, Submission, *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*, 12 March 2014, p. 6.

In its submission to this review, the NSW Police Force suggested,

[a] suitable compromise might be to limit the [use of the consorting] provisions to serious indictable offences committed by persons aged 16 years or older, or to only those matters where a control order is imposed by the Children's Court.³⁸⁰

This office supports the NSW Police Force position that children aged less than 16 years should not be included in the operation of the consorting law.

However, preserving the application of the consorting law to 16 - 17 year olds found guilty of serious indictable offences or sentenced to control orders removes the role of the Children's Court as the gatekeeper as to whether or not the consorting law may be used against a young person aged 16 or 17 years. At present, it is solely within the discretion of the Children's Court as to whether or not a conviction is recorded for a 16 - 17 year old if found guilty.

Additionally, a 'serious indictable offence' is defined in section 4 of the Crimes Act as one where a sentence of five years or more may apply. While this definition includes the most serious criminal offences it also includes low value theft and minor property damage.

Our consultations with police officers repeatedly emphasised the difficulties they experienced in finding out relevant criminal history information while in the field and therefore a definition of 'convicted offender' that is based on the sentencing outcome of an individual matter does not appear to provide a practical solution.³⁸¹

For these reasons, while this office supports the exclusion of children younger than 16 years from the application of the consorting law, in our view the suggestions put forward by the NSW Police Force do not address concerns about the use of the consorting law in relation to children and young people.

8.3.5. Reasons to retain use of the consorting law in relation to children and young people

In several consultations with police, it was suggested that the inclusion of children and young people under the consorting law was desirable as it enabled police to use the consorting law to prevent young people from being recruited by, or otherwise associating with, people linked to organised crime and/or criminal gangs. The Consorting Standing Committee of the NSW Police Force reiterated this view in discussions with this office in January 2016.

However, the consorting law was not used in this way during the review period. Officers from the specialist squads targeting serious and organised crime and criminal gangs have only used the consorting law on eight occasions involving young people - the Gangs Squad on five occasions, the Middle Eastern Organised Crime Squad (MEOCS) on two, and the Child Abuse Squad on a single occasion.

Of the 682 people subject to use of the consorting law by the Gangs Squad, for example, only four were aged less than 18 years. None was younger than 16 years. This amounts to 0.6% of the people targeted by the Gangs Squad.

It could also be argued that the consorting law could be used to restrict the associations of young 'convicted offenders' to prevent them from drawing other young people into crime, or to prevent them from associating with other 'convicted offenders', of any age.

However, it is important to note that in the majority of circumstances police do not need the consorting law in order to do this. Police officers and other relevant decision-makers are already able to restrict whom a young person can lawfully associate with when on bail, when sentenced and as part of any parole conditions.

Section 25 of the *Bail Act 2013* provides that police officers may restrict an accused young person's contact with certain people while on bail if such a restriction is necessary to mitigate an unacceptable risk. Further, non-association orders can be also made by the Children's Court when sentencing a young person.³⁸² Finally, if a child or young person is subject to supervision while on parole, he or she may be forbidden from associating with person(s) specified by their supervisor.³⁸³ Various penalties follow breaching these non-association orders. The noteworthy differences between these orders and consorting warnings are that the non-association orders follow a charge, or resulting court action such as sentencing, and involve the nomination of specific individuals where there is an identified risk.

380. NSW Police Force, Submission, *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*, 12 March 2014, p. 6. A control order is a custodial sentence.

381. For example, Consultation with LAC 1, Central Metropolitan Region, 27 March 2013; Consultation with LAC 1, Northern Region, 22 July 2014.

382. *Children (Criminal Proceedings) Act 1987*, s. 33D.

383. *Crimes (Sentencing Procedure) Act 1999*, s. 51A; *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: *Children (Detention Centres) Regulation 2010*, cl. 96(2)(k).

In light of these alternative means of limiting the people a young offender can associate with, and in light of the minimal use of the consorting law to prevent young people from associating with people linked to organised crime, we are of the view that the potential benefits of retaining the ability of police to use the consorting law in relation to young people are not sufficiently compelling as to outweigh the concerns we have identified. We reiterate that the errors made by police in relation to the 'convicted offender' status of young people when warning their associates about consorting with them have continued despite the NSW Police Force training, publications and other education tools available for frontline officers.

8.3.6. Summary and recommendation

There were 201 children and young people aged between 13 and 17 years subject to the consorting law in the review period, with 93% being issued with a consorting warning and 66% having their friends or associates warned about them. This is despite NSW Police Force policy and training emphasising that the consorting law should only be used in relation to young people in exceptional circumstances. The majority of submissions to our review argued that the use of the consorting law to address offending by children and young people is incompatible with the aims of the Young Offenders Act to divert young offenders from the criminal justice system, to achieve restorative justice and to prevent the disclosure of children and young people's criminal history.

Experts in dealing with children and young people who offend, such as senior staff at Juvenile Justice, advised that warning or charging young people with consorting is unlikely to have any positive impact on reoffending by this group, and in some circumstances may exacerbate problem behaviour or inhibit protective factors.

Importantly, analysis of the consorting data, police records and FACS records establishes that the consorting law has been used mainly in relation to young people with multiple indicators of disadvantage present in their histories. The use of the consorting law to address recidivism by at-risk children and young people appears to be at odds with successful contemporary prevention and diversion strategies which involve a multi-agency approach to offending and recognise the importance of integrated case management aimed at both the young person and their family.

Additionally, 105 out of 133 children and young people who had others warned about consorting with them were incorrectly identified by police as 'convicted offenders'. This exceptional error rate of 79% resulted in 195 unlawful consorting warnings being issued, most of them to other children and young people. Steps taken by the NSW Police Force to address these errors have reduced but not removed the problem. These errors impact on the children and young people directly affected and also constitute a significant waste of policing resources as resources are required both to issue (and record) the warnings and to remedy errors when they occur.

In its submission, the NSW Police Force acknowledged the difficulties faced by operational police in determining whether or not a young person aged 17 years or less is a 'convicted offender' for the purposes of the consorting law. It is noteworthy that children and young people do not feature in the application of the law by the specialist squads targeting serious and organised crime and criminal gangs, comprising only 0.6% of their use. It is also significant that in its submission the NSW Police Force has supported amending the consorting law to remove children aged 15 or less from its operation.

There is agreement among all the submissions that the consorting law should be amended to exclude its application to children aged 15 years and under. However, we are of the view that the consorting law should not be used in relation to any children and young people, that is, anyone who is not yet 18 years old. This will have two separate and distinct effects.

Firstly, prohibiting police from issuing consorting warnings to children and young people should address concerns around the incompatibility of the consorting law with the Young Offenders Act (if the offence of consorting is made out), and other initiatives to address repeat offending by vulnerable young people. Although we acknowledge the police view that there may be circumstances where there may be benefits from permitting police to warn a young person about an adult 'convicted offender', in our view this argument is not sufficiently compelling to outweigh the concerns we have identified, nor is it supported by any evidence that the consorting law was used in this way.

Secondly, prohibiting police from issuing consorting warnings about children and young people should address our concerns that the high incidence of police mistakenly issuing unlawful warnings about young people may continue despite training and other education tools. It will also address community stakeholder concerns about the impact on young people whose friends and associates are warned about them.

For these reasons, we recommend that the Minister consider removing children and young people aged 17 years or less from the application of the consorting law.

In making this recommendation we note that police will still be able to restrict whom a young person can lawfully associate with when on bail, when sentenced and as part of any parole conditions.³⁸⁴

Recommendation

- 1. The Attorney General propose, for the consideration of Parliament, an amendment to the consorting law to remove children and young people aged 17 years or less from the application of the consorting law.**

These amendments should prohibit:

- a) the ability for police to issue consorting warnings and charge a child or young person aged 17 years or less under section 93X, and**
- b) the ability for police to treat a child or young person aged 17 years or less as a ‘convicted offender’ for the purposes of the consorting law.**

The issues discussed in this chapter about the use of the consorting law in relation to disadvantaged and vulnerable people are linked to the breadth of the consorting law and the consequent reliance on the discretion of individual police officers for its application. The breadth of the law provides police commands such as the Gangs Squad, involved in targeting high-risk criminal gangs, with operational flexibility. However, it also creates the risk of negative impacts on disadvantaged and vulnerable groups such as Aboriginal people and people experiencing homelessness. These negative impacts were not the intended consequences of Parliament’s modernisation of the consorting law. We have understood use in relation to children and young people to be a special case and have recommended the removal of this vulnerable group from the application of the consorting law.

Before we discuss recommendations to ameliorate inappropriate negative impacts on Aboriginal adults or people experiencing homelessness, we will outline further issues that arise in relation to consorting warnings and the defences available under section 93Y of the Crimes Act.

384. *Bail Act 2013*, s. 25; *Children (Criminal Proceedings) Act 1987*, s. 33D; *Crimes (Sentencing Procedure) Act 1999*, s. 51A; *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: *Children (Detention Centres) Regulation 2010*, cl. 96(2)(k).

Chapter 9. Issues related to consorting warnings

In this chapter we outline how the provisions relating to official consorting warnings have been used by police during the review period. We then discuss issues that have emerged in relation to this use. These include the format, detail and type of warning issued by police. We discuss the significant errors present in the police consorting data that arise from both inaccurate record keeping by officers and apparent mistakes made in relation to the 'convicted offender' status of a person about whom a warning was issued.

Throughout this review, many organisations have expressed concern to us regarding the apparent lack of a clear review mechanism for consorting warnings. The errors identified underline these concerns. Disquiet has also been expressed about the implications for individuals that may arise from the police disclosure of their criminal histories to associates as is required when a consorting warning is issued. We discuss this issue and ways to avoid unnecessary disclosures.

Finally, we discuss the issues related to, and desirability of, warnings remaining valid for a specific time frame so that the prohibition on certain associations that accompanies a warning is not indefinite.

9.1 Official warnings

For a person to be charged under the consorting law, police must issue that person with an 'official warning' in relation to at least two 'convicted offenders'.³⁸⁵ As noted in chapter 6, more than 9,100 warnings were issued by police during the review period. Under section 93X(3) of the *Crimes Act 1900*, a warning can be oral or written and must state that:

- the person that the recipient is consorting with is a convicted offender, and
- consorting with a convicted offender is an offence.³⁸⁶

A consorting warning is intended to prevent consorting between specific individuals. However, because of the wording of the warning specified in section 93X(3), a warning may have a range of additional consequences:

- it may limit the person warned from communicating or associating with any person they believe may be a 'convicted offender', not merely the specific individual about whom the warning was made
- it potentially isolates a convicted offender from spending time with or speaking to anyone other than family or the other exempted classes of people,³⁸⁷ and
- it impacts on a convicted offender's privacy by disclosing to others the fact they have a criminal record.

9.1.1. Format and detail of official warnings

Given the possible impacts of a consorting warning, it is important to consider whether adequate guidance is provided to operational police about the format and detail of warnings. The *Consorting Standard Operating Procedures* (Consorting SOPs) provide guidance to police on how to issue an official warning, based on the elements of the offence set out in section 93X(3). The suggested content and format is as follows:

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?³⁸⁸

We identified variation in police practices relating to the content of warnings. We found examples where the record of the official warning suggests that the person is not to associate with a particular named individual, but also examples where the proscribed associations are far broader. One record stated, for example:

You are now on notice that further association with persons who you are aware have a conviction for an indictable offence may render you liable to prosecution for the offence of consorting.³⁸⁹

385. *Crimes Act 1900*, s. 93X.

386. *Crimes Act 1900*, s. 93X(3)(a) and (b).

387. Section 93Y of the *Crimes Act 1900* provides that consorting in the course of training, education, or the provision of legal advice or a health service, if reasonable in the circumstances, may be raised as a defence to consorting in section 93X.

388. State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures*, November 2014, p. 12.

389. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

This ambiguity arises from the wording of section 93X(3)(b) itself. The second limb of an official consorting warning is 'consorting with a convicted offender is an offence'. Unless a person is aware of all their associates' criminal conviction histories, they are unable to adjust their behaviours to avoid associating or communicating with 'convicted offenders' generally. More accurately, and to aid the person's understanding and potential compliance, the warning should state that consorting that may lead to an offence, only in relation to those individuals about whom the person has been specifically warned.

In its submission to our review, the NSW Police Force said that they had no objection to amending an official warning, by legislation, to state:

'(Name) is a convicted offender. Consorting with (name) is an offence'.³⁹⁰

The NSW Police Force also acknowledged that it would be useful to expand the Consorting SOPs to inform police of the following:

- it is important that the warning be given in a way that the subject person is able to understand
- a warning may be given orally or in writing, or both, and
- a warning may be given at the time of an incident of consorting or at another time.

In our further consultations with police following the preparation of a consultation draft of this report, senior police asserted the importance of consistency between the format of an official consorting warning as prescribed in section 93X and the actual warning given by police officers. Concern was raised about the possible impact an officer's deviation from the prescribed statutory format could have on a consorting prosecution.

Numerous submissions, including that from the Office of the Director of Public Prosecutions, supported an amendment to section 93X that would clarify that it is only an offence to continue to associate with the named 'convicted offender'.³⁹¹ It is likely that the reduced ambiguity in the warning format recommended below will assist those in receipt of warnings to both understand and potentially comply with an official consorting warning.

Recommendation

2. **The Attorney General propose, for the consideration of Parliament, an amendment to section 93X(3) (b) of the Crimes Act, to remove the present ambiguity and reflect the NSW Police Force submission that a consorting warning state:**

'(Name) is a convicted offender. Consorting with (name) is an offence.'

Understanding a consorting warning

A number of factors may impact upon a person's capacity to understand an official warning, including being intoxicated, having little understanding of English or having an intellectual or other disability. The Consorting SOPs suggest that officers should check whether the person has understood the warning.³⁹² However, 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.

390. NSW Police Force, Submission, *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*, 12 March 2014, p. 7.

391. Office of the Director of Public Prosecutions, Submission, *Consorting Issues Paper – Submission ODPP*, 28 February 2014, p. 3; UTS: Jumbunna, Submission, *Consorting Issues Paper: Review of the use of consorting provisions by the NSW Police Force: Division 7, Part 3A of the Crimes Act 1900*, 4 March 2014, p. 6; The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 8; NSW Council for Civil Liberties Inc, Submission, *NSW Ombudsman Consorting Issues Paper: Review of the Use of the Consorting Provisions by the NSW Police Force Submission by the NSW Council for Civil Liberties*, 5 February 2014, p. 15; Intellectual Disability Rights Service, Submission, *Review of the Use of the Consorting provisions by the NSW Police Force*, 7 March 2014, p. 14; The Law Society of NSW, Submission, *Consorting Issues Paper – Review of the use of the consorting provisions by the NSW Police Force*, 10 March 2014, p. 8; NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 8; Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, p. 11.

392. State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures*, November 2014, p. 12.

Several submissions noted concern that oral warnings may lead to misunderstanding.³⁹³ A consorting warning may be confused with another direction by police or the court such as a non-association order or a move-on direction.³⁹⁴ In its submission to our review, the Public Interest Advocacy Centre stated:

feedback from lawyers in the community sector indicates that persons appear unclear as to whether they have been issued with an 'official warning' under the consorting provisions or whether they are subject to another form of a non-association direction by police or the court (e.g. bail enforcement, parole condition or move-on direction).³⁹⁵

The Office of the Director of Public Prosecutions submitted that where a person is in a temporary or permanent condition that means they cannot understand the warning, police should consider whether it is appropriate to issue a warning at all.³⁹⁶ In circumstances where it is necessary to issue a warning, this should be arranged at a future time when appropriate supports can be provided.³⁹⁷

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, for example, when to defer questioning due to intoxication or when to engage interpreters and/or relevant support people.³⁹⁸ When a person arrives in custody police may, if appropriate, defer questioning until the relevant interpreter or support person arrives. However, because there is no power for police to arrest or detain a person for the issuing of a consorting warning, some concern has been raised about practical issues for police facing the above situations when issuing warnings to people on the street.

In the event that a person requires assistance to understand a consorting warning, the NSW Police Force submitted that the warning could be rephrased or further explained. It was also suggested that the consorting warning could be translated into several common community languages so that a police officer could hand the person a written warning in the event that they could not understand English.³⁹⁹ The NSW Young Lawyers suggested that police ask whether the person requires the services of a translator, legal representation, or guardian or the presence of an observer at the time the warning is issued.⁴⁰⁰

Frontline police officers are experienced in communicating with a wide range of people whose capacity to understand may be limited. Nonetheless, these types of interactions remain challenging and complex. Although our consultations did not identify examples where police experienced difficulty communicating a consorting warning to a vulnerable person, in our view, consorting training and the Consorting SOPs would be strengthened by the inclusion of other police policy relevant to dealing with these types of situations.

Written warnings

The decision to issue a written consorting warning is discretionary for police. We found that the majority of warnings issued were oral. The majority of written warnings in the consorting data were issued by the Gangs Squad and involved pre-emptive warnings issued to Outlaw Motorcycle Gang (OMCG) members about other members or associates who were not present at the time. Nearly all warnings issued by general duties police were verbal.

393. Kingsford Legal Centre, Submission, *Legislative review of the consorting provisions*, 25 February 2014, p. 6; Community Legal Centres NSW, Submission, *Legislative review of the consorting provisions*, 23 March 2014, pp. 3–4; Aboriginal Legal Service (NSW/ACT) Ltd, Submission, *NSW Ombudsman Consorting Issues Paper Response by Aboriginal Legal Service (NSW/ACT) Limited*, 28 February 2014, p. 3; Consultation with Aboriginal Legal Service Moree, 17 September 2014; Intellectual Disability Rights Service, Submission, *Review of the Use of the Consorting provisions by the NSW Police Force*, 7 March 2014, p. 14.

394. Kingsford Legal Centre, Submission, *Legislative review of the consorting provisions*, 25 February 2014, p. 6; Wirringa Baiya, Submission, *Review of the new consorting provisions contained within Division 7, Part 3A of the Crimes Act 1900*, 21 March 2014, p. 2; Aboriginal Legal Service (NSW/ACT) Ltd, Submission, *NSW Ombudsman Consorting Issues Paper Response by Aboriginal Legal Service (NSW/ACT) Limited*, 28 February 2014, pp. 3–4.

395. Public Interest Advocacy Centre Ltd, Submission, Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force, 27 February 2014, p. 14.

396. Office of the Director of Public Prosecutions, Submission, *Consorting Issues Paper – Submission ODPP*, 28 February 2014, p. 4.

397. Office of the Director of Public Prosecutions, Submission, *Consorting Issues Paper – Submission ODPP*, 28 February 2014, p. 4.

398. NSW Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)*, January 2012, pp. 66–69.

399. NSW Police Force, Submission, *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*, 12 March 2014, p. 8; Community Legal Centres NSW, Submission, *Legislative review of the consorting provisions*, 23 March 2014, p. 12.

400. NSW Young Lawyers, Submission, *Review of consorting provisions*, 7 March 2014, p.12.

Many of the submissions we received supported a change to the law to require that consorting warnings be issued in writing.⁴⁰¹ It was suggested that written warnings could communicate the precise meaning of a consorting warning more effectively as well as provide additional information. It was argued that the use of written consorting warnings could:

- enable a person to provide the warning to a lawyer to obtain legal advice⁴⁰²
- standardise consorting warnings across the NSW Police Force⁴⁰³
- set out any available review mechanisms
- include contact information for people wishing to ask questions, receive legal advice or access translation services⁴⁰⁴
- specify the name of the person about whom the warning was made
- include information about the penalty attached to the offence,⁴⁰⁵ and
- include details of the issuing police officer's name and place of duty.⁴⁰⁶

The NSW Police Force did not support a requirement that consorting warnings be issued in writing but commented that a provision stating a written warning be provided where 'reasonably practicable' would 'probably be acceptable'.⁴⁰⁷ The NSW Police Force expressed concern that a person being issued an official warning could refuse to accept service, or read the document, or might lack the literacy skills needed. Further, this may act as a disincentive for officers to properly engage a person and explain the effect of the warning.⁴⁰⁸

The police officers we spoke with in consultations did not support a requirement that warnings be provided in written form.⁴⁰⁹ Spoken communication is a crucial part of effective community policing. One commander told us that 'the best tool police have is communication'.⁴¹⁰ Officers felt that a requirement that consorting warnings be issued in writing would provide a disincentive to explain the meaning of warnings and, unlike an oral warning, it could not be tailored to the individual. Police felt that there is value in having a police officer explain the meaning of the consorting warning,

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401. NSW Young Lawyers, Submission, *Review of consorting provisions*, 7 March 2014, p. 12; UTS: Jumbunna, Submission, *Consorting Issues Paper: Review of the use of consorting provisions by the NSW Police Force: Division 7, Part 3A of the Crimes Act 1900*, 4 March 2014, p. 6; The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 9; NSW Council for Civil Liberties Inc, Submission, *NSW Ombudsman Consorting Issues Paper: Review of the Use of the Consorting Provisions by the NSW Police Force Submission by the NSW Council for Civil Liberties*, 5 February 2014, p. 15; Community Legal Centres NSW, Submission, *Legislative review of the consorting provisions*, 23 March 2014, p. 13; Office of the Director of Public Prosecutions, Submission, *Consorting Issues Paper – Submission ODPP*, 28 February 2014, p. 4; NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 8; Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, p. 14; Kingsford Legal Centre, Submission, *Legislative review of the consorting provisions*, 25 February 2014, p. 6; Wirringa Baiya, Submission, *Review of the new consorting provisions contained within Division 7, Part 3A of the Crimes Act 1900*, 21 March 2014, p. 8; Aboriginal Legal Service (NSW/ACT) Ltd, Submission, *NSW Ombudsman Consorting Issues Paper Response by Aboriginal Legal Service (NSW/ACT) Limited*, 28 February 2014, p. 4; Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, p. 12; The Law Society of NSW, Submission, *Consorting Issues Paper – Review of the use of the consorting provisions by the NSW police force*, 10 March 2014, p. 8.
402. NSW Young Lawyers, Submission, *Review of consorting provisions*, 7 March 2014, p. 12; Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, pp. 12–13; Kingsford Legal Centre, Submission, *Legislative review of the consorting provisions*, 25 February 2014, p. 5; Wirringa Baiya, Submission, *Review of the new consorting provisions contained within Division 7, Part 3A of the Crimes Act 1900*, 21 March 2014, p. 8.
403. Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, pp. 14 and 20; NSW Young Lawyers, Submission, *Review of consorting provisions*, 7 March 2014, p. 12.
404. Community Legal Centres NSW, Submission, *Legislative review of the consorting provisions*, 23 March 2014, p. 13.
405. NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 8; Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, pp. 16–17; Kingsford Legal Centre, Submission, *Legislative review of the consorting provisions*, 25 February 2014, p. 6; Wirringa Baiya, Submission, *Review of the new consorting provisions contained within Division 7, Part 3A of the Crimes Act 1900*, 21 March 2014, p. 8.
406. The Law Society of NSW, Submission, *Consorting Issues Paper – Review of the use of the consorting provisions by the NSW Police Force*, 10 March 2014, p. 8.
407. NSW Police Force, Submission, *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*, 12 March 2014, p. 8.
408. NSW Police Force, Submission, *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*, 12 March 2014, p. 8.
409. Consultation with LAC 1, Central Metropolitan Region, 24 June 2014; Consultation with LAC 1, Northern Region, 22 July 2014; Consultation with LAC 1, Western Region, 17 September 2014.
410. Consultation with LAC 1, Central Metropolitan Region, 24 June 2014.

rather than simply handing a person a piece of paper.⁴¹¹ Further, in a practical sense, a requirement that warnings be issued in writing would mean that officers would have to carry additional documentation.⁴¹²

Written warnings, especially those that name individuals, would have a potentially greater impact on the privacy of 'convicted offenders' who are the subject of a warning, as the document may function to disclose the fact of their conviction to anyone who subsequently views the document.

Our recommendation with respect to the provision of written information by the NSW Police Force regarding consorting warnings issued to individuals is related to the desirability of a simple review mechanism for warnings and is discussed in section 9.4 of this chapter.

9.1.2. Retrospective warnings and pre-emptive warnings

In this section we discuss various types of consorting warnings. Retrospective warnings refer to those issued after a consorting incident has taken place, while pre-emptive warnings refer to warnings issued before an incident of consorting has been recorded. A consorting 'booking' refers to occasions when police observe or become aware of a consorting incident and make a record of it, for example, observing two people together, but do not issue an official consorting warning.

The vast majority of warnings issued by officers during the review period were issued at the time of the consorting incident, that is, when the person was stopped by police while in the company of someone previously convicted of an indictable offence. However, neither the legislation nor the Consorting SOPs provide guidance in relation to the timeframe within which a warning must be issued after an incident of consorting has taken place.

Retrospective warnings

There are compelling operational reasons in some circumstances for warnings to be delivered on a date shortly after the incident of consorting. Police provided some examples of circumstances where this may be appropriate:

- where the person is too intoxicated to understand the warning at the time of the incident⁴¹³
- where police need to arrange for an interpreter or support person to be present⁴¹⁴
- where officers have observed two or more people associating but wish to verify the criminal histories of those present, or⁴¹⁵
- where police need to prioritise other issues, such as breaking up or preventing a fight.⁴¹⁶

In its submission the NSW Police Force emphasised the operational utility of being able to issue warnings retrospectively in its submission and said that it would be counterproductive to impose an 'arbitrary lifespan' on the time within which a warning must be issued.⁴¹⁷

We identified 83 retrospective consorting warnings issued during the review period. The maximum time between the consorting incident and the warning being issued was six months.⁴¹⁸ See case study 14 below.

Case Study 14. Police operation involving retrospective warnings

One Sydney metropolitan Local Area Command ran an operation that included a focus on retrospective consorting warnings. For example, in one Event, a consorting warning was issued two months after the incident; in another, a consorting warning was issued three months after the incident; and in a final Event, the consorting warning was issued six months after the incident. The command's Acting Crime Manager advised that the consorting

411. Consultation with LAC 1, Central Metropolitan Region, 27 March 2013; Consultation with LAC 1, Western Region, 17 September 2014.

412. Consultation with LAC 1, Central Metropolitan Region, 24 June 2014.

413. Consultation with LAC 1, Central Metropolitan Region, 27 March 2013.

414. Consultation with LAC 4, Western Region, 16 September 2014.

415. Consultation with LAC 1, North West Metropolitan Region, 11 April 2015.

416. Consultation with LAC 1, Northern Region, 22 July 2014.

417. NSW Police Force, Submission, *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, 12 March 2014, p. 9.*

418. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

law was being used in this manner ‘as a deterrent strategy’.⁴¹⁹ This strategy was aimed at reducing the number of cars being stolen. Intelligence officers had been tasked with identifying people who may be issued with a consorting warning in a six month period by reviewing all intelligence reports and Computer Operational Policing System (COPS) Events. Police officers then attended the relevant home addresses, explained the meaning of the consorting law and issued official warnings.⁴²⁰

Given that the purpose of the consorting law is to prevent further consorting and thereby reduce the possibility of criminal networks being established, the timeframe between an incident of consorting and the issuing of a warning should be relatively short. This point was made by many organisations who provided submissions to this review.⁴²¹

Additionally, the NSW Bar Association submitted that:

[the] Consorting SOPs should be amended to require the issuing of an official warning as soon as is practically possible after the event, but not later than 7 days. It is important in the interests of justice for the person warned to be able to obtain evidence as to the alleged consorting and to be able to recollect the events with clarity.⁴²²

Community Legal Centres NSW also argued that behaviour and punishment should be very closely linked, as this creates a relationship between behaviour and consequence.⁴²³ This view was shared by a number of frontline officers who advised us that, in their experience, retrospective warnings had less impact on a person’s behaviour than warnings issued at the time of the interaction.⁴²⁴

Recommendation

3. **The NSW Police Force amend its consorting policy, publications, standard operating procedures and training, to ensure retrospective consorting warnings are issued as soon as practicable after an incident of consorting, and not later than 14 days.**

Pre-emptive warnings

A pre-emptive warning involves a police officer issuing a warning to a person about consorting with a ‘convicted offender’ before observing any instances of consorting. The Gangs Squad issued the majority of the pre-emptive warnings during the review period. Pre-emptive warnings issued by the Gangs Squad totalled 2,566 warnings, comprising 28% of all warnings issued by police. These pre-emptive warnings were mostly in written form and listed multiple people suspected of being members or associates of an OMCG. Occasions of use involving pre-emptive warnings by the Gangs Squad tended to entail high numbers of warnings issued during a single interaction. See case study 15.

Case Study 15. Gangs Squad use of pre-emptive warnings

In August 2013, officers from the Gangs Squad attended the address of a person known by police to be a member of an OMCG. Police issued a pre-emptive warning to the person in relation to 28 ‘convicted offenders’ he was believed to know and associate with. The person was given a written list of names and corresponding photographs for him to keep as reference. Police also explained the consorting law and the meaning of the warnings issued.

419. Consultation with LAC 1, Central Metropolitan Region, 8 April 2015.

420. Consultation with LAC 1, Central Metropolitan Region, 8 April 2015.

421. Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, p. 12; NSW Young Lawyers, Submission, *Review of consorting provisions*, 7 March 2014, p. 13.

422. NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 9.

423. Community Legal Centres NSW, Submission, *Legislative review of the consorting provisions*, 23 March 2014, p. 14.

424. Consultation with LAC 3, North West Metropolitan Region, 10 May 2013.

Pre-emptive warnings received significant criticism in the submissions to our review. The Office of the Director of Public Prosecutions stated that pre-emptive warnings should only be issued in circumstances where the reasons for doing so are also given in writing.⁴²⁵ Other submissions suggested that pre-emptive warnings stand in contrast to the presumption in favour of innocence and infer liability in the absence of any actual consorting.⁴²⁶ This was considered especially problematic in the context where a warning exposes a person's criminal history to others without their knowledge.⁴²⁷

The NSW Police Force submitted that 'there is no obvious advantage to public policy in requiring police to have solid evidence of recent association before issuing a warning'.⁴²⁸ The submission also stated it is arguably fairer to issue a consorting warning on a pre-emptive basis because two occasions of consorting are required to follow prior to charge.⁴²⁹

In our analysis of police consorting records, there appeared to be some confusion among officers in relation to the meaning of, and difference between, a pre-emptive warning, a retrospective warning, an official warning and a booking, including when each of them should apply. A booking involves an incident of consorting between two relevant people not necessarily accompanied by a warning. This type of misunderstanding contributed to the high error rate present in the recording of consorting warnings.

9.2 Recording issues and error

In our analysis of police data, we found that over a third of all the narratives in the police consorting records did not accurately reflect the other information recorded in COPS for that interaction (37%).⁴³⁰ We identified several discrepancies between the narratives and the other COPS data. These include:

- failing to capture in COPS all people and/or all warnings described in the narrative
- recording the wrong type of warning in the circumstances
- recording additional warnings in COPS that are not recorded in the narrative
- incorrectly recording names
- duplicating warnings.

These recording issues affect the ability of the NSW Police Force to charge and successfully prosecute individuals with habitually consorting. Also, incorrectly attributing consorting warnings to individuals may influence police action in relation to that individual in the future, as well as the individual's decisions about the people they have social contact with.

On 24 June 2013, the NSW Police Force implemented modifications to COPS designed, among other things, to improve the operation of the consorting law and increase officer compliance with consorting policy via improvements to the electronic recording mechanisms relevant to the consorting law. These modifications have been discussed throughout this report as they are relevant to a number of issues. Prior to these modifications, officers reported significant problems recording and tracking their use of the consorting law, especially in relation to when/if the charge threshold had been met.

The June 2013 modifications to COPS were designed to allow officers to:

- connect official consorting warnings and occasions of consorting in relation to the same person
- identify when the threshold to charge was met

425. Office of the Director of Public Prosecutions, Submission, *Consorting Issues Paper – Submission ODPP*, 28 February 2014, p. 4.

426. NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 8; Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, p. 12; NSW Young Lawyers, Submission, *Review of consorting provisions*, 7 March 2014, p. 12; Wirringa Baiya, Submission, *Review of the new consorting provisions contained within Division 7, Part 3A of the Crimes Act 1900*, 21 March 2014, p. 8; The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 9; NSW Council for Civil Liberties Inc, Submission, *NSW Ombudsman Consorting Issues Paper: Review of the Use of the Consorting Provisions by the NSW Police Force Submission by the NSW Council for Civil Liberties*, 5 February 2014, p. 15; Intellectual Disability Rights Service, Submission, *Review of the Use of the Consorting provisions by the NSW Police Force*, 7 March 2014, p. 15; Community Legal Centres NSW, Submission, *Legislative review of the consorting provisions*, 23 March 2014, p. 13.

427. NSW Council for Civil Liberties Inc, Submission, *NSW Ombudsman Consorting Issues Paper: Review of the Use of the Consorting Provisions by the NSW Police Force Submission by the NSW Council for Civil Liberties*, 5 February 2014, p. 15.

428. NSW Police Force, Submission, *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*, 12 March 2014, p. 8.

429. NSW Police Force, Submission, *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*, 12 March 2014, p. 8.

430. This analysis only applies to consorting COPS Events created from 24 June 2013, when COPS was modified.

- ensure that people under the age of 16 years could not have others warned about consorting with them.
- ensure that people who do not have a conviction for an indictable offence within the previous 10 years cannot have others warned about consorting with them.

The issues identified in the recording of consorting warnings will be addressed by additional training. The majority of frontline officers we consulted requested training in relation to the consorting law. At the time of writing, the NSW Police Force is developing further training and is considering further modifications to COPS to enhance the record-keeping procedures.

9.2.1. Consorting warnings issued in error

Over the course of this review, we identified official consorting warnings issued by police in error. These errors appeared to be based on the mistaken belief by police that a person the subject of a consorting warning was a 'convicted offender' at the relevant time. In chapter 4 we discussed some of the complexities contained in the definition of 'convicted offender'.

Additional complexity exists in relation to the recording of convictions against children and young people. In chapter 8 we reported that 79% of the children and young people who had others warned about consorting with them were incorrectly identified by police as 'convicted offenders'. This resulted in 195 invalid consorting warnings issued about children and young people.

The NSW Police Force provided us with details of the conviction histories of people subject to use of the consorting law during the review period. We analysed these data in relation to people whose associates had been warned about consorting with them. We identified 179 people aged 18 years or older who appeared to have no indictable convictions at the relevant time and therefore appear to have been incorrectly treated as 'convicted offenders' by police.

The police records indicate that there were 424 people, including children and young people, were issued invalid consorting warnings. These invalid consorting warnings relate to consorting with 283 people. Overall, we identified 589 invalid consorting warnings issued during the review period.

Following the modifications to COPS in mid 2013, the number of errors appears to have reduced. We found there were 229 people subject to use of the consorting law prior to the June 2013 changes who appear to have been mistakenly treated as 'convicted offenders' by police, compared to 56 people after this date. We are, however, mindful of the fact that while the modifications to COPS act as a safeguard in relation to unlawful warnings, they also make unlawful warnings less visible in the consorting data. Police are not able to link warnings that are only contained in the relevant narrative section of an Event to an individual in any automated way and these warnings will therefore never be relied on for a consorting charge. The act of creating the record would also alert the officer creating it that he or she had made a mistake in relation to a person's 'convicted offender' status. In this way, the June 2013 modifications to COPS function as a significant safeguard.

Most of the 56 people mistakenly identified as 'convicted offenders' by police in the consorting data after June 2013 have been identified by us based on their appearance in the consorting narratives only. These consorting records exist in COPS because they also contain lawful consorting warnings. There is nothing in the records to indicate that steps have been taken to inform the relevant warning recipients that the warnings are invalid.

We first raised the issue of invalid consorting warnings with the NSW Police Force in early 2013. At the time, police undertook to remove the relevant records from COPS, speak to those who were wrongly subject to the consorting law, and publish material educating officers on the topic.

As outlined in chapter 8, the NSW Police Force has also recently amended the Consorting SOPs to include instructions to officers about the procedure to follow to retract such a warning. Officers are now instructed to:

- a) make arrangements to have the consorting incident deleted/updated, as appropriate
- b) contact the person/s warned and inform them the consorting warning was invalid and the information you gave regarding associating with the person named was inaccurate.⁴³¹

431. State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures*, November 2014, p. 16.

Details of the invalid warnings we identified since then were provided to the NSW Police Force in December 2015. In correspondence dated 11 February 2016, the Commissioner of Police advised that his office 'is writing to the commander of the officer in charge of each instance with instructions on the actions to be taken'.⁴³² The actions include:

- amending or deleting the relevant COPS record
- providing advice and guidance to relevant officers regarding the correct application of the consorting law
- addressing 'any incorrect information that has been given to any person that may have been wrongly advised not to associate with any other person'.⁴³³

Relevant commands are required to report back to the Commissioner's office on the action(s) taken. The Commissioner's office will then coordinate the responses and advise the NSW Ombudsman accordingly.

Recommendation

4. **The NSW Police Force develop and implement training for frontline officers involved in issuing consorting warnings and creating consorting Event records on COPS that includes:**
 - a) **the different types of consorting warnings**
 - b) **the difference between warnings and bookings, and**
 - c) **how to ensure accurate record-keeping, including ensuring that all warnings are accurately recorded and any invalid warnings are identified and addressed according to the Consorting SOPs.**

9.3 Increasing accuracy and fairness

In our consultations with operational police across the state we found that a number of LACs had developed their own local procedures to increase the fairness and accuracy of their use of the consorting law. Examples of these procedures include:

- dip sampling and analysis of COPS consorting records by the Crime Manager or sector supervisor in remote areas
- emphasis on the role of the supervisor to understand the details of the use of the law including why people are targeted and the nature of the criminal activity suspected
- limiting use of the consorting law to people consorting with 'convicted offenders' identified by LAC intelligence officers as posing a high risk of offending.

9.3.1. The need for a specific quality assurance process for the consorting law

The NSW Police Force has a number of policies and procedures in place to supervise officers and their work. However, at present there is no specific, state-wide quality assurance process articulated in relation to the operation of the consorting law that will support the development and embedding of best practice. There is also no specific reference in the Consorting SOPs to the role or obligations of officers performing a supervisory role in relation to frontline police officers use of the consorting law, including their verification of consorting COPS Event records. It is clear from the extent of the errors we have identified in the consorting records that more attention is required by police to ensure consorting records are both lawful and accurate.

In order to properly record use of the consorting law, the NSW Police Force needs to ensure the additional consorting COPS data fields match the free-text description contained in the Event narrative. This will help to ensure all valid consorting warnings have been properly recorded and facilitate the early identification of invalid warnings.

At the time of writing, three of the 12 people charged by general duties police with habitually consorting were charged without all the legal requirements of the offence being met, requiring the NSW Police Force to withdraw the charges at court. The June 2013 modifications to COPS now prevent such prosecutions. However, the possibility remains that consorting prosecutions can be commenced that are lawful but not compliant with NSW Police Force consorting

432. Correspondence from the Office of the Commissioner, NSW Police Force to Professor John McMillan, Acting NSW Ombudsman, dated 11 February 2016.

433. Correspondence from the Office of the Commissioner, NSW Police Force to Professor John McMillan, Acting NSW Ombudsman, dated 11 February 2016.

policy. Inappropriate but lawful use of the consorting law may pose a risk to the reputation of the NSW Police Force and undermine its relationship with the community. The introduction of a quality assurance process for use of the consorting law will aid proper record keeping but also provide an opportunity to ensure use of the consorting law complies with relevant NSW Police Force policy.

As part of a quality assurance process and risk management strategy in relation to the ongoing use of the consorting law, this office recommends the following:

Recommendation

5. **The NSW Police Force design and implement a quality assurance process for the ongoing use of the consorting law. This process should be implemented within each command or relevant organisational unit and must ensure:**
 - a) **accurate record-keeping**
 - b) **that correct procedures are followed if invalid warnings are identified, and**
 - c) **that NSW Police Force consorting policy and guidelines are complied with.**

9.4 Review mechanism for warnings

Prior to the commencement of the new consorting law, the NSW Parliament Legislation Review Committee, whose role it is to consider whether legislation unreasonably encroaches on specific rights and liberties,⁴³⁴ 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.⁴³⁵

Two separate issues have emerged in the course of our review in relation to the absence of a clear procedure for reviewing the issuing of an official consorting warning:

- 1) the appropriateness or reasonableness of issuing the consorting warning in the specific circumstances
- 2) consorting warnings issued that are not lawful as they do not comply with the legal requirements set out in sections 93W and 93X(3) of the Crimes Act.

The first issue relates to lawful consorting warnings and involves a review of the appropriateness of a police officer's decision to issue a consorting warning in the specific circumstances. This type of review involves revisiting the exercise of discretion by the officer.

The second issue relates to warnings issued that are not lawful as they are based on an incorrect belief that the person warned about was a 'convicted offender' for the purposes of the consorting law.

Many organisations who provided submissions were in favour of establishing a review mechanism for consorting warnings.⁴³⁶ The Office of the Director of Public Prosecutions, for example, submitted:

...there should be an avenue of administrative review that is reasonably accessible, timely and inexpensive. This is particularly important if there is no imposition of a time limit to the warnings. If warnings lapse after a period it would ameliorate the need and demand for a review.⁴³⁷

434. The functions of the Legislation Review Committee with respect to Bills are outlined in the *Legislation Review Act 1987*, s. 8A.

435. The Committee referred the question of whether the inability to appeal official consorting warnings constitutes a non-reviewable decision to Parliament. See Legislation Review Committee, *Legislation Review Committee Digest; No. 10 of 55*, NSW Parliament, 2012, p. 8.

436. Only the NSW Police Force did not agree with this.

437. Office of the Director of Public Prosecutions, Submission, *Consorting Issues Paper – Submission ODPP*, 28 February 2014, p. 4.

Other submissions recommended that both a simple internal mechanism and an external review mechanism be introduced to allow a person to challenge a consorting warning.⁴³⁸ An internal review process would be less financially prohibitive for the person seeking the review and less resource intensive than a court or tribunal.⁴³⁹ It was argued that in the event that an internal review was unsuccessful, a person should then be permitted to appeal that decision to the NSW Civil and Administrative Tribunal (NCAT).⁴⁴⁰

The NSW Police Force opposed an external merits review of a police officer's decision to issue a consorting warning. It submitted that consorting warnings should not be subject to any kind of additional review process. In its view, the role of a warning is,

simply that it must have been issued before a successful prosecution can be commenced ... the warning does not, of itself, affect any of the rights or privileges of the person to whom it is issued.⁴⁴¹

In the event that charges were subsequently laid, the prosecution would fail if a warning had been erroneously issued. The NSW Police Force submission stated,

A warning is just that and no more. It is not an administrative decision or action that needs to be subject of a review process to afford procedural fairness.⁴⁴²

We note that in its submission to this office, the NSW Police Force was specifically critical of the suggestion that consorting warnings could possibly be reviewed by NCAT, and differentiated the types of administrative decisions that are reviewable by NCAT, such as firearms licence matters, from the decision to issue a consorting warning. We also note difficulties in a merits review in relation to the lawful exercise of discretion by an officer, and the NSW Police Force view that the current police complaints system under Part 8A of the *Police Act 1990* is adequate.

The NSW Police Force submitted there is no need for an additional review mechanism to consider the appropriateness of consorting warnings:

There is a legislated complaints process already in existence and a person who has been issued a warning and wants to make a complaint or have the matter reviewed is entitled to contact the NSW Police Force and make the complaint. If the person is subsequently charged with a consorting offence, the court will determine the validity of the warning.⁴⁴³

We agree that the police complaints system under Part 8A of the *Police Act* provides a suitable option for a person to make a complaint to the NSW Police Force about a consorting warning issued to or about them.⁴⁴⁴ If it is in the public interest to do so, the Ombudsman may investigate complaints that police conduct is unlawful, or lawful but unreasonable in its effect, which includes complaints about the unreasonable use of the consorting law.⁴⁴⁵

The modifications to COPS in 2013 assist police officers to identify invalid warnings at the point of recording them, and the Consorting SOPs now include a procedure to remedy these errors when identified.

However, given the continued presence of error in relation to the 'convicted offender' status of individuals subject to the consorting law, an accessible, simple procedure that does not require a person to write a formal complaint but allows the verification of the lawfulness of consorting warnings appears warranted.

438. Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, p. 20.

439. NSW Council for Civil Liberties Inc, Submission, *NSW Ombudsman Consorting Issues Paper: Review of the Use of the Consorting Provisions by the NSW Police Force Submission by the NSW Council for Civil Liberties*, 5 February 2014, p. 17; The Law Society of NSW, Submission, *Consorting Issues Paper – Review of the use of the consorting provisions by the NSW police force*, 10 March 2014, p. 9; The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 10; Wirringa Baiya, Submission, *Review of the new consorting provisions contained within Division 7, Part 3A of the Crimes Act 1900*, 21 March 2014, p. 8.

440. Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, p. 20; Wirringa Baiya, Submission, *Review of the new consorting provisions contained within Division 7, Part 3A of the Crimes Act 1900*, 21 March 2014, p. 8; NSW Council for Civil Liberties Inc, Submission, *NSW Ombudsman Consorting Issues Paper: Review of the Use of the Consorting Provisions by the NSW Police Force Submission by the NSW Council for Civil Liberties*, 5 February 2014, p. 17.

441. NSW Police Force, Submission, *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*, 12 March 2014, p. 9.

442. NSW Police Force, Submission, *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*, 12 March 2014, p. 10.

443. NSW Police Force, Submission, *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*, 12 March 2014, p. 10.

444. The Government has signalled that the structure of this system will change prior to January 2017.

445. *Police Act 1990*, s.122(1)(e).

We outline below recommendations that attempt to balance competing views in relation to providing access to a review mechanism for consorting warnings for directly affected people. Our recommendations seek to provide a simple, efficient procedure that works within current police resources and practice. The aim is to allow affected people to understand the consorting law and its impact upon them and to provide the NSW Police Force the opportunity to correct mistakes if any are identified. It is likely that increasing affected individuals' understanding of the consorting law will increase their ability to successfully comply. The proposed procedure may also prevent matters from unnecessarily entering the complaints system.

We include a recommendation that a consorting fact sheet be drafted and published by the NSW Police Force. In making this recommendation, we are aware of police concerns about providing legal advice to those issued with consorting warnings or warned about. We note there is precedent for the publication of a fact sheet by the NSW Police Force: the Criminal Infringement Notices Fact Sheet provides people with information on their rights and responsibilities in relation to criminal infringement notices and is accessible via the NSW Police Force website.⁴⁴⁶ This example provides a useful template for the proposed consorting fact sheet.

Recommendations

6. **On request, whether made at a police station, in writing, or to the Police Assistance Line, the NSW Police Force provide the following information in writing to a person issued with a consorting warning, or a person about whom a warning is issued:**
 - a) confirmation or otherwise of the validity of the relevant consorting warning
 - b) details of the warning including the name of the person(s) warned, the name of the person(s) warned about, and the date and location of the warning.
7. **The NSW Police Force prepare and publish a fact sheet about the consorting law, on the NSW Police Force website. The consorting fact sheet should include relevant information about the consorting law and the police complaints system, and links to the Police Assistance Line and LawAccess NSW.**
8. **The NSW Police Force refer to the requirements imposed by recommendations 6 and 7 in consorting policy, publications, standard operating procedures and training.**

9.5 Relevant time limits

There are no explicit time limits contained in the new consorting offence provisions. Official consorting warnings do not expire and there is no restriction on when a charge may be brought following an incident of consorting. Previously, proceedings for the former consorting offence under section 546A of the Crimes Act were required to be commenced within 12 months from the date of the commission of the alleged offence.⁴⁴⁷

9.5.1. NSW Police Force policy

The NSW Police Force has made the policy decision that officers should not commence criminal proceedings for consorting unless 'the occasions of consorting occurred within a six month period', unless in 'exceptional circumstances'.⁴⁴⁸ This policy provides guidance to police officers only and cannot be relied on by people charged with consorting as part of any defence in a prosecution for consorting. In addition, people issued with warnings are not aware of this policy-based time limit and any impact it may have on the police decision to charge them for consorting.

446. NSW Police Force, Criminal Infringement Notices Fact Sheet, www.police.nsw.gov.au/___data/assets/pdf_file/0009/108288/CIN_fact_sheet_internet.pdf, accessed 8 February 2016.

447. *Crimes Act 1900* (No 40), s. 546A(2) as amended by the *Crimes Legislation Amendment (Gangs) Act 2006*, s.18. A time limit of six months applied prior to the 2006 amendment.

448. State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures*, November 2014, p. 19.

9.5.2. The meaning of ‘habitually’ in the new consorting law

The new consorting law requires a person to ‘habitually’ consort with ‘convicted offenders’ to be charged with the offence.⁴⁴⁹ Some guidance is provided in section 93X(2) of the Crimes Act in relation to the meaning of ‘habitually’. Section 93X(2) states:

- (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.

At the time of writing, 34 prosecutions under section 93X of the Crimes Act had been finalised. Of these, the longest timeframe between the first and last consorting incidents forming the basis of a charge was approximately 18 months.⁴⁵⁰ This involved a case where police relied on 10 occasions of consorting with seven different ‘convicted offenders’. The issue of the amount of time between occasions of consorting and charge has not been raised in court proceedings to date, although the high number of associations close in time together to each other was referred to by the magistrate in a different matter during the sentencing hearing and appeared to increase the court’s view of the seriousness of the offence.⁴⁵¹

In *Tajjour v New South Wales*, the High Court similarly made no specific comment in relation to the meaning of ‘habitually’ in this context. We anticipate the courts will ultimately make determinations about what this term means and what may be considered to fall outside the parameters of ‘habitually consorting’. The lack of clear time restrictions on the validity of official warnings proscribing contact between people and on when a consorting charge may be brought raises issues of fairness in relation to those directly affected.

In its submission to our review, the NSW Police Force stated that there should be no time limit within which occasions of consorting must occur to establish the offence, nor should any time limit apply to the validity of consorting warnings as ‘any changes to weaken or restrict the legislation in its current form will impact its use and value or effectiveness’.⁴⁵² It explained that relationships involving criminal activity may be maintained over many years and evidence of these relationships would be relevant to an investigation. In its view, Parliament deliberately did not impose any time limits on the new consorting offence ‘in order to provide maximum operational flexibility’. The NSW Police Force further submitted that whether or not occasions of consorting may be described as ‘habitual’ in nature is a matter for the court.⁴⁵³

In our consultations with frontline police, we found support for placing a time limit around the period in which incidents of consorting could be used as the basis for a consorting prosecution.⁴⁵⁴ The majority of general duties police officers we spoke with did not believe the imposition of a time limit would create difficulties in their ability to use the consorting law effectively. However, some concerns were raised about the impact of time limits on some larger investigations or covert operations, which take place over a longer period of time. In these cases, it might be strategically advantageous to ‘hold off’ on issuing warnings or charging a person until the investigation or operation has concluded. We were advised that some covert investigations may run for up to 18 months.⁴⁵⁵

In contrast, key NSW criminal justice stakeholders such as the Office of the Director of Public Prosecutions, the NSW Bar Association and Legal Aid NSW, submitted that occasions of consorting should occur within a six to 12 month time frame in order to be valid.⁴⁵⁶ The NSW Bar Association explained that:

449. *Crimes Act 1900*, s. 93X(1)(a).

450. *R v Sattout* (unreported, Fairfield Local Court, 10 August 2015).

451. *R v Zammit* (unreported, Downing Centre Local Court, Magistrate Favretto, 26 May 2015).

452. NSW Police Force, Submission, *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*, 12 March 2014, p. 4.

453. NSW Police Force, Submission, *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*, 12 March 2014, p. 4.

454. Consultation with LAC 3, North West Metropolitan Region, 10 May 2013; Consultation with LAC 3, Western Region, 13 June 2013; Consultation with LAC 1, Northern Region, 22 July 2013; Consultation with LAC 3, Western Region, 19 January 2015; Consultation with LAC 1, Central Metropolitan Region, 27 March 2013; Consultation with LAC 4, Western Region, 16 September 2014; Consultation with LAC 2, North West Metropolitan Region, 8 March 2013.

455. Consultation with LAC 1, South West Metropolitan Region, 17 April 2013; Consultation with LAC 1, North West Metropolitan Region, 21 January 2015; Consultation with the Gangs Squad, 25 February 2015; Consultation with LAC 2, Western Region, May 2013.

456. Office of the Director of Public Prosecutions, Submission, *Consorting Issues Paper – Submission ODPP*, 28 February 2014, pp. 2–3; Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, p. 6; NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 5; UTS: Jumbunna, Submission, *Consorting Issues Paper: Review of the use of consorting provisions by the NSW Police Force: Division 7, Part 3A of the Crimes Act 1900*, 4 March 2014, p. 6.

Allowing the occasions of consorting to be spread over long periods of time permits police to issue an initial warning and then use the consorting provisions as a 'sword of Damocles' that hangs over the person indefinitely.⁴⁵⁷

Legal Aid NSW submitted that there must be a time limit of six months that applies both to the period during which the occasions of consorting should occur to establish the offence and to the length of time the warnings remain valid, stating:

The purpose of the provisions is to curtail habitual consorting which could lead to the creation of criminal ties and activities. If a person does not consort with another person within 6 months, it can hardly be considered habitual.⁴⁵⁸

9.5.3. Time limits in other Australian jurisdictions

Consorting offences in all other Australian jurisdictions are subject to time limits. Most are subject to a limitation on the period of time within which a prosecution must be commenced following the commission of the offence.

Consorting offences in South Australia, Western Australia and Tasmania are all summary offences and police are therefore restricted by the following time limits between an alleged offence of consorting and charge:

- South Australia – two years⁴⁵⁹
- Western Australia – one year⁴⁶⁰
- Tasmania – six months.⁴⁶¹

In contrast, the Northern Territory restricts the period of time for which a consorting warning is valid. In the Northern Territory, warnings are required to be in writing and must not exceed 12 months.⁴⁶² The advantage of this type of time restriction is that it provides the person in receipt of the warning with a clear and definite time frame within which consorting with a particular person is prohibited.

The Victorian Parliament has recently introduced a new offence of consorting.⁴⁶³ It requires police to serve a written 'unlawful association' notice on an individual. A three year time limit runs from the date the notice was issued.⁴⁶⁴

Greater certainty for all participants, including the NSW Police Force, would be provided by the insertion of a definition of 'habitually' in section 93W of the Crimes Act that includes reference to the time period within which the requisite occasions of consorting must occur.

To increase fairness and certainty for those affected, this office recommends the introduction of a statutory time limit with respect to the NSW consorting law. This may involve one or more of three approaches:

- prescribing the length of time following the commission of the offence within which a prosecution must be brought, and/or
- prescribing the length of time for which a consorting warning is valid, and/or
- further defining 'habitually consort' in Part 3A, Division 7 of the Crimes Act. For example, amend section 93X(2) (b) by adding the underlined element to the definition of 'habitually consort' so that section 93X(2) reads:

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 within a period to be determined by the Parliament.

Recommendation

9. The Attorney General propose, for the consideration of Parliament, an amendment to the consorting law to include a statutory time limit.

457. NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 5.

458. Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, p. 6.

459. *Summary Procedure Act 1921 (SA)*, s. 52(1)(b). A charge under section 13 of the *Summary Offences Act 1953 (SA) 1953*, must be brought within two years of the alleged commission of the offence.

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

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

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

463. *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015 (Vic)*. This repeals the previous Victorian offence of consorting contained in section 49F of the *Summary Offences Act 1966 (Vic)*.

464. See *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015 (Vic)*, s. 124H.

9.6 Privacy issues for ‘convicted offenders’

As explained in chapter 4, a police officer who issues an official consorting warning to a person is required by section 93X(3)(a) of the Crimes Act to disclose the fact that the person they are associating with has been convicted of an indictable offence. This raises significant privacy issues, given that the warning recipient would not otherwise be entitled to know this information. Particular privacy issues are raised in relation to ‘convicted offenders’ who are children and young people.

In our analysis of consorting records, we found many instances where the person issued a warning told police that they were not aware that their associate had been convicted of an indictable offence.⁴⁶⁵

The NSW Police Force acknowledged the privacy issues related to the consorting law in its submission to us:

There are obviously very limited avenues to protect the privacy of the convicted offender having regard to the fact that the warning must specify that he or she has been convicted of an indictable offence. Note that the current suggested form of warning in the SOPs does not specify the indictable offence of which the person has been convicted, nor the date or place of the conviction. Police may be able to use some discretion to avoid uninvolved bystanders from hearing the warning.⁴⁶⁶

While section 93X does not require a police officer to disclose specific details about a person’s criminal record, in our analysis of consorting records we found examples of this occurring. Some examples include:

The person you are associating with has been convicted of an indictable offence, that being robbery whilst armed with a dangerous weapon.⁴⁶⁷

The person you associating with has been convicted of an indictable offence. [Name] with assault and [name] with robbery. You are now officially warned that further association with [name] and [name] means you will have the offence of consorting [sic]. I will record this as an official warning. Do you understand that?⁴⁶⁸

Do you know that the person whom you are with has been convicted of an indictable offence, being use false instrument?⁴⁶⁹

Disclosure of the conviction type to others may have unexpected consequences for all involved, including police officers. If an officer discloses the details of a conviction that is spent, he or she may be committing an offence under the *Criminal Records Act 1991*.⁴⁷⁰

More commonly, police officers did not disclose details of the particular offence when issuing a warning. The difficulties of ameliorating the privacy issues that arise from the operation of the consorting law were acknowledged by police and in other submissions we received.⁴⁷¹ Frontline police officers in some LACs advised they separated a person several metres from others before issuing the warning.⁴⁷²

The Consorting SOPs are silent on this issue, and additional practical guidance to officers may assist in reducing any unnecessary impact on a person’s privacy.⁴⁷³

Frontline police officers are experienced in considering and managing people’s privacy when conducting personal searches. In this regard, police policy and practice are informed by section 32 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, which requires officers to conduct personal searches ‘in a way that provides reasonable privacy for the person searched’⁴⁷⁴ as far as is reasonably practicable in the circumstances.⁴⁷⁵

465. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

466. NSW Police Force, Submission, *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*, 12 March 2014, p. 9.

467. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

468. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

469. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

470. *Criminal Records Act 1991*, s.19G.

471. The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman’s review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 9; NSW Council for Civil Liberties Inc, Submission, *NSW Ombudsman Consorting Issues Paper: Review of the Use of the Consorting Provisions by the NSW Police Force Submission by the NSW Council for Civil Liberties*, 5 February 2014, pp. 15–16; Intellectual Disability Rights Service, Submission, *Review of the Use of the Consorting provisions by the NSW Police Force*, 7 March 2014, p. 15; Community Legal Centres NSW, Submission, *Legislative review of the consorting provisions*, 23 March 2014, p. 14.

472. Consultation with two Western region LACs on 16 and 17 September 2014.

473. Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman’s Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, pp. 22–23.

474. *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 32(4)(a).

475. *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 32(1).

This office supports the NSW Police Force view that 'police may be able to use some discretion to avoid uninvolved bystanders from hearing the [consorting] warning'.⁴⁷⁶

Recommendations

10. The NSW Police Force include in the Consorting Standard Operating Procedures practical guidance to officers to avoid unnecessary disclosure of the 'convicted offender' status of a person about whom someone is warned.
11. The NSW Police Force include in the Consorting Standard Operating Procedures instructions that officers are not to disclose the details of the indictable offence a person was previously convicted of when issuing a consorting warning to others about them.

476. NSW Police Force, Submission, *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*, 12 March 2014, p. 9.

Chapter 10. Issues related to the defences

Section 93Y of the *Crimes Act 1900* 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.⁴⁷⁷

The most significant issue to emerge in the review in relation to the defences is the tension between the inability of an exhaustive list of defences to cover the range of associations where communicating with a 'convicted offender' may be reasonable or even desirable, and the certainty and operational benefits to police of constraining the defences to a carefully restricted list.

This chapter first discuss how the defences may operate in practice, including consideration of the impact of the reverse onus of proof. We then discuss the adequacy of the list of defences, with particular emphasis on gaps in the current list that have been raised in submissions and consultations. Finally, we discuss some of the limitations of some of the current defences, including consorting with family members, and consorting that occurs in the provision of a health service.

10.1 How the defences operate

To rely on a defence, the defendant must establish that the consorting falls within one of the categories listed in section 93Y and must satisfy the court that the consorting was 'reasonable in the circumstances'.⁴⁷⁸ There are no other defences.

When the consorting law was introduced, the Hon. David Clarke stated that the intention of including the defences was to direct police 'on what relationships should be exempt' from the operation of the consorting law.⁴⁷⁹ Unlike the consorting provisions in most other Australian jurisdictions, the consorting law contains no general defence of 'reasonable excuse'.⁴⁸⁰

In the more than 30 consorting charges finalised at the time of writing, none involved the testing of any defences. It is therefore not yet clear how any of the defences will be interpreted and applied by the courts.

In an operational sense, the defences have influenced how police use the consorting law. We found that most officers avoided issuing a consorting warning in circumstances where they believed a defence might be relevant to a future prosecution.

10.1.1. Defendant required to satisfy the court the consorting was reasonable

In criminal law, there is a general rule that the prosecution must prove the elements of a criminal offence beyond reasonable doubt.⁴⁸¹ The prosecution is also required to rebut any defence raised by the defendant to the same standard. This rule stems from the presumption of innocence.

Under the new consorting law, the defendant is required to satisfy the court that the circumstances of consorting fell within one of the six defence categories and that it was reasonable in the circumstances.⁴⁸² This amounts to a reversal of the standard burden of proof that exists in the majority of criminal matters.

477. *Crimes Act 1900*, s. 93Y.

478. *Crimes Act 1900*, s. 93Y.

479. The Hon. David Clarke MLC, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Council, 7 March 2012, pp. 9092–9093.

480. See, for example, *Summary Offences Act 1953* (SA), *Summary Offences Act 1966* (Vic), *Summary Offences Act* (NT), and *Police Offences Act 1935* (Tas).

481. *Woolmington v DPP* [1935] AC 462 at 469–470 and 480–482 (HL).

482. *Crimes Act 1900*, s. 93Y.

Many criminal justice stakeholders have expressed concern about this reverse onus of proof. The NSW Law Society has expressed its concern directly to the Attorney General, arguing that the consorting law should be amended to require the prosecution to prove that consorting was not reasonable in the circumstances.⁴⁸³

Legal Aid NSW similarly submitted that the onus should be on the prosecution to demonstrate that such association was not reasonable in the circumstances.⁴⁸⁴

10.2 What the defences do not cover

The consorting law may apply to everyday, commonplace associations and communications between people. People associate in a range of circumstances that might be viewed as reasonable or even desirable, but are not covered by the current list of defences. Examples of these circumstances include attending a soup kitchen, living in a boarding house or crisis accommodation facility, participating in a support group or mentor program, and volunteering with a community service.

The NSW Police Force submitted that expanding the listed defences 'would enable the provisions to be easily subverted'.⁴⁸⁵ However, the submissions we received as part of this review overwhelmingly expressed the view that the current list of defences is inadequate, and supported expanding the list of defences to incorporate a range of other circumstances where consorting may be reasonable. The types of additional defences suggested include:⁴⁸⁶

- consorting that occurs in the course of accessing welfare and support services, peer support or mentoring groups⁴⁸⁷
- consorting that occurs in the course of sporting activities⁴⁸⁸
- consorting that occurs in the course of religious activities⁴⁸⁹
- consorting that occurs in the course of recreational and cultural activities⁴⁹⁰
- consorting between neighbours⁴⁹¹
- consorting that occurs in the provision of a broader range of professional services⁴⁹²
- consorting that occurs through participation in cultural or artistic activities⁴⁹³
- consorting that occurs in the course of volunteering or participation in community activities,⁴⁹⁴ and
- where a person has not understood a consorting warning.⁴⁹⁵

This section discusses some of the noteworthy gaps in the current list of defences.

483. See NSW Ombudsman, *Consorting Issues Paper: Review of the use of the consorting provisions by the NSW Police Force*, November 2013, p. 47; Correspondence from Justin Dowd, President, The Law Society of New South Wales, to the Hon. Greg Smith MP, Attorney General and Minister for Justice, dated 26 October 2012.

484. Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, p. 14; NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 10; UTS: Jumbunna, Submission, *Consorting Issues Paper: Review of the use of consorting provisions by the NSW Police Force: Division 7, Part 3A of the Crimes Act 1900*, 4 March 2014, p. 6.

485. NSW Police Force, Submission, *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*, 12 March 2014, p. 10.

486. These are in addition to those suggested in our issues paper: NSW Ombudsman, *Consorting Issues Paper: Review of the use of the consorting provisions by the NSW Police Force*, November 2013, p. 51.

487. Justice Action, Submission, *Review of the use of the consorting provisions by the NSW Ombudsman*, 27 February 2014, p. 9; Women in Prison Advocacy Network, Submission, *Submission in Response to NSW Ombudsman Consorting Issues Paper*, 21 March 2014, pp. 5–7.

488. Consultation with Intellectual Disability Rights Service, 27 March 2014.

489. Brotherhood Christian Motorcycle Club, Submission, *Submission to the NSW Ombudsman regarding the NSW consorting laws*, 16 February 2015, p. 3.

490. The Law Society of NSW, Submission, *Consorting Issues Paper – Review of the use of the consorting provisions by the NSW Police Force*, 10 March 2014, p. 9.

491. The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 10; Justice Action, Submission, *Review of the use of the consorting provisions by the NSW Ombudsman*, 27 February 2014, p. 9.

492. The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 10.

493. The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 10; Women's Legal Service NSW, Submission, *Consorting Issues Paper: Review of the use of consorting provisions by the NSW Police*, 14 March 2014, p. 2.

494. The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 10; Women in Prison Advocacy Network, Submission, *Submission in Response to NSW Ombudsman Consorting Issues Paper*, 21 March 2014, pp. 5–7.

495. Intellectual Disability Rights Service, Submission, *Review of the Use of the Consorting provisions by the NSW Police Force, 7 March 2014; The Law Society of NSW, Submission, Consorting Issues Paper – Review of the use of the consorting provisions by the NSW police force*, 10 March 2014, p.8.

10.2.1. Management of offenders in the community by government agencies

The reintegration of a person into the community following release from custody involves a range of government supported activities that are not covered by the current list of defences.

As part of our review, we consulted with an Assistant Commissioner from Corrective Services NSW (Corrective Services) as well as other Corrective Services staff.

A person may be issued with a consorting warning, and potentially charged under the consorting law, for conduct in compliance with a condition or direction from Corrective Services staff or the State Parole Authority.⁴⁹⁶ Corrective Services advised that a situation where two 'convicted offenders' are required or encouraged to interact would frequently fall within the ambit of the consorting law. For example, 'convicted offenders' may be referred to the same therapeutic group or may be required to attend certain programs or facilities in accordance with their case plan. A case plan is usually devised by the community corrections officer and is not a 'court order' for the purposes of section 93Y(f) of the Crimes Act. Conditions set by the State Parole Authority similarly do not fall within the definition of 'court order' under section 93Y(f). Accordingly, compliance with a case plan or parole conditions is not protected by a defence.

Corrective Services staff acknowledged that prohibiting associations between certain individuals can have a role in reducing reoffending. For this reason, an offender's case plan might include non-association conditions in circumstances where particular associations are considered to be a risk factor for that person's reoffending. However, a general prohibition on associating with a 'convicted offender' was considered problematic.⁴⁹⁷

The programs, plans and conditions imposed on a person by Corrective Services in custody and upon release will involve assessing and balancing risks to minimise the likelihood of that person's reoffending.⁴⁹⁸ However, the decision to issue a consorting warning does not involve this level of personalised evaluation of risk. We were told that, in some circumstances, maintaining relationships with antisocial peers may be better for that person in terms of reoffending, than being personally isolated. Further, a focus on encouraging pro-social behaviour was considered more effective in reducing reoffending than prohibiting antisocial behaviour.

After our consultation, Corrective Services provided the following feedback in relation to the consorting law:

Our suggestion is that it should be a defence for an offender being supervised by Corrective Services NSW to consort with a convicted offender, where the consorting occurs in compliance with:

- a condition of a sentence or order imposed by a court or the State Parole Authority,
- complying with a case plan prepared by a member of staff of Corrective Services NSW, or
- complying with a direction, advice or recommendation given to the offender by a member of staff of Corrective Services NSW to participate in a program, service or other activity.⁴⁹⁹

Juvenile Justice NSW (Juvenile Justice) funds a range of community programs, including support programs and accommodation services. Young offenders may participate in these programs as part of their case plan and, in doing so, will be interacting with a range of other young people including 'convicted offenders'.⁵⁰⁰ We were advised that the use of the consorting law in these circumstances would be unlikely to reduce reoffending. The views of Juvenile Justice and the application of the consorting law in relation to children and young people are discussed in detail in chapter 8.

10.2.2. Reintegration programs and activities

In our consultation with Corrective Services, we were told that associating with a 'convicted offender' in the course of participating in reintegration programs and activities is likely to be beneficial for those involved and lead to a reduction in reoffending.⁵⁰¹ Organisations such as Women in Prison Advocacy Network and Justice Action facilitate government-funded mentoring and peer-support programs that are aimed at encouraging positive relationships and reducing recidivism rates.⁵⁰² These programs necessarily involve associations between those who have been convicted of an indictable offence.

496. Consultation with Corrective Services NSW, 19 November 2014.

497. Consultation with Corrective Services NSW, 19 November 2014.

498. Consultation with Corrective Services NSW, 19 November 2014.

499. Correspondence from Assistant Commissioner L. Grant, Corrective Services NSW, dated 4 March 2015.

500. Consultation with Juvenile Justice NSW, 17 November 2014.

501. Consultation with Corrective Services NSW, 19 November 2014.

502. Consultation with Corrective Services NSW, 19 November 2014. See also Women in Prison Advocacy Network, Submission, *Submission in Response to NSW Ombudsman Consorting Issues Paper*, 21 March 2014, p. 2.

10.2.3. Welfare support services

Under the consorting law, there is no explicit defence for associations that occur between people in the course of accessing community and welfare services. Welfare support organisations facilitate or provide a broad range of services and programs beyond what may be defined as 'training' or 'education'. These include providing social activities, computer access, shower facilities, meals, hairdressing, referral services and housing assistance. The ability to access support through community and welfare services may be crucial to a person's physical and psychological wellbeing and, for this reason, most of the submissions we received stated that associations that occur in this context should be covered by a defence to consorting. In chapter 8, we discussed how criminalising associations in this context may be counterproductive to efforts to reduce reoffending.

We consulted with several community organisations and welfare services who expressed concern around the lack of a defence relating to consorting that occurs in this context.⁵⁰³ Specifically, we spoke to staff at a soup kitchen in a Sydney metropolitan area that provides breakfast and lunch each day to up to 45 people. They also provide shower facilities to several people each day. Staff said they would be seriously concerned if people accessing their services were targeted for consorting. Clients were actively encouraged to build social networks and connections, and the service aims to create an inclusive community and reduce social isolation. They explained,

social interaction is what we're about. We're about being a community, being a part of something and encouraging people to be a part of this community.⁵⁰⁴

We also consulted with staff at a community centre in the same area that provides onsite services including counselling support, food distribution, financial support, and referrals to local shelters and specialist multicultural services. Staff reported that clients felt frightened to attend the area given police use of the consorting law and, as a result, had been cut off from the support and services they need.⁵⁰⁵

10.2.4. People who live together or share accommodation

There is no defence covering housing arrangements unless the relationship in the house falls within the meaning of 'family'.

Many people we spoke with in consultations supported expanding the defences to include associations between people who live together.⁵⁰⁶ In particular, we spoke to a service involved in assisting people to secure boarding house accommodation. In this context, 'convicted offenders' will often be living together on a temporary basis and share common areas including kitchens and bathrooms. It was concerning to this service that people could be warned for consorting in these circumstances.⁵⁰⁷ Further, following release from custody, people may receive government assistance to secure transitional or short-term accommodation, such as a motel. In these circumstances, several 'convicted offenders' may be staying in the same accommodation and may be at risk of being subject to the consorting law.⁵⁰⁸

In our consultations, views varied among police in relation to whether a defence should be available to people who live together. Some officers felt that the absence of a defence for people who live together might be problematic, but said that people are unlikely to be issued with a consorting warning in relation to people they live with because 'common sense would prevail'.⁵⁰⁹ Officers from several Local Area Commands (LACs) were concerned that, if available, this defence could be easily manipulated and that people would claim to be living together to avoid the consorting law.⁵¹⁰

In practice, we found few instances where police had issued a consorting warning to people who live together, except where people were living in temporary or crisis accommodation, as discussed in chapter 8. Given the concern expressed by officers attached to specialist squads about the potential for a defence relating to people who live

503. Consultation with a Sydney metropolitan area Community Centre, 11 February 2013; Consultation with a Sydney metropolitan area Neighbourhood Centre, 15 July 2015; Consultation with a men's refuge, Sydney metropolitan area, 18 December 2012; Consultation with Salvation Army, Sydney metropolitan area, 10 December 2012.

504. Consultation with Salvation Army, Sydney metropolitan area, 10 December 2012.

505. Consultation with a Sydney metropolitan area community centre, 11 February 2013.

506. Consultation with a Western Region Family Support Service, 16 September 2014; Consultation with Services and Programs Officer, Corrective Services NSW, 8 October 2014; Consultation with Aboriginal Cultural Support Officer, Corrective Services NSW, 26 September 2014.

507. Consultation with a Sydney metropolitan area Neighbourhood Centre, 15 July 2015.

508. Consultation with Aboriginal Cultural Support Officer, Corrective Services NSW, 26 September 2014.

509. Consultation with LAC 1, Western Region, 17 September 2014; Consultation with LAC 2, South West Metropolitan Region, 22 April 2013; similar views were expressed in Consultation with LAC 1, North West Metropolitan Region, 11 April 2013.

510. Consultation with LAC 2, Central Metropolitan Region, 29 April 2013; Consultation with the Gangs Squad, 25 February 2014.

together to be manipulated by those suspected of involvement in organised crime or criminal gangs, a defence that specifically protects people who live in transitional, crisis or emergency accommodation may ameliorate this particular police concern. In doing so, it may strike an appropriate balance between avoiding further marginalising disadvantaged and vulnerable people, and enabling police to target organised crime and criminal gangs.

10.2.5. Inclusion of a ‘reasonable excuse’ defence

A prescribed list of defences does not allow for the ‘discretion of a magistrate to not issue a conviction where there has been a reasonable excuse for consorting’.⁵¹¹ For this reason, many of the submissions we received, as well as people we spoke with in consultations, supported the inclusion of a ‘reasonable excuse’ defence.⁵¹² Consorting laws in two other Australian jurisdictions include a general defence of ‘reasonable excuse’.⁵¹³

The *Consorting Standard Operating Procedures* (Consorting SOPs) relevantly state:

While interactions may occur on their face in one of the contexts detailed in 93Y ..., 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. Exercise your common sense and remember you require admissible proof not personal suspicion.⁵¹⁴

It may be expected that police will not exercise their discretion to issue a consorting warning in circumstances where associations with ‘convicted offenders’ appear to be reasonable. The NSW Police Force is of the view that the Consorting SOPs provide sufficient guidance to police about how they should exercise their discretion in relation to the defences.⁵¹⁵

Case study 16 below provides an example of the potential benefit of allowing the court to consider whether consorting was reasonable in the circumstances.

Case Study 16. *R v F, Downing Centre*⁵¹⁶

A magistrate found F not guilty of a consorting charge 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 consorting warnings being issued to F 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 the police stopping a vehicle that F and a number of others were travelling in. F told police that they were travelling to the hospital to visit his brother who had recently been seriously injured. Other records verified that F’s brother had been seriously injured and was a patient at the time. The court could not consider whether consorting in these circumstances was reasonable as it did not fall within the listed defences.

In our consultations with police officers, responses varied in relation to whether a defence of ‘reasonable excuse’ should be adopted. Some officers believed that it would simplify the consorting law if the statutory list of defences was replaced by a single defence of ‘reasonable excuse’. This would also leave any determination about the reasonableness of consorting in the circumstances to the court.⁵¹⁷

511. Consultation with Intellectual Disability Rights Service, 27 March 2014.

512. Only the NSW Police Force did not support this defence. See Office of the Director of Public Prosecutions, Submission, *Consorting Issues Paper – Submission ODPP*, 28 February 2014, pp. 4–5; Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman’s Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, p. 18; Consultation with Manly Community Centre, 11 February 2013; Consultation with Aboriginal Cultural Support Officer, Corrective Services NSW, 26 September 2014; Legal Aid NSW, Submission, *Responses to the Consorting Issues Paper*, February 2014, p. 14.

513. Summary Offences Act (NT) and *Police Offences Act 1935* (Tas).

514. State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures*, November 2014, p. 15.

515. NSW Police Force, Submission, *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*, 12 March 2014, p. 12.

516. *R v Crowe* (unreported, Downing Centre Local Court, Magistrate Stapleton, 22 July 2013).

517. Consultation with LAC 1, Central Metropolitan Region, 24 June 2014; Consultation with LAC 1, Northern Region, 22 July 2014; Consultation with LAC 3, Central Metropolitan Region, 30 July 2014; Consultation with LAC 3, North West Metropolitan Region, 9 February 2015; Consultation with LAC 4, Western Region, 16 September 2014; Consultation with LAC 2, North West Metropolitan Region, 8 March 2013.

Many police officers acknowledged there were circumstances not covered by the current defences where consorting might be reasonable. However, concern was expressed by some that expanding the list of defences in section 93Y is not desirable as frontline officers are already expected to put into practice an enormous volume of detailed information each day. Creating additional, detailed defences may increase this burden on officers and make the consorting law unwieldy. It was argued that replacing the existing list of defences with a single defence of 'reasonable excuse' may be more operationally effective.

The NSW Police Force was not in favour of a general defence of 'reasonable excuse' being included in addition to, or as an alternative to, the current list of defences.⁵¹⁸

Some police officers we consulted felt that a general defence of 'reasonable excuse' would be too easy for people to manipulate. They were of the view that people could fabricate an excuse for associating and that this would discourage police from using the consorting law: 'you could come up with a million different scenarios, they could tell us anything'.⁵¹⁹ This concern was emphasised in particular in our consultations with the Gangs Squad, who target serious and organised crime. In their view, it is important to carefully restrict the available defences for their targets, who they believe are likely to have access to sophisticated legal advice and would be most able to manipulate the defences.

10.3 Shortcomings of the current defences

Many submissions we received raised concerns about the defences involving consorting with 'family members' and consorting that occurs when a 'health service' is provided.

10.3.1. Definition of 'family'

In our consorting issues paper, we noted that police and others consulted had expressed concern about the lack of definition of 'family members', and the uncertainty about how this term may be interpreted by the courts. In its submission to our review, the NSW Police Force agreed that 'it may be useful to add an inclusive definition of family'.⁵²⁰

In applying the family defence in practice, some police officers said they would generally accept that two people were family members unless they knew this to be incorrect.⁵²¹

We found several instances in the consorting data where it was unclear whether or not the people associating would be considered 'family' for the purposes of section 93Y. For example, a person issued with a consorting warning was in a relationship with the daughter of the person warned about. In another incident, the person issued with a consorting warning was the son of the de facto partner of the person warned about.⁵²²

A particular concern is the lack of clarity about whether 'family members' should be interpreted to include extended kinship ties among Aboriginal or Torres Strait Islander (Aboriginal) people and other cultural groups.⁵²³ 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.⁵²⁴

518. NSW Police Force, Submission, *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*, 12 March 2014, p. 11.

519. Consultation with LAC 1, Northern Region, 22 July 2014. Also see Consultation with LAC 3, Central Metropolitan Region, 30 July 2014; Consultation with Gangs Squad, 25 February 2015; Consultation with LAC 3, Northern Region, 3 March 2015; Consultation with LAC 1, North West Metropolitan Region, 11 April 2013; Consultation with LAC 3, North West Metropolitan Region, 10 May 2013; Consultation with LAC 2, Central Metropolitan Region, 29 April 2013; Consultation with LAC 1, Western Region, 17 September 2014.

520. NSW Police Force, Submission, *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*, 12 March 2014, p. 11.

521. See, for example, Consultation with LAC 1, Western Region, 17 September 2014; Consultation with LAC 1, Central Metropolitan Region, 24 June 2014.

522. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

523. NSW Ombudsman, *Consorting Issues Paper: Review of the use of the consorting provisions by the NSW Police Force*, November 2013, p. 46.

524. The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9093; NSW Ombudsman, *Consorting Issues Paper: Review of the use of the consorting provisions by the NSW Police Force*, November 2013, p. 46.

This issue was raised in the following case study.

Case Study 17. Issuing consorting warnings in relation to family members

Police approached three Aboriginal men and spoke to them about consorting. They told police that their mothers were cousins and that they were therefore related. In this incident, police were also told: ‘You people are different to us black people. We are all family’ and ‘your people don’t understand that our people are different. We are all related to each other’. Police told the three men that their relationship did not count as family and issued consorting warnings to each man in relation to the others.

The majority of submissions we received agreed that the definition of ‘family’ should include concepts of kinship consistent with Aboriginal cultural practice. Aboriginal legal resource centre, Wirringa Baiya, suggested that ‘family’ should be defined in accordance with the definition recommended by the Australian Law Reform Commission in a recent family violence inquiry.⁵²⁵ That definition includes the following relationships:

- (a) past or current intimate relationships, including dating, cohabiting, and spousal relationships, irrespective of the gender of the parties and whether the relationship is of a sexual nature;
- (b) family members;
- (c) relatives;
- (d) children of an intimate partner;
- (e) those who fall within Indigenous concepts of family; and
- (f) those who fall within culturally recognised family groups.

The NSW *Crimes (Domestic and Personal Violence) Act 2007* adopts broad and culturally inclusive definitions of ‘relative’ and ‘domestic relationship’ that in combination are compatible with the definition outlined above.⁵²⁶ These definitions are set out in Appendix 5.

In consultations, people generally supported adopting a definition of ‘family’ similar to that outlined in NSW domestic violence legislation.⁵²⁷ Most police officers we consulted also saw merit in adopting a definition of ‘family’ that they already apply on a regular basis, such as that contained in the *Crimes (Domestic and Personal Violence) Act*.⁵²⁸ It is desirable to maintain consistency across legislation relevant to policing.

The NSW Police Force submitted the interpretation of ‘family’ should be a matter for the courts, stating that the lack of definition of ‘family’ may allow the courts ‘to have regard to traditional practices and relationships that might not apply in the context of other cultures’.⁵²⁹

Officers from the Gangs Squad also expressed significant concern throughout our consultations about any expansion of the defences that may be easily manipulated by those involved in organised crime or criminal gangs. They explained that a definition of ‘family’ that includes people who live together as flatmates in private residential arrangements would provide OMCG members and their associates with an easily accessible defence that would require significant police resources to rebut.

Consultation with the NSW Police Force Consorting Standing Committee in January 2016 revealed support among committee members for amending the Consorting SOPs to include guidance to officers in relation to concepts of kinship consistent with Aboriginal culture and practice, when considering the meaning of ‘family’.

525. Australian Law Reform Commission, *Family Violence – A National Legal Response*, November 2010, Recommendation 7-6.

526. This may suggest that if the ‘domestic relationship’ as defined in NSW family violence legislation were considered ‘family’ for the purposes of the consorting law, unrelated people who live together could rely on this defence. Accordingly, the adoption of definitions to this effect would need to be considered given the police concerns outlined above.

527. Consultation with Aboriginal Legal Service, western NSW, 17 September 2014; Consultation with Western NSW Family Support Service, 16 September 2014.

528. See, for example, Consultation with LAC 1, Western Region, 17 September 2014; Consultation with LAC 4, Western Region, 16 September 2014; Consultation with LAC 1, Central Metropolitan Region, 24 June 2014.

529. NSW Police Force, Submission, *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*, 12 March 2014, p. 5.

10.3.2. Definition of ‘health service’

Section 93Y contains a defence of consorting that occurs in the provision of a health service. The term ‘health service’ is not defined. It is not yet clear how the courts will determine which types of services may fall within the scope of ‘health service’. For example, accessing a social worker might not be considered a health service.

In its submission to our review, the NSW Police Force said it was unnecessary to include a definition of health service in section 93Y.⁵³⁰ However, other submissions argued that the uncertainty about what would qualify as a ‘health service’ means that it would be useful to define the term.⁵³¹ Many submissions emphasised the importance of adopting a definition broad enough to include:

- therapeutic services
- Alcoholics Anonymous and Gamblers Anonymous
- rehabilitation services
- alcohol and other drug support services
- accessing a social worker, and
- counselling.⁵³²

10.4 Conclusion and recommendations

There are two approaches that may address the shortcomings and gaps relating to the defences outlined in this chapter:

- expanding the current list of defences, or
- replacing the current list of specific defences with a ‘reasonable excuse’ defence.

There are positive and negative aspects to both of these approaches.

Expanding the current list of defences would retain certainty and predictability for warning recipients and police about what circumstances give rise to a defence. However, confining the available defences to a specific list will almost certainly omit circumstances where the consorting should not be considered a criminal offence.

In contrast, replacing the current list of defences with a ‘reasonable excuse’ defence could encompass all circumstances where consorting may be reasonable and would enable the court to exercise greater discretion in relation to the defences. However, this would remove the certainty attached to a specific list of defences, and may add to police concern about the potential for the defence to be manipulated.

In the light of Parliament’s decision to provide direction in the consorting law on ‘what relationships should be exempt’⁵³³ and police concern regarding the inclusion of a ‘reasonable excuse’ defence, this office recommends modification of the current exhaustive list of defences in section 93Y.

Our recommendations focus upon improving the operation of the consorting defences by:

- including three additional defences to cover gaps in the current list of defences, and
- including broad definitions of two key terms in the current defences.

530. NSW Police Force, Submission, *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*, 12 March 2014, p. 11.

531. Community Legal Centres NSW, Submission, *Legislative review of the consorting provisions*, 23 March 2014, pp. 15–16; The Law Society of NSW, Submission, *Consorting Issues Paper – Review of the use of the consorting provisions by the NSW police force*, 10 March 2014, p. 9; NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 10; Wurringa Baiya, Submission, *Review of the new consorting provisions contained within Division 7, Part 3A of the Crimes Act 1900*, 21 March 2014, p. 9; Public Interest Advocacy Centre Ltd, Submission, *Submission in response to the NSW Ombudsman’s Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014, pp. 18–19.

532. Office of the Director of Public Prosecutions, Submission, *Consorting Issues Paper – Submission ODPP*, 28 February 2014, p. 5; Consultation with Intellectual Disability Rights Service, 27 March 2014; Community Legal Centres NSW, Submission, *Legislative review of the consorting provisions*, 23 March 2014, pp. 15–16; The Law Society of NSW, Submission, *Consorting Issues Paper – Review of the use of the consorting provisions by the NSW police force*, 10 March 2014, p. 9; NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 10; Wayback Ltd, Submission, *Submission Regarding the Consorting Issues Paper*, 8 January 2014, pp. 1–2.

533. The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, pp. 9092–9093.

These recommendations address the most serious shortcomings identified in this review and take into account concerns expressed by police about the potential for criminal organisations and criminal groups to manipulate any expansion of or flexibility in the defences to avoid the proper application of the consorting law.

There is broad support from stakeholders including Corrective Services and a range of community organisations in relation to our recommendation to add three new defences into the consorting law.

Recommendation

- 12. The Attorney General propose, for the consideration of Parliament, amendments to section 93Y of the Crimes Act to include the following additional defences:**
- a) **Consorting that occurs in the course of complying with an order by the State Parole Authority or with a case plan, direction or recommendation by a member of staff of Corrective Services NSW.**
 - b) **Consorting that occurs in the course of the provision of transitional, crisis or emergency accommodation.**
 - c) **Consorting that occurs in the course of the provision of a welfare or support service.**

Any concerns about the potential for the defence in relation to welfare or support services to be manipulated might be addressed by way of a carefully managed list of 'welfare or support services' inserted into the regulations.⁵³⁴

The recommendations that follow in relation to defining key terms in section 93Y will provide greater certainty about the scope of the defences and promote greater consistency in the application of the consorting law.

Police officers and others we consulted raised the issue of a lack of clarity in relation to the meaning of 'family members'. Of particular concern was the uncertainty as to whether it includes kinship relationships among Aboriginal people.

Section 5(h) of the Crimes (Domestic and Personal Violence) Act ensures that kinship relationships between Aboriginal people and Torres Strait Islander people are included in that Act's definition of 'domestic relationship'. Section 5(h) provides if a person 'is or has been part of the extended family or kin of the other person according to the Indigenous kinship system of the person's culture', then they fall within the definition of 'domestic relationship'.⁵³⁵

Some but not all police officers told us they understood the term 'family members' in a way that was broadly consistent with the definitions of 'domestic relationship' and 'relative' in sections 5 and 6 of the Crimes (Domestic and Personal Violence) Act.⁵³⁶

Likewise, a large number of stakeholders, including the Office of the Director of Public Prosecutions, raised concerns about the lack of clarity in relation to the meaning of 'health services' and whether it covered therapeutic and counselling services as well as support groups such as Narcotics Anonymous.

Recommendations

- 13. The Attorney General propose, for the consideration of Parliament, an amendment to the consorting law to include a definition of 'family members' that includes kinship relations between Aboriginal people.**
- 14. The Attorney General propose, for the consideration of Parliament, an amendment to the consorting law to include a broad definition of 'health service' that includes therapeutic, rehabilitation, drug and alcohol services, and accessing social workers and other counselling services.**

534. Any definition or prescribed list of 'welfare or support services' should include services provided to the homeless, such as food distribution, hygiene and grooming, accommodation referrals, financial support, social activities, access to computers and specialist multicultural services.

535. *Crimes (Domestic and Personal Violence) Act 2007*, ss. 5 and 5(h).

536. See, for example, Consultation with LAC 1, Western Region, 17 September 2014; Consultation with LAC 4, Western Region, 16 September 2014; Consultation with LAC 1, Central Metropolitan Region, 24 June 2014. Contrast this with officers who told us that they did not support kinship relationships being included in the definition of 'family' as it would undermine the use of the consorting law in small communities: Consultation with LAC 3, Western Region, 13 June 2013.

Any concerns about the potential for the 'health services' defence to be manipulated can be addressed by way of a carefully managed list of health services in the regulations. Any list of 'welfare or support services' should include services provided to the homeless, such as food distribution, hygiene and grooming, accommodation referrals, financial support, social activities, access to computers and specialist multicultural services.

As an interim measure and notwithstanding the implementation of our recommendations by the Government, this office recommends the NSW Police Force undertake the following:

- 15. The NSW Police Force amend its consorting policy, standard operating procedures, publications and training to encourage officers to exercise their discretion not to issue consorting warnings or commence criminal proceedings on the basis of the following types of consorting:**
- a) **Consorting that occurs in the course of complying with an order by the State Parole Authority or with a case plan, direction or recommendation by a member of staff of Corrective Services NSW.**
 - b) **Consorting that occurs in the course of the provision of transitional, crisis or emergency accommodation.**
 - c) **Consorting that occurs between family members where 'family members' is defined in a culturally inclusive way, with particular reference to the Aboriginal kinship system.**
 - d) **Consorting that occurs in the course of the provision of a welfare or support service.**

Chapter 11. Is the consorting law operating fairly and reasonably?

Consorting is a controversial offence as it involves 'the criminalisation of ordinarily harmless and seemingly innocent behaviour in order to allow authorities to intervene at an early stage'⁵³⁷ and attempt to prevent or reduce future offending.

The current provisions were introduced as part of a suite of amendments contained in the Crimes Amendment (Consorting and Organised Crime) Bill 2012 that 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'.⁵³⁸

While the reading speech linked the intent of the Bill as a whole to the policing of criminal groups and organised crime, discussion of the intent of the consorting amendments was restricted to modernising the offence of consorting and deterring people from 'building criminal networks' or 'mixing in a criminal milieu'.⁵³⁹ At the outset, the NSW Police Force made a policy decision not to limit use of the consorting law to serious and organised crime or criminal gangs. Without explicit restrictions regarding the nature of criminal offending to be targeted, the new consorting law has been applied to a wide range of policing issues ranging from antisocial behaviour and minor street crime to the most serious criminal offences.

Parliament framed the new consorting law broadly, adopting the same definition of 'convicted offender' that existed under the previous version contained in section 546A of the *Crimes Act 1900*. This has meant that the 'primary practical constraint upon its application is the discretion afforded to police officers',⁵⁴⁰ as section 93X itself 'does not discriminate between cases in which the purpose of impeding criminal networks may be served, and cases in which patently it is not'.⁵⁴¹ This was acknowledged in the second reading speech:

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.⁵⁴²

Potential risks associated with the breadth of the new consorting offence provisions and the consequent extent of the discretion afforded to police officers, were also acknowledged in the parliamentary debates when the law was introduced:

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.⁵⁴³

When enacting the new consorting law, Parliament required this office to 'prepare a report on the operation' of the new law to be provided to the Attorney General and the Commissioner of Police.⁵⁴⁴ Our report covers the operation of the new consorting law from its commencement on 9 April 2012 to 8 April 2015.

Elaborating on the role of this report, the Parliamentary Secretary stated:

The old [consorting] provision has fallen into disuse and has been criticised in the past. This report will provide an opportunity... to review the use of the new provision and to consider any further amendments or repeal of the provisions as necessary.⁵⁴⁵

Widespread concern has been expressed about the new consorting law throughout the review period, with 33 of the 34 submissions we received in response to our issues paper expressing serious concern about the new law. A majority also called for its repeal.

537. David Brown et al., *Criminal Laws: Material and commentary on criminal law and processes of New South Wales*, The Federation Press, 6th edition, 2015, p. 101.

538. The Hon. David Clarke MLC, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Council, 7 March 2012, p. 9091.

539. The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, pp. 9092–9093.

540. *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 at 1.

541. *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 at 45.

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

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

544. *Crimes Act 1900*, Schedule 11, Part 29.

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

At the centre of this concern is the consorting law's curtailment of the freedom of association and communication of people to whom the law is applied in circumstances where there is no requirement for police to suspect or establish any link between the consorting and planning or undertaking criminal activity or 'building criminal networks'. Underpinning this is the notion that the interpersonal interactions that may be restricted by police applying the consorting law are important to how we live. The NSW Bar Association submitted:

It may be accepted that much criminal activity occurs within family groups and friendship groups. However, both groups are also the foundations of society.⁵⁴⁶

The ability of the consorting law to be lawfully applied by police in circumstances involving otherwise innocent social activities is accompanied by a risk of negative outcomes that were unintended by Parliament. These negative outcomes include:

- restricting and criminalising people's freedom to associate and communicate with others in circumstances where the relationships or interactions are disconnected from any criminal activity
- disclosing people's private information about previous indictable convictions in circumstances where there is no connection to criminal activity
- disproportionately impacting on certain disadvantaged and vulnerable groups within communities
- impeding efforts by community organisations and government agencies to reduce social isolation or to reintegrate people into the community.

With little use of electronic consorting, the operation of the consorting law has relied on police observations of people spending time together in places open to the public. As a result, the risk of negative outcomes is increased for people who spend a lot of time in areas open to the public due to their potential to be subject to the consorting law to a greater degree than others.

In addition to being more visible to police, some vulnerable or disadvantaged groups have a proportionally higher number of people with previous convictions for indictable offences when compared to the general population. The history of over-representation of Aboriginal people in criminal statistics, for example, creates a substantially increased potential for Aboriginal people, and people they spend time with, to become subject to the consorting law. In table 13 in chapter 8 we provide statistical support for this increased risk, calculating that 40% of Aboriginal men aged 30 years and over are 'convicted offenders' for the purposes of the consorting law.

In chapter 8 we report and discuss the available evidence regarding use of the consorting law in relation to Aboriginal people, people experiencing homelessness, and children and young people. We recommend that children and young people under the age of 18 years be removed from the application of the consorting law. Our reasons for that recommendation are outlined in section 8.3 of chapter 8.

It is acknowledged that people's vulnerability does not preclude their being involved in serious criminal offending. However, the broad framing of the consorting law and the absence of any requirement for police to suspect or prove a link between use of the consorting law and crime prevention increase the risk that already marginalised people will be disproportionately and inappropriately affected by the operation of the consorting law.

The recommendations we make in chapters 8, 9 and 10 and in this chapter are intended to mitigate the risks of inappropriate use of the consorting law that captures people, including disadvantaged and vulnerable people, who are not linked to serious criminal offending.

In this chapter we summarise the evidence about the operation of the consorting law during the review period and outline our final recommendations.

11.1 Use of the consorting law by the NSW Police Force

In order to prepare this report, we have analysed the NSW Police Force consorting data and consulted extensively with police to understand the law in its operational context. A statistical overview of the operation of the consorting law is provided in chapter 6 and a discussion of the different types of use of the law can be found in chapters 7 and 8.

We have not been able to quantify the extent to which the consorting law has been used by police officers to target people suspected of involvement in serious and organised crime or criminal gangs. However, we have quantified use of the consorting law by specialist squads in the Organised Crime Directorate and Serious Crime Directorate of the State Crime Command, whose operational remit is restricted to serious crime, organised crime and criminal gangs. This provides insight into the extent of use of the consorting law in this space.

546. NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 3.

Our understanding of how different Local Area Commands (LACs) have used the consorting law is based on our analysis of the relevant consorting data and what officers from each command have told us about the reasons for using the law and its operational effectiveness. Where appropriate we have also met with other community stakeholders to discuss specific local issues that have emerged.

11.1.1. Use by specialist squads

On many measures, the Gangs Squad was the most significant and sustained user of the consorting law during the review period. Strike Force Raptor, the unit within the Gangs Squad responsible for that squad's use, is focused on the policing of high-risk Outlaw Motorcycle Gangs (OMCGs).

The Gangs Squad was responsible for 4,527, or 49%, of all consorting warnings issued by police and for charging 71% of the people charged with consorting during the review period (n=30). Despite this, the Gangs Squad was only responsible for targeting 24% of all people subject to the consorting law and 11% of all occasions on which the consorting law was used by police. This is due to the characteristics of use by the Gangs Squad, which tended to involve targeting people in larger groups, issuing pre-emptive warnings about known associates and repeatedly targeting some individuals. For example, 10% of those targeted by the Gangs Squad were targeted on more than five occasions. This more targeted approach is also evident in the consorting prosecutions brought by the Gangs Squad. These tended to rely on significantly higher numbers of consorting warnings and associations than the minimum required by the consorting law.⁵⁴⁷ In some cases, the Gangs Squad relied on up to nine associations with up to 10 'convicted offenders'.

Further analysis of the consorting data relevant to the Gangs Squad use revealed the proportion of Aboriginal people present in the data to be 13%, significantly lower than the 44% of those subject to the consorting law by general duties police. Additionally, children and young people were not represented in any significant way, being less than 1% of those targeted by the Gangs Squad, with no children aged less than 16 years. We found no evidence of use by the Gangs Squad in relation to people experiencing homelessness.

Consultations with Gangs Squad officers indicated considerable support for the consorting law and belief in its effectiveness as a tool for policing high-risk OMCGs. As outlined in section 7.5 of chapter 7, the law's effectiveness in this context lies in part with the cultural characteristics of OMCGs, including their hierarchical nature, use of insignia to identify themselves and propensity to gather regularly in groups in places open to the public and elsewhere such as clubhouses. It also lies in the intelligence-led approach to policing high-risk OMCGs adopted by Strike Force Raptor of the Gangs Squad.

The involvement of some members of some OMCGs in serious criminal activities has been documented widely. The Australian Crime Commission reports that OMCG members who are involved in criminal activities facilitate these activities by leveraging off the reputation of the gang.⁵⁴⁸ The consorting law's ability to disrupt the capacity of gang members to associate together in public places and elsewhere such as clubhouses underpins its effectiveness. The hierarchical nature of OMCGs with vertical structures and an identified leadership group also enables the targeting of key members within a gang via consorting warnings and charges.⁵⁴⁹ Case studies 1, 2 and 3 in chapter 7 illustrate the impact of the consorting law on OMCGs' ability to associate in different contexts. These case studies highlight use at a clubhouse, the impact on the Rebels' national run in 2014, and the use of the consorting law to assist to avoid an affray at licensed premises and hinder recruitment. All case studies involve use of a variety of police powers alongside the consorting law.

Officers from Strike Force Raptor have adopted an intelligence-driven and consequence-based approach to their prioritising of certain OMCGs to be targeted for consorting: 'if they participate in violent criminal activity then targeting them and their associates will become a priority for us.'⁵⁵⁰

The prioritising of certain gangs is reflected in the Gangs Squad consorting charge data. For example, of the 30 alleged OMCG members and associates charged with consorting by Strike Force Raptor in the review period, only three different gangs are represented. Twenty-five of the men charged are alleged members or associates of one OMCG and collectively face 29 consorting charges. Three of these, including the alleged national president, were charged with several consorting charges.

547. Section 93X(2) of the *Crimes Act 1900* requires consorting with a minimum of two 'convicted offenders' on at least two occasions in relation to each offender.

548. Australian Crime Commission, *Crime Profile Series – Outlaw Motorcycle Gangs*, July 2013, p. 2.

549. The hierarchical nature and vertical structure have been observed and commented on by courts in NSW and other jurisdictions. See, for example, *R v Hawi* [2012] NSWSC 332 and *R v Cluse* [2014] SADC 26.

550. Traci Palladino, 'Raptor takes down the one percenters', *Police Monthly*, May 2014, p. 8.

In addition, there are a number of characteristics of the consorting law that Gangs Squad officers have highlighted as underpinning its operational effectiveness in their specific context. These include the lack of any requirement to rely on non-police witnesses in consorting prosecutions, the restricted defences available to a person (with the onus on the defendant to prove reasonableness in the circumstances), and the operational flexibility of the consorting provisions that arises from the breadth of the definition of 'convicted offender' and the absence of any statutory requirement to suspect or establish a link to criminal activity.

A more detailed discussion of the reasons for the efficacy of the consorting law for the policing of OMCGs is provided in section 7.5 of chapter 7. We have also outlined the reasons for the decline in use by the Middle Eastern Organised Crime Squad (MEOCS) and the lack of uptake of the consorting law by the 10 other specialist squads in the Organised Crime Directorate and Serious Crime Directorate in sections 7.6 and 7.7 respectively.

11.1.2. Use by general duties officers

We found the consorting law was being used by general duties police to address a wide variety of local policing issues. We detail the different types of use of the consorting law by general duties police in section 7.8 of chapter 7. Our discussion is based on our analysis of the consorting data and state-wide consultations with general duties police officers located in 26 LACs.

Approximately half of all consorting warnings were issued by general duties police (n=4,401), and nearly 80% of people subject to the consorting law were affected as a result of an interaction with general duties officers (n=2,601).⁵⁵¹

General duties officers were responsible for 85% of all occasions of use of the consorting law during the review period (n=1,538) but charged only 12 people with consorting. Charges against three of these people were required to be withdrawn as they had been incorrectly laid.

During our consultations, we found significant variation between commands in relation to why police were using the consorting law, what or whom they were targeting, and police views regarding its effectiveness. We identified use by general duties officers in relation to members and associates of OMCGs; for example, a small proportion of people subject to the consorting law (3%) were targeted by both general duties and specialist squad officers. One rural LAC charged three alleged nominees of an OMCG with consorting.

LACs also advised of using the consorting law to target people suspected of involvement in the most serious types of offending including participation in violent home invasions. Other examples include use of the consorting law to target people suspected of involvement in ongoing drug supply and aggravated break and enters. There was also use informed by an intelligence-driven identification of individuals determined to be at high risk of ongoing offending.

A number of LACs used the consorting law to police public areas. It was used to target people in public seating areas, and public walkways and in and around public transport hubs. Generally, the impetus for this use came as a result of nuisance offending in these areas or complaints from local businesses about 'undesirable' people disrupting retail or hospitality enterprises. We spoke with police from four metropolitan LACs in 2013 and then again in 2014 or 2015 in relation to this type of use. Three out of the four LACs discontinued use and advised they found their use of the consorting law in this context to be resource-intensive with few tangible results. One metropolitan LAC thought their use of the consorting law was an effective crime prevention strategy. This LAC targeted people in open, public areas and seated on public benches or at bus stops, often during daylight hours. A number of people experiencing homelessness were subject to the consorting law in this area. Police advised the aim was to 'clean up the CBD, to make it safer for everybody and discourage people from committing offences'.⁵⁵²

The Police Transport Command increased its use of the consorting law towards the end of the review period. In total, 147 consorting warnings were issued to 127 people by officers from the Police Transport Command.⁵⁵³ On most occasions, the consorting law was used by police in conjunction with a person search and a move-on direction.⁵⁵⁴ On a number of occasions, people were initially approached by police for the purposes of determining whether they were travelling with a valid ticket; if they were not they were issued an infringement notice in addition to a consorting warning.⁵⁵⁵

The proportion of Aboriginal people and the incidence of children and young people were far higher among those targeted by general duties police when compared with those targeted by specialist squads.

551. Note that we do not have information relating to the commands who issued the warnings for 33 unique people.

552. Consultation with LAC 2, North West Metropolitan Region, 8 March 2013.

553. Transport North West, Transport South West and Transport North/Central.

554. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

555. Details provided to the NSW Police Force by the NSW Ombudsman in the consultation draft of this report.

More than 40% of the people targeted by general duties officers were Aboriginal. There was significant variation between regions and commands in the use of the consorting law by general duties police in relation to Aboriginal people. This is detailed in section 6.8 of chapter 6. For example, the proportion of people subject to the consorting law in the Western Region who were Aboriginal was 78%, compared to 25% in the South West Metropolitan Region.

The proportion of women, and children and young people subject to the consorting law who were Aboriginal was especially high, with half of the adult women and 60% of the children and young people being Aboriginal.

During our analysis of the consorting data and information relating to a number of people charged with consorting, we identified clusters of use by general duties police in relation to people experiencing homelessness. There is no suggestion that use of the consorting law in relation to people experiencing homelessness was widespread; instead the examples reported demonstrate the breadth of circumstances within which the consorting law may be used and highlight the importance of a carefully defined framework within which the consorting law may be appropriately applied.

11.2 Recommendations to improve the operation of the consorting law

The implementation of the new consorting law during the review period reflects the broad scope of the provisions and the implementation framework adopted by the NSW Police Force. These provide police with discretion to employ the consorting law to disrupt a broad range of criminal activities.

The use of the consorting law by the Gangs Squad, the MEOCS and some LACs is consistent with targeting serious crime, organised crime and criminal gangs. However, there is also evidence that the consorting law has been used by some LACs to respond to nuisance behaviour and minor offending. While we have quantified use against Aboriginal people and children and young people, and have identified pockets of use with respect to people experiencing homelessness, our analysis does not establish whether any measurable crime prevention benefit has been achieved by this use or whether the people targeted have merely become caught up in the consorting law through their otherwise innocent use of public space.

Against this background, we have given careful consideration to the concerns about the negative impacts regarding the operation of the consorting law raised with us in submissions and in consultations.

The consorting law provides police with an additional tool to disrupt serious crime that currently appears to be effective, particularly in the context of the policing of high-risk OMCGs, for the reasons outlined in chapter 7 and summarised earlier in this chapter.

The public interest in the successful policing of high-risk OMCGs is highlighted by the continuing concern held by law enforcement bodies such as the Australian Crime Commission, which report the growth in OMCG membership, the escalation in the level of violence within and between motorcycle gangs, and the increase in the variety and sophistication of gangs' being involved in criminal activity.⁵⁵⁶ The Executive Director of the Australian Crime Commission reported there had been a 53% increase in the number of active members of OMCGs in the five year period to 2012.⁵⁵⁷ In 2015, the Australian Crime Commission also reported the involvement of members of different OMCGs in the importation, manufacture and trafficking of the drug methylamphetamine, or 'ice'.⁵⁵⁸

However, the consorting law has also been used in relation to disadvantaged and vulnerable people within our communities, and people involved in minor offending. In chapter 8 we discuss the operation of the consorting law in relation to Aboriginal people, people experiencing homelessness, and children and young people. In section 6.8 of chapter 6 we outline that 15% of 'convicted offenders' about whom police issued consorting warnings had only relatively minor or traffic offences in their criminal histories.

This office recommends that statutory and policy amendments are required to mitigate the unintended impacts of the operation of the consorting law on people in circumstances where there is no crime prevention benefit or where the crime that may be prevented is relatively minor.

Unless changes are made, it is likely that minor offenders and disadvantaged and vulnerable people not involved in serious criminal activity will continue to be subject to the consorting law. Operation of the consorting law in this manner carries a significant risk of harm to the relationships between communities and police, and may erode public confidence both in the consorting law and in the NSW Police Force.

556. Australian Crime Commission, *Crime Profile Series – Outlaw Motorcycle Gangs*, July 2013, pp. 2–3.

557. Paul Jevtovic APM, (Australian Crime Commission Executive Director), *OMCG activity in QLD*, media statement, 4 October 2013.

558. Australian Crime Commission, *The Australian Methylamphetamine Market: The National Picture*, 2015, p. 11.

There is a tension in the consorting law that arises from its broad framing. The operational flexibility that the broadly framed law provides to the Gangs Squad, for example, is important to its effectiveness as a tool against members and associates of high-risk OMCGs. However, this breadth and flexibility mean that the consorting law may be used lawfully to capture people who are participating in everyday, otherwise innocent, social interactions in public spaces, or who are involved in only minor or nuisance offending.

The recommendations in this report seek to balance the operational advantage of the law's flexibility against the risk of negative or unintended impacts associated with its broad implementation. In our view, there are clear advantages to reducing inappropriate use of the consorting law in relation to people not involved in any criminal activity or involved in only minor offending, including people belonging to 'marginal groups',⁵⁵⁹ and instead focusing its use on the prevention of serious crime. Some of the adjustments to the consorting law we recommend are the responsibility of the Attorney General and Parliament, and others are within the responsibility of the NSW Police Force.

11.3 Clarifying and refining the scope and application of the consorting law

In light of the risks associated with inappropriate but lawful use of the consorting law that resulted from the broad implementation by the NSW Police Force and that are detailed in chapters 6, 7 and 8, it is our view the law would benefit from a refined scope and application.

The majority of the submissions we received and organisations we consulted expressed the view that there needs to be a close connection between use of the consorting law and the prevention of serious crime. NSW Police Force publications acknowledge that 'it simply makes good sense' for use of the consorting law to be connected to crime prevention.⁵⁶⁰

We recommend that this be achieved by amending NSW Police Force policy so that the operation of the consorting law is:

- focused on serious offending,
- closely linked to crime prevention, and
- prohibited from being used to address minor or nuisance offending.

We also recommend that Parliament consider inserting an objects or purpose clause into the consorting law, to clarify the intent of the consorting law to be the prevention of serious crime.

11.3.1. Defining 'serious criminal offending' for the purposes of the consorting law

Central to clarifying the scope and application of the consorting law is defining the criminal offending that it is intended to address.

The second reading speech for the Bill that introduced the new consorting law⁵⁶¹ stated the intention of the Bill was to equip police to address organised crime and criminal gangs.⁵⁶² However, these comments related to the Bill as a whole.

It is possible to define 'serious criminal offending' in various ways, including by reference to the maximum sentence available, pre-existing statutory definitions, and/or the criminal procedure required to be used in any prosecution. During consultations with police and the NSW Bureau of Crime Statistics and Research (BOCSAR), we were advised that the activities of those involved in organised crime and criminal gangs are not limited to certain areas of offending or specific offences. It follows that to attempt to constrain use of the consorting law to the prevention of specific offences may be counterproductive.

The term 'serious indictable offence' is defined in section 4 of the Crimes Act as an offence that is punishable by imprisonment for a term of five years or more. This definition includes relatively minor offences such as theft and minor property damage. For this reason the definition is inadequate for the purposes of restricting the scope of the consorting law.

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

560. NSW Police Force, 'Law Notes: Consorting: a valid crime prevention tool', *Police Monthly*, May 2015, p. 35.

561. Crimes Amendment (Consorting and Organised Crime) Bill 2012.

562. The Hon. David Clarke MLC, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Council, 7 March 2012, pp. 9091–9023.

In response to our issues paper, a number of organisations suggested that use of the consorting law should be restricted to targeting 'strictly indictable' offences.⁵⁶³ Strictly indictable offences are those that may not be dealt with summarily and are required to be dealt with on indictment in the District Court or Supreme Court. However, while strictly indictable offences amount to a class of offences considered to be the most serious, knowledge of criminal procedure is required to determine whether or not an offence falls within this category. It is also true that some serious offences, including some serious violence offences, may be dealt with summarily on election.⁵⁶⁴ This office is concerned that this type of definition may be overly restrictive.

Taking into account the NSW Police Force's desire to maintain operational flexibility, we recommend that 'serious criminal offending' be defined in police policy by reference to the maximum sentence available and that an appropriate level would be offences punishable by 10 years or more imprisonment. This definition captures serious violence offences, robberies, break and enters and major drug supply. It excludes common assault, minor property damage, theft and drug possession. New criminal offences enacted that carry a maximum sentence of 10 years or more imprisonment would automatically fall within the definition without need for additional adjustment.

In our consultation with the NSW Police Force Consorting Standing Committee in January 2016, it was indicated that some frontline officers may not have an accurate understanding of the offences that carry a maximum sentence of 10 years or more imprisonment. We suggest this concern may be addressed through training and police publications.

Recommendation

- 16. The NSW Police Force amend its consorting policy, standard operating procedures, relevant publications, and training so that application of the consorting law is focused on the prevention of serious criminal offending.**

11.3.2. Strengthening the link between use of the consorting law and the prevention of serious criminal offending

In sections 4.2 and 5.1 of this report we noted the absence of any statutory requirement on police officers to prove or suspect that individuals targeted for consorting are involved in recent or ongoing criminal activity or that use of the consorting law may assist to prevent crime. During the review period we observed the continued issuing of consorting warnings that were invalid as they were based on a mistaken belief that a person was a 'convicted offender' at the relevant time.

Use of the consorting law to issue invalid warnings, and/or where there is no suspected crime prevention benefit, is not in keeping with the requirement placed on officers in the *Police Act 1990* to make 'efficient and economical use of public resources'.⁵⁶⁵

Many stakeholders have called for the addition of a 'reasonable suspicion' requirement to the offence provisions in section 93X such as a requirement that an officer 'reasonably suspect' that the people warned are involved in ongoing criminal activity and that the officer 'reasonably suspect' that issuing consorting warnings will assist to prevent future criminal activity.

The introduction of such additional statutory requirements was strongly opposed by the NSW Police Force in its submission. It argued that a requirement to establish in court the basis for a reasonable belief or suspicion may involve material that police would ordinarily not expose on public interest grounds and 'may prejudice ongoing operations

563. Office of the Director of Public Prosecutions, Submission, *Consorting Issues Paper – Submission ODPP*, 28 February 2014, p. 5; The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of the use of the consorting provisions by the NSW Police Force – Submission from the Shopfront Youth Legal Centre*, 28 February 2014, p. 3. The NSW Bar Association suggested that use of the consorting law should be restricted to 'strictly indictable offence[s] concerning drugs, firearms and/or violence within the previous 3 years': NSW Bar Association, Submission, *Consorting provisions: Issues Paper*, 28 February 2014, p. 5.

564. For example, some types of grievous bodily harm and wounding offences, assaults causing actual bodily harm, aggravated indecent assaults, as well as choking, suffocating or strangling a person (without causing their death) can be dealt with summarily: *Criminal Procedure Act 1986*, Schedule 1, Tables 1 and 2.

565. *Police Act 1990*, s. 7(g).

or confidential sources of intelligence in order to establish the grounds on which the association relates to criminal activity'.⁵⁶⁶ The majority of operational police officers we consulted also opposed such a recommendation due to its perceived practical shortcomings.

There remain strong policy reasons for the NSW Police Force to ensure that there is a close connection between use of the consorting law and crime prevention. The NSW Police Force's own advice to officers is that:

It simply makes good sense to expend law enforcement resources strategically in a way that is most likely to disrupt or prevent crime rather than to use consorting rigidly in every circumstance to which it could apply.⁵⁶⁷

This is likely to achieve a number of additional benefits, including:

- reducing inappropriate or unnecessary use of the consorting law and therefore saving police resources
- reducing error in relation to people's 'convicted offender' status
- increasing community confidence that the law is being used for legitimate crime prevention purposes by targeting people suspected of involvement in recent or ongoing serious criminal activity.

Intelligence-driven policing practice

Police consorting policy introduced in 2015 places some emphasis on the utility of the consorting law in targeted, intelligence-driven policing practice:

Integrate consorting provisions into targeted policing practice to address local crime problems, including crime hotspots and High Risk Offenders (STMPs), OMCGs, MEOCs and other identified criminal groups.⁵⁶⁸

However, while the policy recommends use in relation to people considered by police to be 'high-risk offenders' - people assessed as at significant risk of continued involvement in criminal activity - we have found use of the consorting law was not restricted to targeting these people during the review period.

This office recommends that the NSW Police Force further strengthen its policy in this area by requiring all use of the consorting law to be based on an objective assessment of the risk posed by the people whose associations are to be targeted. The identification of people whose associations are to be targeted must also include the accurate establishment of relevant people's 'convicted offender' status.

A closer connection between use of the consorting law and the prevention of crime will be assisted by ensuring that people who are to be targeted for consorting are reasonably suspected of involvement in recent or ongoing serious criminal activity, and use of the consorting law is likely to disrupt and prevent these activities.

The NSW Police Force already has procedures in place to facilitate the identification, assessment and targeting of people suspected of being repeat offenders or responsible for emerging crime problems within each LAC. For example, the Suspect Targeting Management Plan II (STMP II) seeks to effectively target command resources to prevent and address identified current crime problems. The plan aims to standardise police practices through the 'introduction of structured, accountable and ethical identification and targeting mechanisms'.⁵⁶⁹ It requires police to nominate individuals for consideration, with the risk of their involvement in ongoing offending assessed by an intelligence officer based on suspected and historical criminal activity and other available information. Assessment, nomination and development of strategies are shared by more than one officer, and targeting strategies must be approved by senior staff.

The Gangs Squad already prioritises the investigation of particular OMCGs considered to be high risk based on intelligence about suspected criminal activities and the alleged links of individual members to serious, often violent incidents.

The policy modifications we recommend below will assist frontline police officers to better exercise their discretion, while not reducing the operational characteristics of effective use such as that by the Gangs Squad. In consultations in January 2016, members of the NSW Police Force Consorting Standing Committee expressed support for use of the consorting law to be intelligence-driven.

566. NSW Police Force, Submission, *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*, 12 March 2014, p. 2.

567. NSW Police Force, 'Law Notes: Consorting: a valid crime prevention tool', *Police Monthly*, May 2015, p. 35.

568. NSW Police Force, *Consorting Strategic Plan 2015–2017*.

569. NSW Police Force, *Suspect Targeting Management Plan II*, undated, p. 26. The NSW Police Force implemented the Suspect Targeting Management Plan II on 2 May 2005.

Accordingly, we make the following recommendation:

Recommendation

17. **The NSW Police Force amend its consorting policy, standard operating procedures, relevant publications, and training so that:**
- a) **identification of people who are to be targeted for consorting should be intelligence-driven, and based on an identified risk that the relevant individuals are involved in recent or ongoing serious criminal offending, and**
 - b) **use of the consorting law in the circumstances is likely to assist to prevent serious criminal offending.**

11.3.3. Prohibiting use of the consorting law to address minor offending

Use of the consorting law to attempt to prevent minor offences which, if proven, carry lesser penalties than the offence of consorting, circumvents the level of seriousness allocated by Parliament to those minor offences. When Parliament introduced the new consorting law, it included an increased maximum penalty of three years imprisonment and/or a fine of \$16,500. By comparison, all offences in the Summary Offences Act 1988 attract lesser maximum penalties if proven. To use the consorting law to target summary offences, for example, may result in the illogical outcome where the possible prevention of an offence is punishable by a higher penalty than the actual commission of the same offence. Offences such as offensive conduct and offensive language provide relevant examples.⁵⁷⁰

Additionally, officers have access to numerous other policing strategies to address nuisance or minor offending within communities.

Throughout the review we found widespread agreement that the consorting law should never be applied to people suspected of involvement in minor offences such as summary offences. This view was expressed repeatedly to us by both police and non-police stakeholders. In chapters 7 and 8 we report examples of use of the consorting law by police to address nuisance or petty offending and note the risks that this use will disproportionately affect disadvantaged or vulnerable people.

In light of the reported evidence of this type of use and given the extent of the potential harms that arise from it, we recommend the NSW Police Force amend its policy to explicitly proscribe use of the consorting law to address or prevent offending that may be described as minor, such as offences contained in the Summary Offences Act.

Recommendation

18. **The NSW Police Force proscribe use of the consorting law to address or prevent minor offending, including offences outlined in the Summary Offences Act 1988, and reflect this in NSW Police Force consorting policy, standard operating procedures, relevant publications, and training.**

11.3.4. Introducing an objects or purpose clause

In section 3.6 of chapter 3 of this report, we describe the issues that have emerged in relation to the precise intention of the Parliament when enacting the new consorting law. It is not clear whether Parliament intended for the consorting law to be focused on serious criminal offending or applied more broadly to any criminal offending. The law was implemented broadly by the NSW Police Force and used in relation to a variety of local policing issues. It is the use of the consorting law to target those involved in minor or no offending, that has raised the most concern during the review period.

⁵⁷⁰ *Summary Offences Act 1988*, ss. 4 and 4A.

In light of this, this office recommends that Parliament seek to enshrine a more certain scope for the consorting law in Part 3A, Division 7 of the Crimes Act. This may be achieved by inserting an objects clause into the consorting provisions in the Crimes Act that clarifies the intended purpose of the consorting law.

An objects clause provides a mechanism for lawmakers to indicate the intended purpose of a law. In accordance with section 33 of the *Interpretation Act 1987*, legislation is to be interpreted in a way that promotes the purpose or object of the Act or provision. An objects clause may then provide courts with the discretion to make decisions in accordance with that purpose depending on the facts of each case.⁵⁷¹

The insertion of an objects clause would provide Parliament with the opportunity to clarify and embed a more precise intent for the consorting law. It would be expected that this intent would be reflected in NSW Police Force policy and practice. In this way, the objects clause would determine the future operation of the consorting law in a significant way.

This office recommends that any objects clause define the purpose of the consorting law in relation to the prevention of serious criminal offending. Throughout this report we have reiterated the risks associated with failing to focus the operation of the consorting law on the prevention of serious criminal offending. In section 11.3.1 above, we have provided a suggested definition of serious criminal offending; however, it is acknowledged that there are numerous ways in which it may be defined. In our view, public confidence in the consorting law and the NSW Police Force may be undermined if the operation of the consorting law is not focused on the prevention of serious crime.

We have made recommendations to adjust police policy with respect to the appropriate focus of the consorting law; however, the inclusion of an objects clause will bring clarity to the nature of offending that is appropriate to target with the consorting law and increase community confidence in the consorting law and the implementation of it by the NSW Police Force.

Recommendation

- 19. The Attorney General propose, for the consideration of Parliament, an amendment to the consorting law to insert an objects clause into Part 3A, Division 7 of the Crimes Act that defines the purpose of the consorting law to be the prevention of serious criminal offending.**

11.4 Future review of the operation of the consorting law

The constitutional challenge to the validity of the new consorting law was finalised in October 2014, six months before the end of the review period. The challenge was on foot for approximately two years prior to that and had an impact on both use and implementation of the consorting law. It is not clear whether 'normal' use of the consorting law was established prior to the end of the review period upon which this report is based.

In chapter 7 we outline the use of the consorting law by the Gangs Squad, its views regarding the law's effectiveness and the qualitative evidence in support. A possible consequence of the success of the Gangs Squad in this context is that members and associates of high-risk OMCGs alter the way they meet and communicate with each other in an effort to reduce the impact of the consorting law on their activities. While this remains to be seen, it is expected that organisations and individuals involved in serious and organised crime will adapt their behaviours where possible in order to minimise the impact of successful law enforcement strategies. The adaptability of organised crime groups is a characteristic noted by the Australian Crime Commission.⁵⁷² For this reason, the utility and effectiveness of the consorting law may diminish over time.

571. In making a determination, the court must exercise its discretion in accordance with the objects of an Act (*Lee v NSW Crime Commission* [2013] HCA 39; *Jacob v R* [2014] NSWCCA 65).

572. For example, the Australian Crime Commission recently found that organised crime groups involved in drug trafficking are diversifying, with cooperation between groups and intertwining of different types of criminal activities becoming more apparent. See Australian Crime Commission, *Organised Crime in Australia 2015*, May 2015, p. 7.

In light of these considerations, and in acknowledgement of the potential risks associated with inappropriate use of the consorting law, we recommend a further independent review of the operation of the consorting law be conducted in the future when normal use has been established and implementation of any of the recommendations made in this report, has occurred. It is suggested the period to be reviewed commence on 9 April 2018, three years from the end of the review period upon which this report is based.

A future independent review should have a broad remit, proper access to relevant police records, and input from all relevant police commands and non-police stakeholders. This office also recommends that there be provision for input from the BOCSAR with a view to establishing quantitative measures of the effectiveness of the consorting law in relation to the prevention of serious crime. Any use of the consorting law in relation to disadvantaged and vulnerable people should be identified and analysed.

The review should provide advice to the Attorney-General and Commissioner of Police regarding issues that continue or emerge in relation to the operation of the consorting law. The report prepared should be made publicly available as soon as practicable.

Recommendation

- 20. The Attorney-General require the preparation of a further public report by an independent body on the operation of the consorting law in Part 3A, Division 7 of the Crimes Act.**

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.

Schedule 11

Part 29 Crimes Amendment (Consorting and Organised Crime) Act 2012

71 Report by Ombudsman on consorting offence

- (1) As soon as practicable after the end of the period of 3 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.
- (2) For that purpose, the Commissioner of Police is to ensure that the Ombudsman is provided with information about any prosecutions brought under section 93X.
- (3) The Ombudsman may at any time require the Commissioner of Police, or any public authority, to provide any information or further information the Ombudsman requires for the purposes of preparing the report under this clause.
- (4) The Ombudsman must furnish a copy of the report to the Attorney General and to the Commissioner of Police.
- (5) The Attorney General is to lay (or cause to be laid) a copy of the report before both Houses of Parliament as soon as practicable after the Attorney General receives the report.
- (6) If a House of Parliament is not sitting when the Attorney General seeks to lay a report before it, the Attorney General may present copies of the report to the Clerk of the House concerned.
- (7) The report:
 - (a) is, on presentation and for all purposes, taken to have been laid before the House, and
 - (b) may be printed by authority of the Clerk of the House, and
 - (c) if so printed, is for all purposes taken to be a document published by or under the authority of the House, and
 - (d) is to be recorded:
 - (i) in the case of the Legislative Council, in the Minutes of the Proceedings of the Legislative Council, and
 - (ii) in the case of the Legislative Assembly, in the Votes and Proceedings of the Legislative Assembly, on the first sitting day of the House after receipt of the report by the Clerk.

Appendix 2

List of submissions

- (1) Mr. D. Abel
- (2) Aboriginal Legal Service (NSW/ACT) Ltd.
- (3) The Australian Motorcycle Council Inc.
- (4) The Brotherhood Christian Motorcycle Club
- (5) Mr. G. Caines
- (6) Mr. R. Camel Wattie
- (7) Community Legal Centres NSW
- (8) Ms. E. Cripps
- (9) Mr. T. Dwyer
- (10) Homelessness NSW
- (11) The Intellectual Disability Rights Service
- (12) Ms. C. Jamieson
- (13) Mr. S. Jarrett
- (14) Justice Action
- (15) Kingsford Legal Centre
- (16) The Law Society of NSW, joint submission on behalf of the Criminal Law, Juvenile Justice, Indigenous Issues and the Human Rights Committees of the Law Society of NSW.
- (17) The Law Society of NSW, Young Lawyers, Criminal Law Committee
- (18) Legal Aid NSW
- (19) The NSW Bar Association
- (20) The NSW Council for Civil Liberties
- (21) The NSW Police Force
- (22) The Office of the Director of Public Prosecutions NSW
- (23) Public Interest Advocacy Centre Ltd.
- (24) Dr. P. Rawlinson
- (25) The Rule of Law Institute of Australia
- (26) The Shopfront Youth Legal Centre
- (27) Ms. A. Thorpe
- (28) University of Technology Sydney, Jumbunna Indigenous House of Learning
- (29) Wayback Ltd
- (30) Wurringa Baiya Aboriginal Women's Legal Centre Inc.
- (31) Women's Legal Services NSW
- (32) Women in Prison Advocacy Network
- (33) The Youth Justice Coalition
- (34) Mr. A. van de Zandt

Appendix 3

Criminal Procedure Act 1986

Section 3 Definitions

...

“**indictable offence**” means an offence (including a common law offence) that may be prosecuted on indictment.

Section 5 Certain offences to be dealt with on 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.

Appendix 4

Relevant NSW Police Force organisational information



Central Metropolitan Region

Botany Bay LAC
 Eastern Beaches LAC
 Eastern Suburbs LAC
 Harbourside LAC
 Kings Cross LAC
 Leichhardt LAC
 Miranda LAC
 Newtown LAC
 Redfern LAC
 Rose Bay LAC
 St George LAC
 Surry Hills LAC
 Sutherland LAC
 Sydney City LAC

South West Metropolitan Region

Ashfield LAC
 Bankstown LAC
 Burwood LAC
 Cabramatta LAC
 Camden LAC
 Campbelltown LAC
 Campsie LAC
 Fairfield LAC
 Flemington LAC
 Green Valley LAC
 Liverpool LAC
 Macquarie Fields LAC
 Marrickville LAC
 Rosehill LAC

Western Region

Barrier LAC
 Barwon LAC
 Canobolas LAC
 Castlereagh LAC
 Chifley LAC
 Darling River LAC
 Lachlan LAC
 Mudgee LAC
 New England LAC
 Orana LAC
 Oxley LAC

North West Metropolitan Region

Blacktown LAC
 Blue Mountains LAC
 Hawkesbury LAC
 Holroyd LAC
 Ku ring Gai LAC
 Mt Druitt LAC
 North Shore LAC
 Northern Beaches LAC
 Parramatta LAC
 Penrith LAC
 Quakers Hill LAC
 Ryde LAC
 St Marys LAC
 The Hills LAC

Southern Region

Albury LAC
 Cootamundra LAC
 Deniliquin LAC
 Far South Coast LAC
 Griffith LAC
 Lake Illawarra LAC
 Monaro LAC
 Shoalhaven LAC
 The Hume LAC
 Wagga Wagga LAC
 Wollongong LAC

Northern Region

Brisbane Water LAC
 Central Hunter LAC
 Coffs-Clarence LAC
 Hunter Valley LAC
 Lake Macquarie LAC
 Manning-Great Lakes LAC
 Mid North Coast LAC
 Newcastle City LAC
 Port Stephens LAC
 Richmond LAC
 Tuggerah Lakes LAC
 Tweed-Byron LAC

During the review period, nine Local Area Commands either changed their name or amalgamated. We have referred to these commands by their current name.

Eastwood and Gladesville LACs were amalgamated into Ryde LAC, Manly and Northern Beaches were amalgamated into Northern Beaches LAC, Hurstville and St George LACs were amalgamated into St George LAC, City Central and The Rocks were amalgamated into Sydney City LAC and Goulburn LAC is now called The Hume LAC.

Appendix 5

Crimes (Domestic and Personal Violence) Act 2007

Section 5 Meaning of “domestic relationship”

For the purposes of this Act, a person has a “**domestic relationship**” with another person if the person:

- (a) is or has been married to the other person, or
- (b) is or has been a de facto partner of that other person, or
- (c) has or has had an intimate personal relationship with the other person, whether or not the intimate relationship involves or has involved a relationship of a sexual nature, or
- (d) is living or has lived in the same household as the other person, or
- (e) is living or has lived as a long-term resident in the same residential facility as the other person and at the same time as the other person (not being a facility that is a correctional centre within the meaning of the *Crimes (Administration of Sentences) Act 1999* or a detention centre within the meaning of the *Children (Detention Centres) Act 1987*), or
- (f) has or has had a relationship involving his or her dependence on the ongoing paid or unpaid care of the other person, or
- (g) is or has been a relative of the other person, or
- (h) in the case of an Aboriginal person or a Torres Strait Islander, is or has been part of the extended family or kin of the other person according to the Indigenous kinship system of the person’s culture.

Section 6 Meaning of “relative”

For the purposes of this Act, a person is a “**relative**” of another person (the “**other person**”):

- (a) if the person is:
 - (i) a father, mother, grandfather, grandmother, step-father, step-mother, father-in-law or mother-in-law, or
 - (ii) a son, daughter, grandson, grand-daughter, step-son, step-daughter, son-in-law or daughter-in-law, or
 - (iii) a brother, sister, half-brother, half-sister, step-brother, step-sister, brother-in-law or sister-in-law, or
 - (iv) an uncle, aunt, uncle-in-law or aunt-in-law, or
 - (v) a nephew or niece, or
 - (vi) a cousin,of the other person, or
- (b) where the person has a de facto partner (the “**person’s partner**”) if the other person is:
 - (i) a father, mother, grandfather, grandmother, step-father or step-mother, or
 - (ii) a son, daughter, grandson, grand-daughter, step-son or step-daughter, or
 - (iii) a brother, sister, half-brother, half-sister, step-brother or step-sister, or
 - (iv) an uncle or aunt, or
 - (v) a nephew or niece, or
 - (vi) a cousin,of the person’s partner.

Appendix 6

Principal offence of adults subject to the consorting law by National Offence Index.

Principal conviction by National Offence Index	No. of unique adults ever issued a consorting warning*	No. of unique adults ever warned about*
1 - Murder	3	3
2 - Attempted murder	4	5
3 - Manslaughter	2	2
4 - Driving causing death	2	3
7 - Aggravated sexual assault	37	49
10 - Child pornography offences	2	2
12 - Non-assaultive sexual offences	1	1
14 - Import illicit drugs	3	3
17 - Deal or traffic in illicit drugs - commercial quantity	41	46
18 - Manufacture illicit drugs	4	6
19 - Cultivate illicit drugs	59	66
21 - Deal or traffic in illicit drugs - non-commercial quantity	180	197
23 - Serious assault resulting in injury	512	582
24 - Abduction and kidnapping	7	7
25 - Aggravated robbery	133	150
27 - Serious assault not resulting in injury	137	136
28 - Common assault	265	275
31 - Stalking	29	32
35 - Other dangerous or negligent acts endangering persons	1	1
37 - Drive under the influence of alcohol or other substance	33	32
38 - Dangerous or negligent operation (driving) of a vehicle	96	95
40 - Non-aggravated robbery	11	10
42 - Threatening behaviour	16	16
44 - Property damage by fire or explosion	1	2
47 - Sell, possess and/or use prohibited weapons/explosives	33	40
50 - Unlawfully obtain or possess regulated weapons/explosives	18	16
51 - Misuse of regulated weapons/explosives	8	8
59 - Unlawful entry with intent/burglary, break and enter	72	70
60 - Obtain benefit by deception	43	46
61 - Forgery of documents	5	5
64 - Dishonest conversion	1	2
66 - Other fraud and deception offences	13	10
68 - Theft of a motor vehicle	1	1


Principal conviction by National Offence Index	No. of unique adults ever issued a consorting warning*	No. of unique adults ever warned about*
69 - Illegal use of a motor vehicle	12	14
70 - Theft from a person (excluding by force)	5	5
74 - Theft from retail premises	35	31
75 - Theft (except motor vehicles)	38	35
77 - Receive or handle proceeds of crime	32	27
83 - Exceed the prescribed content of alcohol or other substance limit	56	27
84 - Graffiti	3	3
85 - Property damage	25	28
95 - Transport regulation offences	2	1
97 - Licit drug offences	9	5
103 - Offences against justice procedures	5	5
113 - Breach of violence order	7	3
115 - Breach of community based order	1	1
117 - Prison regulation offences	3	1
124 - Possess illicit drugs	44	31
127 - Other illicit drug offences	2	2
128 - Riot and affray	10	13
129 - Trespass	10	9
130 - Offensive language	10	7
131 - Offensive behaviour	9	4
132 - Criminal intent	1	2
135 - Liquor and tobacco offences	1	0
138 - Resist or hinder police officer or justice official	5	4
141 - Drive while licence disqualified or suspended	32	9
142 - Drive without a licence	20	8
143 - Driver licence offences	1	1
145 - Registration offences	5	2
150 - Regulatory driving offences	7	1
155 - Other miscellaneous offences	1	0
No convictions	450	129
Total	2,614	2,327

* These are not mutually exclusive. The majority of people subject to use of the consorting law were both issued a consorting warning and had others warned about consorting with them.

Source: NSW Police Force – COPS (Criminal history data as at 7 May 2015, received on 21 May 2015).

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