Review of consorting provisions

7 March 2014

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Introduction

The NSW Young Lawyers Criminal Law Committee ("the Committee") refers to the NSW Ombudsman’s position paper seeking submissions in regards to consorting laws.

NSW Young Lawyers, a division of the Law Society of NSW, is made up of legal practitioners and law students who are under the age of 36 or in their first five years of practice. Our membership is made up of some 13,000 persons.

The Committee provides education to the legal profession and wider community on current and future developments in the criminal law, and identifies and submits on issues in need of law reform.
Opening Comment

The Committee is opposed to the retention of the consorting laws.

It cannot be doubted that the laws are useful for the NSW Police Force. We acknowledge that it is all but impossible to quantify the extent to which the laws have reduced the incidence of crime in the community.

We submit, however, that the consorting laws are an unacceptable infringement on the rights and liberties of this state’s citizens.

These laws allow police to drastically restrict a person’s freedom of association. Indeed, it allows police to do so without that person having committed an offence, and without even being suspected of having an intention of committing an offence.

The paper to which we are responding supplies no evidence of the powers being used capriciously or inappropriately. Indeed, there are multiple references to police policies and procedures that temper the extraordinary powers that police have been gifted through the enactment of Division 7 of Part 3A of the Crimes Act 1900. Police deserve commendation for that.

However, that fact that it has been necessary for police to introduce these policies is a demonstration of the extraordinary and unacceptable breadth of these powers.

In our submission, when the nebulous and unquantifiable reduction in crime is balanced against the remarkable limitation of personal liberty, privacy and freedom of association, it can be recognised that these laws should not be retained.

In an effort to provide useful feedback, the below questions are generally predicated on an assumption that the laws are to be retained. However, none of our submissions should be construed as being in any way an endorsement of the provisions in question.
Are the NSW consorting provisions necessary?

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

The principle gap filled by the consorting laws is that it now allows limitations and controls to be placed upon a person who has not committed an offence. In this way, police can act appropriately to prevent crime before it occurs.

In a scenario where police could perfectly predict who was going to commit criminal offences, this would be useful, and appropriate. Of course, the true situation is that police who are appropriately utilising these powers are attempting to predict who may offend in the future, and then act to prevent the crime through the use of these powers.

A troubling assumption underlying this approach appears to be that persons planning to commit serious crimes will be prevented from doing so as a result of being forbidden to spend time with their co-conspirators. The extent to which members of the criminal milieu would change their behaviours as a result of such a warning is unclear.
Are the consorting provisions too broad?

2. What checks and balances, if any, should be in place to ensure personal relationships between people who are not involved in any criminal activities are not criminalised by the new consorting provisions?

The Committee submits that checks and balances are necessary to ensure that individuals undergoing rehabilitation will not be isolated or alienated from wider society by having innocent interpersonal relationships criminalised.

More generally, the Committee suggests (as is discussed later in our response) that, in order for an order to be made, it should be necessary for there to be a criminal intent to the association.

The paper’s statistics going to the prevalence of persons with a conviction for an indictable offence in the community show how easily these orders could have the effect (intended or not) of making almost any association in a person’s community a crime. This is especially so for persons of Aboriginal decent, who often live in small, tight-knit communities.

The Committee believes that the addition of more and broader defences to the offence would be an effective way of protecting personal relationships. It is recognised that there are already multiple defences but the extraordinary breadth of these powers means that significant different relationships need to be ‘carved out’ to limit the unintended effect of a warning.

What would be far more appropriate would be to introduce a requirement that the association be for criminal purposes. This would allow police to target those for whom the legislation was first introduced, and would eliminate the need for cumbersome and vague exclusions. This would be a far more appropriate course rather than simply relying on police discretion to ensure that the innocent (that is to say, those not participating in criminal activities) are not targeted by the warnings.

The value of this policy aim should be self evident; that in a liberal democratic society we should value interpersonal relationships and freedom of association except where there is a clear and identifiable harm to individuals or society in general. The blanket consorting laws lack sufficient checks and balances to ensure that only those who present a potential harm to society are targeted.

3. Should police be required to show the associations that are the subject of official warnings are linked to current or suspected criminal activity?

Yes, for the above reasons. Given the high level of discretion that exists for police at present, it is important to ensure that there are safeguards beyond police policy and individual police discretion. The hope that police will use their discretion to only target current or suspected criminal activity, and not other activity is insufficient in all the circumstances.

The very fact that a relationship to current or suspected criminal activity is not even part of the existing offense structure but is the claimed justification for the laws demonstrates the fault in the legislation.

The recognition by police in the report at section 5.2.2.1 that some warnings have been issued in response to public pressure to be seen to be doing something illustrates the
potential outcomes when links to criminal activity are not a necessary part of the offence structure.

Ideally, the Committee argues that if police were to be required to show a criminal intent, that burden should be an objective test, not a subjective one.

4. Should police be required to hold a reasonable belief the issuing of consorting warnings is likely to prevent future offending?

Yes. It is the Committee’s position that it would be easy and massively beneficial that police be required to demonstrate (for example) that the association with the person in question was principally for the organisation of criminal activity.

Alternatively, and remaining aware of the potential “excuses” that could be proffered for associating with someone, it may be more appropriate to show that the person is involved in current or planning future criminal activity with the subject.

This would bring the legislation in line with the stated purpose, as detailed at 5.2.

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

The context in which this legislation was enacted was a perceived upturn in serious organised crime related activity in certain parts of NSW. The powers conferred on police to issue warnings to people who are habitually consorting with convicted offenders ought to be viewed in that light. There ought to be, as there are in Victoria, appropriately legislated parameters regarding the categories of offences to which those powers apply.

The intent of the legislation is best served by confining the application of the offence to consorting with those convicted of crimes involving a systematic course of criminal conduct. This would ensure that the legislation targets only those groups whose activities have such a negative effect upon society that a limitation on fundamental freedoms is justified.

6. Is it appropriate for police to target people for consorting who are suspected of involvement in less serious offences such as shoplifting?

No. The basis for broad powers such as these should be employed only to attack serious organised crime related activity. Whatever the perceived benefits of the powers, there can be no disputing their capacity to impede basic civil liberties. There must be a limit to the reach of police powers where these fundamental principles are at stake. That limit should be, as enunciated in question 5 above, that the powers only be used to combat serious organised crime.

7. Should convictions for certain offences or offence categories be excluded from defining a person as a convicted offender, and if so, which ones?
Yes. The requirement we have suggested at question 4 (namely that the association sought to be limited was an association for the purpose of criminal offending) should have this effect.

Alternatively, it may be appropriate to require that police be able to prove an objective, reasonable suspicion of the intention to commit an indictable offence.

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

We submit that the current time-limit policy of the NSW Police Force should be enacted into legislation — namely, that that criminal proceedings should not be commenced for consorting unless the convicted offender has him or herself been convicted within the last 10 years. As long as this retains the status of a policy or Standard Operating Procedures, as opposed to law, it can legally be deviated from at the discretion of police. A 10-year time limit would prevent those persons who have not seriously re-offended in a recent period being unduly subjected to police powers.

As this legislation is first and foremost about targeting and curbing organised crime syndicates and criminal gangs involved in serious criminal activities, it may be necessary to create an exception to the 10-year limit where the previous offence fell in a particular category. This may be especially appropriate for offences that typically result in imprisonment for periods up to and beyond 10 years, such as large scale drug importations.

9. Should there be a limit governing the period of time during which the occasions of consorting must occur included in the offence? If so, what timeframe?

Consideration of this question requires consideration of the purpose of the legislation, as well as the difficulties in enforcing it.

Police are required to be aware that a person is consorting with a person, provide the appropriate warning, and then catch the person consorting again. An offender should not escape penalty merely because they are able to "lay low" for a short period of time.

By the same token, it does not seem in accordance with the stated purposes of the legislation for police to be able to prosecute someone for being seen with a particular person of interest at very long intervals.

We submit that a time limit in which habitual consorting occurs should be enacted into legislation, and that time limit should be restricted to 6 months. This may curb some potential for abuse of the provisions, but still provides ample opportunity for police to prove that a person is consorting.

10. Should official police warnings remain valid for a specified timeframe, such as 12 months or two years? If so, what timeframe?

For the same reasons outlined in our response to question 9, there should be a limit of 6 months.
Use in relation to disadvantaged and vulnerable groups

11. What, if any, protections should be put in place to ensure that Aboriginal people are not unfairly affected by the consorting provisions?

It is the Committee’s position that protections should be put in place to limit the exposure of Aboriginal and Torres Strait islanders to the law. While ideally many of the below recommendations would take the form of legislative amendments, the Committee acknowledges that such an approach may be slow and complicated. We therefore submit that it would be effective for the Ombudsman, NSWPF Senior Commanders and the Police Aboriginal Consultative Committee to collaborate specifically to further enhance the CSOP taking into account the contributions made to this review on this question.

The Committee recommends that Aboriginality be adopted as a consideration against issuing a warning. It may be appropriate to restrict warnings made to indigenous persons to situations involving ‘high risk offenders’ or adopting a requirement that there be reason to believe that a warning to an Aboriginal person is likely to prevent future offending (see Q4 above). It is also recommended that family be defined to include kinship groups (see Q12 below).

The Committee notes with particular concern the application of the provisions on young indigenous people. With this in mind it is recommended that that the decision to issue a warning against an indigenous person and young person under the age of 16 (i.e. whether there are ‘exceptional circumstances’) should be made by an officer of a senior rank, preferably the LAC commander or Crime Manager, in consultation with an intelligence officer and be based on an analysis of patterns of reported crime, intelligence holdings and information relating to the person’s previous offending. The relatively low number of children subject to consorting provisions, the majority of whom are indigenous, suggests that this would not create an undue burden and would significantly lessen the unfair impact of the provisions on young aboriginals.

12. One of the defences listed in section 93Y of the Crimes Act is ‘consorting with family members’. Should ‘family’ be defined within the legislation or in the Consorting SOPs and if so, what definition of ‘family’ should be adopted?

In determining whether, and in what terms, a definition of ‘family’ should be provided under the Act regard must be had to counterbalancing considerations of precision and certainty on the one hand and flexibility and practicality on the other.

It is submitted that a definition of ‘family’ ought to be provided in the Act. In the absence of a statutory definition the term ‘family’ will inevitably be subject to wildly varying interpretation. Without a clear point of reference, the consorting provisions will continue to hazard uncertainty for the judiciary, for persons affected by the provisions and for police.

As regards the nature of the definition, it is submitted that a non-exhaustive list would provide the most appropriate balance between the abovementioned considerations. In reaching this conclusion it must be borne in mind that the traditional nuclear family is no longer necessarily representative of Australian families. It is therefore submitted that a non-exhaustive list would provide an appropriate guide as to what constitutes a ‘family’ for the purposes of the provision whilst allowing for flexibility and utility.
It is worth noting at this point that the difficulty in defining family for the purpose of this exception is a strong argument in favour of abandoning exceptions and, rather, as is suggested in our answer to question 2 and 3, requiring proof of a criminal intention.

13. What protections, if any, should be introduced concerning the use of consorting provisions in relation to young people?

The Committee submits that the consorting provisions should not be applicable to young persons, primarily for the reasons set out in sections 6.3.5.2 and 6.3.7.

If the power to issue warnings is retained for young persons, the Committee is of the view that protections should be introduced. These protections should include, but not be necessarily limited to, increased privacy protections, time limits for the period between when the original offence was committed and the warning or charge of consorting, and some form of checking mechanism in relation to erroneous exercise of police power in issuing warnings against or charging people who have not committed indictable offences. The last would also go some way to addressing privacy issues in relation children and young persons.

We also refer to our answer to question 11 wherein we suggest that police adopt an internal policy requiring a more senior officer issue warnings to young persons.

14. Should young people sentenced for certain classes of offences be included in the definition of ‘convicted offender’ even where no indictable conviction has been recorded by the Children’s Court? If yes, what types or classes of offences?

No. The Committee does not accept that there is any justification for further widening of the provisions with regard to young persons.

15. Should the circumstances in which an official warning can be issued about a young person be restricted due to privacy considerations?

Yes. The circumstances should be limited to those in which the issuer has a high level of suspicion that the consorting is related to current and serious criminal behaviour. Stringent existing privacy protections regarding criminality and prior offending of Young People should be protected as far as possible.

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

There should be safeguards in the legislation. The purpose of the consorting legislation is to limit the activities of criminal groups in Australia and combat organised crime. Homeless people have no obvious connection to such activity. Further, homeless people are particularly susceptible to consorting provisions as they can only congregate in public places.

We propose that a specific legislative exception for homeless people be created. A homeless person’s support network will often include friends rather than family members. Furthermore, such friends may be a source of accommodation and companionship for vulnerable people. Such an exemption is preferable to the creation of a specific defence
under s 93Y for homeless people as such a defence would place a positive burden on the homeless person. Homeless people have little to no access to legal advice and such a burden would require resources that may not be readily available.

It may well be difficult to implement a legislative exemption as described above for homeless people, due to difficulties in definition. For that reason, and in the alternative, the Committee recommends that police standard operating procedure (SOP) could be modified to instruct that criminal proceedings for consorting should not be brought against homeless people except in exceptional circumstances. Such a change to SOPs would be in line with the Protocol for Homeless People in Public Places and prevent the use of the consorting provisions against homeless people not engaged in organised criminal activity.
Issues relating to the offence

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

18. What further guidance, if any, should be provided in the Consorting SOPs regarding the content and format of an official warning?

The warning presently provided for is not easy to understand and provides no proper explanation to the recipient of their reduced freedom.

The Committee suggests that a standard written warning should be provided, in the same way that a person who is arrested is provided with a paper copy of their Part 9 rights. This would be something that a person could take away and read, and potentially then give to a legal representative to obtain advice.

At a minimum, that written warning should clearly explain who the person is no longer permitted to associate with.

The warning should also make a person aware of the right to seek judicial review of the warning, as we suggest in our response to question 24.

19. What practical strategies can police adopt to assist people who may have difficulty understanding the content of official warnings?

As detailed above, the warning should be written, and the provision of that document should be the only way that a warning could be properly issued.

The NSW Police officers should be required to ensure that the individual issued with the warning understands the warning issued and is able to repeat back to the officer what has been said and what it means. Potential offenders should always be asked if they require the service of a translator, legal representation or a guardian or observer at the time of the issuing of the warning or caution.

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

Yes, for the reasons set out above.

21. Should police officers be able to issue official warnings pre-emptively? If yes, in what circumstances would it be appropriate for police officers to issue warnings in this way?

It is difficult to envisage circumstances where police could be required to issue a warning pre-emptively. This term suggests that police may wish to issue a warning to a person where they have no evidence of them actually consorting in the first place.
The legislation contains no requirement for police to witness a consort. There is no particular reason, on the current legislation, that police could not issue a warning based on intelligence that (say) person A and person B are committing armed robberies.

For that reason, the Committee does not perceive any need for amendment of the legislation in this regard. If it is police policy to not warn a person for consorting unless police have witnessed the consort themselves, that is a matter for police to resolve internally.

22. What guidance, if any, should be provided to police officers about the timeframe between an incident of consorting and the issuing of an official warning?

Warnings should be given promptly. Whilst the Committee recognises the need for checks to be made, and applauds police who take a diligent and careful approach to the exercise of these powers, the Committee is concerned at the prospect of persons being warned after allegedly consorting months previously.

If the purpose of these provisions is to prevent crime, there should be no need for warnings to be given weeks or months after the event. CSOP should be amended to require prompt warnings to be given, without denying police the opportunity to make the necessary checks or suggesting that due diligence should not be exercised.

23. Are there any practical ways police can reduce the impact on people’s privacy when issuing official warnings?

No. This is one of the major objections that the Committee has to the retention of these laws.

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

Yes. The person should be able to make an application to the Local Court or the NCAT for the warning to be declared invalid.

This is essential as, at present, if the person believes the warning to be improperly given, they have no opportunity to obtain certainty around the issue until they are charged with the relevant offence.

The Local Court should be given jurisdiction to hear challenges to warnings with a view to providing warned persons with certainty as to the validity of warnings given to them. Such a process could take a similar form to a Local Court Hearing, with evidence, witnesses and cross-examination.

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

The Committee is not opposed to such a system being introduced. However, the Committee commends judicial review as the preferred course.

In the alternative, the Committee supports an internal review process. There are clearly instances where invalid warnings have been given and this should be addressed whether criminal charges are eventually laid or not.
It is appropriate that police who have issued a warning be required to submit a report to be considered by an internal panel that considers the proper basis (or lack thereof) for the warning and then takes any action it deems appropriate.

26. Should the defences to consorting be expanded to include any of the following:
   - consorting between people who live together
   - consorting between people who are in a relationship
   - consorting that occurs in the provision of therapeutic, rehabilitation and support services
   - consorting that occurs in the course of sporting activities
   - consorting that occurs in the course of religious activities
   - consorting that occurs in the course of genuine protest, advocacy or dissent?

The defences to consorting should be expanded to include consorting between people who are in a relationship or who live together. Consorting that occurs in the provision of therapeutic, rehabilitation and support services would likely be covered under the defence of ‘consorting that occurs in the provision of a health service’ if that were to be defined broadly.

It should be noted that the proliferation of defences is not a product of nit-picking or an argumentative stance. Rather, the long list of defences is necessary to protect the multitude of proper and acceptable reasons that a person may need to associate with a convicted person.

It is for this reason that, at question 2, we recommended that it be required that, for a warning to be given, a criminal intention be shown. If such an intention is not required, it is necessary to carve out proper bases for association to protect persons who have no criminal intention.

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

Inclusive. We again refer to our response to question 2.

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

 Assuming that our recommendation for a criminal intent is not adopted, the Committee recommends the introduction of a defence of ‘reasonable excuse’. We recognise the potential for such a defence to be interpreted widely, and the opportunities that may provide for persons in sophisticated criminal enterprises. A general defence may well be too vague but this is a product of the broad powers consorting provisions permit in the absence of a requirement to prove criminal intent.

It is not appropriate to rely on police discretion to limit warnings to circumstances where it is appropriate or necessary.
29. Should definitions of ‘family members’ and ‘health service’ be included in section 93Y? If yes, how should these terms be defined?

We refer to our answers above.

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

If the present structure is retained, the Committee is of the view that specific guidance regarding the operation of the defences is essential. The Standard Operating Procedures should make clear that the purpose of the consorting provisions is not to criminalise individual relationships but to deter people from associating in a criminal environment, as well as providing Police with adequate tools for addressing organised crime. It is in this context in which the available defences in any given circumstance should be assessed.

The guidance to police should aim to achieve state-wide uniformity in the use of the consorting defences. Police need to be made aware of many factors which may affect use of their discretion, such as:

- mental illness
- homelessness
- intoxication
- Aboriginal and Torres Strait Islander (ATSI) status
- intellectual and physical disability

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

The Committee does not wish to address this question.
Evaluating the effect of the consorting provisions

32. Do you have any suggestions regarding how to approach evaluation of the effectiveness of official warnings and the consorting provisions in your local area?

The Committee suggests that the evaluation be approached using the consorting data gathering methods cited by the Consorting Issues Paper and tailoring them to gather localised data. Methods include review of COPS data, assessment of data from the Bureau of Crime Statistics and Research, consultation with police and requests for submissions and information from stakeholders and the. Local Area Command COPS databases will undoubtedly be the most useful tool to evaluate the effectiveness of official warnings and consorting provisions in each locality.

The following pieces of data should be the primary consideration:

- The number of official warnings and consorting charges against the number and outcomes of prosecutions;
- The types of indictable offences that convicted offenders who are the subject of warnings have been convicted of and whether these offences typically involve an element of criminal association;
- Assessing the impact on crime, imprisonment and recidivism rates by tracking whether all individuals subject to warnings go on to commit further crimes and whether these crimes are committed pursuant to criminal association;
- Consultation with, or reports to be completed by, Police and other stakeholders to determine the practical effects that warnings have within the community. Other stakeholders should include Community Legal Centres, Lawyers, social workers, youth workers, indigenous workers and government and non-government organisations providing support services in the particular community; and

The Committee suggests that it is imperative that these strategies are also applied to evaluate of the effectiveness of the warnings and provisions with respect to Aboriginals, children, the homeless and other vulnerable people, particularly through consultation with individuals subject to official warnings or charges and other community stakeholders.

33. If you have received an official warning for consorting or been the subject of a warning issued to others, what impact did this have on you?

The Committee is not aware of any members who have received or been the subject of a warning.

34. What behaviour, if any, have you changed as a result of receiving an official warning or being the subject of a warning?

See answer to question 33
35. If you are involved in providing a service to vulnerable or disadvantaged people or ex-prisoners:
   â Have clients of your service been affected by the consorting provisions and, if so, how?
   â Has there been any impact on your clients’ engagement with services and supports?
Please describe the impact of the provisions on your clients

The Committee is not in a position to provide a useful response to this question.

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

The Committee has no comment to make in addition to the responses provided above.
The Committee thanks the Ombudsman for the opportunity to provide its comments in response to the issues paper.

If you have any questions in relation to the matters raised in this submission, please contact:

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OR
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Yours faithfully,

Alexander Edwards | Chair, Criminal Law Committee
NSW Young Lawyers | The Law Society of New South Wales