



Targeting criminality

**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**

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The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works cooperatively with other organisations to advocate for affected individuals and groups. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus; and
- develop models to respond to unmet legal need.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales (NSW), with support from the (then) NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC is derived primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Trade and Investment, Regional Infrastructure and Services NSW for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's interest in the consorting provisions

PIAC works to ensure that the criminal justice system operates fairly. Based on its casework experience, PIAC has a particular interest in changes to the law that may disproportionately or unreasonably impact upon children and young persons, Aboriginal and Torres Strait Islander persons, persons experiencing homelessness and persons suffering from mental health or substance abuse issues. PIAC is also concerned about laws that confer wide discretionary powers on police officers without appropriate accountability mechanisms that minimise the risk of over-criminalisation and abuse of process.

Over the past 18 months, PIAC has worked with its clients and experts in the field to determine the impact of the consorting provisions contained in Division 7, Part 3A of the *Crimes Act 1900* (NSW) (Crimes Act) (consorting provisions).

In particular, PIAC has liaised extensively with the criminal bar, consulted with Legal Aid NSW, the Aboriginal Legal Service (ALS) in the western region of NSW and community sector lawyers acting for persons charged under the consorting provisions – including in some circumstances the grant of access to client details and court transcripts, and conducted outreach within local homeless communities who are at risk of criminalisation under the law. In preparation for this submission PIAC also interviewed:

- police at the Eastern Beaches Local Area Command;
- police at the Manly Local Area Command;
- police at the Harbourside Local Area Command; and
- community service providers in Sydney's west.

PIAC has also liaised with the Ombudsman's office regarding its review of the use of the consorting provisions by the NSW Police Force and its findings (Issues Paper).

1. Overview of PIAC's submission and summary of recommendations

The purpose of PIAC's submission is to provide practical advice on how to address some of the most concerning issues that arise in the context of the consorting provisions.

Fundamentally, any consorting law, by its very nature, impinges on a person's right to freedom of association and principles enshrined in international human rights law. Most significantly, the International Convention on Civil and Political Rights, to which Australia is a party, specifically protects an individual's right to freedom of association.¹ Moreover, 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.²

In this context, regardless of legislative drafting, there remains a serious risk that the law could result in criminalising otherwise legitimate interactions and dismantling key social units. As Associate Professor Alex Steel remarked in 2003 on an earlier version of the NSW consorting 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.³

Since the consorting provisions impinge so significantly on international human rights law, no legislative amendment or policy change could ever fully cure the law's deficiencies. On this basis, PIAC strongly recommends repeal of the consorting provisions.

While repeal of the law is PIAC's primary submission, in the event that certain consorting provisions are retained, the recommendations below are an attempt to 'improve' the significant problems with the law. To reiterate, even if adopted, PIAC's recommendations remain improvements only, not full-scale fixes. In these circumstances, PIAC recommends the following:

- Narrow the application of the consorting provisions to a targeted group of persons involved in serious criminal activity.
- Specify timeframes for the period:
 - between the commission of an indictable offence and the issuance of the consorting warning;
 - for which warnings remain valid; and
 - during which 'habitual' consorting must occur.
- Provide protections under the law to address the specific needs of vulnerable persons.
- Clarify the procedural requirements for the issuance of an effective warning.

¹ *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR') art 22.

² ICCPR, HRC Dec 15/21, 15th sess, UN Doc A/HRC/RES/15/21 (6 October 2010).

³ Alex Steel, 'Consorting in New South Wales: Substantive Offence of Police Power?' (2003) 26 *University of NSW Law Journal* 567, 598.

- Expand the defences available to a person warned or charged with the offence of consorting.
- Introduce an internal and external review mechanism for a person to challenge the issuance of a warning.
- Minimise privacy concerns that arise in the context of the offence of consorting.

In most instances PIAC has recommended legislative amendment to ensure that a person's right is statutorily protected and not dependent on police guidance manuals. That said, PIAC recommends that all changes made to the drafting of the consorting provisions be accompanied by updates to the NSW Police Force's Consorting Standard Operating Procedures (Consorting SOPs).⁴

2. PIAC's key areas of concern with the consorting provisions and recommendations

Q1. What gaps, if any, do the new consorting provisions fill that the suite of laws and powers regarding limiting associations do not already cover?

The consorting provisions fundamentally offend basic human rights principles. Most notably, a person's right to freedom of association. Laws that pose such an inherent risk to a person's otherwise legitimate benefit of social interaction, community networks, political ties and family and personal relationships, are so problematic that they cannot be cured by legislative amendment.

As outlined in the Issues Paper, the NSW Police Force and the courts already have an array of laws available to them to address non-association type behaviour.⁵ In particular, under s36B of the *Bail Act 1978* (NSW) a person charged with an offence may have bail conditions imposed that can include non-association restrictions. Non-association orders are also available when sentencing a person for an offence that is punishable by six-months imprisonment or more, in accordance with s 17A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). Further, non-association conditions can also be imposed on adults and children as part of conditions of release.⁶

There are also several laws that cover restrictions on associations between members of criminal groups⁷ and which are referred to in the Issues Paper.⁸ For example, under section 3(1) of the *Crimes (Criminal Organisations Control) Act 2012* (NSW), all forms of association including electronic communication is restricted.

The suite of laws referred to above highlights that the NSW Police Force and the courts have a wide variety of options available to them to prevent, deter and address criminal activity by limiting, where appropriate, a person's ability to associate with another person. The consorting provisions

⁴ State Crime Command, NSW Police Force, *Consorting Standard Operating Procedures* (April 2012).

⁵ NSW Ombudsman, *Consorting Issues Paper: Review of the Use of the Consorting Provisions by the NSW Police Force*, 4 November 2013, 4.

⁶ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 51A; *Crimes (Administration of Sentences Act) 1999* (NSW) s 128A.

⁷ *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 5(1), s7(1).

⁸ NSW Ombudsman, above n5, 4.3.

are unnecessary and problematic and the law should be repealed because its potential to reduce serious criminal activity is disproportionate to its potential to dismantle critical social structures.

Recommendation 1: Repeal the law

PIAC recommends that the consorting provisions be repealed. In the event that the consorting provisions are not repealed, PIAC makes the recommendations below to address some of the most concerning features of the law but with the qualification that none of PIAC's proposed changes constitutes a 'perfect' fix.

Q2. What checks and balances, if any, should be in place to ensure personal relationships between people who are not involved in criminal activities are not criminalised by the new consorting provisions?

Q3. Should police be required to show the associations that are the subject of official warnings are linked to current or suspected criminal activity?

Q4. Should police be required to hold a reasonable belief the issuing of consorting warnings is likely to prevent future offending?

Q5. 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 are legislated in other jurisdictions? What offence categories would be appropriate?

Q6. Is it appropriate for police to target people consorting who are suspected of involvement in less serious offences, such as shoplifting?

Q7. Should convictions for certain offences or offence categories be excluded from defining a person as a convicted offender, and if so, which ones?

2.1 The drafting of the law is too wide

2.1.1 The consorting provisions apply to 'any person' in NSW

Any person in NSW can receive a consorting warning or be charged with consorting if that person associates or communicates with persons who are convicted of an indictable offence.⁹

In other jurisdictions, the application of the relevant consorting law is significantly narrower and targeted at persons who have proven involvement in criminal activity. For example, in Western Australia only a 'declared drug trafficker' can be charged with a consorting offence.¹⁰ Similarly, under the Northern Territory consorting regime, the offence is only applicable to persons 'found guilty of a prescribed offence.'¹¹

The wide reach of the consorting provisions seems to be at odds with the intention of the NSW Parliament when it introduced the law. According to the NSW Premier, the Crimes Amendment (Consorting and Organised Crime) Bill 2012 (consorting bill) would 'make it harder for criminal

⁹ *Crimes Act 1900* (NSW) s 93X.

¹⁰ *Criminal Code Act 1913* (WA) s 557J(1)-(2).

¹¹ *Summary Offences Act 1923* (NT) s 55A(4).

gangs to engage in planned criminal activity by modernising consorting laws.¹² Further, as referenced in the Issues Paper, the second reading speech for the consorting bill emphasised that the purpose of the consorting provisions was to deter persons from associating with ‘criminal milieu’ but not to criminalise meetings if the defendant was not ‘establishing, using or building up criminal networks.’¹³

The disjuncture between on one hand the second reading speech and the NSW Premier’s 2012 media release, which both suggest a relatively narrow scope of the consorting provisions, and on the other hand the natural and ordinary meaning of the consorting provisions, creates confusion. It invites the courts to adopt a construction of the law that departs from the natural and ordinary meaning of the provisions themselves. This is an undesirable result because it makes the law in this area more difficult to understand and predict. Such concerns are problematic in any area of law, but especially so in the criminal law, given the principle that ignorance of the criminal law is no excuse for criminal behaviour.

2.1.1.1 The use of the law signals a departure from NSW Parliament’s intent

PIAC is very concerned about the Ombudsman’s findings that over the first 12 months of use of the consorting provisions, 16% of total individuals directly affected by the law had either no criminal record at all, a conviction for a summary offence only or had only received an infringement notice in the past 15 years.¹⁴

Moreover, the Issues Paper indicates that 40% of all persons the subject of the consorting provisions in the review period were Aboriginal.¹⁵ Further, the Ombudsman found that 83 children and young persons aged between 13 and 17 years were subject to the consorting provisions, and that two thirds of those persons were Aboriginal children and youth.¹⁶

The Issues Paper also identified that of the five homeless persons warned or charged under the consorting provisions in the relevant period, while all had been found guilty of an indictable offence, none of the men was warned under the consorting provisions in the context of organised crime, serious criminal conduct or gang activity.¹⁷

The data clearly confirms that the law is sufficiently expansive to criminalise a population of community members outside the scope of typical ‘criminal milieu’ and that to date it has been used by the NSW Police Force to do so. Four of the ten police local area commands interviewed by the Ombudsman advised that they were targeting persons and others congregating in public places including shopping malls, outdoor seating areas and in cafes, who were suspected of involvement in using and selling drugs and stealing from shops.¹⁸ This deliberate policing approach highlights the tremendous scope for any number of persons, particularly vulnerable persons who traditionally associate in public spaces but who are otherwise uninvolved with

¹² The Hon. Barry O’Farrell MP, ‘New Laws to Tackle Drive-by Shootings’ (Media Release, 13 February 2012).

¹³ The Hon. David Clarke MLC, Legislative Council, *Crimes Amendment (Consorting and Organised Crime) Bill 2012*, 7 March 2012, 9091.

¹⁴ NSW Ombudsman, above n5, 5.1.1.

¹⁵ *Ibid* 3.3.1.

¹⁶ *Ibid*.

¹⁷ *Ibid* 6.4.2.

¹⁸ *Ibid* 5.4.

serious criminal or gang activity, to be unreasonably targeted or affected by the consorting provisions.

2.1.2 The definition of ‘convicted offender’ is too broad

In all Australian jurisdictions where the offence of consorting exists other than in NSW, the relevant law regarding a person’s criminal history is limited to specific – more serious – categories of offences. The types of offences vary but include persons convicted or suspected of involvement in such conduct as organised crime, drug trafficking and child sex offences or persons convicted of offences attracting a maximum of 10 years imprisonment.¹⁹

2.1.2.1 Indictable offences constitute the vast majority of crimes in NSW

The consorting provisions define ‘convicted offender’ as a person convicted of an indictable offence.²⁰ As the Issues Paper correctly highlights, indictable offences include ‘virtually all types of criminal activity or offence category’²¹ meaning that the majority of people convicted of offences in NSW may be affected by the law.

Further, there is no legislative language to ensure that the consorting provisions are limited to any type of crime. As the Ombudsman’s data above indicates, the NSW Police Force has by no means restricted application of the law to persons involved in serious criminal activity.

Recommendation 2: Narrow the application of the law to a targeted group of persons involved in serious criminal activity

PIAC recommends that the law be narrowed to a targeted group of persons involved in serious criminal activity. The applicability of the consorting provisions to ‘any person’ must be significantly narrowed to reflect NSW Parliament’s intention in introducing the law, minimise the instances of improper use by the NSW Police Force and reduce the potentially disproportionate impact the law has on vulnerable persons who are otherwise consorting for legitimate reasons. Such an approach would encourage police to target persons who are genuinely planning criminal activity and significantly reduce the practical difficulties for police trying to establish at the time of issuing a warning, whether the person is in fact linked to criminal activity and whether it is reasonable for police in the circumstances to believe that issuing a warning would likely prevent future offending.

PIAC recommends that the persons who may be charged under the consorting provisions be restricted to adults involved in serious criminal conduct that is more closely aligned with group-type activity eg, organised crime, drug trafficking and child sex offences. Children should be excluded from the application of the consorting provisions. Bail conditions and other court orders suffice to cover non-association behaviour.

Juvenile offenders should also be excluded from the definition of ‘convicted offender’ given that so few convictions are recorded against juveniles in NSW and in order to protect the unique needs of children. It is prudent to adopt such an approach as a matter of public policy and to promote use of the law for the persons for whom it was originally intended.

PIAC recommends that the definition of ‘convicted offender’ at s 93W of the Crimes Act should

¹⁹ *Summary Offences Act 1953* (SA) s 13(3); *Summary Offences Act 1966* (Vic) s 49F(1); *Criminal Code Act 1913* (WA) s 557J-K.

²⁰ *Crimes Act 1900* (NSW) s 93W.

²¹ NSW Ombudsman, above n5, 5.3.

be amended so that it reads:

convicted offender means any adult who has been convicted of a serious indictable offence in the last five years and whose conviction is not spent.

The term 'serious indictable offence' should be inserted in the definitions section as follows:

serious indictable offence means a person who has been found guilty of, or is reasonably suspected of having committed, an organised crime offence or is guilty of, or is reasonably suspected of having participated in a criminal group offence.

Based largely on the definition provided at s 49F(3) of the *Summary Offences Act 1966* (Vic), as to an 'organised crime offence,' PIAC suggests the insertion of the following definition:

organised crime offence means an indictable offence committed in the last five years, that is punishable by 10 years maximum imprisonment or more and that:

- *involves two or more offenders;*
- *involves substantial planning and organisation;*
- *forms part of systemic and continuing criminal activity; and*
- *has a purpose of obtaining profit, gain, power or influence.*²²

As to the definition of 'criminal group' PIAC relies on s 93S of the Crimes Act, which concerns the offence of participation in a 'criminal group', defined as follows:

a group of three or more people who have as their objective or one of their objectives as:

- *obtaining material benefits from conduct that constitutes a serious indictable offence; or*
- *committing, or engaging in conduct that constitutes a serious violence offence.*

A 'serious violence offence' is an offence punishable by imprisonment for life or for a term of 10 years or more, where the conduct constituting the offence involves:

- loss of a person's life or serious risk of loss of a person's life;
- serious injury to a person or serious risk of serious injury to a person;
- serious damage to property in circumstances endangering the safety of any person; or
- perverting the course of justice in relation to any conduct that, if proved, would constitute a serious violence offence.²³

PIAC recommends that a definition of 'serious violence offence' in accordance with above be inserted into the consorting provisions.

Q8. Should the 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 an appropriate timeframe?

²² PIAC has adopted the drafting of the Victorian law but restricted the commission of the offence to a five-year period in accordance with PIAC's recommendations that a five-year limit is appropriate in the circumstances.

²³ *Crimes Act 1900* (NSW) s 93S.

Q9. 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?

Q10. Should official police warnings remain valid for a specified timeframe, such as 12 months or two years? If so, what timeframe?

Q22. 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?

2.2 The definition of ‘convicted offender’ is not limited by any time period

PIAC is concerned that a warning under the consorting provisions could still be issued even after an unreasonably long period of time has lapsed since the conviction. As noted in the Issues Paper, the NSW Police Force has made a policy decision not to commence proceedings against a person for consorting unless the conviction for an indictable offence is within the last ten years.²⁴ However, the consorting provisions do not contain any such express language and ten years is an excessive period of time in the context of the offence. Further, proportionally for a young person, 10 years is an inappropriate period of time.

PIAC’s concern specifically relates to the common link between criminal activity and drug or alcohol abuse. Where a person subsequently rehabilitates and no longer engages in crime associated with addiction, it is unreasonable that they are or any other person who subsequently associates with that person – for an indefinite period of time – remain at risk of receiving a warning or being charged under the consorting provisions.

2.3 Warnings are valid for an indefinite period

There are two noticeable omissions in the consorting provisions regarding the timing of the official warning. First, the period of time a warning remains valid and secondly, the requisite time between warnings and charging a person under the law. Overly lengthy periods of time between the issuance of warnings or laying of charges seriously undermines the notion of ‘habitual’ consorting which is required under the law given that a plain language reading of ‘habitual’ means to engage in behaviour regularly or routinely.

As the Ombudsman is aware, the Consorting SOPs provide that police officers should not commence criminal proceedings unless the occasions of consorting occurred within a six-month period, except where exceptional circumstances exist.²⁵ However, this is guidance only.

In the other Australian jurisdictions where consorting laws exist, the time limit for commencing proceedings against a person who has received a warning ranges from six months to two years.²⁶ The complete absence of any such limitations in the consorting provisions effectively means that a warning and the threat of being charged under the law remains operative indefinitely and without any recourse for a person to challenge its validity.

²⁴ State Crime Command, NSW Police, above n4, 15.

²⁵ Ibid.

²⁶ *Summary Procedure Act 1921* (SA) s 52(1)(b); *Criminal Procedure Act 2009* (Vic) s 7(1); *Criminal Procedure Act 2004* (WA) s 21; *Summary Offences Act 1923* (NT) s 55A(1)(a); *Justices Act 1959* (TAS) s 26(1)(a).

Recommendation 3: Specify timeframes for the period between the commission of the indictable offence and the issuance of a warning, the period for which warnings remain valid and the period for which 'habitual' consorting must occur

PIAC recommends that timeframes for the period: between the commission of the indictable offence and the issuance of warning, for which warnings remain valid and for which 'habitual' consorting must occur, should be inserted into the consorting provisions.

As to the issue of the relevant incidents of consorting and the date of a person's conviction for a serious indictable offence, the law must be restricted to a reasonable period of time. For example, a gap in time between the consorting events and commission of a serious indictable offence may coincide with a period of rehabilitation away from crime, and persons who regularly associate with such a person should not run an indefinite risk of committing an offence under the consorting provisions.

PIAC recommends a five-year limit. Drafting to the effect of 'within the last five years of the date of the first official warning' should be inserted at the end of the definition of 'convicted offender' at s 93W of the Crimes Act.

The law must also be amended to reflect the Consorting SOPs guidance that police officers should not commence proceedings unless the occasions of consorting occurred within a six-month period ie, two official warnings and any subsequent incident of consorting between the relevant persons must all occur within a six-month timeframe.

Such an approach is consistent with the consorting law in Tasmania. When PIAC consulted police about the issue, one local area command agreed that a six-month period of time was the most meaningful and appropriate timeframe to adopt given the nature of the offence.

PIAC recommends that the drafting 'within a six-month period' be added after the words 'on at least 2 occasions' at s 93X(2)(b) of the Crimes Act. PIAC has also included drafting to reflect this amendment in the proposed 'Notice of an official warning' below.

Q11. What, if any, protections should be put in place to ensure that Aboriginal people are not unfairly affected by the consorting provisions?

Q12. 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?

Q13. What protections, if any, should be introduced concerning the use of consorting provisions in relation to young people?

Q14. 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?

Q15. Should the circumstances in which an official warning can be issued about a young person be restricted due to privacy considerations?

Q16. What, if any, safeguards should be included within the legislation or police policy with regard to the use of consorting provisions against homeless people?

2.4 Aboriginal persons are disproportionately impacted upon by the consorting provisions

As identified in the Issues Paper, Aboriginal people account for 2.5% of the NSW population but constitute 40% of all persons subject to the consorting provisions in their first year of use.²⁷ A third of men issued with warnings over that period were Aboriginal and 62% of all women issued with warnings were identified as Aboriginal.²⁸ Over half of the children warned in the first year of the law's use were identified as Aboriginal.²⁹

Aboriginal persons are particularly vulnerable to over-criminalisation under the consorting provisions. First, as the Issues Paper highlights, 30.05% of Aboriginal persons have been convicted of an indictable offence over the last 10 years compared to 3.53% of indictable offence conviction rates in the general population.³⁰ Secondly, Aboriginal social and kinship structures mean that extended members of the Aboriginal community are more likely to be in regular contact with one another and their visibility (often congregating in public spaces) results in higher warning and charge rates.

2.5 Children are not expressly excluded from the operation of the law

The definition of 'convicted offender' does not accommodate the unique position of youth in the criminal justice system. As outlined in the Issues Paper, owing to the restrictions on the Children's Court's ability to record convictions for young persons,³¹ it is extremely rare for a juvenile offender to have a conviction for an indictable offence recorded, and therefore the consorting provisions are only applicable to very few young people in NSW. Nevertheless, as referred to above, the Ombudsman found that of all consorting events records in the first 12 months of the law's use, 83 children and young persons aged between 13 and 17 years were subject to the consorting provisions.

PIAC recognises that the NSW Police Force has sought to respond to this issue by making a policy decision not to commence criminal proceedings for consorting against people under the age of 16 'except in exceptional circumstances.'³² PIAC also acknowledges the enhancements the NSW Police Force has made to its Computerised Operational Policing System (COPS) to restrict a police officer's ability to submit a COPS event record where the person the subject of a warning is under 16 years of age or does not have a recorded indictable offence.³³

Yet despite the modifications to COPS, PIAC's recent consultations with members of the NSW Police Force suggest that there remains uncertainty in the field about how the consorting provisions relate to children and young persons and that the youth specific 'tweaks' introduced are not necessarily being consistently applied.

²⁷ NSW Ombudsman, above n5, 3.3.1.

²⁸ Ibid 6.2.1.1.

²⁹ Ibid.

³⁰ Ibid 5.1.3; 6.1.2.

³¹ *Children (Criminal Proceedings) Act 1987* (NSW) s 14(1)(b); NSW Ombudsman, above n5, 5.5.1.2.

³² NSW Ombudsman, above n5, 6.3.1.

³³ Ibid 6.3.4.1.

2.5.1 Police are confused over the application of the law to children

Of the police consulted, one local area command advised PIAC that it used (and continues to use) the consorting provisions on a group of persons it suspected of involvement in drug dealing and associated theft offences. That same local area command indicated that there are few youth offenders in the area but that if youth crime became an issue, it would have no hesitation in using the consorting provisions to deter suspected crime. The local area command also advised us that police operating in Sydney's southwest have frequently used the consorting provisions for the specific purpose of deterring suspected Islander youth gang activity.³⁴

Police from another local area command commented that while youth crime was not an issue in its jurisdiction, children and young persons with an indictable offence actually recorded against them 'had to be' responsible for very serious offences, and therefore the consorting laws should most certainly apply. These comments did not appear to take into account factors such as time lapsed since the commission of the offence, that there are other existing mechanisms such as bail and parole conditions available to the courts to address non-association behaviour, or that vulnerable youth often associate with 'street family' for survival (and not to plan or engage in criminal activity).

During consultations with a community service provider in Sydney's west PIAC was made aware of the impact of the law shortly after it was introduced. In 2012, the community service provider ran a program at the local shopping centre for marginalised and homeless youth to encourage community engagement and employment opportunities. The community service provider observed a significant drop in attendance following the threat of the law by local police on the street.

In particular, the community service provider advised two young persons who were threatened by police that they would be charged with consorting if they continued to associate with one another and that they could go to jail for 'up to eight years' if convicted. The young persons were extremely concerned because they lived together at the time and provided social support to one another. When the community service provider approached local police about the issue it was advised 'nothing would ever come of it at court' because the young persons 'were not bikies.' The community service provider has no other recorded complaints since this time.

Although the incidents in Sydney's west predate the more recent initiatives by the NSW Police Force to address young persons' interaction with the consorting provisions, they reflect more general confusion in the field about the operation and applicability of the law to different categories of persons. Moreover, the incidents highlight the capacity of the law to interfere unnecessarily with critical networks that are established to minimise isolation of vulnerable persons and encourage rehabilitation away from crime.

³⁴ PIAC was not able to obtain data on the age of the offenders or on whether they have convictions for indictable offences recorded against them.

2.6 Homeless persons are at risk of over-criminalisation

As outlined in the Issues Paper, homeless persons are at risk of over-criminalisation under the consorting provisions.³⁵ PIAC refers to the analysis above and below regarding the potentially negative consequences the law could have on a person experiencing homelessness but who is otherwise uninvolved in serious criminal activity. Homeless persons traditionally rely on community networks for rehabilitation and the consorting provisions have the capacity to fray these crucial networks.

As per PIAC's recommendations below, the rights of the homeless community should be protected under the consorting provisions.

Recommendation 4: Provide protections under the law to address the specific needs of vulnerable persons

PIAC recommends that the consorting provisions be amended to provide protections to address the specific needs of vulnerable persons.

To mitigate the adverse impact of the consorting provisions on Aboriginal persons and persons experiencing homelessness, PIAC recommends that the following definitions be inserted at s 93W of the Crimes Act:

family means lineal and blood relations, kinship ties and a social unit existing between persons experiencing homelessness.

homelessness means:

- *the person is sleeping rough or living in an improvised dwelling;*
- *either the person is: temporarily living with friends or relatives and has no other usual address or the person is living in accommodation provided by a specialist homelessness service;*
or
- *the person is living in a boarding house, caravan park, hostel, refuge, shelter or similar accommodation, whether on a short-term or long-term basis, in respect of which the person has no secure lease.*

To complement the legislative amendments, the Consorting SOPs should be updated to guide the NSW Police Force on the unique features of Aboriginal family structures, the meaning and importance of 'street family' for persons experiencing homelessness and the range of scenarios where consorting between persons is most likely to be valid. Such guidance may be best achieved by way of hypothetical situations or case studies.

In order to address the issues that arise in the context of young persons, PIAC reiterates its position outlined in Recommendation 2 above concerning narrowing the application of the law to a targeted group of persons involved in serious criminal activity. Children should be excluded from the operation of the consorting provisions both in terms of applicability of the law to young persons and in terms of narrowing the definition of "convicted offender" to exclude juvenile offenders. The exclusion of children from operation of the consorting provisions also resolves the privacy concerns that arise in this context.

³⁵ NSW Ombudsman, above n5, 6.4.

Q17. 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?

Q18. What further guidance, if any, should be provided in the Consorting SOPs regarding the content and format of an official warning?

Q19. What practical strategies can police adopt to assist people who may have difficulty understanding the content of official warnings?

Q20. Should the consorting provisions require police officers to provide official warnings in writing, in addition to giving an oral warning?

Q21. 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?

Q32. Do you have any suggestions regarding how to approach evaluation of the effectiveness of official warnings and the consorting provisions in your local area?

2.7 The process for issuing an effective warning is unclear

The warning system is problematic for a number of reasons including that:

- police officers have a choice between issuing a warning orally or in writing;
- confusion appears to exist in the field about whether one or two warnings are required prior to charging a person with consorting;
- the consorting provisions do not specify a period of time for which a warning remains valid (see Recommendation 3 above); and
- the consorting provisions do not specify a timeframe between the issuance of a warning and charging a person with the consorting offence (see Recommendation 3 above).

2.7.1 Written warnings are rare if they are ever issued

Based on PIAC's consultations with police, officers are issuing warnings orally only. The reliance on oral warnings has exacerbated confusion about the operation of the law on the ground.

For example, informal 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 (eg, bail enforcement, parole condition or move-on direction).

When PIAC discussed with police how a warning might be issued in writing, police suggested either having a person the subject of the warning sign the police officer's notebook entry or the issuance of a police 'sticker.'

Both of these proposed practices are unsatisfactory because there is no uniformity in approach and no documentation to capture how the warning was issued. Any written warning must follow a standardised format. The only way to ensure consistency across the NSW Police Force and to reduce instances of police discretion being exercised inappropriately or unlawfully is to have a warning properly recorded.

2.7.2 Police do not understand whether two or three instances of consorting are required to meet the definition of ‘habitual’ consorting

PIAC’s consultation with different local area commands revealed that some police are issuing a single ‘official warning’ before charging an individual with consorting, while other police stations understand the legislation to mean that a person must be issued with two ‘official warnings’ and only then (on a third occasion) can that person be charged with consorting. The issue appears to relate to the drafting of s 93X(2)(b) of the Crimes Act, which requires a person to consort on at least two occasions but does not specify whether the second occasion is sufficient to give rise to the offence. The divergence in interpretation of the law demonstrates the level of confusion in the field and the inconsistent application of the consorting provisions in different jurisdictions.

The Ombudsman’s observations with respect to the use of retrospective warnings and pre-emptive warnings by some NSW police,³⁶ further complicates the issue and highlights the urgent need for clarity on what amounts to an ‘official warning’ for the purposes of the consorting provisions.

One local area command reported to PIAC that it conducted a specialist operation to retrospectively warn persons in the area. During the operation, the police reviewed all incidents of crime in a prior three-month period and made a determination of where it would have been appropriate to issue warnings under the consorting provisions. 36 such incidents were identified and police were able to locate between 20 – 25 persons who were subsequently warned under the consorting provisions. Yet, the law is silent on whether retrospective warnings constitute ‘official warnings’ for the purposes of the legislation, further demonstrating the lack of guidance on the practical operation of warnings in the field.

2.7.3 COPS does not have the capability to ensure warnings and charges are lawful

Police at two local area commands advised PIAC that where an officer suspects that a person is consorting with another person convicted of an indictable offence, the usual practice is for the officer on duty to radio back to the station and have the operator confirm the person’s identity and criminal history. However, significantly, COPS does not contain any search function that enables an operator to definitively establish whether a person charged with an indictable offence was ultimately convicted of that offence.

As one local area command confirmed, the only method by which an operator could establish the status of a person’s criminal history would be to manually scroll through each court update entry on COPS and even in those circumstances it is not always clear whether in fact a conviction has been recorded. The police acknowledged that it is impractical for a radio operator to conduct such a thorough search each time a police officer radios back to the station to verify the status of a person’s criminal history.

Further, the local area command expressed concern regarding COPS’s inability to accurately capture the limitless number of scenarios in which a person could be warned under the law. For example, provided that persons B, C, D, E, F and G were all convicted of an indictable offence, if person A was warned not to associate with persons B and C, and on the next occasion police observed person A consorting with persons C and D, and then on a subsequent occasion person A was observed consorting with persons D, E, F and G, these would all amount to separate

³⁶ Ibid 7.3.1.1.

warnings, but none of these combinations satisfies the requirements giving rise to the offence of consorting under the law.

As PIAC understands, COPS does not have the capability to accurately record all the relevant narratives required per warning on an event record, and this issue may lead to a high incident of error and charges being unlawfully laid.

2.8 The overly complicated nature of the law poses barriers to effective use

One local area command reported the issuance of over 300 warnings to approximately 150 persons from September 2012 to date. Police in that jurisdiction have developed an informal program to evaluate whether a person meets all the relevant criteria to be charged with the offence.

The feedback PIAC received from the local area command was that – despite the issuance of 300 warnings – it has not charged any person with the offence because they have yet to identify any person who satisfies all the necessary elements to lay a charge. For example, of its list of 150 persons, the police identified one individual who after receiving two warnings was found consorting on a third occasion with the relevant persons. However, the police subsequently established that one of the relevant offenders had only been charged with an indictable offence but not convicted of it, and therefore any consorting charge was invalid.

Recommendation 5: Clarify the procedural requirements for the issuance of an effective warning

PIAC recommends that the consorting provisions be amended to clarify the procedural requirements for the issuance of an effective warning.

An official warning must be in writing to standardise practice and procedure in the field and promote consistency. Record keeping is also essential to enable a person to appeal the issuance of a warning or charge.

PIAC recommends that each person issued with a warning be provided with a copy of a NSW Police Force document which includes language to the following effect:

Notice of an official warning for consorting

This document constitutes an official warning under s 93X of the Crimes Act 1900 (NSW) for the offence of consorting. Under the law, a person is prohibited from consorting with certain persons in particular circumstances if those persons have been convicted of a serious indictable offence.

Prohibited conduct

[Enter first offender's name] has been convicted of a serious indictable offence.

[Enter second offender's name] has been convicted of a serious indictable offence.

Subject to this official warning, you are prohibited from any contact with [enter offenders' names] until [enter six months date from today's date] unless you successfully appeal the issuance of this warning.

This official warning constitutes your [first / second] official warning under the law. If, during the course of a six-month period, you receive two official warnings not to consort with [enter offenders' names] you may be charged for the offence of consorting on any subsequent occasion that you are found to be consorting with [enter offenders' names].

Maximum penalty

The maximum penalty for this offence is three years imprisonment or a fine of \$16,500 or both.

PIAC also recommends that the Consorting SOPs be updated to prohibit the NSW Police Force from issuing pre-emptive and retrospective warnings. Police officers should only issue warnings at the time of the alleged consorting incident.

As outlined above, the practice of issuing retrospective warnings has only exacerbated confusion in the field about the validity and effectiveness of a warning. It is costly and ineffective for police officers to undertake extensive review of prior crime incidents to determine whether a warning should have been issued in a particular circumstance, and accordingly, retrospective warnings should likewise be prohibited.

Further, pre-emptive warnings conflict so inherently with a person's right to freedom of association that they must be banned across the NSW Police Force.

Q26. 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?**

Q27. Should the list of defences be an inclusive list instead of an exhaustive list?

Q28. Should a general defence of reasonable excuse be included in addition, or as an alternative, to the current list of defences?

Q29. Should definitions of 'family members' and 'health service' be included in section 93Y? If yes, how should these terms be defined?

Q30. What guidance, if any, should be provided to police about how they should exercise their discretion in relation to the defences?

Q31. Should the consorting provisions be amended to provide that the prosecution must satisfy the court that the consorting was not reasonable in the circumstances?

2.9 The list of defences is too narrow

PIAC is concerned about the defences under the consorting provisions for the following reasons:

- The existing defences are not defined and do not expressly take into account factors such as Aboriginal family structures or 'street family' structures for homeless persons.

- The list of defences is exhaustive and several categories of legitimate association are not covered including consorting that occurs between persons who:
 - are in a relationship;
 - engage in the same religious activities;
 - engage in the same sporting activities;
 - exercise their right to public protest or industrial action;
 - live communally or access refuge accommodation; or
 - associate during the course of rehabilitation, therapeutic services or other support services.
- There is no 'reasonable excuse' defence.
- Even if a suitable defence is available under the consorting provisions, a person must still prove that consorting was 'reasonable in the circumstances'³⁷ (reversing the conventional burden of proof).

As addressed above, among the many definitional problems with the defences, PIAC is most concerned about the failure of the law and the Consorting SOPs to consider expressly kinship ties between Aboriginal persons, which are broader than lineal or blood relations, as falling within the definition of 'family'. The absence of any guidance to police officers on this issue is particularly alarming given the Ombudsman's findings on the disproportionate impact the consorting provisions have had on Aboriginal persons.³⁸

Also addressed above, the other principal concern with the legislation's failure to define 'family' relates to PIAC's experience dealing with homeless clients and PIAC's understanding of how critical 'street family' is to a homeless person's survival. Homeless persons congregate in public spaces, at housing shelters, at food-vans, and often have criminal histories by virtue of their high visibility to police. There is currently no protection afforded to homeless persons under the consorting provisions and they remain at particularly high risk of criminalisation and, more problematically, of the law dismantling fundamental social networks.

In addition to the absence of several categories of legitimate association from the list of defences under the consorting provisions, contrary to some other Australian jurisdictions, there is no 'reasonable excuse' defence available to persons charged under the law. For example, the consorting laws in South Australia, Victoria and the Northern Territory, all include a 'reasonable excuse' provision to capture the range of valid defences to the offence.³⁹ The failure of the consorting provisions to include such a defence gives rise to the possibility of over-criminalisation of persons who the law was not intended to target.

Recommendation 6: Expand the defences available to a person warned or charged with the offence of consorting

PIAC recommends that the consorting provisions be amended to expand the defences available to a person warned or charged with the offence of consorting.

The effect of the consorting provisions is to effectively force certain persons to become socially isolated by reason of their previous conviction. Such isolation impairs all relevant persons'

³⁷ *Crimes Act 1900* (NSW) s 93Y.

³⁸ NSW Ombudsman, above n5, 6.2.

³⁹ *Summary Offences Act 1953* (SA) s 13(1); *Summary Offences Act 1966* (Vic) s 49F(1); *Summary Offences Act 1923* (NT) s 55A(2).

capacity to use critical networks or reintegrate back into society after a period of contact with the criminal justice system.

The current list of defences to the offence is exhaustive and does not cover several circumstances where consorting between persons is legitimate and not linked to criminal activity. Accordingly, PIAC recommends that s 93Y of the Crimes Act be amended as follows to include instances where consorting occurs between persons:

- *who are in a relationship;*
- *during the course of religious activities;*
- *during the course of sporting activities;*
- *exercising their right to public protest or industrial action;*
- *living communally or accessing refuge accommodation;*
- *accessing rehabilitation, therapeutic or other support services;*
- or*
- *who otherwise have a reasonable excuse to do so.*

Further, PIAC recommends that the words ‘if the defendant satisfies the court that the consorting was reasonable in the circumstances’ be deleted from s 93Y of the Crimes Act to remove the burden of proof. Rather, the defences should be automatic and the onus of proof should shift to the prosecution to satisfy the court that the consorting was not reasonable in the circumstances.

PIAC also recommends that a definition of ‘health service’ be included in the consorting provisions to the following effect:

health service means an activity performed in relation to a person that is intended to:

- *assess, maintain or improve the person’s health;*
- *diagnose the person’s illness, injury or disability; or*
- *treat the person’s illness, injury or disability, or suspected illness, injury or disability, including dispensing of prescription drugs by a pharmacist.*

As to the definition of ‘family’, we refer to Recommendation 4 above.

Q24. Should the consorting provisions provide for a process for review of official warnings? If yes, what kind of review process would be appropriate?

Q25. Should police formally establish an internal review process to assess the validity of warnings upon the request of the person warned?

Q36. How could any potential adverse effects of the consorting provisions on vulnerable people or ex-prisoners be mitigated?

2.10 There is no review mechanism available to persons warned under the consorting provisions

As the Issues Paper recognises, under the consorting provisions, a person’s only opportunity to challenge the lawfulness of a warning or to raise a defence only arises once the person is charged with the offence and the matter is heard in court.

The absence of a merits review process – where a person could challenge the NSW Police Force’s decision to issue the warning before it progresses to court – amounts to a denial of procedural fairness, undermines police accountability and significantly increases the likelihood that charges may be laid unlawfully.

Further, relying on the court system alone to adjudicate such matters places an additional and unnecessary burden on judicial officers as well as the limited resources of the court and legal service providers.

Recommendation 7: Introduce an internal and external review mechanism for a person to challenge the issuance of a warning

PIAC recommends that the consorting provisions be amended to allow for an internal and external review mechanism for a person to challenge the issuance of a warning.

An effective review mechanism is essential to reducing instances of improper use of the consorting provisions by the NSW Police Force. A merits review process at the warning stage of the offence, before a person is charged and the matter progresses to court, will also minimise court backlog and preserve resources.

PIAC has considered other ‘strike out’ type offences for guidance on an appropriate review mechanism in the context of the consorting provisions. For example, the ‘three strikes’ disciplinary scheme under the *Liquor Act 2007* (NSW) (Liquor Act) was designed to target repeat offenders for certain offences under the Liquor Act.⁴⁰

Pursuant to that model, applications can be made to the Independent Liquor & Gaming Authority (ILG Authority) for review of any decision made by the Director General of the NSW Department of Trade and Investment, Regional Infrastructure and Services to impose a first or second strike against a licensee and approved manager.⁴¹ Decisions at the third strike out stage are made by the ILG Authority.⁴² Any decision made by the ILG Authority (concerning a first, second or third strike) can be appealed to the NSW Civil and Administrative Tribunal.⁴³

As to the consorting provisions, PIAC recommends that the law be amended to allow a person to seek internal merits review of an official warning within 21 days of its issuance. The review should be adjudicated by an independent authority within the NSW Police Force and not by the local area command responsible for issuing the official warning. If unsuccessful at the internal merits review stage, a person should be afforded the right to appeal that decision to the NSW Civil and Administrative Tribunal.

A police officer should enter a COPS record of the event at the time the warning was issued. A copy of that COPS event record should then be forwarded to the relevant independent authority. The official warning should only display on COPS as being ‘effective’ once the 21 day period has lapsed and the independent authority has notified the relevant local area command that no appeal was lodged.

⁴⁰ Office of Liquor, Gaming and Racing, NSW Department of Trade and Investment, Regional Infrastructure and Services, “Three Strikes” Disciplinary Scheme (Fact Sheet, July 2012).

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

Each person issued with a 'Notice of an official warning for consorting' should also receive an 'Appeal notice' on the reverse side of the document that includes language to the following effect:

Appeal notice

You may appeal the issuance of this official warning within 21 days of today's date.

Basis of your appeal

Please tick the relevant box below, to identify the basis of your appeal, where consorting with [enter offenders' names] occurred in the course of:

- *an exchange between you and a family member, relative or person with whom you are in a relationship;*
- *lawful employment or the lawful operation of a business;*
- *training or education;*
- *provision of a health service;*
- *provision of legal advice;*
- *complying with a court order;*
- *religious activity;*
- *sporting activity or recreational club;*
- *public protest or industrial action;*
- *communal living or refuge accommodation arrangements;*
- *therapeutic, rehabilitation or other support services; or*
- *any other circumstance where it was reasonable to do so.*

Documents required to support your appeal

A copy of this document constitutes your appeal notice.

In the case of consorting with a family member, relative or person with whom you are in a relationship, or in the case of defending the issuance of an official warning on the basis that it was reasonable to consort in the circumstances, you should submit with your appeal notice a statutory declaration that explains your relationship with that person, the length of time that you have known that person and all other relevant factors.

In all other cases, you should submit with your appeal notice a letter from the appropriate entity (eg, employer, church, club, doctor or service provider) that explains your connection with that entity and the reason that you were consorting with [enter offenders' names] at the time this official warning was issued.

How to lodge your appeal

Please send a copy of your appeal notice and the accompanying documents to:

[Enter relevant address of NSW Police Force]

Timeframe for your appeal

The NSW Police Force will notify you on the outcome of your appeal via the contact information you provide below within 10 days of receipt of your appeal notice.

You should not consort with [enter offenders' names] until you have been notified of the outcome of your appeal.

External merits review

If your appeal to the NSW Police Force is unsuccessful, you have a right to challenge that decision before the NSW Civil and Administrative Tribunal (NCAT). You may wish to seek legal advice before filing an application form with NCAT or visit <http://www.ncat.nsw.gov.au>

PIAC also recommends the development of an accompanying guide (in conjunction with PIAC, Legal Aid NSW, the ALS and community legal centres) to assist unrepresented persons lodging an appeal.

Q23. Are there any practical ways police can reduce the impact on people's privacy when issuing official warnings?

2.11 The consorting provisions give rise to serious privacy concerns

The Issues Paper concentrates on the privacy issues that arise in the context of the consorting provisions and young persons. In particular, the Issues Paper highlights the range of laws that contain stringent privacy protections for young persons who become involved in the criminal justice system and which are undermined by the operation of the consorting provisions.⁴⁴

The consorting provisions also raise serious confidentiality concerns for adults. The disclosure of a person's criminal history to other persons in many instances is also likely to cause public shame.

This issue is particularly concerning where warnings are issued improperly (eg, where a police officer warns a person for consorting but subsequently discovers that the relevant person was only ever charged with an indictable offence but not convicted) and a person is nevertheless forced to endure unnecessary humiliation. The data in the Issues Paper – that approximately 50 of 200 individuals were wrongly treated as convicted offenders resulting in the wrongful issuance of warnings to an estimated 100 individuals⁴⁵ – demonstrates that this is a significant area of concern.

Recommendation 8: Minimise privacy concerns that arise in the context of the offence of consorting

PIAC recommends that the Consorting SOPs be amended to guide police on ways in which to minimise privacy concerns that arise in the context of the offence of consorting.

It is difficult to identify practical solutions to reduce the impact of a person's privacy when warnings are issued, given the nature of the offence.

For a police officer, a warning is only 'official' if information about a person's criminal history is disclosed. In these circumstances, PIAC recommends that the Consorting SOPs provide strict guidance to police officers on, where practicable to do so:

- Warning a subject privately by having that person step aside from a group of persons for issuance of the warning;
- Exercising extreme caution before issuing a warning in circumstances where a defence may apply; and

⁴⁴ NSW Ombudsman, above n5, 6.3.7.

⁴⁵ Ibid 7.3.3.

- Not issuing warnings at places of worship, outside schools or in other public forums where children or community members may be present.

As referred to above, the particular privacy issues that arise in the context of children and young persons further strengthen PIAC's recommendation that youth should be excluded from the operation of the consorting provisions both in terms of a person who may be charged under the law and disclosing sensitive details about a child's criminal history.

3. Conclusion

The consorting provisions are very problematic. The law has already been used by the NSW Police Force so as to operate in a way that departs from their legislative intention, impact on particularly vulnerable persons and cause major confusion on the ground both for police officers and members of the public who have been warned or charged under the law.

The extensive number of issues that arise in the context of the law heightens the urgent need for legislative overhaul and reform. PIAC's primary position is that no amendments or policy changes could ever fully cure the law's deficiencies and so the consorting provisions should be repealed accordingly.

In the absence of full repeal, PIAC recommends the following:

- Narrow the application of the consorting provisions to a targeted group of persons involved in serious criminal activity.
- Specify timeframes for the period:
 - between the commission of an indictable offence and the issuance of the consorting warning;
 - for which warnings remain valid; and
 - during which 'habitual' consorting must occur.
- Provide protections under the law to address the specific needs of vulnerable persons.
- Clarify the procedural requirements for the issuance of an effective warning.
- Expand the defences available to a person warned or charged with the offence of consorting.
- Introduce an internal and external review mechanism for a person to challenge the issuance of a warning.
- Minimise privacy concerns that arise in the context of the offence of consorting.