

Review of the operation of  
amendments to the consorting  
law under Part 3A Division 7 of  
the *Crimes Act 1900*

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**February 2023**

# LECC

## Law Enforcement Conduct Commission

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The Law Enforcement Conduct Commission acknowledges and pays respect to the Traditional Owners and Custodians of the lands on which we work, and recognises their continuing connection to the lands and waters of NSW. We pay our respects to the people, the cultures, and the Elders past and present.



# LECC

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28 February 2023

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Parliament House  
SYDNEY NSW 2000

The Hon Jonathan O'Dea MP  
Speaker  
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Dear Mr President and Mr Speaker,

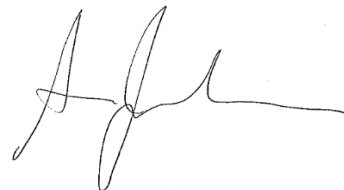
In accordance with section 138 of the *Law Enforcement Conduct Commission Act 2016* (the Act), the Commission hereby furnishes to you its observational paper entitled *Review of the operation of amendments to the consorting law under Division 7 Part 3A of the Crimes Act 1900*.

Pursuant to section 142(2) of the Act, we recommend that this report be made public immediately.

Yours sincerely,



The Hon Peter Johnson SC  
Chief Commissioner



Anina Johnson  
Commissioner

# Foreword

This report outlines the findings and recommendations of the Law Enforcement Conduct Commission (the Commission) following our review of the operation of amendments to Division 7, Part 3A of the *Crimes Act 1900* (the consorting law). The Parliament tasked the Commission with the review after making amendments to the consorting law based on recommendations made by the NSW Ombudsman. The Commission's review period ran from 1 February 2019 to 28 February 2022.

In April 2016, the Ombudsman reported on his review of modernised consorting laws, which were introduced in 2012.<sup>1</sup> The Ombudsman's recommendations were aimed at ensuring the laws did not have a disproportionate impact on vulnerable segments of the community, including young people, those who are homeless and Aboriginal and Torres Strait Islander peoples. This included a recommendation for a second review of the operation of the laws following several additional years of operation. When Parliament amended the consorting law, it tasked the Commission with reviewing only the impact of those amendments, rather than reviewing the operation of the consorting laws in full.

The Commission looked at information relating to all recorded uses of the consorting law during the review period. Our focus in this review has been on the use of the laws relating to particularly vulnerable groups and those who have historically had a greater level of contact with the criminal justice system.

The number of warnings police issued to people under the age of 18 has reduced significantly since the Ombudsman's report. Additionally, police did not charge anyone under 18 with consorting during the review period. That said, any use of consorting law against people under 18 must be considered against the potential impact on that young person's trajectory into the criminal justice system. The Commission believes it is timely for the Parliament to reconsider the application of the consorting laws to those under 18.

It was clear when Parliament introduced the amendments in 2019 it continued to believe the consorting law was an essential tool for police to combat organised and serious criminal activity.

This review, and the Ombudsman's earlier review, have both shown that police often use the laws to attempt to disrupt comparatively less serious potential criminal activity, such as drug possession. The Commission has seen many examples where people searched by police on suspicion of drug possession are given an oral consorting warning and often a move on direction.

While there have not been any charges brought in the review period relating to warnings linked to less serious offending, this does not mean charges will not be brought in the future. If the law continues to be used by police in the current manner, the Commission believes the Government should reconsider amending the law to clearly state its object. This would provide an important safeguard against future prosecutions that are not related to preventing serious organised criminal activity.

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<sup>1</sup> NSW Ombudsman, *The Consorting Law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*, April 2016.

The use of consorting laws as a whole would also benefit from further consideration after another period of usage, either by this Commission or another legislative review body. This will assess the impact of any legislative, policy and procedural changes made in response to the Commission's recommendations.

The Commission would like to thank the various NSW Police Force staff who have assisted us by providing relevant information and giving their time to assist in better understanding how the amendments have operated, as well as informing a broader understanding of the operation of the consorting laws over the review period.

We would also like to thank those who took the time to provide detailed and considered submissions to inform the review.

There are references throughout this report to Aboriginal people. These references include both Aboriginal and Torres Strait Islander peoples.

# Contents

Foreword .....	ii
Recommendations.....	1
List of case studies .....	3
1. Consorting legislation in NSW.....	4
1.1 What is consorting?.....	4
1.2 Public concern about gang activity.....	5
1.3 Continuing concerns about consorting laws.....	7
2. How we did our review .....	9
2.1 Information from NSW Police Force .....	9
2.2 Discussion paper and submissions .....	11
2.3 Court transcripts and related information .....	11
2.4 Academic literature and developments in other jurisdictions.....	12
2.5 Parliamentary debate.....	12
3. Use of consorting laws.....	13
3.1 Number of warnings.....	13
3.2 Where warnings were issued .....	15
3.3 Types of consorting interaction .....	19
4. Operation of amendments to consorting laws .....	21
4.1 Indictable offences in other jurisdictions .....	21
4.2 Children and young people .....	23
4.3 Duration of warnings.....	29
4.4 Wording of a warning .....	33
4.5 Additional defences .....	34
5. Aboriginal people and kin.....	39
5.1 Consorting and Aboriginal people .....	39
5.2 Aboriginal Strategic Direction.....	42
5.3 Kinship.....	42
6. Other issues identified during the review.....	46
6.1 Quality assurance framework.....	46
6.2 Targeting summary offending.....	48
6.3 Discretion at the point of warning.....	54
6.4 The impact of COVID-19 .....	56
6.5 Intelligence driven .....	57

6.6 Online and electronic consorting .....	59
7. Conclusion.....	60
Appendix A – The consorting law .....	62
Appendix B Warnings by Command .....	64
Appendix C Criminal conviction histories .....	67
Appendix D Consorting Fact Sheet .....	68
Appendix E Consorting incident form.....	69
Appendix F Pre-emptive consorting notice.....	70
Appendix G Consorting guidance for officers .....	71
Appendix H Consorting SMIT .....	72
Glossary .....	74





## Recommendations

The NSW Police Force should:

1. Ensure that all warnings naming people convicted of an offence in another jurisdiction that would be an indictable offence if committed in NSW are reviewed and verified at the time the warning is issued. ....22

The Attorney General propose, for the consideration of Parliament:

2. An amendment to preclude the consorting laws from applying to people under the age of 18. ....30

The NSW Police Force should:

3. If Recommendation 2 is not accepted, amend its Standard Operating Procedures to require a JusticeLink check to be conducted either before naming someone under the age of 18 or as soon as practicable after a warning is issued. If this check identifies that the person named did not have a conviction recorded, the warning should be removed from COPS and the person issued with the warning should be told the warning has been withdrawn. ....30
4. Amend its Consorting Standard Operating Procedures to require all warnings issued to people under the age of 18 to be in writing. ....30
5. Amend its Consorting Standard Operating Procedures and consorting training materials to require officers to ensure someone under the age of 18:
  - a) has understood the warning issued to them
  - b) knows the warning is valid for 6 months
  - c) understands the definition of habitual consorting. ....30
6. Amend its Consorting Standard Operating Procedures and training to require officers to tell those issued with an oral warning that they can request a warning in writing. ....33
7. Amend its publicly available consorting fact sheet to clearly state that someone issued with an oral warning can request the warning in writing. ....33
8. Include a clearly worded description of what ‘habitually consorting’ means based on the wording in the consorting law in a checklist for officers issuing warnings. ....35
9. Amend its template letters for pre-emptive warnings to include the statutory definition of habitual consorting. ....35
10. Include guidance in the consorting Standard Operating Procedures and consorting training on assessing what impact a warning may have on both the person warned and person named in a warning continuing to access drug and alcohol treatment and diversion services. ....40
11. Ensure its consorting training provides guidance around the meaning of kin and the amended process for considering issuing a consorting warning to an Aboriginal person. ....47

12. Amend its Consorting Standard Operating Procedures to require officers, unless there is an overriding operational reason not to, to activate their body worn video whenever they are issuing a consorting warning, particularly when issuing an oral warning. The reason for not recording the warning on BWV should be stated in the accompanying COPS event.....49

The Attorney General propose, for the consideration of Parliament:

13. An amendment to the consorting law to state that the purpose of the consorting law is to prevent serious criminal offending.....55

## List of case studies

Case study 1:	Patrols following a shooting.....	24
Case study 2:	Open drinks and a knife.....	25
Case study 3:	Suspected supply of alcohol to minors .....	25
Case study 4:	Coffee after the clinic .....	36
Case study 5:	Walking to the clinic .....	36
Case study 6:	Methadone in a regional town .....	36
Case study 7:	COVID stop on the way to collect methadone .....	36
Case study 8:	Responding to a noise complaint .....	41
Case study 9:	Suspected drug possession.....	41
Case study 10:	Drinking in a park.....	41
Case study 11:	Possible kin relationship .....	44
Case study 12:	Transport offences .....	49
Case study 13:	Warnings relating to anti-social behaviour .....	49
Case study 14:	High use by one Police Area Command.....	51
Case study 15:	High end car theft and aggravated break and enter .....	53
Case study 16:	Increasing OMCG activity in a regional town .....	54
Case study 17:	Hands are tied due to the time .....	55
Case study 18:	Gone fishing.....	56
Case study 19:	Towing a motorbike.....	57
Case study 20:	Burgers and drinks .....	58
Case study 21:	So I can only hang out with my dog? .....	58

# 1. Consorting legislation in NSW

## 1.1 What is consorting?

The term ‘consorting’ is not defined in the *Crimes Act 1900* or anywhere else. The High Court has defined it as meaning to associate or to keep company with someone, and involves seeking or accepting of the association. It does not require an unlawful intention or criminal purpose.<sup>2</sup>

### 1.1.1 Origins

Modern consorting legislation has its origins in the 14<sup>th</sup> century. Vagrancy laws were introduced following the disintegration of the feudal system to respond to the ‘masterless man.’ One of the first examples was enacted in 1562, which deemed a person found in the company of gypsies over the course of a month to be a felon.

These laws evolved over time, and in the 19<sup>th</sup> century began to operate alongside a range of other regulations aimed at reducing reliance on welfare.<sup>3</sup> The laws targeted what the Courts and various statutes described as the ‘less desirable classes of the population’ who were classified as ‘idle and disorderly persons’, ‘vagabonds and rogues’ or ‘incorrigible rogues.’<sup>4</sup>

### 1.1.2 Australian vagrancy laws

There were various versions of the vagrancy laws introduced in Australia based on the English *Vagrancy Act 1824*. These laws made it an offence to be in a house frequented by thieves, prostitutes or persons without lawful means of support, and for non-Aboriginal persons to keep company with Aboriginal people.<sup>5</sup>

In NSW, the *Vagrancy Act 1835* listed a number of categories of people deemed to be ‘idle and disorderly.’ The earliest laws to target ‘habitual’ consorting were enacted in New Zealand.<sup>6</sup> It formed as a model for Australian jurisdictions to follow.

The offence of vagrancy was extended in 1929 to anyone who habitually consorted with reputed criminals or known prostitutes or persons who have been convicted of having no visible means of lawful support. This was, in part, to assist police in responding to criminal activity by ‘Razor Gangs’ in Sydney who could not be prosecuted for firearms offences.

The Vagrancy Act was repealed in 1970 and replaced by the *Summary Offences Act 1970*. This included the offence of habitually consorting. In 1979, a new offence was added to the Crimes Act making it an offence to habitually consort with those who had been convicted of an indictable offence if the person charged knew the other person had such a conviction.<sup>7</sup>

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<sup>2</sup> *Johanson v Dickson* (1979) 143 CLR 376 at 8.

<sup>3</sup> Arlie Loughnan, ‘Consorting, Then and Now: Changing Relations of Responsibility’, *University of Western Australia Law Review*, 45(2) 8-36, 11.

<sup>4</sup> *Ibid* p.12.

<sup>5</sup> *Ibid* p 12.

<sup>6</sup> S 26(4) *Police Offences Act 1884* (NZ).

<sup>7</sup> S 546A *Crimes Act 1900*.

## 1.2 Public concern about gang activity

There were a series of very public and highly publicised incidents involving the members of Outlaw Motorcycle Gangs (OMCGs) in 2008-2010, culminating in a brutal fight at Sydney Airport between members of the Hell's Angels and Comancheros OMCGs, that resulted in the death of a Hell's Angel associate. In response to the public discussion and extensive media coverage, the Government passed new consorting laws, alongside a series of other legislative instruments aimed at frustrating and preventing OMCG activity.<sup>8</sup> The Parliamentary Secretary at the time said the legislation 'modernises the offence of consorting as well as extending and clarifying its application.'<sup>9</sup>

The *Crimes Amendment (Consorting and Organised Crime) Act 2012* inserted the new consorting powers in Part 3A, Division 7 of the Crimes Act. The Act:

- made consorting an indictable offence
- increased the maximum penalty from a maximum of six months imprisonment and/or a fine of \$400 to three years imprisonment and/or a \$16,500 fine
- extended the meaning of consorting to include communication by electronic means
- provided guidance on the meaning of 'habitually consorting'
- included six possible defences where the former offence had none.

### 1.2.1 Ombudsman review

The Ombudsman<sup>10</sup> was tasked with reviewing the operation of the consorting laws over a three-year period. He issued his final report in April 2016, making 20 recommendations aimed at increasing 'the fairness of the operation of the consorting law, and to mitigate the unintended impacts of its operation on people in circumstances where there is no crime prevention benefit, or where the crime prevented is relatively minor.'<sup>11</sup>

The NSW Government accepted that further safeguards should be introduced whilst balancing the requirement of police to effectively respond to serious and organised criminal networks. Nineteen of the Ombudsman's 20 recommendations were either supported, supported in part, or supported in principle.

The Ombudsman emphasised that the consorting law must be focussed:

... on serious crime, is closely linked to crime prevention, and is not used in relation to minor offending such as summary offending. This framework is consistent with the overarching intention of Parliament that the consorting law adequately equips police to combat serious and organised crime and criminal groups.<sup>12</sup>

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<sup>8</sup> These include: participation in a criminal group (s.95 of the *Crimes Act 1900*); a criminal organisation declaration (ss.5(1) and 7(1) of the *Crimes (Criminal Organisations Control) Act 2012*); associating with a member of a declared criminal organisation (s.26 of the *Crimes (Criminal Organisations Control) Act 2012*).

<sup>9</sup> The Hon David Clarke, MLC New South Wales *Parliamentary Debates*, Legislative Council, 7 March 2012, 9091.

<sup>10</sup> At the commencement of the review, Mr Bruce Barbour was the NSW Ombudsman. When the final report was released in April 2016, Professor John McMillan was the Acting NSW Ombudsman.

<sup>11</sup> NSW Ombudsman, *The Consorting Law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*, April 2016, iii.

<sup>12</sup> *Ibid*, iii.

## 1.2.2 Recent legislative amendments

In response to the Ombudsman's recommendations, the Government introduced the *Criminal Legislation Amendment (Consorting and Restricted Premises) Act 2018* (the amending Act). The amending Act made the following amendments to Part 3A, Division 7 of the Crimes Act:

- providing that 'indictable offence' includes an indictable offence committed in another jurisdiction
- excluding the application of the legislation to children under the age of 14 years
- providing timeframes for the duration of official consorting warnings to six months for persons under 18 years and for two years for persons 18 years and over
- providing clarity around the elements of the consorting warning
- providing extra defences such as: compliance with directions from the State Parole Authority and Corrective Services officers, engaging in welfare services or transitory accommodation arrangements
- extending the definition of 'family members' to recognise kinship systems of Aboriginal communities, and
- requiring the Commission to review the operation of the amendments after three years.<sup>13</sup>

When the amending Act was introduced, the then Attorney General stated that the amendments 'will continue to ensure police are able to respond effectively to the threat caused by serious and organised crime, including OMCs, while at the same time addressing concerns raised by the Ombudsman about the operation of some powers.'<sup>14</sup>

The amending Act was passed without amendment and with limited debate. One member noted that consorting laws 'have had a long, chequered, unpleasant and contested history.'<sup>15</sup>

The current consorting law is included at Appendix A.

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<sup>13</sup> Clause 88 of Schedule 1, Part 36 of the Crimes Act.

<sup>14</sup> The Hon Mark Speakman MP, New South Wales Parliamentary Debates (NSWPD), Legislative Assembly, 19 September 2018.

<sup>15</sup> The Hon Adam Searle MLC, NSWPD (Hansard), Legislative Council, 26 September 2018.

## 1.3 Continuing concerns about consorting laws

Consorting differs from most other criminal offences, in that it is a pre-inchoate offence.<sup>16</sup> This means that liability is imposed on an individual before they have done anything to prepare for or commit an offence that has resulted or may result in some form of harm. This means:

The offence is not being with thieves on occasions when it may be suspected that they are about their nefarious occupation, but simply habitually consorting with them; it is not companionship in thieving, but with thieves.<sup>17</sup>

This in turn means that ‘the conduct to be punished may be quite innocent’ and as a result ‘the wisdom and even the justice of such a law may be, and often has been, questioned.’<sup>18</sup>

This element of the consorting laws has created concern about the potential for police misuse and particularly the risk that the laws will have a detrimental impact on the most vulnerable members of the community.

The Commission received four submissions in response to its discussion paper released in October 2021. All submissions restated the concerns traditionally expressed about the potential detrimental impact of consorting laws, with a particular focus on the potential impact of the laws on individual liberty and freedom of association. The submissions also questioned whether there were real benefits relating to serious organised crime.<sup>19</sup>

The Centre for Crime, Law and Justice raised a concern which was consistent across all the submissions we received:

... Government and NSWPF have expanded the original purpose of the 2012 amendments from organised crime to general crime prevention, notwithstanding their agreement in principle that policy and intelligence be directed to prioritising serious and organised crime.<sup>20</sup>

Several submissions also noted continuing concerns about the potential for the consorting laws to impinge upon the right to freedom of assembly and association under international instruments.<sup>21</sup>

All of the submissions received called for the repeal of the consorting laws. The Public Interest Advocacy Centre noted that if the laws were not repealed, the Ombudsman’s full suite of recommendations should be implemented, particularly three key recommendations:

- Remove children and young people from the application of the consorting law
- Proscribe the use of the consorting law to address and prevent minor offending
- Clarify that the intent of consorting laws was to prevent serious crime.<sup>22</sup>

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<sup>16</sup> Ashworth, Andrew and Zedner, Lucia, *Preventative Justice* (Oxford University Press, 2014) 98-9.

<sup>17</sup> *Gabriel v Lenthall* [1930] SASR 318, 327.

<sup>18</sup> *Jan v Fingleton* (1983) 32 SASR 379.

<sup>19</sup> Submissions from the NSW Bar Association, the UNSW Centre for Crime, Law and Justice, Aboriginal Legal Service (NSW/ACT), the Public Interest Advocacy Centre.

<sup>20</sup> Letter from the UNSW Centre for Crime, Law & Justice, 4 February 2022.

<sup>21</sup> For example, the Aboriginal Legal Service (NSW/ACT) Limited highlighted Articles 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR).

<sup>22</sup> Public Interest Advocacy Centre, *Submission to the Law Enforcement Conduct Commission: Review of the Amendments to the consorting law under Part 3A Division 7 of the Crimes Act 1900*, 2.

These continuing concerns are one of the reasons the Commission has considered and included additional comments on certain issues that are not directly related to the operation of the amendments at the conclusion of this report. There is no further external review built into the consorting law, and with the limited number of prosecutions brought during the reporting period, it is not possible to fully assess any potential future detrimental impact of the laws.



## 2. How we did our review

### 2.1 Information from NSW Police Force

#### 2.1.1 COPS records

The NSW Police Force provided the Commission with records relating to all uses of the consorting law during the review period. This included statistical information drawn from the Computerised Operating Policing System (COPS) as well as the COPS records relating to all 16,480 warnings issued over the three year review period.

The Commission did not request access to officer notebooks, in which officers write contemporaneous notes of their interactions while on duty. The NSW Police Force indicated that the COPS record was the most accurate written record of the warning, and should be viewed as the formal written record to provide the reasons for warnings.<sup>23</sup> The NSW Police Force also stated that collating even a sample of the notebooks for a three-year period would be a large-scale task with little benefit.<sup>24</sup> The Commission has operated on this basis, and has relied on the COPS record as the primary written record of the interaction leading to a consorting warning.

#### 2.1.2 Body worn video

The Commission identified COPS records that indicated there was associated body worn video (BWV) footage of the warning.<sup>25</sup> BWV footage provides a real time record of interactions between police officers and the public, and is a useful accountability tool. The Commission reviewed 2,115 event narratives, and focussed on BWV for oral warnings issued by general duties officers, as the warnings issued relating to OMCG and other gang activity largely followed the same process, with a warning read to the person warned and a written warning accompanied by photographs provided, along with the NSW Police Force consorting fact sheet.<sup>26</sup> We reviewed 92 pieces of BWV footage over the course of the review.<sup>27</sup>

#### 2.1.3 Consultation with Commands

The Commission identified the Police Area Commands (PACs) and Police Districts (PDs) that made the most use of the consorting laws. A number of PACs also had comparatively low numbers of consorting warnings during the reporting period compared to neighbouring PACs. Between March and September 2022, the Commission consulted with 8 PACs.<sup>28</sup> These included some PACs with high and some with low numbers of warnings. We spoke to the Commander, Crime Manager and managers of proactive and high visibility policing units within these PACs to better understand:

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<sup>23</sup> Letter from the Commander of State Crime Command to the LECC Commissioner, 3 August 2021.

<sup>24</sup> Ibid.

<sup>25</sup> The Commission reviewed an extracted record for each COPS event relating to a consorting warning. As there is not a field that records whether there is associated body worn video footage, the Commission identified records that referenced body worn video. This information was included within the narrative description that formed part of the COPS event.

<sup>26</sup> This publicly available fact sheet is accessible through the NSW Police Force website. It was developed in response to a recommendation from the Ombudsman. The fact sheet is reproduced at Appendix D.

<sup>27</sup> A number of the requested pieces of BWV footage were no longer available, as the footage had not been appropriately linked to the COPS record. This meant the footage was only kept for 6 months.

<sup>28</sup> The Commission met with the following PACs and PDs: Bankstown, Inner West, Mount Druitt, Hunter Valley, Leichhardt, Oxley, Ku Ring Gai and Kings Cross.

- the application of the amendments
- how the consorting law is used in the PAC
- what guidance, direction and training are provided to officers about using the consorting law
- how and when the PAC expect their officers to use their discretion when considering issuing a consorting warning
- how warnings are recorded
- what quality assurance process is in place to check consorting warnings
- what considerations influence the decision to prosecute someone for consorting.

Following these meetings, a number of PACs provided the Commission with additional guidance and operational materials, including training slides, template correspondence and notebook stickers that have been used to assist officers issuing consorting warnings in the field. A guidance sheet developed by one PAC is included at Appendix G.

We also met with the Commander, an intelligence analyst and several officers who are part of the Raptor Squad.<sup>29</sup> We discussed the process they followed for issuing consorting warnings, how Raptor works with PACs, and the impact of issuing warnings on organised criminal activity.

#### 2.1.4 Guidance and training materials

The NSW Police Force Consorting Standard Operating Procedures (2019 consorting SOPs) are the central guidance for officers around how, when and why to:

- issue a consorting warning
- move to charge a person with consorting.

The Commission has referenced the 2019 consorting SOPs throughout the review. The NSW Police Force have been conducting a review of the SOPs during the reporting period. We provided initial feedback to inform the review based on the information we collected. The NSW Police Force provided the Commission with updated consorting SOPs (2022 consorting SOPs) in December 2022. These integrate the Commission's observations, as well as the Ombudsman's earlier recommendations.

At the end of 2022, the NSW Police Force also developed and started using a consorting incident form for officers in the field. This is designed to walk officers through issuing a warning. The incident form is included at Appendix E.

The NSW Police Force has also developed a case management framework for all consorting warnings issued. It requires a level of senior supervision and ongoing scrutiny for all warnings issued. The NSW Police Force has indicated that this model will address several of the Commission's concerns around invalid warnings. This system was implemented at the end of 2022, and was not in place during the review period.

The NSW Police Force provided the Commission with access to the consorting law online training course (consorting course) available to officers through the Police Education and Training Environment (PETE). The PETE system went live on 2 November

<sup>29</sup> Raptor Squad forms part of State Crime Command. Established in 2009 as Strike Force Raptor, it is described by the NSW Police Force as a 'proactive, high-impact operation targeting OMCs and any associated criminal enterprises.'  
[https://www.police.nsw.gov.au/can\\_you\\_help\\_us/reporting\\_bikie\\_gang\\_activity](https://www.police.nsw.gov.au/can_you_help_us/reporting_bikie_gang_activity)

2020. By the end of the review period, 258 officers from across NSW had completed the consorting course. This increased to 489 officers by the end of October 2022.<sup>30</sup> During the review period 856 officers issued consorting warnings. We were also able to access and review the NSW Police Force Six Minute Intensive Training (SMIT) courses on consorting. These online materials are aimed at giving officers relevant information and guidance quickly and easily. A scenario based consorting SMIT is included at Appendix H.

## 2.2 Discussion paper and submissions

The Commission released a public discussion paper (the paper) in October 2021. The paper outlined the usage of the consorting law in the first half of the reporting period, identified a number of areas of concern from the initial data, and provided an update on the implementation of the Ombudsman's earlier recommendations. We received submissions from the following organisations:

- Aboriginal Legal Service (NSW/ACT)
- Public Interest Advocacy Centre
- NSW Bar Association
- University of NSW Centre for Crime, Law and Justice.

We have used these submissions to inform a number of recommendations, particularly those relating to the application of the consorting laws to comparatively less serious potential criminal activity.

## 2.3 Court transcripts and related information

The Commission requested court transcripts from the relevant NSW Local Court for all people charged with consorting. We received 10 transcripts and reviewed these to determine if any of the amended defences applied and whether the Magistrate made any comment on the application of the consorting law.<sup>31</sup>

The Commission also has access to JusticeLink, the electronic system linking all NSW courts. We reviewed JusticeLink to confirm the conviction status of people named in warnings, and particularly those who went before the Children's Court. We could then identify warnings that appeared to be invalid based on the court outcomes of the people named in warnings. In total we identified 57 potentially invalid warnings and we shared this information with the NSW Police Force.

The 2019 and 2022 consorting SOPs state that all invalid warnings identified must be removed from COPS and the person issued with the warning should be told the warning is no longer in force. The NSW Police Force will review the list and take appropriate action.<sup>32</sup>

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<sup>30</sup> Further information about the officers who completed the PETE training course is included in chapter 3.

<sup>31</sup> While there were 12 prosecutions, there were only 10 transcripts as one person was charged twice, with one matter withdrawn at Court, and another person did not attend Court, and a warrant was issued for his arrest.

<sup>32</sup> Letter from Commander of State Crime Command to the LECC Commissioner, December 2021.

## 2.4 Academic literature and developments in other jurisdictions

There has been a great deal of academic discussion of legislative and policing responses to OMCGs and organised crime more broadly. The Commission has collected and reviewed relevant material, and it has informed the review where relevant.

The Commission has also reviewed developments in consorting laws and responses to organised crime in other jurisdictions. This has included new Acts, legislative amendments and relevant Parliamentary and departmental reviews.

## 2.5 Parliamentary debate

The Commission has reviewed the NSW Parliamentary Hansard relating to the 2012 legislative changes as well as the debate before the amendments that are the subject of this review. The Commission has also reviewed Parliamentary debate that has accompanied the introduction of consorting legislation in other jurisdictions. This provided useful context, particularly around the consideration of the potential impact on vulnerable members of the community.

## 3. Use of consorting laws

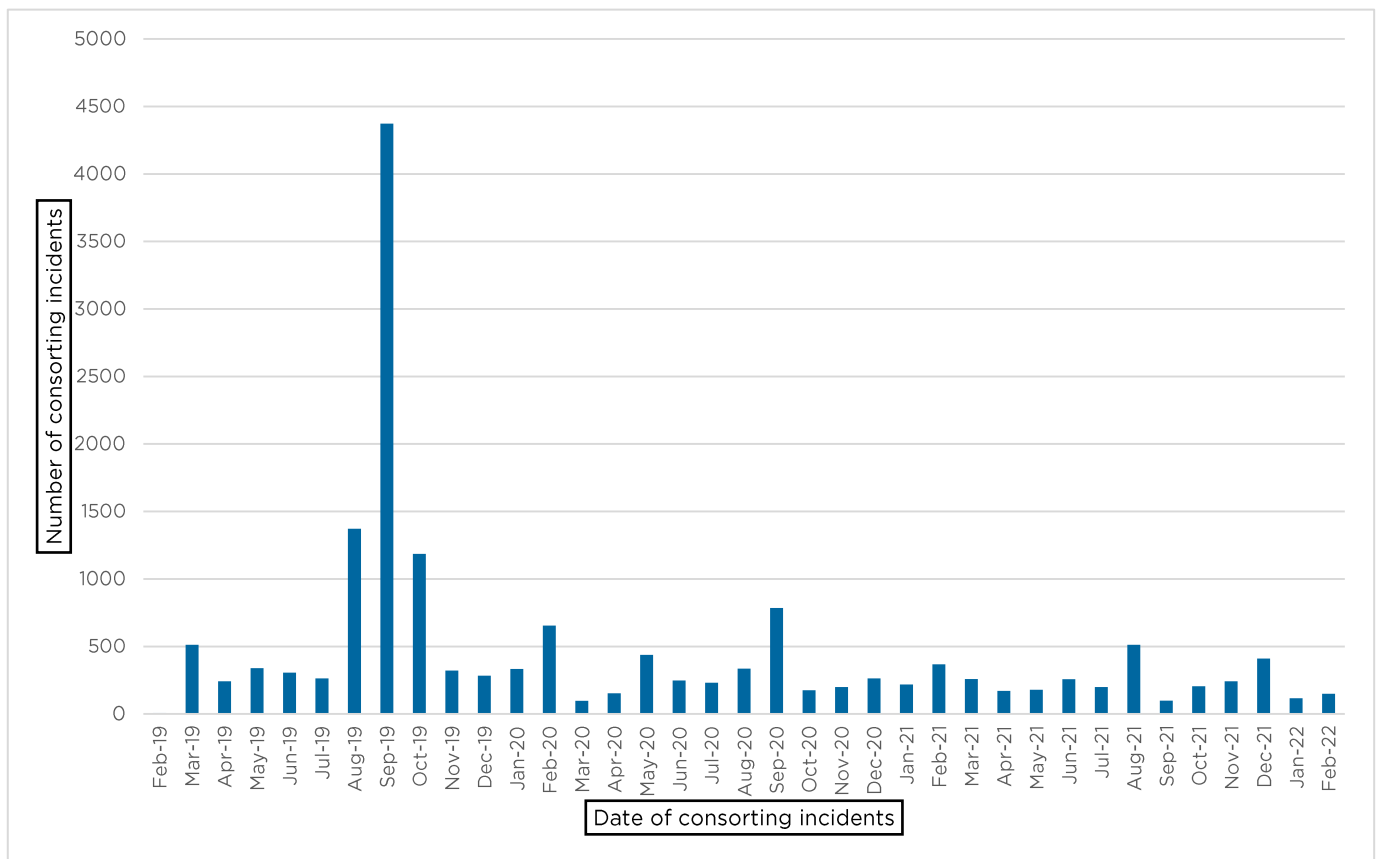
The NSW Police Force provided the Commission with data about the use of the consorting laws for the review period, which ran from February 2019 to February 2022. This chapter provides an overview of how, where and against whom the consorting law was used. Relevant data is also referenced in other chapters of the report dealing with particular amendments (and other issues) identified by the review.

### 3.1 Number of warnings

During the review period:



Graph 1: Consorting incidents by month

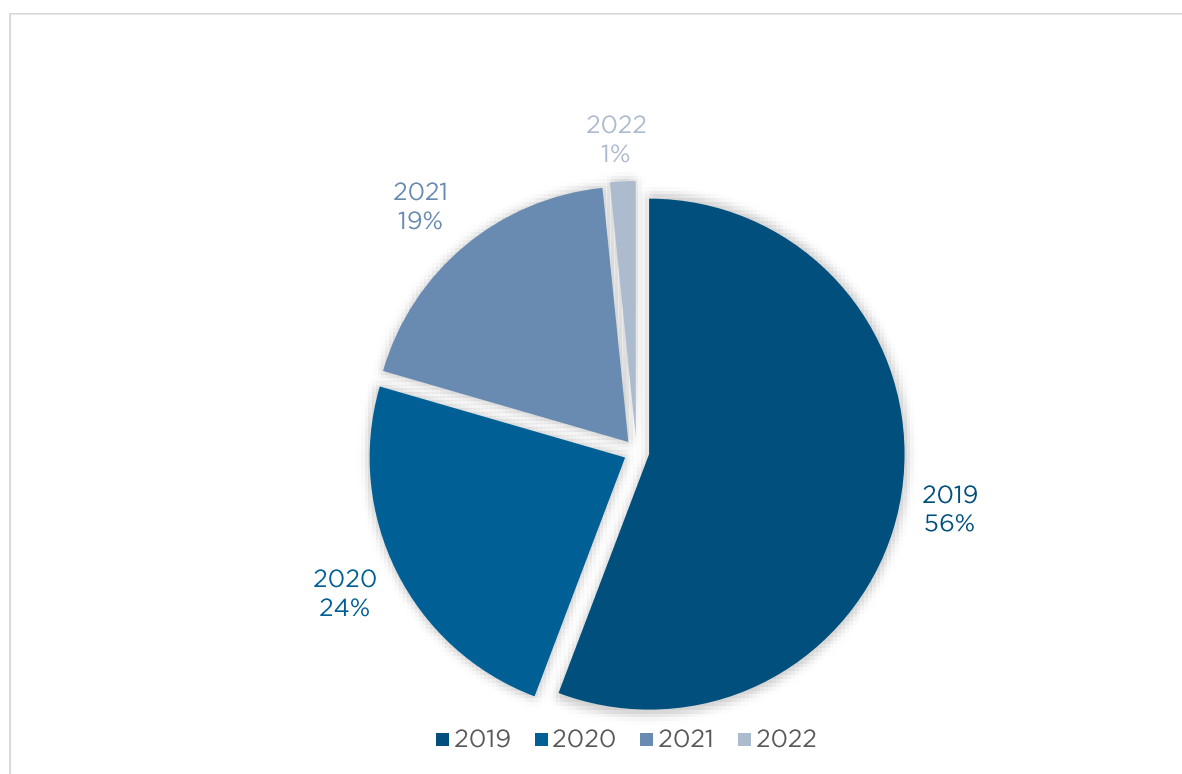


Source: NSW Police Force – COPS (merged dataset, 1 February 2019 to 30 February 2022).

Graph 1 shows that a comparatively large number of warnings were issued in September 2019. This was due to an operation by the Raptor Squad which resulted in members and known associates of an OMCG receiving warnings relating to multiple other members of this OMCG, and known associates.

There was a reduction in the number of warnings issued during the peak of the COVID-19 pandemic. This is discussed in more detail at 7.4.

**Graph 2: Consorting incidents by year**



Source: NSW Police Force – COPS (merged dataset, 1 February 2019 to 30 February 2022).

### 3.2 Where warnings were issued

Table 1 shows the state-wide distribution of consorting warnings issued. A map showing the location of the NSW Police Force Regions is included at Appendix B, along with a more detailed breakdown of the warnings across each region by PAC/PD.

**Table 1: Number of warnings issued by NSW Police Force Region**

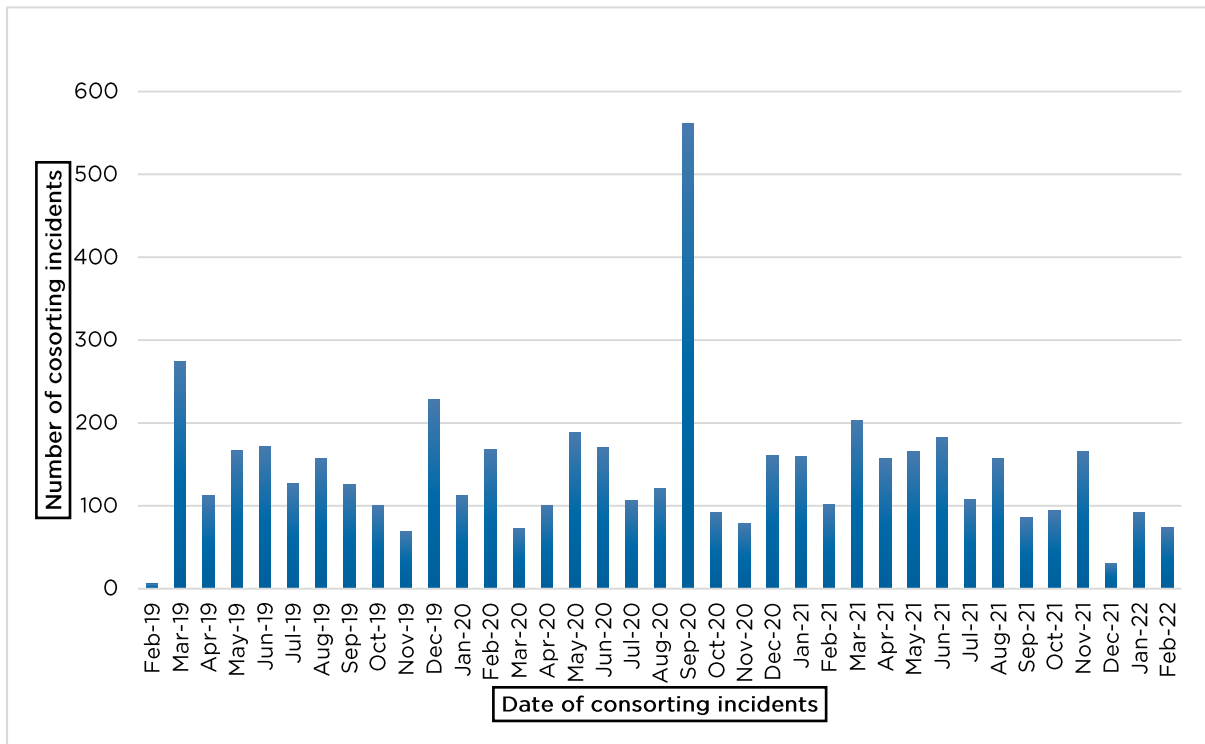
Warnings Issued by Region	Number of Warnings Issued
State Crime Command	11,050
Northern Region	1,381
Central Metropolitan Region	1,314
North West Metropolitan Region	1,047
Western Region	542
Southern Region	540
South West Metropolitan Region	415
Public Transport & Public Safety	191
<b>Total</b>	<b>16,480</b>

Source: NSW Police Force – COPS (merged dataset, 1 February 2019 to 30 February 2022).

One PD in the Northern Region used the consorting laws to target increased OMCG activity, increasing the number for the Region as a whole. The PD issued 426 warnings in September 2020, resulting in an increase in warnings issued by general duties officers in September 2020 which is shown in Graph 3 below.

Almost half of the warnings issued in the Central Metropolitan Region were issued by one PAC. This PAC did not issue any pre-emptive warnings<sup>33</sup> relating to organised criminal activity, and unlike several other PACs with comparatively high warning numbers, they did not work with State Crime Command to issue warnings. Most of the warnings were issued on the spot. The way this PAC used the laws is discussed in more detail in Case Study 13.

**Graph 3: Consorting incidents by month – General duties officers**



Source: NSW Police Force – COPS (merged dataset, 1 February 2019 to 30 February 2022).

<sup>33</sup> A pre-emptive warning is issued naming people convicted of an indictable offence. This type of warning is usually issued in writing, often accompanied by photographs of the people named. Pre-emptive warnings are usually issued by the Gangs Squad within State Crime Command.



**Table 2: Use by general duties police by Region**

Region	No. of warnings	No. of incidents	No. of people warned	No. of people warned about	No. of people both warned and warned about	Total No. of people	Average No. of warnings per person warned
Central Metropolitan	1314	1040	793	812	504	1101	1.66
North West Metropolitan	1047	474	639	485	384	740	1.64
Northern	1381	415	354	603	142	815	3.90
South West Metropolitan	415	179	167	261	114	314	2.49
Southern	540	352	300	371	205	466	1.80
Western	542	274	175	256	214	217	3.10
<b>Total</b>	<b>5239</b>	<b>2734</b>	<b>2428</b>	<b>2788</b>	<b>1563</b>	<b>3653</b>	<b>2.16</b>

Note: The number of people is not mutually exclusive across all regions. The count is not unique as individuals may be warned or have others warned about them in more than one Region.

Source: NSW Police Force – COPS (merged dataset, 1 February 2019 to 30 February 2022).

Table 3 provides a breakdown of warnings issued by the rank of the officer who issued the warning. The highest number of warnings was issued by those at a Senior Constable rank. This is due both to the rank of those seconded to State Crime Command as well as the rank of officers responsible for conducting proactive and high visibility policing operations.

**Table 3: Rank of officer issuing consorting warning – all officers**

Rank of Issuing Officer	Number of Consorting Warnings Issued
Chief Inspector	4
Inspector	8
Senior Sergeant	1
Sergeant	426
Senior Constable	12,301
Constable	3,575
Probationary Constable	112
Unknown*	53
<b>Total</b>	<b>16,480</b>

\*These warnings were issued by 5 officers, with 49 issued by the Raptor Squad to 3 people. (One person received a warning naming 34 people, the second named 11, and the third named 4). The remaining 4 warnings were issued to 4 people about individuals by general duties officers.

Source: NSW Police Force – COPS (merged dataset, 1 February 2019 to 30 February 2022).

The NSW Police Force provided a breakdown of who completed the PETE online consorting training and accessed the consorting SMIT as of 30 October 2022. Table 4 provides a breakdown of the rank of those who have completed the PETE training and Table 5 lists the number of officers who have completed the PETE training course by Region.

**Table 4: Officers completed PETE consorting course – by rank**

Rank	Number of officers
Assistant Commissioner	1
Inspector	1
S/Sergeant	1
Sergeant	29
Sen Constable	265
Pro Constable	15
Constable	110
Unsworn	67
<b>Total</b>	<b>489</b>

Source: NSW Police Force People and Capability Command.

**Table 5: Officers completed PETE online training course – by Region/Specialist Command**

Region	Number of officers
Central Metropolitan	90
North West Metropolitan	78
Northern	40
South West Metropolitan	76
Southern	36
Western	43
Capability Performance & Youth	1
Communications & Security Command	5
Counter Terrorism & Special Tactics	14
Digital Technology and Innovation	1
FETS Identification Services	10
Finance & Business Services	2
Metropolitan Field Operations	1
People Capability Command	2
Police Prosecutions & Licensing	4
Police Transport & Public Safety	13
State Crime Command	13
State Intelligence Command	52
Traffic & Highway Patrol Command	8
<b>Total</b>	<b>489</b>

Source: NSW Police Force People and Capability Command.

### 3.3 Types of consorting interaction

The use of consorting laws are recorded in COPS in the following ways:

- Consorting warning – pre-emptive
- Consorting warning – on the spot
- Consorting warning – subsequent or retrospective
- Consorting booking.

A pre-emptive warning is usually issued to someone before police have seen them in the company of (or in contact with) the person or people they are warned about. These warnings are almost always issued in writing, name more than one person and are accompanied by photographs of the people named in the warning. Pre-emptive warnings are most commonly issued by State Crime Command officers, and relate to the members and known associates of OMCGs and several other organised criminal organisations. The number of pre-emptive warnings is the highest of the various types because a pre-emptive warning is usually a series of warnings about a group. An example of a pre-emptive consorting letter used by a PAC is included at Appendix F.

The second type of warning is ‘on the spot’. These warnings are most commonly issued by general duties officers, rather than specialist squads. These warnings usually only relate to one or two other people, and the primary record of these warnings is the COPS event created after the warning is issued. If an officer has activated their BWV, this also provides an accurate record of the warning issued. This should be linked to the COPS event to ensure the footage is stored and is easily accessible.

Subsequent or retrospective consorting warnings are issued after the consorting incident has occurred. These are less common, and either occur:

- after an officer has returned to the station and reviewed the conviction history of those they have had contact with during their shift, or
- after reviewing CCTV or other footage of individuals together.

A consorting booking follows an initial warning. It is usually a notation in police records that a person warned has been seen with a convicted offender. Police do not always tell the person warned that they have been seen with a convicted offender. Bookings are usually recorded in relation to OMCG members and close associates when there is clear evidence they have been together and the meeting was not coincidental. During the review period, these bookings often relied on CCTV or video footage from licenced premises. In one case, the booking was based on photographs uploaded to the Facebook page associated with a particular chapter of an OMCG.

Table 6 below shows how many consorting warnings were issued for each of these categories.

**Table 6: Type of consorting warning issued**

	Number of Warnings
Consorting Warning – on the spot	3,568
Consorting Warning – pre-emptive	12,430
Consorting Booked	284
Consorting Warning – Subsequent/Retrospective	72
Other*	157
<b>Total</b>	<b>16,480</b>

\*This number is often a result of other primary actions taken in a COPS event. This could include issuing a Court Attendance Notice, Child Protection Register Reporting obligations, and other factors.

Source: NSW Police Force – COPS (merged dataset, 1 February 2019 to 30 February 2022).

Most people warned during the reporting period were only involved in one consorting incident. This includes those who were warned and those warned about. This means they were either issued with a warning or named in a warning once. Seventy-seven percent of people were involved in five or less consorting incidents.

Table 7 provides a breakdown of the number of times people have been involved in a consorting incident.

**Table 7: People involved in more than one consorting incident**

Consorting Occasions	Number of People	%
One occasion	1,884	44.14
Between 2 and 5	1,390	32.57
Between 6 and 10	671	15.72
Between 11 and 20	421	9.86
Between 21 and 30	231	5.41
Between 31 and 40	185	4.33
Between 41 and 50	102	2.39
Between 51 and 60	30	0.70
Between 61 and 70	8	0.19
More than 70	1	0.02

Source: NSW Police Force – COPS (merged dataset, 1 February 2019 to 30 February 2022).

## 4. Operation of amendments to consorting laws

### 4.1 Indictable offences in other jurisdictions

The 2019 amendments to Part 3A division 7 of the Crimes Act expanded the types of indictable offences that fell within the consorting law to include offences that were committed outside New South Wales:

For the purposes of this Division, as **indictable offence** includes an offence committed in another jurisdiction that would be an indictable offence if committed in this jurisdiction.<sup>34</sup>

When the amendment Act was debated, the then Attorney General stated that:

Outlaw motorcycle gangs and other organised criminal groups do not confine their activities within the borders of a single State or Territory.<sup>35</sup>

#### 4.1.1 Relevant uses in the reporting period

There were 27 people named in warnings based on an interstate conviction. No prosecutions have been brought based on warnings about a person who has only been convicted of indictable offences in another jurisdiction.

#### 4.1.2 Challenges for general duties officers

To enter a warning in COPS, the person named in the warning must have a conviction recorded for an indictable offence. Officers can override this if they have information about an interstate conviction that they believe would constitute an indictable offence if committed in NSW.

Officers attached to Raptor Squad said that one of the most important elements for issuing a consorting warning is ensuring that the conviction history of the people named in the warning is accurate. An intelligence analyst reviews all information holdings for each person named in a warning to ensure that any conviction relied upon as a basis for the warning is accurate. As an analyst noted during consultation, this ensures any decision to charge a person is based on valid warnings and bookings.

For those they believed had been convicted of an offence in another jurisdiction, Raptor Squad said they would contact the equivalent anti-gang unit within the relevant interstate police force to confirm the details of the conviction.

Conversely, general duties officers issuing oral warnings in the field do not have the interstate contact, or the time, to thoroughly check the conviction history of a person to be named in a warning.

There were a small number of matters during the review period where general duties officers relied on an interstate conviction in order to issue a warning.

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<sup>34</sup> S. 93W (2) *Crimes Act 1900*

<sup>35</sup> The Hon Mark Speakman, NSWPD (Hansard), Legislative Assembly, 19 September 2018.

The Commission has identified one person who was named in 12 different warnings. The information that was added to the COPS record by the issuing officer lists the person's offence in Queensland as 'contravene direction or requirement.'<sup>36</sup> The Commission believes the equivalent offence in NSW is the failure to comply with a lawful direction, which is a summary offence.<sup>37</sup> We have provided the 12 warnings to the NSW Police Force as part of a list of warnings we believe are invalid.

Ultimately it will be a matter for a court to decide if an interstate offence would constitute an indictable offence if it was committed in NSW. However, if someone adheres to an invalid warning, it could still have a detrimental impact on his or her life and community connections for up to two years.

Some of the PACs we consulted said they work closely with a police prosecutor when issuing warnings as part of 'organised' operations. As there are only a small number of warnings naming someone who is convicted for an indictable offence in another jurisdiction,<sup>38</sup> the Commission believes that it would be appropriate for the NSW Police Force to include an additional quality assurance stage for such warnings.

The Commission initially suggested that each warning that relied on an interstate conviction should be reviewed by a police prosecutor. This would provide a greater level of certainty that the offence for which a person named in the warning was convicted would have been an indictable offence in NSW.

If, after review, police learn that the offence would not constitute an indictable offence in NSW, the warning should be removed from COPS and the person issued with the warning should be contacted in writing to tell them the warning is no longer in force. This conforms to the current NSW Police Force process for dealing with invalid warnings.<sup>39</sup>

The NSW Police Force told the Commission it did not support this approach.<sup>40</sup> Instead, it pointed to requirements in the 2022 consorting SOPs which state that for interstate offences officers will need to verify and record the offence on COPS and obtain a charge certificate. The NSW Police Force also said that the case management framework introduced at the end of 2022 requires the criminal investigator to confirm the appropriateness of the warnings, including verifying the validity of the interstate offence. It is not clear if this verification will be required at the point of issuing a warning or moving to charge.

The Commission considers it is important for the interstate convictions to be reviewed and verified at the time the warning is issued – whether this is done by a prosecutor, or another officer.

### **Recommendation 1:**

**The NSW Police Force should ensure that all warnings naming people convicted of an offence in another jurisdiction that would be an indictable offence if committed in NSW are reviewed and verified at the time the warning is issued.**

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<sup>36</sup> This would appear to be a reference to s.791 of the *Powers and Responsibilities Act 2000* (Qld)

<sup>37</sup> *Law Enforcement (Powers and Responsibilities) Act 2002*

<sup>38</sup> 27 people in the three year review period.

<sup>39</sup> NSW Police Force, *Consorting Standard Operating Procedures*, December 2022

<sup>40</sup> NSW Police Force response to consultation draft of the final review report, 19 January 2023.

## 4.2 Children and young people

The amending Act made two important changes to the consorting law as it relates to children and young people. The first was making it unlawful to issue a warning to a person under the age of 14. The second was to make warnings issued to anyone under the age of 18 valid for six months (and not two years). The Ombudsman had recommended that the Act be amended to exclude all those aged 17 or under.

The 2022 consorting SOPS provide guidance about prosecutions of those under the age of 18 for consorting (emphasis added):

Criminal proceedings are not to be commenced for consorting:

1. **Against children under the age of 14.**
2. **Against children under 16 unless exceptional circumstances exist.**
3. Unless the convicted offender has been convicted within the last 10 years.

Police Prosecutions Command must be consulted when:

4. The POI is under 18.
5. The occasions of consorting occurred more than six months apart.

This guidance relates only to charging, but not to issuing warnings.

### 4.2.1 Uses in the reporting period

In line with the amendments, no young people under the age of 14 were warned for consorting.

The number of young people over the age of 14 and under 18, who were subject to the consorting law during the review period is also far lower than during the Ombudsman's review period. During the Ombudsman's review period, 325 young people were warned and 251 were warned about.<sup>41</sup> During the Commission's review period, 48 young people were warned and 11 were warned about.

**Table 8: Age and number of young people issued with a consorting warning**

Age	Total
14	6
15	11
16	10
17	21
<b>Total</b>	<b>48</b>

Source: NSW Police Force – COPS (merged dataset, 1 February 2019 to 30 February 2022).

Of the 48 young people issued with a warning, 12 were Aboriginal.

<sup>41</sup> NSW Ombudsman, *The Consorting law: Review of the operation of Part 3A, Division 7 of the Crimes Act 1900*, April 2016. During the Ombudsman's review period, warnings were issued to children and young people between the ages of 13 and 17.

**Table 9: Age and number of young people named in a consorting warning**

Age	Total
15	1
16	2
17	8
<b>Total</b>	<b>11</b>

Source: NSW Police Force – COPS (merged dataset, 1 February 2019 to 30 February 2022).

The young people issued with warnings interacted with police in a range of settings for different reasons.

Police issued most warnings in public places while addressing risks relating to drug activity and particularly drug possession. For example, a PAC in Northern Sydney issued a series of warnings to 4 young people in company with an older person with a history of criminal activity and convictions for indictable offences.

When we spoke with officers attached to that PAC, they said that they had been dealing with a range of drug and property crime at that time involving young people. The PAC has not made use of the consorting laws in the same way within the remainder of the reporting period, and the Commander noted that he would only see the law being used in the future in the PAC if there was ever an escalation in OMCG activity.

When the amending Act was introduced limiting the consorting law’s application to those 14 years and older, the then Attorney General noted that:

Excluding people under the age of 18 from the consorting law may also result in certain young people being more susceptible to exploitation by organised crime groups.<sup>42</sup>

Of the 48 young people warned, 4 were issued warnings by officers attached to the State Crime Command. Three were aged 17 at the time they were warned, and one was aged 15. Case Study 1 below relates to one of those warnings.

During consultation, Raptor Squad officers said that they were rarely involved with people under the age of 18, and could not see any regular circumstances in which they would consider issuing a warning to someone who was aged under 18. They said that they directed most of their warnings to existing gang members and they were aimed at addressing a particular risk, threat or ongoing criminal activity.<sup>43</sup>

#### **Case study 1: Patrols following a shooting**

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Officers from Raptor Squad were patrolling an area following a double homicide nearby that day. They stopped and spoke to a group of four men in and around a parked vehicle that was owned by a member of an OMCG with affiliations to other organised crime groups. One of the people in the car was aged 17 years. Police issued this young person with a warning for the owner of the vehicle. Police did not issue warnings to a number of other people in the car because they were related to each other.

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<sup>42</sup> The Hon Mark Speakman, NSWPD (Hansard), Legislative Assembly, 19 September 2018.

<sup>43</sup> Consultation with Raptor Squad, 7 September 2022.



Case Studies 2 and 3 are examples of warnings issued to young people where the link to preventing serious criminal activity is not clear.

#### Case study 2: **Open drinks and a knife**

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At 10:30pm officers were conducting patrols in a public park on Sydney's North Shore. They saw a group of young people sitting in a grandstand drinking alcohol. Police approached the group and obtained identification from them. Police searched the three young people. While the searches were taking place, the officers saw a knife fall out of one of the young person's pants. He said it was not his. Police cautioned him and placed him under arrest. Police also gave him a consorting warning regarding one of the other young people who was with him on the night. The police record notes that the young person who was placed under arrest could not be named in a warning to the other young people who were present, as his court matter was finalised before he turned 16 and as such could not be entered into the COPS system.

When the Commission checked the conviction history of the young person named in the warning, we identified that he had been found guilty of a number of offences, but no conviction had been recorded. As a result, the warning was not valid. Given the time that has passed, the warning has now expired, but it is not clear from the police records whether the young person was told the warning was only valid for 6 months.

#### Case study 3: **Suspected supply of alcohol to minors**

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Police responded to a report at 5:30pm that a group of young people were being supplied with alcohol in a public park on Sydney's North Shore. Officers spoke with 2 people who were aged 15 and 16 at the time, and an older person who was aged 20. The young people denied drinking, and the older person said he was waiting to meet a friend. Police gave him a move on direction. After checking the older person's history, officers found he had been convicted of an indictable offence. Police issued consorting warnings to both young people.

This interaction took place eight days after the same older person interacted with police at the same park regarding a similar complaint about drinking and anti-social behaviour. At that time, he was with three other people, one of whom was 16. Police had also issued that young person with a consorting warning.

The 2019 consorting SOPs direct officers not to give an official warning 'in relation to' a person aged under 18 unless they are certain a young person has been convicted of a serious children's indictable offence.<sup>44</sup> As noted in the Commission's discussion paper, this category of offences is prescribed in the *Children (Criminal Proceedings) Act 1987*, and includes homicide, aggravated sexual assault and any offence punishable by imprisonment for life or for 25 years.

Of the 48 people aged under 18 issued with a consorting warning, four had a conviction recorded at the time they were issued with a warning. All four were 17 when police issued them warnings. Their convictions were for:

- common assault

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<sup>44</sup> NSW Police Force, *Consorting Standard Operating Procedures*, August 2019, p. 22. It is not clear if this means those named in a warning or those who are issued with a warning.

- deal or traffic in a commercial quantity of illicit drugs
- aggravated robbery.

Of the 11 people aged under 18 who were named in a consorting warning:

- we believe 8 do not have a conviction for an indictable offence
- one was convicted of reckless grievous bodily harm
- one was convicted of supplying a commercial quantity of a prohibited drug
- one was convicted of robbery armed with an offensive weapon.

The NSW Police Force has indicated that it will amend the 2022 consorting SOPs to clearly state that a person under 18 should only be named in a warning if they have been convicted of a serious children's indictable offence.<sup>45</sup> None of the people under 18 named in a warning during the review period would have met this threshold.

#### 4.2.2 Do young people understand the warning?

Warnings issued to people under the age of 18 are usually verbal warnings, and in many cases do not contain the same amount of information about what consorting is as a written pre-emptive warning.

The BWV reviewed by the Commission relating to warnings issued shows that many of the people warned, regardless of their age, do not know what consorting is when they are warned.

The Commission is recommending that the NSW Attorney General consider excluding those under the age of 18 from the scope of the consorting law.

If this does not happen, it would seem appropriate for anyone under the age of 18 to be provided with a written warning following an oral warning. Given the small number of warnings issued to young people, this should not be an onerous obligation on police. It may also ensure that the young person's parent or guardian is aware of the warning and the potential consequence of further warnings.

#### 4.2.3 Were young people convicted?

When discussing the use of the consorting laws in relation to people aged under 18, most PACs noted the challenges of issuing warnings to, and about, young people - particularly the difficulty of establishing the conviction history of the young person at the time of issuing a warning.

The Commission's review of JusticeLink records identified 10 warnings that were issued naming a person for whom the Children's Court chose not to record a conviction.

Case Study 14 outlines an operation conducted by a PAC to respond to high-end car theft and aggravated break and enter offences. Those who were warned or warned about were over the age of 18.

We spoke with the PAC responsible for issuing the warnings, and they told us that they believed there were young people under 18 involved in the criminal activity. They chose not to issue warnings naming people under the age of 18 because they could not be sure whether the young person had a conviction recorded against them.

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<sup>45</sup> NSW Police Force response to consultation draft of the final review report, 19 January 2023.

The recently introduced Western Australian consorting law includes the following definition of a conviction in order for someone to be named in a warning (emphasis added):

**conviction** —

(a) means a finding of guilt, or the acceptance of a plea of guilty, in respect of an offence, whether summarily or on indictment; but

(b) does not include —

**(i) a finding of guilt, or the acceptance of a plea of guilty, in respect of an offence committed by a person before the person had reached 18 years of age; or**

(ii) a spent conviction as defined in the *Spent Convictions Act 1988* section 3;<sup>46</sup>

#### 4.2.4 Is warning young people beneficial?

During the review, the NSW Police Force advised us that issuing warnings for consorting to children and young people:

... allow children and their parents/guardians an opportunity to understand the dangers of associating with substandard peers which is a major factor for recidivism. Far from bringing young people into the system, they are being encouraged to stay out of it.<sup>47</sup>

It is not clear how the NSW Police Force expects oral warnings issued in the field to be communicated to parents, unless the young person themselves chooses to tell their parents.

There are a range of methods available to police to try to prevent young people from being involved with people who may increase their risk of offending, including issuing move on directions. The NSW Police Force has identified intervention programs as being essential in preventing contact with the criminal justice system.<sup>48</sup>

Consorting laws were introduced in order to frustrate and disrupt serious organised criminal activity. When considering whether to exclude anyone under the age of 18 following the Ombudsman's review, the Government indicated it had not done so because:

... the consorting law provides an effective means of deterring young people from serious criminal activity, including warning young people about consorting with convicted offenders who are suspected of recruiting young people for violent extremism or terror-related activities. Consorting warnings are also a useful diversionary tool for young people and can provide a gateway for young people accessing and participating in diversionary programs.<sup>49</sup>

While police may use the contact with a young person as an opportunity to link them to programs or supports, it is not clear how using consorting warnings is diversionary.

If police choose to issue the young person with warnings against consorting with 2 different people and the young person is found to have interacted with those people twice, police may move to charge the young person. Unless there is a relevant defence

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<sup>46</sup> *Criminal Law (Unlawful Consorting and Prohibited Insignia) Act 2021* s 3.

<sup>47</sup> Letter from Commander of State Crime Command to the LECC Commissioner, 3 August 2021.

<sup>48</sup> NSW Police Force, *Youth Strategy* [https://www.police.nsw.gov.au/\\_data/assets/pdf\\_file/0010/616816/YouthStrategy\\_D17.pdf](https://www.police.nsw.gov.au/_data/assets/pdf_file/0010/616816/YouthStrategy_D17.pdf)

<sup>49</sup> NSW Government response to the Ombudsman's *Report on the operation of Part 3A, Division 7 of the Crimes Act 1900* (April 2016)

available to the young person, they will be found guilty. This means that officer discretion, and the Magistrate, are the only safeguards against the young person entering the criminal justice system.

#### 4.2.5 Approaches in other jurisdictions

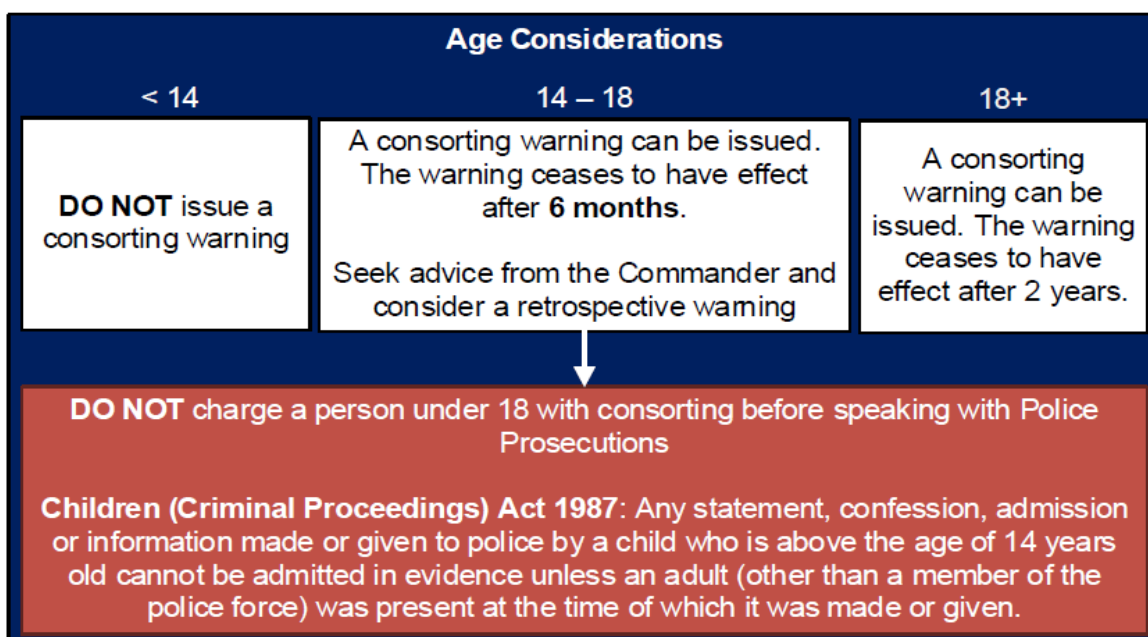
Consorting laws are not applicable to people under the age of 18 in Queensland, Victoria, Western Australia and Tasmania. South Australia and NSW are the only two Australian jurisdictions where someone aged under 18 can be issued with a warning for, or charged with, consorting.

When introducing Western Australia’s updated consorting legislation, the Attorney General noted that the Act was based on the approach in NSW, but had also carefully considered the Ombudsman’s recommendations to avoid harm to vulnerable groups, including those under the age of 18.

While this review has found a substantial reduction in the number of young people who are subject to the consorting law, and none of the young people warned have been charged with consorting, the Ombudsman’s concerns remain valid. The Commission believes NSW should follow the example of the majority of other jurisdictions and preclude people under the age of 18 from the application of the consorting law.

#### 4.2.6 Additional quality assurance check

The 2022 consorting SOPs provide the following guidance when considering issuing warnings to anyone under the age of 18:



Requiring officers to seek advice from their Commander before issuing a warning should reduce the number of warnings issued to people under the age of 18. The 2022 consorting SOPs indicate that if the Commander believes a warning is necessary, the young person will be issued with a retrospective warning. This warning would relate to the contact witnessed by the issuing officer, but would be issued after the contact took place. This is a positive addition to the SOPs. The Commission believes this could be

further strengthened by requiring any retrospective warning issued to a person under the age of 18 to be in writing.

### **Recommendation 2:**

**The Attorney General propose, for the consideration of Parliament, an amendment to preclude the consorting laws from applying to people under the age of 18.**

The NSW Police Force has indicated that it does not support this recommendation, as people under 18 are still involved in ‘coordinated serious criminal activity.’<sup>50</sup> There is no doubt some people under 18 are linked to, and commit, serious criminal offences. However, the majority of the use of the consorting law against young people during the reporting period appears to target activity that does not fit the definition of ‘coordinated serious criminal activity’. As such, its use against those under 18 should be reconsidered.

### **Recommendation 3:**

**If Recommendation 2 is not accepted, the NSW Police Force amend its Standard Operating Procedures to require a JusticeLink check to be conducted either before naming someone under 18 or as soon as practicable after a warning is issued. If this check identifies that the person named did not have a conviction recorded, the warning should be removed from COPS and the person issued with the warning should be told the warning has been withdrawn.**

The NSW Police Force said that the case management model it introduced at the end of 2022 requires a criminal investigator to verify the conviction status of young people named in a warning.<sup>51</sup> Including a JusticeLink check, in the case management process when it is clear the apparent conviction was before a person turned 18 will ensure the person named in the warning has in fact been convicted of an indictable offence.

### **Recommendation 4:**

**The NSW Police Force should amend its Consorting Standard Operating Procedures to require all warnings issued to people under the age of 18 to be in writing.**

### **Recommendation 5:**

**The NSW Police Force should amend its Consorting Standard Operating Procedures and consorting training materials to require officers to ensure someone under 18:**

- a) has understood the warning issued to them
- b) knows the warning is valid for 6 months
- c) understands the definition of habitual consorting.

The NSW Police Force has said that it will update its warning templates to clearly state that warnings issued to people under the age of 18 are valid for 6 months.<sup>52</sup> If police were to issue all warnings given to people under 18 in writing, then the NSW Police Force could include the information at a) to c) above in the template warning letters.

## **4.3 Duration of warnings**

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<sup>50</sup> NSW Police Force response to consultation draft of the final review report, 19 January 2023.

<sup>51</sup> NSW Police Force response to consultation draft of the final review report, 19 January 2023.

<sup>52</sup> NSW Police Force response to consultation draft of the final review report, 19 January 2023.

Section 93X(4) was added to the consorting law by the amending Act:

- (4) An official warning ceases to have effect for the purposes of subsection (1)
- (a) if the warning is given to a person under the age of 18 years – 6 months after the warning is given
  - (b) in any other case – 2 years after the warning is given.

### 4.3.1 Prosecutions during the reporting period

There were 11 people charged with consorting during the review period, with one person charged twice. All of those charged were aged over 18. None of the warnings and bookings referenced in support of the prosecutions were outside of the 2 year timeframe.

### 4.3.2 Information given to those warned

While police adhered to the timeframes in bringing the 12 prosecutions, when we reviewed BWV we saw inconsistency in the accuracy and amount of information provided to people warned about how long the warning was valid in the BWV we have reviewed.

#### 4.3.2.1 Oral warnings

The Commission viewed BWV relating to 63 incidents during which oral consorting warnings were issued by general duties officers.<sup>53</sup> None of these warnings contained accurate information about the duration of the warning.

In some cases, the person warned was told that the warning was in force ‘forever’. In others, the person warned was given inaccurate advice about the length of time for which a warning was valid.

For example in one instance, police told two people issued with warnings that if they were found together three times in the space of a month they would be charged. In most of the oral warnings we have reviewed on BWV footage, police did not give the person warned any information about how long the warning is valid.

The Commission is unable to assess the impact that adhering to a warning may have had on these people’s lives. If people are following the warning, and believe the warning is in place indefinitely, this may well have a detrimental impact. Alternatively, those who are told a warning is only in place for a limited amount of time risk either:

- having a consorting booking recorded against them that they would not be aware of, or
- being issued with additional warnings.

#### 4.3.2.2 Written warnings

While there was some inconsistency in the oral warnings we have reviewed around the information provided about the duration of warnings, the same is not true for written pre-emptive warnings.

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<sup>53</sup> This is a count of incidents and not of footage. A number of incidents included multiple BWV recordings.

We have looked at the template letters used by State Crime Command and certain PACs issuing pre-emptive warnings. These letters clearly state all of the elements of the warning, including its period of validity. An example of a written pre-emptive warning is included at Appendix F. The pre-emptive warnings we have seen issued on BWV have shown that the issuing officer usually:

- hands the person the written warning
- reads the letter to the person being warned
- asks them if they understand the warning, if they have any questions, and
- refers them to the publicly available consorting fact sheet, which is reproduced at Appendix D.

Most of the cases involving a pre-emptive written warning that we reviewed were issued by, or on behalf of, the State Crime Command - particularly Raptor Squad. The people being warned are usually aware of the consorting law, and in some cases, have been issued with earlier warnings. While the Commission has seen evidence suggesting that some people question the need for the warning, or tell police that they no longer have contact with some or all of the people named in the warning, they have a clear record of the duration of the warning.

The 2022 consorting SOPs currently state that, if requested, police should provide the person with a written warning as soon as practicable after an oral warning is issued. The publicly available consorting fact sheet states that ‘after a warning has been issued, New South Wales Police Force may provide information in writing to a person, relevant to a consorting warning to or about the person.’<sup>54</sup> However, not all people would know to ask for a written warning.

The NSW Police Force should amend both the SOPS and fact sheet to state that when issuing an oral warning, police should offer the person warned the opportunity to receive a written warning. This will ensure that all of the relevant aspects of the warning are provided to the person warned, including the length of time the warning is valid.

#### 4.3.2.3 Checklist for officers

The NSW Police Force has indicated that it is considering developing a checklist for officers to work through when issuing and recording a warning on the mobile policing network (mobiPOL). This would ensure officers are stepped through all of the questions they need to ask for and information they need to provide relating to a warning each time one was issued. Similar processes have been included on mobiPOL for issuing infringements. This checklist would ensure everyone issued with a consorting warning is told how long the warning will be valid. The consorting incident form introduced at the end of 2022 takes officers through the key considerations. It is reproduced at Appendix E. At this stage it is not clear whether the form will be provided to the person warned, or if it is added to the officer’s notebook. It is also not clear how it will be accessed and used by officers in the field.

#### 4.3.2.4 NSW Police Force fact sheet

The NSW Police Force developed a consorting fact sheet in response to a recommendation by the Ombudsman. It is available on the NSW Police Force website.

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<sup>54</sup> NSW Police Force, *Fact Sheet About Consorting*, [https://www.police.nsw.gov.au/about\\_us/policies\\_procedures\\_and\\_legislation/fact\\_sheet\\_about\\_consorting](https://www.police.nsw.gov.au/about_us/policies_procedures_and_legislation/fact_sheet_about_consorting)

Police usually give it to people who receive a written pre-emptive warning. It includes information about the length of time a warning is valid.

However, in order for this information to be useful to a person issued with an oral warning, they would need to:

- remember they were issued with a warning
- know that the warning was for consorting
- be told about the fact sheet during their interaction with police.

The BWV footage reviewed by the Commission included some examples where the person given the warning is clearly under the influence of drugs, alcohol or both at the time of being issued with the warning. It is not clear that they have understood the warning, or are aware of the consequence of the warning. Others acknowledge the warning quickly as they appear to want to end their interaction with police as quickly as possible.

In the interactions we saw on BWV, a number of people issued with warnings appeared to have a mental illness or cognitive impairment. This could limit their capacity to understand or remember the warning. The Commission considers that, in these circumstances, the NSW Police Force should instruct police officers to provide the person with a copy of the fact sheet.

#### **Recommendation 6:**

**The NSW Police Force amend its Consorting Standard Operating Procedures and training to require officers to tell those issued with an oral warning that they can request a warning in writing.**

#### **Recommendation 7:**

**The NSW Police Force amend its publicly available consorting fact sheet to clearly state that someone issued with an oral warning can request the warning in writing.**

The NSW Police Force has accepted this recommendation. The NSW Police Force told the Commission that it will update the fact sheet to inform persons warned that they can request the warning in writing.<sup>55</sup> This will assist all persons who are handed the fact sheet.

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<sup>55</sup> NSW Police Force response to consultation draft of the final review report, 19 January 2023.



## 4.4 Wording of a warning

Prior to the 2018 amendments section 93X of the Crimes Act stated:

- (3) An official warning is a warning given by a police officer (orally or in writing) that:
  - (a) a convicted offender is a convicted offender, and
  - (b) consorting with a convicted offender is an offence.

The amending Act replaced that provision with:

- (3) An official warning is a warning given by a police officer (orally or in writing) to the effect that:
  - (a) a certain person is a convicted offender, and
  - (b) habitually consorting with a convicted offender is an offence.

Section 93X of the Crimes Act also states that:

- (2) A person does not **habitually consort** with convicted offenders unless –
  - (a) the person consorts with at least 2 convicted offenders (whether on the same or separate occasions), and
  - (b) the person consorts with each convicted offender on at least 2 occasions.<sup>56</sup>

### 4.4.1 Use during the reporting period

The COPS records we reviewed did not always provide a full record of the information police officers gave to the person warned.

In most cases, the record simply states that once the officers were aware of a conviction for an indictable offence, those with the person were issued with consorting warnings.

When police issue a person with a pre-emptive written warning, the warning letter they receive states that ‘the persons listed are convicted offenders and that habitually consorting with a convicted offender is an offence’. It does not include information about how habitual consorting is defined in the consorting law. While many of those issued with pre-emptive warnings have an understanding of the consorting law or have the capacity to seek legal advice about how it operates, the template letters could include the relevant definition of habitual consorting alongside information about the length of time the warning is valid.

The oral warnings we have reviewed on BWV have included different wording. Some have used wording similar to s 93X(3), stating that:

- Person X is a convicted offender
- Habitually consorting with a convicted offender is an offence.

Others have used wording that pre-dates the 2018 amendments, stating that:

- Person X is a convicted offender
- Consorting with a convicted offender is an offence.

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<sup>56</sup> Section 93X, *Crime Act 1900*

In others examples we reviewed, the officers provided further information about the nature of the conviction. None of the people issued with oral warnings were told clearly that they could be charged if they are found to have consorted with two separate people on two occasions. This is covered clearly in the 2022 consorting SOPs, the SMITs and the PETE training course. If the NSW Police Force develops a checklist on mobiPOL of the kind of information officers should convey to people when issuing a warning, the definition of habitual consorting should be included.

#### **Recommendation 8:**

**The NSW Police Force include a clearly worded description of what ‘habitually consorting’ means based on the wording in the consorting law in a checklist for officers issuing warnings.**

The NSW Police Force told the Commission that the consorting incident form addresses the delivery of the warning, and also that a simplified definition of consorting is included in the consorting incident form, consorting SOPs and template warning letters. While that guidance is useful, the Commission still considers the inclusion of the definition of habitual consorting in a mobiPOL checklist will ensure that persons warned are given clear and consistent information about the impact of the warning.

#### **Recommendation 9:**

**The NSW Police Force amend its template letters for pre-emptive warnings to include the statutory definition of habitual consorting.**

The NSW Police Force told the Commission it will update its pre-emptive and retrospective warning letter templates to include the statutory definition of habitual consorting.<sup>57</sup>

## **4.5 Additional defences**

Section 93Y of the consorting law outlines a number of circumstances in which a court may disregard certain forms of consorting if the defendant satisfies the court the consorting was reasonable in the circumstances.

### **4.5.1 State Parole Authority and Corrective Services**

The defences relating to consorting in section 93Y of the consorting Act were expanded to include:

- (g) consorting that occurs in the course of complying with:
  - (i) an order granted by the Parole Authority, or
  - (ii) a case plan, direction or recommendation by a member of staff of Corrective Services NSW

During the review period a number of people warned had recently been released from gaol. However, the Commission did not identify any warnings that would appear to have an impact on an order granted by the Parole Authority or a case plan, direction or recommendation given by Corrective Services staff.

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<sup>57</sup> NSW Police Force response to consultation draft of the final review report, 19 January 2023.

## 4.5.2 Health, welfare services and accommodation

The amending Act added a definition of health service to provide greater clarity to the defence. It states that:

**Health service** means:

- (a) Medical (including psychological), hospital, ambulance, paramedical, dental, community health or environmental health service, or
- (b) another service;
  - (i) relating to the maintenance or improvement of the health, or the restoration to health, of persons or the prevention of disease in, or injury to, persons (whether provided as a public or private service), and
  - (ii) that is of a class or description prescribed by the regulations.<sup>58</sup>

The amending Act also defined welfare service:

**Welfare service** means a service (whether provided as a public or private service) relating to the provision of:

- (a) housing, employment benefits, rental assistance or other financial assistance or family support, or
- (b) another community welfare service necessary for the promotion, protection, development and maintenance of the well-being of persons, including any rehabilitation, counselling, drug or alcohol service.<sup>59</sup>

An additional defence was also included in the consorting law relating to:

- (h) consorting that occurs in the course of providing transitional, crisis or emergency accommodation.<sup>60</sup>

There were a number of warnings that included various hostels that provide transitional accommodation as the address for the person warned. There were also several people warned about those living within the same boarding house. This is discussed in more detail below at 5.5.2.2.

The Commission identified a number of warnings that police issued while people were travelling to or from methadone clinics. When we spoke to one PAC with both a busy methadone clinic and a safe injecting room, the Commander indicated that officers took a very careful approach to policing activity around both sites. He acknowledged how important each were, but also noted that people congregating at each presented increased challenges for police, particularly around drug possession and theft offences.

While the warnings issued did not prevent people from attending clinics or collecting their methadone directly, there is a risk that removing the contacts and friendships associated with collecting methadone doses may have a detrimental impact on a person's continued involvement in a methadone program.

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<sup>58</sup> s 93Y(2)

<sup>59</sup> S 93Y(2)

<sup>60</sup> S 93Y(1)(h)

#### Case study 4: **Coffee after the clinic**

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Police approached two men at 11am who they had watched walk through a public area, sit on a park bench and then watch police closely. The men were having a coffee and talking. When police spoke with them, one man indicated that he was listed as a suspect in a stealing incident in another Command. The men told police they had met through the nearby methadone clinic they both attended, and that they had a coffee twice a week after collecting their methadone. The men were open with police about their past, and joked about their successful criminal activity.

As the men could not provide an explanation for sitting together other than having a coffee, the officers recorded that they formed a suspicion that they were meeting to discuss, organise or plan criminal activity. Police issued one of the men a consorting warning naming the other. Police explained the warning to him, and was asked if he understood. He was given the issuing officer's notebook to sign to acknowledge the warning.

#### Case study 5: **Walking to the clinic**

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Police stopped two men walking along the street in the Sydney CBD at 10am. The officers knew one of the men from earlier drug related contact. Police searched the men and nothing was found. The men told police they were walking to the nearby methadone clinic together. When the officers indicated they were going to warn both men for consorting, one asked how they were consorting. The officer told them by "just being around each other, hanging around like this."

The men noted they went to the same clinic together regularly, and went for a coffee afterwards. The officers told them they could seek medical attention together, but if they got a coffee afterwards, it could constitute an offence. They were also issued move on directions from the area. Both men walked off together towards the methadone clinic.

#### Case study 6: **Methadone in a regional town**

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Police saw two men walking together at 8:30am in a regional town. Police knew both men had convictions for theft and armed robbery. The police officers approached them and asked why they were together. The men said they knew each other from their time in gaol, and were walking to collect their methadone.

Police issued both men with consorting warnings about each other. While both men accepted the warnings, they argued whether the warnings are appropriate, with one man noting that it would mean he couldn't hang around with half of the town due to either his or their conviction history.

#### Case study 7: **COVID stop on the way to collect methadone**

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Two people were stopped by police in Sydney's Inner West at 9:30am when the officers saw them cross the road in front of oncoming traffic. The officers asked the two people why they were outside while the public health order was in place. One person said he was going to collect his methadone. The other said they were keeping their friend company. Police asked for their identification, and found both had involvement in drug activity. Both were searched and nothing was found. They were issued with a warning for being outside without a valid reason, and one person was

issued with a consorting warning, as the other person had been convicted of an indictable offence.

The Public Interest Advocacy Centre noted that:

The use of consorting warnings as part of overt targeting by police officers risks destabilising positive efforts being made by that person to create a pro-social environment for their rehabilitation, diversion and reintegration into their community.<sup>61</sup>

The training provided to officers should recognise the importance of people engaging with drug programs, including methadone clinics. This will ensure they consider the potential impact of issuing a warning on the continuing involvement of both the person warned and those named in a warning. This should include asking if the people access any other services together. If they indicate that they do, this should influence the decision to issue a warning.

#### 4.5.2.1 Ambulance services

Police issued a number of warnings after being called out alongside Ambulance officers to respond to a suspected drug overdose. The person receiving treatment was not issued with a warning, and the people warned were not at the location to provide assistance, but rather were with the person receiving treatment when they suffered the overdose.

#### 4.5.2.2 Boarding houses

The Commission identified several matters where police were conducting checks on recently released offenders. All were on the Child Protection Register at the time and had recently served custodial sentences for child sex offences.

In one case, officers were speaking with a person who indicated he was moving to another boarding house he had been told about by someone he had met while in gaol who was living there. Police conducted checks on the other person, and discovered he was also on the Child Protection Register. The person they were speaking with was issued with a consorting warning for the other person. The officers told him that:

As you live in the same residence it's one thing if you happen to meet in the kitchen or something, but outside the confines of the residence you can't associate with him. This includes over the phone or internet or in any other way ... it's because he has been convicted of an indictable offence. You met him in gaol so you know he's been convicted of an indictable offence. Anyone who has been to gaol has been. It is an offence for you, as a person convicted of an indictable offence, to associate or consort with anyone else who has been convicted of an indictable offence. This includes over the phone, emails, messages, anything. It means no contact. You can't go for coffee together. You can't walk to the bus stop together. You can't call each other. No contact at all.

In a similar case, a man attended a police station to report following his release from gaol. He confirmed that several other people on the Child Protection Register lived at the same boarding house and that he also worked with one of the people. He was issued an oral consorting warning not to associate with either of the other people on the register outside of the boarding house and at work.

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<sup>61</sup> Public Interest Advocacy Centre, *Submission to the Law Enforcement Conduct Commission*, February 2022, p.8.

In both of these examples, the officers issuing the warning acknowledged the need for the people who had been recently released from custody to have secure housing and employment, but ensured they knew they could not spend time or communicate with those named in the warnings at any other time. This reflects the intention of the amendments by ensuring people have safe accommodation and employment opportunities, while also reducing the risk of serious reoffending resulting from contact with other people on the Child Protection Register.

#### **Recommendation 10:**

**The NSW Police Force include guidance in the consorting Standard Operating Procedures and consorting training on assessing what impact a warning may have on both the person warned and person named in a warning continuing to access drug and alcohol treatment and diversion services.**

The NSW Police Force said it has addressed this recommendation in the 2022 consorting SOPs by emphasising discretion and reiterating the importance of assessing an interaction and its likelihood of facilitating future serious crime. The NSW Police Force also said the 2022 consorting SOPs emphasise that the defences in the consorting law should be considered at the point of issuing a warning in addition to considering moving to charge.<sup>62</sup> These changes will also need to be reflected in the consorting training provided to officers.

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<sup>62</sup> NSW Police Force response to consultation draft of the final review report, 19 January 2023.

## 5. Aboriginal people and kin

The consorting law was amended to include the following within the definition of family member:

**family member** includes, for a defendant who is an Aboriginal person or a Torres Strait Islander, a person who is or has been part of the extended family or kin of the defendant according to the indigenous kinship system of the defendant's culture.

The consorting law provides for the defence to be raised when a prosecution for consorting reaches court. There is no legislative requirement for officers to consider the defence and related definition of family member at the point of issuing a warning.

This was a response to the Ombudsman's recommendation that a defence be included:

... for a defendant who is an Aboriginal person or a Torres Strait Islander, a person who is or has been part of the extended family or kin of the defendant according to the indigenous kinship system of the defendant's culture.

The amended defence has been used as the model for the recently introduced Western Australian consorting legislation, which includes the following in the definition of a family member:

... a person is a family member of another person who is an Indigenous person if, under the customary law and culture of the Indigenous person's community, the person is regarded as a member of the extended family or kinship group of the Indigenous person.<sup>63</sup>

This chapter will consider both the operation of the amendment, as well as the continuing overrepresentation of Aboriginal people in the use of the consorting law. As noted at the beginning of the report, references to Aboriginal people throughout this chapter are intended to include both Aboriginal and Torres Strait Islander peoples.

### 5.1 Consorting and Aboriginal people

During the review period, 1,797 (42%) of the 4,257 people who were the subject of the consorting law identified as Aboriginal. When looking at use of the consorting law by general duties officers, the proportion of people subject to the consorting law who were Aboriginal was 46%.<sup>64</sup>

**Table 10: Use of consorting law on Aboriginal people**

Police	Aboriginal people	Non Aboriginal people
General Duties Police	1602	1847
Specialist Squads	359	924

\*Some people have interacted with both generalist and specialist officers under the consorting law.

Source: NSW Police Force – COPS (merged dataset, 1 February 2019 to 30 February 2022).

<sup>63</sup> Section 4(2), *Criminal Law (Unlawful Consorting and Prohibited Insignia) Act 2021*.

<sup>64</sup> 1,602 of 3,449 people who interacted with general duties under the consorting law were Aboriginal.

**Table 11: Aboriginal people issued a consorting warning or named in a warning**

Region	Issued consorting warning	Named in consorting warning	Both warned and warned about
Central Metropolitan	380	423	266
North West Metropolitan	147	242	99
Northern Region	179	354	116
South West Metropolitan	35	73	28
Southern Region	150	193	118
Western Region	107	144	26
State Crime Command	103	247	67
Counter Terrorism & Special Tactics Command	1	1	0
Public Transport & Public Safety Command	50	34	9
<b>Total</b>	<b>1152</b>	<b>1711</b>	<b>729</b>

Source: NSW Police Force – COPS (merged dataset, 1 February 2019 to 30 February 2022).

**Table 12: Use of the consorting law in relation to Aboriginal people by Region**

Region	Aboriginal people	Non Aboriginal people	Total number of people	% of people who are Aboriginal
Central Metropolitan	537	564	1101	48.77
North West Metropolitan	290	450	740	39.19
Northern Region	417	398	815	51.17
South West Metropolitan	80	234	314	25.48
Southern Region	225	241	466	48.28
Western Region	163	54	217	75.12
Public Transport & Public Safety Command	75	68	143	52.45
Counter Terrorism & Special Tactics Command	2	0	2	100
State Crime Command	283	855	1138	24.87
<b>Total</b>	<b>2072</b>	<b>2864</b>	<b>4936</b>	<b>41.98</b>

Source: NSW Police Force – COPS (merged dataset, 1 February 2019 to 30 February 2022).



The COPS narratives and BWV reviewed by the Commission did not show any difference in the way that NSW Police Force officers issued warnings to Aboriginal people in comparison to non-Aboriginal people. As discussed at 6.2, many of the warnings issued during the review period, including those issued to Aboriginal people, related to suspected involvement in comparatively less serious criminal activity. Case Studies 8-10 are several examples of warnings issued to Aboriginal people.

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Case study 8:      **Responding to a noise complaint**

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Police went to an apartment in South Western Sydney at 3am to respond to a noise complaint. As they approached the apartment, police heard the occupants talk about having a joint. The event narrative states that the officers asked if they could enter the apartment and were invited in. Police conducted checks on both the occupants, and found they had both been convicted of an indictable offence. One of them was given a consorting warning. Police records contain no indication about why the officers believed a warning was appropriate.

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Case study 9:      **Suspected drug possession**

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Police were conducting high visibility patrols in a regional town in Western NSW in the middle of the day to ensure compliance with COVID-19 public health orders. They recognised two people in a group of three from recent interactions. Police suspected they may have prohibited drugs, and when they spoke to them, one person told them he had a syringe. All three were searched, with the syringe located and nothing else found. All three people were given warnings about breaching the public health order. Two of the people had convictions for indictable offences, and were given consorting warnings. All three were then given move on directions.

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Case study 10:     **Drinking in a park**

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Police saw two people at 8pm drinking alcohol in part of a public park that is an alcohol free zone. Police seized and destroyed the alcohol. Police asked both people for their identification, and found that one person had been convicted of an indictable offence. The other person was given a consorting warning and both were given move on directions.

### 5.1.1 Prosecutions

There were 6 prosecutions brought against 5 Aboriginal people during the reporting period. Four of the 5 Aboriginal people charged had an association with an OMCG, with several alleged to hold senior positions within their local chapter. The warnings they were issued (and bookings recorded that resulted in charges) named other members and associates of the relevant OMCG.

None of the defendants raised kinship relationships or cultural ties as a defence for their contact with those named in warnings. The defendants did not raise any other defences at Court. None of the 5 Aboriginal people who pled guilty to consorting received a custodial sentence.

## 5.2 Aboriginal Strategic Direction

The NSW Police Force has suggested that the use of the consorting laws is ‘beneficial in achieving the goal of the Aboriginal Strategic Direction to reduce the number of Aboriginal and Torres Strait Islander people in the criminal justice system.’<sup>65</sup>

The Aboriginal Strategic Direction (ASD) is aimed at fostering ‘strong and cohesive partnerships with Aboriginal communities.’<sup>66</sup>

The ASD requires each PAC and PD to conduct an Aboriginal Environmental Scan, which is a community profile of local Aboriginal cultural groups, population, crime statistics and service providers.<sup>67</sup> This process should provide PACs with a strong understanding of the particular issues in community, including particular kin relationships. This information can be used to inform consideration of kin when considering issuing a consorting warning.

The ASD also requires all NSW Police Force recruits and all personnel working in communities with high Aboriginal populations to complete Working with Aboriginal Community Training.<sup>68</sup> This is complemented by locally focussed Aboriginal Awareness Training, which will be delivered alongside community representatives.

It is not clear how issuing a consorting warning such as those outlined in Case Studies 8-10 reduces the risk of entering the criminal justice system. If anything, a consorting warning takes a person one step closer to being eligible to be charged with an indictable offence with limited defences available to justify being in company with a person who has a conviction for an indictable offence.

## 5.3 Kinship

Kinship connections are an essential linkage within Aboriginal communities. Strengthening and maintaining healthy relationships to family and kin has also been shown to be one of the essential components in addressing issues such as high rates of suicide in the Aboriginal community.<sup>69</sup>

The ASD stresses the importance of these broader relationships in Aboriginal communities:

It must be remembered that Aboriginal people have both direct family ties and kinship ties that both carry obligation and connection.

Kinship and family ties can be defined through blood relationships, adoption, or marriage and household economies.

An understanding of the closeness of familial and kinship relationships is essential especially in relation to the consorting laws.

The definition of kin within the ASD is relatively narrow. While there are differing considerations when assessing kinship in communities, and kin and cultural linkages can

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<sup>65</sup> Letter from Commander of State Crime Command to the LECC Commissioner, 3 August 2021.

<sup>66</sup> NSW Police Force, *Aboriginal Strategic Direction 2018-2023*, [https://www.police.nsw.gov.au/\\_data/assets/pdf\\_file/0003/481215/ASD\\_2018-2023\\_Book\\_Updated\\_4Web.pdf](https://www.police.nsw.gov.au/_data/assets/pdf_file/0003/481215/ASD_2018-2023_Book_Updated_4Web.pdf)

<sup>67</sup> *Ibid.*, p.10.

<sup>68</sup> *Ibid.*, p.14.

<sup>69</sup> Dudgeon P, Blustein S, Bray A, Calma T, McPhee R & Ring I (2021) *Connection between family, kinship and social and emotional wellbeing*. Produced for the Indigenous Mental Health and Suicide Prevention Clearinghouse. Cat. no. IMH 4. Canberra: AIHW, p. 2.

change or be more difficult to identify in metropolitan settings,<sup>70</sup> there are three broadly recognised elements to kinship linkages that are common across Australia –discussed below. These extend beyond the blood relationships to create broader connections. The NSW Police Force could consider including this guidance as part of its Aboriginal cultural appreciation training, and also be reflected in the NSW Police Force consorting training as considerations when assessing kinship relationships.

The following information draws on the work of the National Centre for Cultural Competence at the University of Sydney.<sup>71</sup>

### **Moiety**

Moiety is a system whereby everything is considered to be one half of a whole. This is based on a belief that the universe can be seen as two halves coming together. This in turn means that Aboriginal communities commonly have a unilineal line of descent, with patrilineal and matrilineal lines for everyone. This means that everyone belongs to one of two moiety groups, and all marriages take place with members of the opposite moiety.

### **Totems**

Aboriginal people generally have at least four totems that represent their nation, clan, family group and their personal totem. Nation and clan totems are predetermined. Personal totems are linked to personal strengths and weaknesses. Totems are split between moieties, providing additional points of connection that can not only move across community but also more broadly.

### **Skin names**

Skin names are similar to a surname, but unlike non-Aboriginal surnames, a husband and wife cannot have the same skin name, and children do not share their parent's skin name. People are given their skin names on a sequential system. This means the name given to someone is based on the preceding name and position in the naming cycle. This will mean that a child will take their mother's skin name if they are within a matrilineal cycle.

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<sup>70</sup> Yamanouchi, Yuriko, 'Managing 'Aboriginal selves' in South-Western Sydney', *Oceania* 82, 2012

<sup>71</sup> National Centre for Cultural Competence, *Kinship Module*, <https://www.sydney.edu.au/about-us/vision-and-values/our-aboriginal-and-torres-strait-islander-community/kinship-module/learning-module.html>

### 5.3.1 Consideration of kin when issuing a warning

There were only a small number of warnings within the review period where it is clear the officers issuing a warning considered whether the person being warned and the person they were warned about may have a kin relationship. There were also warnings involving multiple people where the officers noted that two Aboriginal people were family members, and as a result did not issue a warning naming those family members. Case Study 11 is one of a small number of events that make specific reference to consideration of kin relationships at the time of issuing a warning.

#### Case study 11: **Possible kin relationship**

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An Aboriginal person was issued with a pre-emptive warning naming 8 people. When the warning was issued, the officers noted that the person warned indicated he was related to 4 of the people named in the warning. The record states that ‘he could not confirm how they were related, but it is noted they may share kinship under their Aboriginal heritage. Consideration should be given to exploring this matter prior to any formal action being taken ... for these persons under the Consorting legislation.’ The warning was not altered to remove the 4 people, and is still valid.

### 5.3.2 Challenges to identifying kinship

As outlined above, linkages through kin in Aboriginal communities can be very broad, and can encompass a wide range of people who do not fit within what many in the community may immediately consider ‘family’. During our consultation sessions, a number of PACs indicated that they were mindful of the importance of kin when considering issuing warnings, and that there were many more interactions between police and Aboriginal people where a consorting warning could have been issued but was not due to a potential kinship relationship.

The Commission cannot test this, as it is not possible to identify circumstances where an officer considered a warning, but did not issue one.

The NSW Police Force told the Commission that it is too challenging for general duties officers to assess kin relationships in the field, and that any relationship could be raised when a person is charged and goes before the Court.<sup>72</sup>

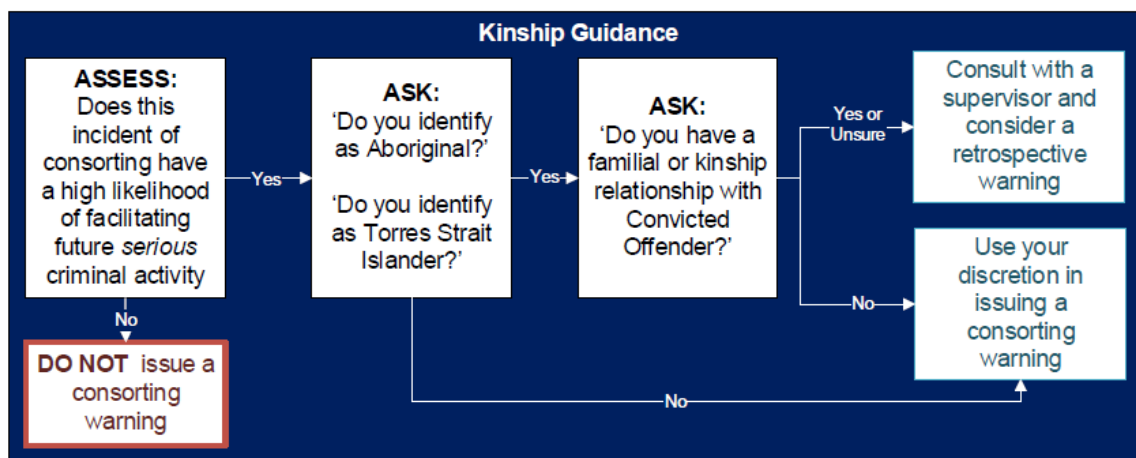
The Commission believes this approach does not recognise the potential impact of a consorting warning. If the person warned has some form of kin relationship with a person named, adhering to the warning may well break that linkage. This in turn could have a detrimental impact on the support systems available to the person.

Since January 2022, the NSW Police Force requires officers to ask anyone who they come into contact with whether they identify as Aboriginal or Torres Strait Islander. This will provide an opportunity for officers considering issuing a consorting warning to then ask if the person to be named in the warning has any form of extended familial or kin relationship to the person they are considering warning.

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<sup>72</sup> Letter from Commander of the State Crime Command to the LECC Commissioner, 3 August 2021.

The 2022 consorting SOPs include the following table to guide officers when considering issuing a consorting warning:



This is an encouraging change to the guidance provided to officers relating to Aboriginal kinship. The same guidance will need to be incorporated into consorting training.

### 5.3.3 Ongoing monitoring

The NSW Police Force has indicated that it does not currently track the use of consorting laws in relation to Aboriginal people. This is an important issue, and the Commission considers this should be one of a number of measures relating to Aboriginal people that the NSW Police Force should track and monitor to assist it to address the overrepresentation of Aboriginal people in the criminal justice system.

#### Recommendation 11:

**The NSW Police Force ensure its consorting training provides guidance around the meaning of kin and the amended process for considering issuing a consorting warning to an Aboriginal person.**

The Commission initially recommended the NSW Police Force include guidance around consorting and kinship in its Working with Aboriginal Communities training. The NSW Police Force suggested that the consorting training was a better vehicle for communicating the necessary information. The Commission accepts this and has amended its recommendation accordingly.

## 6. Other issues identified during the review

The primary focus of this review has been the impact of the amending Act on:

- who is issued with warnings
- who is named in warnings
- how consorting warnings are issued.

The Commission has also had the opportunity to review the supporting information for all warnings issued during the review period. This has raised a number of issues that the Commission believes it is important to address. These are:

- the continuing need for a quality assurance framework for consorting warnings
- the ongoing use of consorting warnings to address relatively minor offending
- the importance of discretion when issuing warnings
- the impact of COVID-19
- the need for an intelligence-driven approach to issuing consorting warnings
- the low number of warnings relating to online content and electronic communication.

### 6.1 Quality assurance framework

The Ombudsman's 2016 review of the consorting laws identified a number of common errors when reviewing consorting warnings and prosecutions.

Changes to COPS and improvements to the SOPS went some way to addressing these, and the Commission saw a lower number of consorting warnings either naming a person without a conviction recorded for an indictable offence or someone convicted of a summary offence during the review period than the Ombudsman. No prosecutions proceeded based on invalid warnings during the reporting period.

The Commission identified 57 warnings that appeared to be invalid. A list of those warnings has been provided to the NSW Police Force to consider, and the NSW Police Force has indicated that it will remove any invalid consorting warnings from COPS and also tell the person warned that the warning is no longer in place where appropriate.

As already noted, in some cases this was due to an interstate conviction which on its face did not appear to meet the threshold for a conviction of an indictable offence in NSW.

In others, the person named in the warning was only convicted of a summary offence. The final category of invalid warning were those issued about people who were found guilty of an indictable offence when they were under the age of 18 and the Court chose not to record a conviction. The officer creating the COPS entry would have received a warning to tell them that the warning could not be entered.

The PACs we spoke to describe a similar process for reviewing COPS entries relating to consorting warnings. The first stage is common to all COPS entries, and involves a supervisor reviewing and verifying the record. The Commands also conducted dip

sample reviews of COPS entries and related BWV. The PAC that took a targeted approach to the consorting law outlined in Case Study 16 tasked two officers with tracking warnings. They maintained a spreadsheet of warnings issued with all relevant details, reviewed the BWV and event narratives for warnings issued. If they identified any changes needed, they then spoke with the issuing officers who corrected the narrative. This ensured all warnings were issued correctly and sufficient detail was recorded.

The 2022 consorting SOPs include a case management process for all consorting warnings. Each person warned has a case created on COPS, and this is allocated to a team for monitoring and follow-up. A Criminal Investigator or a Detective must be assigned as the officer in charge. Each consorting warning case is monitored within regular 28 day time periods to assess any contact between the person warned and those named in a warning. The officer in charge is responsible for linking each relevant COPS event to the case and updating the list of relevant convicted offenders in the case narrative.<sup>73</sup>

This should ensure there is a clear owner of each consorting warning, and that someone is responsible for tracking warnings issued.

The best possible quality assurance tool is recording each consorting warning on BWV. The 2022 consorting SOPs state that:

When delivering a warning it is imperative you:

- Ensure you have a record showing the person understands and acknowledges the warning. Body Worn Video (BWV) provides the best corroborative evidence of an interaction and is considered best practice. When BWV is unavailable, record your warning, observations and results of any inquiries on your MobiPol, or in your Official Police Notebook and have the POIs sign your notebook.<sup>74</sup>

The updated SOPs also state that:

Photographic or video evidence provides the best evidence for court and can establish the POI and convicted offenders' identity. Photographing or video recording may be used in a public place without breaching the Surveillance Devices Act 2007. BWV is the easiest way to obtain that evidence.<sup>75</sup>

These are important amendments. They could be made stronger by making it mandatory for police officers to activate BWV, particularly when issuing oral warnings. This will ensure there is a clear record of the wording of the warning, and that the person warned understood what the warning meant.

### **Recommendation 12:**

**The NSW Police Force amend its Consorting Standard Operating Procedures to require officers, unless there is an overriding operational reason not to, to activate their body worn video whenever they are issuing a consorting warning, particularly when issuing an oral warning. The reason for not recording the warning on BWV should be stated in the accompanying COPS event.**

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<sup>73</sup> NSW Police Force, Consorting Standard Operating Procedures, December 2022, 16.

<sup>74</sup> NSW Police Force, Consorting Standard Operating Procedures, December 2022, 13.

<sup>75</sup> NSW Police Force, Consorting Standard Operating Procedures, December 2022, 10.

The NSW Police Force said it did not support a recommendation mandating the use of BWV to record oral warnings, noting that:

The requirement for activation may lead to the exclusion of evidence for consorting bookings, even though interactions leading to the bookings may have been captured by other public CCTV or electronic devices. If consorting bookings were mandated for BWV recording in policy the true nature of criminal relationships, including reasons for not recording, will be affected and potentially removed from judicial scrutiny, which is contrary to open and transparent justice.<sup>76</sup>

The NSW Police Force gave the example of an officer choosing not to record a consorting warning in circumstances where the person is also a human source. There may be some limited circumstances where operational reasons mean a consorting warning should not be recorded on BWV. If there is an overriding operational reason against recording the issuing of a warning, this should be noted in the COPS event narrative. However, in other circumstances, it would be best practice to record the warning on BWV so it is clear what was conveyed to the person warned, and what they understood.

While the BWV Standard Operating Procedures instruct officers that their BWV camera should be used when police would normally use their official notebook to record information, the Commission considers it important that the consorting SOPs re-emphasise the requirement to record oral warnings on BWV.

## 6.2 Targeting summary offending

When the Ombudsman issued his final report, he noted that:

Although the NSW Police Force has used the consorting law to disrupt serious and organised crime and criminal gangs as intended by Parliament, it has also used the consorting law in a matter that, to some extent, illustrated public concerns about its operation.<sup>77</sup>

To address the extension of the use of the consorting laws to comparatively less serious offending, the Ombudsman recommended including an objects provision to accompany the consorting law.

While this is not an issue that is directly related to the amendments made to the Act that are the subject of this review, the Commission believes it is important to provide some examples of the type of interactions that appear to be beyond the scope of the intention of the Parliament.

The 2019 consorting SOPs stated that:

While this legislation can be widely used in the field, it's focussed on the prevention of organised criminal activity that establishes, uses or builds up criminal networks. It's aimed at organised crime and stopping organised crime and stopping the associations that go hand in hand with serious criminal activity. Application of the consorting law to address or prevent minor offending must be appropriate in the circumstances. The legislation will operate most effectively where police already know the POI and the convicted offenders beforehand.<sup>78</sup>

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<sup>76</sup> NSW Police Force response to consultation draft of the final review report, 19 January 2023.

<sup>77</sup> NSW Ombudsman, *The Consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*, April 2016, iii.

<sup>78</sup> NSW Police Force, *Consorting Standard Operating Procedures*, August 2019, 5.



This has been amended in the 2022 consorting SOPs to state that:

The application of the consorting legislation should be limited to preventing serious coordinated criminal activity. Consorting is an indictable offence and can include up to three years imprisonment. Officers must not use the legislation to target individuals who have incidental contact or those who interact for reasons that are unlikely to result in ongoing or future serious criminal activity.<sup>79</sup>

As outlined at 3.1, general duties officers were responsible for issuing warnings to 2,119 people. Some of the warnings issued by general duties officers formed part of a targeted approach to serious organised criminal activity, such as the operation discussed in Case Study 15. In a large number of cases, such as Case Studies 12 and 13 below, there appears to be no clear link between serious criminal activity and the warning issued.

#### Case study 12: **Transport offences**

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Police were conducting patrols on a Sydney train on the North Shore Line at 9am when they located 2 men without valid tickets. The men provided their details, and checks revealed both had convictions for indictable offences. One had been convicted in 2019, while the other was convicted in 2015. The officers asked if they had a medical, educational or work related reason to be together, which they did not. They said they were travelling to visit a friend. They were then both given consorting warnings for each other.

#### Case study 13: **Warnings relating to anti-social behaviour**

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Police saw 3 men sitting on a park bench in the early evening in a location described as 'well known for convicted criminals loitering there and engaging in anti-social behaviour.' Police checked the records of the 3 men, and when they found all 3 had convictions for indictable offences, they were all issued consorting warnings.

One of the men was warned about consorting with 8 different people during the review period. He was warned about one person three times, and another twice, making him eligible to be charged. All of the warnings were issued in public parks. One event records that the officers from the proactive crime team were conducting an operation targeting 'the offence of consorting'.

### 6.2.1 Use alongside other police powers

Police have the power to stop, search and detain a person if they suspect on reasonable grounds that the person has:

- a stolen or illegal or dangerous item<sup>80</sup>
- something that was used or intended to be used in the commission of an offence<sup>81</sup>
- something dangerous in public that is being used or was used in relation to an offence<sup>82</sup>

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<sup>79</sup> NSW Police Force, *Consorting Standard Operating Procedures*, December 2022, 7.

<sup>80</sup> *Law Enforcement (Powers and Responsibilities) Act 2002*, s 21 (1)(a), s 21(2)(a) and (c).

<sup>81</sup> *Ibid*, s 21(1)(b) and (2)(b).

<sup>82</sup> *Ibid*, s 21(1)(c).

- an illegal plant or drug.<sup>83</sup>

An officer can also issue a move on direction to a person or a group of people if they believe on reasonable grounds that a person's behaviour or their presence in a public place is:

- obstructing people or traffic
- amounts to harassment or intimidation
- causing fear or likely to cause fear to a reasonable person, or
- to unlawfully sell or buy illegal drugs, or they intend to unlawfully sell or buy drugs.<sup>84</sup>

The direction has to be reasonable for the purpose of reducing or stopping the obstruction, harassment, intimidation or fear, or stopping the sale or receipt of illegal drugs.<sup>85</sup>

In the three years from June 2019 to June 2022, the NSW Police Force:

- issued 306,212 move on directions
- conducted 628,390 person searches.<sup>86</sup>

The Commission was able to identify the number of person searches and strip searches conducted and/or move on directions issued at the same time as a consorting warning or warnings were issued.<sup>87</sup> During the review period we found:

- 1,963 people were subjected to person searches with nothing found
  - 1,403 of those searched were suspected of possessing an illegal drug
  - 145 were suspected of having an item in connection with an offence
  - 157 were suspected of possessing a weapon that was used or intended to be used
  - 98 were suspected of having stolen property
- 28 people were subjected to a strip search
  - 27 were searched in relation to suspected possession of illegal drugs
  - 1 person was searched because he was a member of an OMCG and officers suspected he may have had a weapon hidden
- 567 people were issued with and complied with a move on direction, of these
  - 414 were suspected of being in a location to buy illegal drugs
  - 229 were suspected of being in a location to sell illegal drugs
  - 113 were causing fear or alarm
  - 38 were intoxicated
  - 14 were acting in a harassing or intimidating manner.<sup>88</sup>

Our review of the COPS narratives identified a consistent pattern in relation to consorting warnings issued by general duties police officers:

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<sup>83</sup> Ibid, s 21(1)(d) and (2)(d).

<sup>84</sup> Ibid, s 197(1)

<sup>85</sup> Ibid, s 197(2).

<sup>86</sup> BOCSAR, NSW Recorded Crime Statistics June 2022, p.24, [https://www.bocsar.nsw.gov.au/Publications/RCS-Quarterly/NSW\\_Recorded\\_Crime\\_June\\_2022.pdf](https://www.bocsar.nsw.gov.au/Publications/RCS-Quarterly/NSW_Recorded_Crime_June_2022.pdf), last accessed 20 September 2022.

<sup>87</sup> It is important to note that not all those searched or issued with a move on direction were subject to the consorting law. In some cases, those searched or issued with a move on direction were not warned or warned about, but were with those warned or warned about.

<sup>88</sup> Reasons for move on directions often list more than one reason under LEPRA.

- Police saw several people acting suspiciously in a location described by police as being known for drug activity.
- Police records describe the people as appearing nervous, or exhibiting the signs of recent drug or alcohol use (sweating, dilated pupils, slurred speech).
- On the basis of the location and their demeanour, police stated they formed a reasonable suspicion that they may have drugs, and conduct a person search, often with nothing found.
- Police then check the COPS system and find one or more of the group has a conviction for an indictable offence. The officer issues those accompanying the convicted person with a consorting warning.
- The group are then issued with move on directions.

Both a person search and a move on direction usually have a short-term impact on an individual. A person search involves a level of inconvenience, as the person has to turn out their pockets, remove any outer garments, remove their shoes and have their bags emptied onto the ground. There is also the potential for embarrassment if the search is conducted in a public place or thoroughfare, such as a busy street or a train station.

A person must follow a move on direction unless they have a reasonable excuse. Not following a move on direction is a summary offence. The direction is also usually for a limited time. In some cases, it is for several hours, or if issued late at night, it is usually for the remainder of the night.

A consorting warning is not the same as either of these police powers. A warning is valid for 2 years for anyone over the age of 18. It does not require an officer to form a reasonable suspicion that anything illegal or dangerous is or may be about to take place. If the person meets the definition for habitual consorting during the time the warnings are valid, they can be charged with an indictable offence that carries a maximum penalty of 3 years imprisonment and/or a \$16,500 fine.

The PACs we spoke to during our consultation mostly said that they would not expect to see a great deal of use of consorting law within their Command, as it was primarily aimed at targeting and disrupting gang activity. One PAC with the highest use has a different approach. Case Study 14 is a summary of the information provided by that PAC about its use of the consorting law.

#### Case study 14: **High use by one Police Area Command**

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We spoke with the central metropolitan PAC with the highest number of consorting warnings issued during the review period outside of State Crime Command. It was responsible for issuing 667 warnings to 387 people. Of those issued with a warning, 353 had been convicted of an offence. The warnings named 375 people.<sup>89</sup> The Commission identified three warnings that appeared to be invalid on the basis of the conviction history of the person named.

The PAC told us that it has been using the consorting law alongside its other policing powers since 2015 to target crime related to drug usage. The PAC used the consorting laws to target people it suspects are moving through the PAC when police see them in association with people known for drug related activity or when police see them near premises known for drug related incidents. The PAC told us

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<sup>89</sup> 217 people were both issued with a warning and named in a warning in the same event.

this approach aimed to reduce property crime and other criminal activity by those moving through the PAC, often on the way to the Sydney CBD.

The PAC indicated that the use of the consorting law was limited to approximately 20 officers. We found that 46 officers from the PAC issued consorting warnings, and 8 officers were responsible for issuing 75% of warnings. One officer alone issued 105 warnings during the review period.

The narratives we reviewed are consistent with the advice from the PAC around the intended use of the consorting laws. The common consorting warning involved groups of two or three people being stopped by officers on suspicion of drug possession. They are then searched with nothing found. If any of the group have a conviction for an indictable offence, police give the other people with them consorting warnings. If the warning was issued in a public place, all of the group are usually then issued with a move on direction. If the warning was issued at or near the place where one person lives, those from outside the PAC were issued with a move on direction.

The PAC provided us with training material used to provide guidance to officers on how and when to use the consorting law. This material had not been updated to reflect the most recent legislative changes. The NSW Police Force training records show that 8 officers from the PAC have completed the PETE consorting course as at October 2022.<sup>90</sup>

The PAC also gave us a notebook sticker that is provided to officers to ensure they record the information needed to issue a warning, and also provide space for the person issued with a warning to sign. We have seen the sticker in use in BWV for one other PAC. We viewed one BWV recording from the PAC that showed the sticker being used. This warning is described in Case Study 16.

The Commander told us that he felt using the consorting warning alongside stop and search powers and move on directions was an effective method of crime prevention and reduction in the PAC. The PAC knew it used the consorting law more frequently than other Commands.

While this PAC issued the largest number of consorting warnings, the nature of its warnings was not inconsistent with the use across other PACs, namely it was primarily targeting drug possession and was often used alongside a person search and a move on direction. This is the same type of usage that prompted the Ombudsman to recommend an amendment to make it clear that the law should be used to prevent serious criminal offending. The NSW Police Force has amended its consorting SOPs to clearly state what type of activity the consorting law should be used to disrupt and prevent. A similar statement within the consorting law itself would make the intended purpose of the law even clearer.

### **Recommendation 13:**

**The Attorney General propose, for the consideration of Parliament, an amendment to the consorting law to state that the purpose of the consorting law is to prevent serious criminal offending.**

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<sup>90</sup> Information provided by People and Capability Command, 28 October 2022.

## 6.2.2 Targeted general duties use

Not all use by general duties officers related to comparatively less serious potential offending. We saw several instances where PACs used the consorting law in a similar manner to State Crime Command to target serious offending. In Case Study 15 below, a PAC used consorting warnings to try and disrupt and prevent serious organised criminal activity. Case Study 16 was an operation to target OMCG activity in a regional area.

### Case study 15: **High end car theft and aggravated break and enter**

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A PAC in Western Sydney had been attempting to disrupt and prevent a string of luxury car thefts and aggravated break and enter offences they suspected involved an organised group operating out of the Command. The illegal activity had been the subject of 2 earlier task forces, but was continuing. Most of the people involved were under the age of 25.

The PAC told us that it decided to use consorting warnings in an attempt to break up the group and as a result reduce their offending in other areas of Sydney.

Based on intelligence collected over several years, the Command believed it had a list of those who were or may be involved as part of an organised criminal group. Several officers with a strong understanding of the consorting law were tasked with drawing up pre-emptive consorting warnings naming the members of the group listing those who had been convicted of an indictable offence. All involved officers completed the online consorting course before taking part in the operation, and were provided with ongoing support.

There were a number of young people involved in the group who were not yet 18. One of the involved officers told the Commission they did not issue warnings to or about anyone under 18, as it was more challenging to be sure of their conviction history.

One Aboriginal young person over the age of 18 issued with a warning had left Western Sydney and returned to live with his family on the North Coast. He was arrested on an outstanding warrant for failing to attend court. He was given the pre-emptive consorting warning at the same time. When he was given the warning, the arresting officer read him the pre-emptive consorting warning, and as he went through the names, he asked the young person if he knew each of the people named and how he knew them. The officer focussed on ensuring he was not related to any of the people named in the warning. The young person told the arresting officer one of the main reasons he had left Western Sydney and moved back with his mother was to get clear of the group's activity, as he continued to get in trouble. He said he appreciated the warning and would follow it.

## Case study 16: **Increasing OMCG activity in a regional town**

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One of the regional PACs the Commission selected to speak with had an increase in the number of consorting warnings issued during the review period involving a small number of people. It had also moved to charge several people involved in a local chapter of an OMCG with consorting.

The PAC told us that it had used different methods to try to disrupt the local chapter in the past, but had decided to move to consorting warnings to disrupt the senior leadership.

Rather than issuing pre-emptive warnings, the Command chose to issue warnings and record bookings when the OMCG members were together. The Command tasked several officers to act as the subject matter experts. They provided advice and direction to those officers involved in stopping and warning the individuals. They were also responsible for reviewing each of the warnings to ensure it was valid, as well as maintaining a list of the warnings issued to all of the targeted members.

When we requested body worn video relating to warnings, one of the videos related to the OMCG members who were targeted as part of the operation. It was clear that each of the people warned knew what a consorting warning was, and they acknowledged that they had been issued with earlier warnings.

Each of the OMCG associates targeted had multiple warnings issued to them before the Command chose to move to charge them with consorting. Each of the individuals charged plead guilty. They were given community correction orders for 12 months and issued with non-association orders for the people named in the warnings.

### 6.3 Discretion at the point of warning

When the consorting law was introduced in 2012, it was noted that the law requires officers to:

... make a judgment about whether observed behaviour reaches the level sought to be addressed by the bill, that is, behaviour which forms or reinforces criminal ties.<sup>91</sup>

As one Commander noted during consultation, they believe officers are exercising their discretion regularly, as their PAC only issued a small number of warnings and officers came into contact with those convicted of indictable offences every day. While many officers may be aware of the consorting laws and choose to exercise their discretion not to warn, another possible explanation is that there are a comparatively small number of officers who are aware of, and as a consequence make use of the consorting laws.

The Commission has seen a number of warnings recorded on BWV during which the officers have told the person or people being warned that they have no choice but to issue a warning once they know that someone has a conviction for an indictable offence (see Case Study 17). The wording of many of the event narratives for the review period also suggests that, once officers identify that one or more people in a group have a conviction for an indictable offence, there is no consideration of whether it is appropriate to issue a consorting warning. The following are some examples of the way warnings are represented in COPS event narratives relating to consorting warnings which suggest that some officers think they must issue a consorting warning if they

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<sup>91</sup> The Hon David Clarke MLC, NSWPD (Hansard), Legislative Council, 7 March 2012, 9093.

encounter people associating with a person who has previously been convicted of an indictable offence:

“Due to POI1 being a convicted offender, POI2 was given a warning for consorting and informed that it was an offence to habitually consort with convicted offenders.”

“Police confirmed both POI's had previously been convicted of indictable offences to which a consorting warning was issued.”

“Due to the POIS being convicted of an indictable offence, the POIS were issued with a consorting warning.”

#### Case study 17: **Hands are tied due to the time**

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A group of young people over the age of 18 were stopped by police just before dawn on a Friday after reports of an incident at party nearby. Police records indicate the young people were searched as the officers believed they may be involved in drug activity based on the time and location. Nothing was found during the search. One of the young people indicated that he had recently been released on parole.

The BWV footage of the interaction shows the officer tell the young people “You are not meant to hang around in public because you are both convicted of indictable offences. Our hands are tied because of the time, during the day it would be a different story.” He then tells one of the people warned that “if you get 3 of these you can actually be charged.”

The officer used a notebook sticker to record the details of the warning, and asked the young people warned to sign the notebook entry to acknowledge the warning.

The 2019 consorting SOPs state that:

Discretion is the freedom to decide what should be done in a particular situation.

An officer exercises his or her discretion when he or she selects a course of action from a number of choices. This discretion should always be exercised in good faith and be appropriate to the circumstances presented.

...

Examples of where you may exercise your discretion not to commence criminal proceedings:

- A person plays sport every weekend on a team consisting of several convicted offenders. The person's association with these people is in relation to the sport.
- A parent's child is friends with another child whose parents are convicted offenders. Whilst the families regularly visit each other's houses, the association appears mainly to allow the children to play together.
- Several convicted offenders catch public transport together when travelling to work. Whilst they see each other regularly, they all appear to be “going straight”.<sup>92</sup>

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<sup>92</sup> NSW Police Force, *Consorting Standard Operating Procedures*, August 2019, 15-16.

The 2022 consorting SOPs state that officers should consider the following when considering a consorting warning:

Observe all persons for a reasonable time and ensure the association is consorting and not just a coincidental meeting. When you can, use video or take photographs to record the POI consorting with convicted offenders before speaking with any person.

If you suspect the interaction is unlikely to facilitate future serious crime, use your discretion and consider whether other police powers may be more appropriate (e.g., move-on direction).<sup>93</sup>

...

Officers' application of consorting legislation – both official warnings and criminal proceedings – must be appropriate to the circumstances presented. Officers should use discretion and consider whether the interaction was reasonable in the circumstances or if the behaviour forms or reinforces criminal ties.<sup>94</sup>

These are important additions to the guidance provided to officers around exercising their discretion.

The 2022 consorting SOPs also make it clear that officers have to be able to 'articulate the reasons for reaching' the decision to issue a consorting warning.<sup>95</sup> This should assist officers to turn their minds to their exercise of discretion when they are issuing a warning.

## 6.4 The impact of COVID-19

The COVID-19 pandemic has had a substantial impact on the lives of all of the community. During our consultation with PACs and PDs, a number of Commanders noted that the number of consorting warnings issued in their Command would have been reduced as a result of COVID-19, as far fewer people were in the street. This is reflected in the number of warnings issued each year, with the largest number issued in 2019. As one Commander of an area that usually has a great deal of foot traffic and was busy at night told us, the area had become a "ghost town" over the last few years during various lockdowns. The Commander thought the Command might use the consorting law, alongside other police powers, more now that the public health orders restricting movement had been lifted.

COVID-19 had another impact on the use of the consorting law. The Commission has reviewed a number of examples of situations where individuals were issued with a consorting warning at the end of an interaction that began with officers questioning why they were out in public during lockdown or outside of a required geographic or local government area.

### Case study 18: **Gone fishing**

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Police saw a car drive the wrong way down a one-way street at 11:40pm. They stopped the car, which had three men in it. The driver told police they were going fishing, and the officers saw fishing gear in the car. Police asked if the men knew

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<sup>93</sup> NSW Police Force, *Consorting Standard Operating Procedures*, December 2022, 9.

<sup>94</sup> *Ibid*, 11.

<sup>95</sup> *Ibid*, 9.



about the public health order in place, and they said they did, but did not think it stopped them from going fishing.

The officers decided that while fishing constituted exercise, as they were in a group of more than 2 people they were in breach of the current public health order. All 3 men were issued with a warning for the breach. While police were checking the men's details, they saw that two of them had convictions for indictable offences. They were issued with consorting warnings for each other. There is no indication in the COPS record why a consorting warning was necessary.

#### Case study 19: **Towing a motorbike**

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Police were waiting for a tow truck in a suburban area of a regional town to pick up a motorbike that was suspected to be stolen. While waiting, officers saw a large group of people in the front yard and under the carport of a house across the road. The group and the property they were on did not have any connection with the motorbike.

Given there was a public health order in place, the officers approached the property and asked the people whether they knew about the current restrictions. After obtaining the details of all those present, the officers decided not to issue penalty notices. The checks conducted showed that 2 of the people at the property had been convicted of indictable offences. The other people at the property were issued with consorting warnings naming those 2 people. There is no indication in the event narrative to indicate how the warnings would disrupt criminal activity, particularly given the officers were not at the location to interact with the people at the property.

## 6.5 Intelligence driven

The 2019 consorting SOPs state that:

The identification of offenders should be intelligence driven. Primarily based on identified risk that the relevant individuals are involved in recent or ongoing criminal offending and the use of the consorting law is in the circumstances likely to assist to prevent criminal offending.<sup>96</sup>

When we spoke to Raptor Squad, they explained how they select people both to be issued with a consorting warning and also to be named in a pre-emptive warning. They noted firstly that preparing a consorting warning was time consuming, as they needed to cross check all the information behind the warning, including the conviction history of the people named in the warning. This meant they could not simply issue warnings to all those associated with criminal organisations about all other people involved in the same or related criminal organisations. They rely on the criminal intelligence they hold about particular activity to target who receive warnings and who they are warned about. For example, if they become aware of an upcoming organised ride for an OMCG, they will issue warnings to all members they expect to take part about all other members of the club who have a conviction for an indictable offence. This assessment is based on the potential risk of criminal activity and violence that may result, and using consorting warnings to try to disrupt the contact that could lead to such activity.

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<sup>96</sup> NSW Police Force, Consorting Standard Operating Procedures, August 2019, p.5.

The Raptor Squad officers we spoke to indicated that they viewed consorting warnings, issued in a targeted and strategic manner, to be one of the most effective tools available to them to frustrate and disrupt criminal organisations, and particularly OMCGs. They believe that consorting warnings are one of the key reasons for the reduction in large-scale congregation of OMCG members to take part in organised runs and other public meetings. They have seen members instead moving their runs to other jurisdictions, and leaving NSW to attend the runs in smaller numbers or with those who they have not already received a warning about. Police believe this is to avoid reaching the requisite number of warnings to be charged with consorting.<sup>97</sup>

Unlike those warnings issued by Raptor Squad and State Crime Command more generally, the information and intelligence relied upon by general duties officers issuing oral consorting warnings is less clear.

While there were warnings that were clearly driven by intelligence about an individual, a group or a location, others appeared to be opportunistic and issued purely because one or more of a group has a conviction recorded for an indictable offence. In addition to a number of other case studies throughout this report, Case Studies 20 and 21 are examples where it is not clear what intelligence informed the decision to issue a warning.

#### Case study 20: **Burgers and drinks**

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Two people were stopped by a police officer for riding bicycles without helmets or lights in the early hours of the morning. They told the officer who stopped them that they were heading home after getting food. They had burgers and drinks in their bags. The officer asked for their details, and after seeing they both had earlier drug related contact with police he decided to search both men. He did not find anything during the search. Both men were very open about their criminal histories and their ongoing occasional drug use.

The officer asked how they knew each other, and both men indicated they met at a methadone clinic. He then issued both men with a verbal consorting warning, telling them “I’ve got a job to do and you two shouldn’t be together.” One of the men asked why they were being warned, as they were not breaking the law. The officer responded that “you are now because you are convicted offenders.”

#### Case study 21: **So I can only hang out with my dog?**

---

Police spoke with two men in a suburban street on the Northern Beaches of Sydney in the early evening in response to reports they were acting suspiciously. After speaking with both men, they found out they were picking up items that were outside a house for Council clean-up. Police noticed that the vehicle they were in had a bald tire. When they obtained the driver’s details, they saw that he had a conviction for an indictable offence.

The officers gave the passenger a verbal consorting warning. The driver asked if this meant he could not spend time with anyone and could only spend time with his dog. The passenger noted that he did some regular labouring work for the driver, and asked if he could still do that work. The officer told him he could not. This is not correct, as employment is a defence under the consorting law. The BWV and the

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<sup>97</sup> Consultation with Raptor Squad, 7 September 2022.

COPS narrative do not show how issuing the warning would disrupt or prevent criminal activity.

There is less opportunity for officers considering issuing consorting warnings in the field to adequately consider the risk posed by the individual, what changes they may have made to their lives since their prior conviction, or what impact a warning may have on their lives. The Commission believes these considerations should form part of any consideration of a consorting warning, particularly when it is unplanned.

## 6.6 Online and electronic consorting

Recent research about the operation of organised crime in Australia and around the world has shown that it is increasingly reliant on online communication. This in turn has contributed to a growth in transnational organised crime, with an estimated 70% of Australia's serious criminal threats having an international dimension.<sup>98</sup> This has been demonstrated most recently by the Australian Federal Police's Special Operation Ironside.<sup>99</sup>

The 2022 consorting SOPs state that 'while the legislation covers consorting by electronic means such as Facebook, Twitter and text messages, these SOPs provide guidance in relation to face-to-face associations only.' There is no other guidance for officers around how and when to issue a warning or a booking for electronic consorting.

Officers from Raptor Squad noted the challenges in establishing that an individual was in control of either an electronic device or a social media account at a particular time, and as a result they would be unlikely to issue consorting warnings or record bookings relating to online or electronic consorting.

There were only a small number of matters during the review period where online information was used as the basis for a booking. These were not based on communication, but rather social media posts that showed individuals who had been issued with prior consorting warnings together in photographs at restaurants and bars.

Recent national and international policing operations have centred on the use of electronic communication. While this is not a focus of this review, the Commission believes it may be timely to consider whether it is still necessary to include online communication within the scope of the consorting law. If online communication can still form the basis of a consorting warning, the NSW Police Force will need to develop guidance for officers outlining how those consorting warnings should be issued.

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<sup>98</sup> Department of Foreign Affairs and Trade, 2017 Foreign Policy White Paper, <https://www.dfat.gov.au/sites/default/files/minisite/static/4ca0813c-585e-4fe1-86eb-de665e65001a/fpwhitepaper/foreign-policy-white-paper/chapter-five-keeping-australia-and-australians-safe-secure-and-free-1.html>, last accessed 21 October 2022.

<sup>99</sup> <https://online.afp.gov.au/ironside>

## 7. Conclusion

Consorting laws were updated in 2012, and amended in 2019, to ensure the laws were used to disrupt and target serious organised criminal activity, and also to ensure the laws did not have a detrimental impact on vulnerable groups within our community.

Some of the amendments to the consorting laws changed defences available to people who are prosecuted for consorting. The Commission has not been able to fully assess the impact of those amendments, because the defences were not relevant to any of the prosecutions during the review period. There is, however, opportunity for police officers who are deciding whether to issue a consorting warning, to consider whether one of the defences may later be available, and in these cases, not issue a consorting warning at all. The NSW Police Force amended its consorting SOPs at the end of 2022 to require officers to turn their minds to any relevant defences when considering issuing a warning.

It is encouraging that there has been a substantial reduction in the number of children and young people under the age of 18 who are both issued with warnings and named in warnings. Although the use of consorting warnings was framed as a diversionary strategy by NSW Police Force, the evidence base for this is unclear. Instead, consorting laws risk increasing the number of young people entering the criminal justice system. The Commission believes the Government should consider excluding anyone under the age of 18 from the operation of the consorting law. Even if this recommendation is not accepted, there remain a number of improvements the NSW Police Force could make to its systems and processes to ensure the law is used sparingly against those under the age of 18, and that they and their parents and carers have all the information they need about what a consorting warning means. The NSW Police Force has amended its consorting SOPs to require officers to consult with their Commander before issuing a warning to someone between 14 and 18.

Despite the inclusion of kinship relationships within the definition of family members, Aboriginal people are still over-represented in the consorting warnings issued. The NSW Police Force has addressed this by limiting the application of the consorting laws for Aboriginal people to only target serious criminal activity.

Since December 2022 officers are also required to ask about kinship connections when considering consorting interactions between Aboriginal people, and then check with a supervisor before issuing a consorting warning. The NSW Police Force will need to incorporate this new step into training as well to ensure it is embedded in practice. Time will tell if this new step has an impact on the number of Aboriginal people who are issued with consorting warnings, and this should be monitored closely by the NSW Police Force.

While we identified fewer invalid warnings than the previous reviews of the consorting laws, there are still opportunities to improve systems to reduce this number further. The NSW Police Force said it has been working on a quality assurance framework to ensure warnings are both valid and appropriate. This will ensure invalid warnings are identified and those warnings are removed from COPS. It will also mean that the person warned is given timely information that the warning is no longer in place.

The NSW Police Force has indicated that it is considering developing a checklist to help officers to give those issued with a warning with all the information they need. This is a positive development, and will ensure those warned know:

- what habitually consorting means
- how long the warning is valid, and
- that they can request the warning in writing if it is issued orally.

The new case management process introduced for all consorting warnings should also ensure there are fewer invalid warnings, as well as reducing the number of warnings issued that do not appear to be targeting serious organised criminal activity.

The organisations who made submissions to the review restated concerns about the use of the consorting law to address comparatively less serious potential criminal activity. The consorting law was not introduced to address this type of potential offending, but rather to target and disrupt serious organised criminal activity. We saw a large number of uses of the consorting law alongside police powers such as person searches and move on directions. In many cases, police used the powers in relation to suspected drug possession. The increased emphasis in the updated SOPs on using the consorting laws to address interactions relating to 'serious crime' will hopefully result in a more focussed use of the laws. This will only be able to be measured over time. Notwithstanding this addition to the procedures, the Commission believes the Government should consider including an objects provision for the consorting law. This will ensure it is only used to target and disrupt serious, organised criminal activity.

# Appendix A – The consorting law

## Part 3A Offences relating to public order

### Division 7 Consorting

#### 93W Definitions

(1) In this Division –

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

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

(2) For the purposes of this Division, an **indictable offence** includes an offence committed in another jurisdiction that would be an indictable offence if committed in this jurisdiction.

#### 93X Consorting

(1) A person (other than a person under the age of 14 years) who –

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

is guilty of an offence.

Maximum penalty – imprisonment for 3 years, or a fine of 150 penalty units, or both.

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

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

(3) An **official warning** is a warning given by a police officer (orally or in writing) to the effect that –

- a. a certain person is a convicted offender, and
- b. habitually consorting with convicted offenders is an offence.

(4) An official warning ceases to have effect for the purposes of subsection (1) –

- a. if the warning is given to a person under the age of 18 years – 6 months after the warning is given, or
- b. in any other case – 2 years after the warning is given.

#### 93Y Defence

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

- a. consorting with family members,
- b. consorting that occurs in the course of lawful employment or the lawful operation of a business,
- c. consorting that occurs in the course of training or education,
- d. consorting that occurs in the course of the provision of a health service or welfare service,
- e. consorting that occurs in the course of the provision of legal advice,
- f. consorting that occurs in lawful custody or in the course of complying with a court order,
- g. consorting that occurs in the course of complying with –
  - i. an order granted by the Parole Authority, or
  - ii. a case plan, direction or recommendation by a member of staff of Corrective Services NSW,
- h. consorting that occurs in the course of providing transitional, crisis or emergency accommodation.

(2) In this section –

**family member** includes a person who is or has been part of the extended family or kin of the defendant according to the indigenous kinship system of the defendant’s culture.

**health service** means –

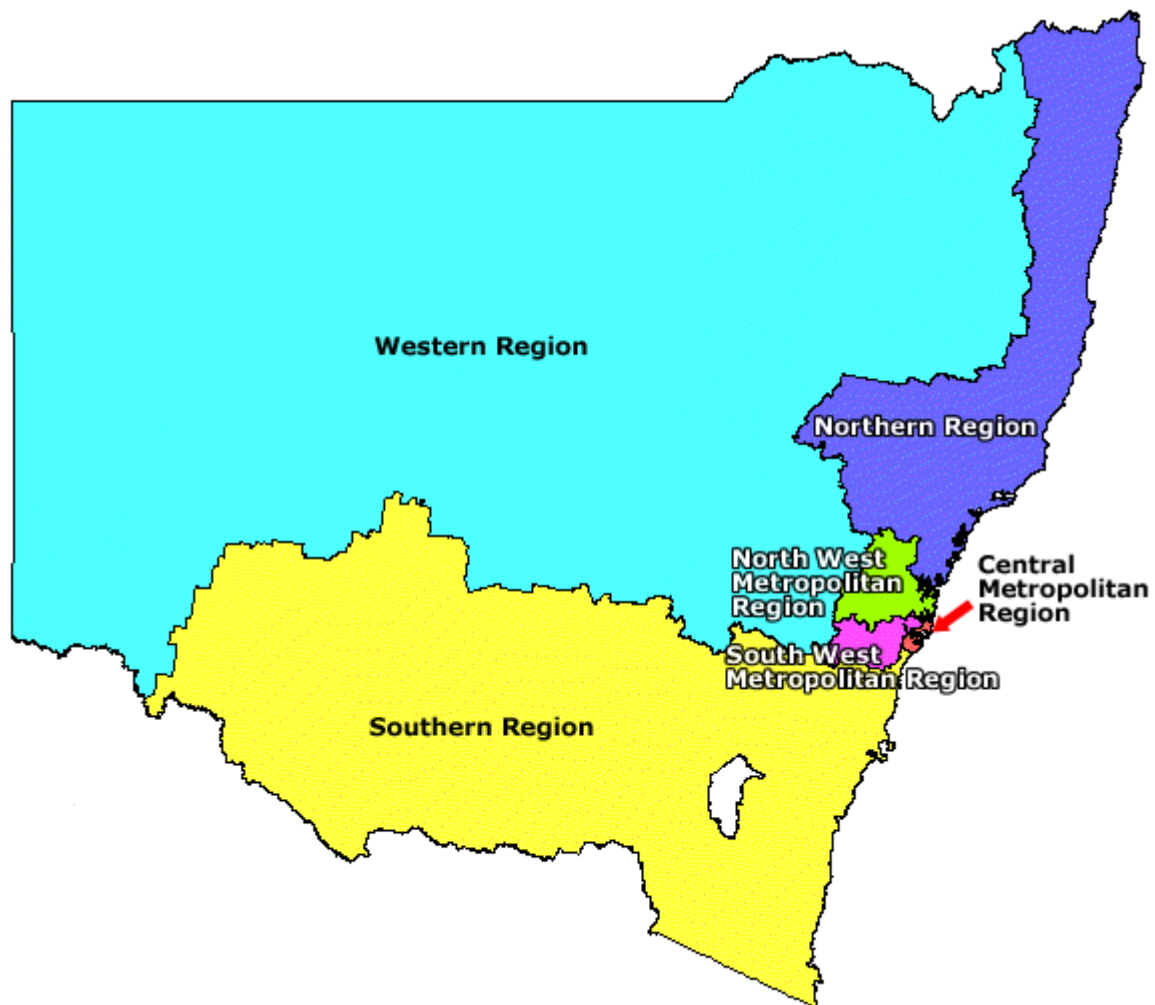
- a. Medical (including psychological), hospital, ambulance, paramedical, dental, community health or environmental health service, or
- b. another service –
  - i. relating to the maintenance or improvement of the health, or the restoration to health, of persons or the prevention of disease in, or injury to, persons (whether provided as a public or private service), and
  - ii. that is of a class or description prescribed by the regulations.

**Parole authority** means the State Parole Authority constituted by section 183 of the *Crimes (Administration of Sentences) Act 1999*.

**welfare service** means a service (whether provided as a public or private service) relating to the provision of –

- a. housing, employment benefits, rental assistance or other financial assistance or family support, or
- b. another community welfare service necessary for the promotion, protection, development and maintenance of the wellbeing of persons, including any rehabilitation, counselling, drug or alcohol service.

# Appendix B – Warnings by Command



Central Metropolitan Region	1,314
Eastern Beaches	125
Eastern Suburbs	49
Inner West	106
Kings Cross	85
Leichhardt	667
North Shore	2
South Sydney	29
St George Pac	84
Surry Hills	30
Sutherland Shire	31
Sydney City	106
North West Metropolitan Region	1,047



Blacktown	157
Blue Mountains	3
Ku-ring Gai	112
Mt Drutt	367
Nepean	65
North Shore	72
Northern Beaches	63
Parramatta	28
Quakers Hill	34
Riverstone	61
Ryde	62
The Hills	23
<b>Northern Region</b>	<b>1,381</b>
Brisbane Water	55
Hunter Valley	232
Lake Macquarie	56
Manning/Great Lakes	13
Mid North Coast	414
Mt Drutt	1
Newcastle City	153
Port Stephens-Hunter	107
Richmond	155
Tuggerah Lakes	105
Tweed/Byron	90
<b>Public Transport &amp; Public Safety</b>	<b>191</b>
Auburn	2
Bankstown	6
Blacktown	35
Brisbane Water	5
Campsie	1
Cumberland	2
Fairfield City	10
Kings Cross	1
Kuring Gai	4
Liverpool City	1
Mt Drutt	5
Nepean	49
Newcastle City	4
North Shore	2
Parramatta	22
Marine Area Command	2
Richmond	1
Riverstone	3

Surry Hills	25
Sydney City	6
The Hills	4
Tweed/Byron	1
<b>South West Metropolitan Region</b>	<b>415</b>
Auburn	13
Bankstown	79
Blacktown	11
Burwood	42
Camden	16
Campsie	21
Cumberland	120
Fairfield City	44
Liverpool City	40
Mt Druit	15
Parramatta	8
Ryde	1
St George	5
<b>Southern Region</b>	<b>540</b>
Lake Illawarra	54
Monaro	47
Murray River	14
Murrumbidgee	96
Riverina	102
South Coast	110
The Hume	108
Wollongong	9
<b>State Crime Command</b>	<b>11,050</b>
Public Order & Riot Squad	1
Child Abuse & Sex Crimes Squad	7
Criminal Groups Squad	9,241
Raptor Squad	1,801
<b>Western Region</b>	<b>542</b>
Brisbane Waters	1
Central North	9
Central West	35
Chifley	11
Coffs/Clarence	55
New England	95
Orana Mid Western	76
Oxley	260
<b>Total</b>	<b>16,480</b>

# Appendix C – Criminal conviction histories

ANZSOC division	People issued a warning	People warned about
Abduction and Related Offences	23	27
Acts intended to cause injury	1065	1530
Dangerous or Negligent Acts Endangering Persons	26	51
Deception and Related Offences	51	69
Homicide and Related Offences	20	28
Illicit Drug Offences	494	783
No Conviction	511	60*
Offences Against Justice Procedures, Government Security and Government Operations	14	19
Property Damage and Environmental Pollution	26	28
Public Order Offences	26	40
Robbery, Extortion and Related Offences	118	183
Sexual Assault and Related Offences	75	112
Theft and Related Offences	75	82
Unlawful Entry with Intent/Burglary, Break and Enter	66	87
Weapons and Explosive Offences	81	118
<b>Total</b>	<b>2671</b>	<b>3217</b>

\* Some people met the definition of a conviction offender and others were incorrectly identified as having committed an indictable offence and had a conviction recorded.

# Appendix D – Consorting Fact Sheet

Below is the content of the NSW Police Force Consorting Fact Sheet. Police in some PACs/PDs provide this fact sheet to people when they are issued with a consorting warning.

The consorting law in New South Wales makes it a criminal offence for a person to continue to associate or communicate with at least two people who have previously been convicted of an indictable offence, after receiving an official police warning. The consorting law aims to prevent crime by disrupting organised criminal activity that establishes, uses or builds up criminal networks.

## **What is an official warning?**

The consorting offence is found in Section 93X of the Crimes Act NSW and the legislation makes it clear that an official warning can be given orally or in writing. The warning informs the person being warned that the person with whom they are consorting is a convicted offender and that habitually consorting with convicted offenders is an offence.

An official warning ceases to have effect:

- a. If the warning is given to a person under the age of 18 years – 6 months after the warning is given or
- b. In any other case – 2 years after the warning is given.

A warning can be given before, during or after any consorting incident.

## **What does consorting mean?**

A person consorting with another person if that person communicates or associate with that person in any form, including by electronic or other form of communication. Some examples of consorting include meeting with, speaking to, emailing or contacting another person by social media.

## **Who are convicted offenders?**

A convicted offender means:

.... a person who has been convicted of an indictable offence (disregarding any offence under section 93X). This includes interstate offences, that if occurred in NSW would be an indictable offence.

## **Can I be guilty of consorting even though I have never been convicted of an offence?**

Yes. The offence is about associating with convicted offenders, not being a convicted offender.

## **Do the police have to tell me I am consorting?**


No. Police have to warn you that consorting with convicted offenders is an offence. If you continue to associate with that person (the convicted offender) after you have been warned, then you may be committing an offence.

After a warning has been issued, New South Wales Police Force may provide information in writing to a person, relevant to a consorting warning to or about the person.<sup>100</sup>

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<sup>100</sup> NSW Police Force, *Fact Sheet About Consorting*, [https://www.police.nsw.gov.au/about\\_us/policies\\_procedures\\_and\\_legislation/fact\\_sheet\\_about\\_consorting](https://www.police.nsw.gov.au/about_us/policies_procedures_and_legislation/fact_sheet_about_consorting)

# Appendix E – Consorting incident form



**OFFICIAL**  
**Consorting Form**

Observe all persons for a reasonable time and ensure the association is consorting and not just a coincidental meeting. Where you can, use video or take photographs to record the POI consorting with convicted offenders before speaking with any person.

Time: \_\_\_\_\_ Date: \_\_\_\_\_

Location: \_\_\_\_\_

Police 1 \_\_\_\_\_ Reg: \_\_\_\_\_

Police 2 \_\_\_\_\_ Reg: \_\_\_\_\_

Person Warned's Name: \_\_\_\_\_

Person Warned's DOB: \_\_\_\_\_

Person Warned's Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Associate: *A person convicted of an indictable offence*

Name: \_\_\_\_\_

DOB: \_\_\_\_\_

Address: \_\_\_\_\_

Notes: \_\_\_\_\_

**NB. For further details use back of form.**

I am going to ask you some questions. You do not have to say or do anything if you do not want to. Do you understand that?

YES      NO

I will record what you say or do. We can use this recording in Court. Do you understand that?

YES      NO

**Make inquiries**

- How do you know (name of associate)?
- How long have you known (name of associate)?
- Why are you here with (name of associate)?

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Make inquiries**

Are you Aboriginal or a Torres Strait Islander?

YES      NO

**IF YES: Do you have a Kinship relationship?**

YES      NO

**IF YES: Confirm with supervisor and consider a retrospective warning**

This is an official warning. (name of associate) is a convicted offender. Consorting with a convicted offender is an offence. This means that if you continue to associate with (name of associate) you might be prosecuted for the offence of consorting." Do you understand?

YES      NO

**IF NO:**

This means it is an offence for you to intentionally and repeatedly associate with people who have been convicted of serious offences such as (Convicted Offenders' name/s) without a reasonable explanation. This includes in-person or any other means such as texting, social media or other forms of communication. Do you understand that?"

YES      NO

This warning remains valid for 2 years (or 6 months for persons under 18). A consorting fact sheet is available on the NSW Police Force website.

**SIGNED**

Person Warned: \_\_\_\_\_

Date: \_\_\_\_\_

Police 1: \_\_\_\_\_

Police 2: \_\_\_\_\_

Event No \_\_\_\_\_

BWV # \_\_\_\_\_

# Appendix F – Pre-emptive consorting notice

Name:

Address:

Suburb:



**NSW Police Force**  
www.police.nsw.gov.au

## SERVICE COPY

as at [Day] [Month] [Year].

Insert Command

Mr/Miss/Mrs \_\_\_\_\_

Location \_\_\_\_\_

This is an Official Warning.

The following persons are convicted offenders, and habitually consorting with convicted offenders is an offence.

This means it is an offence for you to intentionally and repeatedly associate with people who have been convicted of serious offences such as [convicted offenders' name] without a reasonable explanation. This includes in-person or any other means such as texting, social media or other forms of communication.

This warning is valid for 2 years from today.

A fact sheet on consorting is available on the NSWPF website.

Insert POI photo.	Insert POI photo.	Insert POI photo.	Insert POI photo.
Name:	Name:	Name:	Name:

# Appendix G – Consorting guidance for officers



## CONSORTING – 93X CRIMES ACT 1900

### PERSON RECEIVING WARNING:

- Must be over 14 years old
- Does not have to be a convicted person, BUT -
- Must habitually consort with (at least 2) convicted offenders (on least 2 occasions)
- Does not necessarily have to consort with the two convicted persons at the same time

**DEFENCES** for consorting include, family members (within reason), lawful employment, accessing a health or welfare service, seeking legal advice, when in lawful custody or when complying with a court order, transitional or emergency accommodation, attending training or education.



### IF ELIGIBLE TO SERVE WARNING NOTICE:

- Serve a warning notice on each person that you want to warn.
- Serve the notice using BWV and create an event and case to monitor.
- Only provide the warned person with the name and age of the convicted person.

*"This is an Official Warning. (Name of convicted offender) is a convicted offender. Habitually consorting with convicted offenders is an offence. Do you understand that?"*

**After the person has been warned on at least 2 occasions with at least 2 convicted offenders, and you want to commence criminal proceedings, confirm with NSW Justice that the convictions still remain (not spent/ quashed).**

S.33 of the Children (Criminal Proceedings) Act 1987, S.10 of the Crimes (Sentencing Procedure) Act 1999, S.9 of the Crimes (Sentencing Procedure) Act 1999, and other similar orders are not convictions.



### COMMENCE CRIMINAL PROCEEDINGS:

- Field CAN
- Future CAN
- Arrest (if S.99 LEPRA satisfied, e.g. to stop the person committing or repeating the offence or committing another offence)

*LPC: 76998 – Habitually consort with convicted offenders after warning – Max Imprisonment 2 years Local Court, 3 years District Court*



NSWPF/2021/15386

# Appendix H – Consorting SMIT

While conducting a foot patrol of the CBD within your Local Area Command you observe Jack Black sitting in the alfresco dining area of a coffee shop. Sitting next to Jack Black is Steven Johnson who has been convicted of a number of Break and Enter offences in the last 18 months. You speak to Jack and warn him that Steven is a convicted offender and that consorting with convicted offenders is an offence.

Later the same day you see Jack Black sitting on a bench in the park speaking to Peter Wilson who is also a well-known convicted offender. You warn Jack that Peter is a convicted offender and that consorting with convicted offenders is an offence,

A week later you see Jack sitting in a coffee shop speaking with Steven Johnson and Peter Wilson.

## Critical Issues

### 1. Has Jack Black committed the offence of consorting?

- Yes. Section 93X(1) of the *Crimes Act 1900* provides that a person commits an offence if:
  - They habitually consort with convicted offenders
  - They consort with each offender after having been provided an official warning in relation to each offender.

### 2. What is habitual consorting?

- Section 93X(2) of the *Crimes Act* makes it clear that to habitually consort a person must:
  - Consort with at least 2 convicted offenders, and
  - Consort with each convicted offender on at least 2 separate occasions.

### 3. Does it matter that Jack was talking with Steven and Peter separately?

- No. Section 93(X)(2)(a) of the *Crimes Act* makes it clear that it does not matter whether Jack is speaking with Steven and Peter on the same or separate occasions (provided that Jack habitually consorts – see 2. Above).

### 4. What possible defences could Jack offer?

- Section 93Y of the *Crimes Act* provides that Jack has a defence to consorting if he can satisfy the court that his meetings with Steven and Peter were reasonable in the circumstances and that:
  - Steven and Peter are Jack's family members
  - Their meetings occurred during the course of work or business, or
  - Their meetings occurred during training or education, or
  - Their meetings occurred during the provision of health services, or
  - Their meetings occurred during the provision of legal services, or
  - Their meeting occurred during lawful custody (not relevant) or in compliance with a court order (unlikely).

### 5. Is there anything else that I should consider before charging Jack?

- Yes. Ask yourself whether you think their meetings are connected with some criminal objective or are simply a chance meeting. There may be cases where a person coincidentally meets with convicted persons regularly (e.g. at a bus stop). Coincidence is not consorting ... it does not



extend to chance or accidental meetings, and it is not the intention of the offence to criminalise meetings where the defendant is not mixing in a criminal milieu or establishing, using or building up criminal networks.

## **6. What about Steven and Peter?**

- When you see Jack speaking with both Steven and Peter at the same time, remember to warn Steven that Peter is a convicted offender and that consorting with convicted offenders is an offence. Also, remember to warn Peter that Steven is a convicted offender and that consorting with convicted offenders is an offence.<sup>101</sup>

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<sup>101</sup> NSW Police Force, *SC019 Habitually Consorting*, last accessed 31 August 2021.

# Glossary

Glossary	Description
Aboriginal people	The term Aboriginal refers to Aboriginal and/or Torres Strait Islander peoples
ANZSOC	Australia and New Zealand Standard Offence Classification System
ASD	NSW Police Force Aboriginal Strategic Direction
BOCSAR	NSW Bureau of Crime Statistics and Research
Consorting law	Division 7 Part 3A of the <i>Crimes Act 1900</i>
Consorting SOPs	The NSW Police Force Consorting Standards Operating Procedures
COPS	The NSW Police Force Computerised Operational Policing System
Event narrative	The free-text portion of a COPS event created by police officers
General duties police	Officers attached to Police Area Commands and Police Divisions
Justicelink	An online case management and court data system for NSW Courts
MobiPOL	Shared smart phone and tablet devices used by NSW Police Force officers
NSWPF	NSW Police Force
OMCG	Outlaw Motorcycle Gang
PAC	Police Area Command
SOPs	Standard Operating procedures
SMIT	Six Minute Intensive Training
Specialist officers	Officers working within State Crime Command
The Commission	The Law Enforcement Conduct Commission

