

LECC

Law Enforcement
Conduct Commission

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

October 2021

LECC

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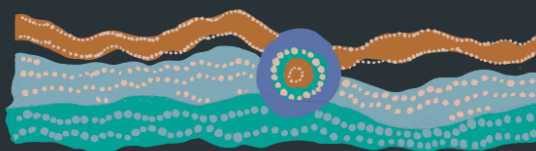
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The Law Enforcement Conduct Commission acknowledges and pays respect to the Traditional Owners and Custodians of the lands on which we work, and recognises their continuing connection to the lands and waters of NSW. We pay our respects to the people,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



Office of Commissioner

26 October 2021

The Hon Matthew Ryan Mason-Cox MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon Jonathan O'Dea MP
Speaker
Legislative Council
Parliament House
SYDNEY NSW 2000

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 discussion paper entitled *Discussion Paper: Review of the operation of the amendments to the consorting law under Part 3A Division 7 of the Crimes Act 1900*.

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

Yours sincerely,



The Hon Lea Drake
Commissioner

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1. INTRODUCTION

This discussion paper has been prepared as part of the Law Enforcement Conduct Commission's (**the Commission**) review of the operation of amendments to the consorting law under Part 3A Division 7 of the *Crimes Act 1900*, which came into effect on 28 February 2019.

Consorting laws were first introduced in NSW in the 1920s in response to the 'razor gangs' of East Sydney, but fell into disuse.¹ The NSW Government modernised consorting laws in 2012. This legislation made it a criminal offence for a person to continue to associate or communicate with people who have been convicted of an indictable offence, after receiving an official police warning. This was prompted by drive-by shootings and an escalation of violence related to Outlaw Motorcycle Gangs (**OMCGs**). The updated legislation formed part of a suite of legislative amendments designed to ensure the NSW Police Force had effective powers to detect and disrupt serious and organised crime. The then Premier, the Hon. Barry O'Farrell, described the reforms as 'additional tools in the police armoury to help them protect innocent lives and bring those involved in criminal gangs behind drive-by shootings before the courts.'²

The *Crimes Amendment (Consorting and Organised Crime) Act 2012* inserted the new consorting powers in Part 3A, Division 7 of the *Crimes Act 1900* (**the Act**). The changes were significant. The Act:

- made consorting an indictable offence and increased the maximum penalty to three years imprisonment and/or a \$16,500 fine, from a maximum of six months and/or a fine of \$400;
- extended the meaning of consorting to include communication by electronic means;
- provided guidance on the meaning of 'habitually consorting'; and
- included six possible defences.

The amended consorting law was subject to a 2014 High Court (**the Court**) challenge³ on the grounds it infringed implied constitutional rights to freedom of association and political communication, and was at odds with Australia's international obligations. While the Court agreed that it did impinge on freedom of political communication, a majority of the seven judges ruled the law was reasonably appropriate and adapted, or proportionate, to serve the legitimate

¹ Associate Professor Terry Goldsworthy, 'Criminalising Conversations: Australia's damaging love affair with consorting laws'. *The Conversation*, February 8 2016.

² The Hon Barry O'Farrell, New laws to tackle drive-by shootings, media release, Sydney, 13 February 2012.

³ *Tajjour v State of New South Wales; Hawthorne v State of New South Wales; Forster v State of New South Wales* [2014] HCA 35.

end of the prevention of crime, and upheld the constitutional validity of the legislation. The Court also held that the law was not invalid because of any inconsistency with the International Covenant on Civil and Political Rights.

In 2016, the NSW Ombudsman tabled its review of the operation of the Act for the period 9 April 2012 to 8 April 2015. The *Consorting Law: Report on Part 3A, Division 7 of the Crimes Act 1900 (the Ombudsman's report)* found that the new powers were effective at targeting and disrupting organised criminal networks like OMCGs. Despite this, general duties officers were using the laws to respond to relatively minor offending, and there were high error rates in the way that police applied the law to people aged under 18 years.⁴ Concerns relating to the potential disproportionate impact of the consorting law on vulnerable people, including Aboriginal and Torres Strait Islander people were also raised.

The Ombudsman's findings were informed by an analysis of NSW Police Force consorting data, discussions with police officers, and information gathered from public submissions to its *Consorting Issues Paper: Review of the use of the consorting provisions by the NSW Police Force*. The Ombudsman's report made 20 recommendations seeking to 'increase the fairness of the operation of the consorting law, and to mitigate the unintended impacts of its operation on people in circumstances where there is no crime prevention benefit, or where the crime prevented is relatively minor.'⁵ Seven of the report's recommendations related to statutory reform, and 13 focussed on amending NSW Police Force policy and procedure.

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 by the NSW Government.⁶

1.1 LEGISLATIVE AMENDMENTS

The *Criminal Legislation Amendment (Consorting and Restricted Premises) Act 2018 (amending Act)* came into effect on 28 February 2019.

The amending Act made the following changes to Part 3A, Division 7 of the Crimes Act:

- 'indictable offence' was expanded to include an indictable offence committed in another jurisdiction;

⁴ *The Consorting Law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*. NSW Ombudsman. April 2016, p. 1.

⁵ *The Consorting Law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*. NSW Ombudsman. April 2006, p. iii.

⁶ *NSW Government response to the Ombudsman's Report on the operation of Part 3A, Division 7 of the Crimes Act 1900 (April 2016)*.

- children under the age of 14 years were excluded;
- official consorting warnings are now valid for six months for persons under 18 years and for two years for persons 18 years and over;
- the elements of the consorting warning were clarified;
- new defences were added including: compliance with directions from the State Parole Authority and Corrective Services officers; engaging in welfare services or transitory accommodation arrangements;
- the definition of ‘family members’ was extended to recognise kinship systems of Aboriginal culture; and
- the Commission was required to review the operation of the amendments for three years.

Despite these changes, there was still some concern expressed in Parliamentary debate that the amendments did not go far enough to address the ‘potential disproportionate impact’ of the consorting legislation.⁷

This paper outlines the initial information and observations of the Commission. It also aims to inform any submissions made to the Commission to assist with the next stage of its review of the amending Act.

1.2 NSW POLICE FORCE POLICY

The NSW Police Force Consorting Standard Operating Procedures (**the SOPs**) were last revised in August 2019. The SOPs provide guidance to officers on:

- what constitutes consorting,
- how to issue and record consorting warnings,
- how to prepare for criminal proceedings in the event of a charge of consorting.

The SOPs are accompanied by educational material including: a flow chart; Step Guide; and a PowerPoint presentation which the Commission understands was delivered on 20 occasions to officers in 2019. Further discussion about the SOPs is contained in Chapter 3 of this report.

In January 2020 the NSW Police Force advised the Commission that the SOPs were under review and that it intended to conduct ‘an evaluation of the amended consorting provisions’ in early 2020, which would be made available to the Commission upon completion. The NSW Police Force has since advised that the

⁷ Second Reading Speech David Shoebridge, Second reading speeches (Legislative Assembly and Council) <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3549>, 19 Sept 2018.

review did not result in any changes to the SOPs. As such, the Commission will continue to rely on the August 2019 version of the SOPs.

1.3 OUR ROLE

The amending Act requires the Commission to report to the Attorney General and the Minister for Police on the outcome of the review as soon as practicable after it is completed.

A draft of this paper was provided to the NSW Police Force on 10 June 2021 for comment. The NSW Police Force responded on 3 August 2021, and provided additional statistical information on 26 August. That response is reflected in and referenced at relevant points throughout the paper.

Both Part 3A, Division 7 of the *Crimes Act 1900* and the relevant provisions of the amending Act are reproduced in full at Appendix 1.

1.4 METHODOLOGY

A person is considered to be ‘subject to the consorting law’ if they are either warned, or have had others warned, about them. The NSW Police Force provided the Commission with consorting data extracted from its Computerised Operational Policing System (**COPS**) in relation to consorting incidents as well as the demographic data, and conviction histories, of all persons subject to the consorting law for the period 28 February 2019 to 30 June 2020 (**the interim reporting period**).⁸ The Commission also reviewed NSW Police Force consorting policy documentation and information sourced from the Courts, Parliament, as well as academic and media articles.

The Commission was provided with NSW Police Force COPS Event Narratives (**event narratives**) involving the application of consorting powers during the interim reporting period. A total number of 1,048 event narratives were provided to the Commission, and a randomly selected sample of 281 were reviewed in detail. This number represented a sample size required for there to be 95% confidence that inferences drawn from analyses would reflect the total number of narratives provided with a relative standard error percentage of five.⁹ This narrative review considered how officers were applying the consorting laws in the field.

The Commission also searched for certain keywords among the 1,048 narratives to determine whether any of the amendments were relevant to the events. The Commission requested Body Worn Video (**BWV**), where available, for each of the

⁸ A total of 34 consorting warnings and one consorting charge have not been included in data analysis for the interim reporting period. These interactions were not reported to the Commission until February 2021, even though they fell within the interim reporting period. The Commission will ensure these matters are analysed and included in the data presented in the Final report.

⁹ <https://www.abs.gov.au/websitedbs/D3310114.nsf/home/Sample+Size+Calculator>

events used as case studies in this interim report to support the analysis undertaken. The Commission's analysis of the review of event narratives is found in Chapter 3 of this report.

The Commission identified discrepancies in 20% of the 281 event narratives reviewed primarily related to records of all people and/or warnings described in the narrative compared to information recorded in COPS. The Commission also found some event narratives were not clear about who was being issued with a warning, and who had someone warned about them. There were also 16 narratives that contained no reference to consorting. The Commission has raised these discrepancies with the NSW Police Force, and will continue to do so if any further discrepancies are identified during the course of the review.

A statistical overview of how the consorting law was used in the interim reporting period is provided in Chapter 4 of this report.

The Commission also reviewed COPS records for 43 persons who were recorded as being named in a consorting warning despite the fact that COPS indicated the person had no NSW indictable conviction in the last 10 years. These persons are discussed in Chapter 5.

Legislative amendments, changes to NSW Police Force consorting policy, as well as changes to the NSW Police Force organisational structure, have meant the way the consorting law is used has changed. This means it is not possible to make direct comparisons between the Ombudsman's report and the Commission's analysis. There are however some high level patterns that are worth noting between the two reporting periods, and these are presented later in this paper.

This discussion paper provides a snapshot of the uses of the laws. This is to assist those who wish to make a submission to the Commission. The Commission would particularly like to hear and consider the views of those who wish to make a submission about the impact of the amended consorting laws, including discussion of the experiences of those who have been subject to the laws.

1.5 OVERVIEW OF KEY STATISTICS

The Commission's initial review has shown that:

- no child under the age of 14 was subject to the consorting law;
- there has been a significant reduction in the number of children (defined as people under 18) subject to the consorting law;
- the proportion of consorting warnings issued by officers attached to specialist squads has increased compared to general duties officers since the Ombudsman's reporting period; and
- no expired warning formed the basis of a consorting charge.

1.6 OMBUDSMAN RECOMMENDATIONS

It appears the NSW Police Force has not fully implemented all of the recommendations proposed by the Ombudsman that were either supported, supported in part or supported in principle by the NSW Government. A table of each of these recommendations and the NSW Government response is provided at Appendix 2 of this report.

The Ombudsman policy recommendations of particular relevance to NSW Police Force and the operation of the legislative amendments include:

Recommendation 5 (supported by NSW Government):

The NSWPF design and implement a quality assurance process for the ongoing use of the consorting law.

This process should be implemented within each command or relevant organisational unit and must ensure:

- a) accurate record-keeping;
- b) that correct procedures are followed if invalid warnings are identified; and
- c) that the NSWPF consorting policy and guidelines are complied with.

Recommendation 15 (supported by NSW Government):

The NSWPF amend its consorting policy, SOPs, publications and training to encourage officers to exercise their discretion not to issue consorting warnings or commence criminal proceedings on the basis of the following types of consorting:

- a) Consorting that occurs in the course of complying with an order by the State Parole Authority or with a case plan, direction or recommendation by a member of staff of Corrective Services NSW;
- b) Consorting that occurs in the course of the provision of transitional, crisis or emergency accommodation;
- c) Consorting that occurs between family members where 'family members' is defined in a culturally inclusive way, with particular reference to the Aboriginal kinship system; and
- d) Consorting that occurs in the course of the provision of a welfare or support service.

Recommendation 16 (supported in principle by NSW Government):

The NSWPF amend its consorting policy, SOPs, relevant publications, and training so that application of the consorting law is focused on the prevention of serious criminal offending.

NSW Government response: The NSWPF will review and, where appropriate, update internal NSWPF policy, SOPs and training regarding application of the consorting law to state the application of the consorting law is focused on the

prevention of organised criminal activity that establishes, uses or builds up criminal networks.

Recommendation 17 (supported in principle by NSW Government):

The NSWPF amend its consorting policy, SOPs, relevant publications, and training so that:

a) identification of people who are to be targeted for consorting should be intelligence-driven, and based on an identified risk that the relevant individuals are involved in recent or ongoing serious criminal offending; and

b) use of the consorting law in the circumstances is likely to assist to prevent serious criminal offending.

NSW Government response: The NSWPF will update its internal consorting policy, SOPs, relevant publications, and training so that:

a) identification of people who are targeted for consorting should be intelligence-driven, and based on an identified risk that the relevant individuals are involved in recent or ongoing criminal offending; and

b) use of the consorting law in the circumstances is likely to assist to prevent criminal offending. The NSWPF will review internal policy to ensure that the application of the consorting law is focused on the prevention of organised criminal activity that establishes, uses, or builds up criminal networks.

Recommendation 18 (supported in principle by NSW Government):

The NSWPF proscribes the use of the consorting law to address or prevent minor offending, including offences outlined in the Summary Offences Act 1988, and reflect this in NSWPF consorting policy, SOPs, relevant publications, and training.

NSW Government response: The NSWPF will review NSWPF consorting policy, SOPs, relevant publications, and training to ensure that the application of the consorting law to address or prevent minor offending is appropriate given the focus of the consorting law to prevent organised criminal activity that establishes, uses, or builds up criminal networks.

1.6.1 EFFECT OF EXPANDED DEFENCES ON OFFICER DISCRETION

At this stage of the review, the Commission cannot definitively comment on the impact of the expanded defences on the operation of the consorting law because it is not clear to what extent the expanded defences deterred officers from issuing consorting warnings. The NSW Government supported the NSW Ombudsman recommendation (15) that ‘the NSWPF amend its consorting policy, SOPs, publications and training to encourage officers to exercise their discretion not to issue consorting warnings or commence criminal proceedings’ on the basis of the expanded defences. This guidance does not appear to have been fully incorporated into these documents. There is guidance relating to charging individuals and pursuing a prosecution. There is, however, little guidance on how to apply discretion when considering whether to issue a warning.

Like the expanded defences, the Commission cannot comment on the extent to which officers communicated all elements of the consorting warning, as many warnings are issued verbally and without a BWV recording. It is encouraging that all elements of the consorting warning are included in the SOPs, accompanying educative material, and in relevant templates provided to officers.

There is scope for further clarity and guidance to be added to the SOPs about the identification and recording of persons who have been convicted of indictable offences in other jurisdictions; as well as to how the expanded defence of Aboriginal and Torres Strait Islander kinship systems should be considered or applied by officers in the field. This is discussed in Chapter 3.

The development of a quality and assurance framework, as recommended by the NSW Ombudsman (recommendation 5) would provide additional rigor to the accuracy of recording consorting warnings.

While the Commission found the SOPs to be a generally robust and comprehensive document setting out clear expectations and guidance to officers, the guidance could be further strengthened by more fully addressing the Ombudsman's recommendations that were either supported, or supported in principle, by the NSW Government. The Ombudsman's policy recommendations complement and support the effective operation of the legislative amendments by keeping the emphasis on the prevention of 'organised criminal activity that establishes, uses, or builds up criminal networks.'

2. THE CONSORTING LAW IN PRACTICE

This chapter provides an overview of the consorting law and how it was applied in the interim reporting period.

2.1 WHAT IS THE OFFENCE OF CONSORTING?

Section 93X of the *Crimes Act 1900* provides that a person who habitually consorts with convicted offenders, and consorts with those convicted offenders after having been given an official warning in relation to each, is guilty of an offence. The section does not define 'habitually consort' specifically, but section 93X(2) provides:

A person does not habitually consort with offenders unless:

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

A person is found to be consorting if they communicate or associate with a convicted offender in any way, including by electronic or other communication means. The Ombudsman's report noted that the High Court affirmed in 2014¹⁰ that provisions setting out consorting offences in all Australian jurisdictions are to be interpreted in line with the leading High Court decision in *Johanson v Dixon* (1979) 143 CLR 376.¹¹ The High Court determined:

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

The SOPs provide guidance to officers as to how to exercise their discretion in determining what constitutes consorting. The SOPs contain practical examples of what is, and what is not, consorting and include relevant case notes, including *Johanson v Dixon*.

¹⁰ *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35.

¹¹ *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35 at 64 and 101.

2.2 OFFICIAL WARNINGS BY POLICE FOR CONSORTING

NSW Police Force officers do not need to form a reasonable belief of a person's intent to commit a crime before issuing a consorting warning. It is enough that a person communicates or associates with a person who has been convicted of an indictable offence.

A police officer can give an official consorting warning either 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. A warning can be given before (pre-emptive), during, or after (retrospective) a consorting incident.

Any officer can issue a consorting warning. Chapter 4 provides detail on the use by various commands.

2.2.1 RECORDING CONSORTING WARNINGS

A consorting incident (or interaction) is an occasion involving one or more persons where police have recorded a use of the consorting law. For example, an officer may issue a consorting warning to a person for consorting with several people. The person who is the subject of the warning may also have others warned about them in the same incident - providing that they too have been convicted of an indictable offence.

The SOPs provide guidance to officers about how they should record a warning for each occasion of consorting. Officers are required to make a record of the incident in their notebook and create an Event in COPS. These records should capture an officer's observations, responses, and the behaviour of the people who are subject to the consorting law. When the notebook entry is complete, officers are instructed to ask the person being issued the warning to sign the notebook, or to indicate if the person refuses, and if so, sign it themselves and/or ask another witness to sign.

2.3 WHAT IS THE MEANING OF CONVICTED OFFENDER?

Any person can be warned for consorting if they associate or communicate with a 'convicted offender' and further charged if they meet the threshold of 'habitually consorting' prescribed under section 93X.

Determining whether a person is a 'convicted offender' for the purpose of naming them in a consorting warning can be a difficult exercise.

Section 93W defines a convicted offender as a 'person who has been convicted of an indictable offence (disregarding any offence under section 93X)'.¹²

¹² *Crimes Act 1900*, s. 93W

Indictable offences are classified broadly. They range from the most serious of crimes, such as murder, to less serious offences, such as shop lifting and minor property damage. The *Criminal Procedure Act 1986* provides that some indictable offences are to be dealt with summarily by the Local Court ‘unless the prosecutor or the person charged with the offence elects in accordance with this Chapter to have the offence dealt with on indictment.’¹³ If these offences result in conviction, even if the charges were dealt with summarily, the person who has been convicted will be considered a ‘convicted offender’ for the purposes of the consorting legislation.

The amending Act broadened the meaning of indictable offence in section 93W, to include an offence committed in another jurisdiction that would be indictable if committed in NSW. Offences that are indictable in another jurisdiction may not be indictable in NSW, and vice versa. To conclude whether a person is a ‘convicted offender’ due to offending in a different jurisdiction, an officer needs to know a level of detail about the offending and the criminal laws in both NSW and the other jurisdiction. This is discussed in 3.1.

A person is not a ‘convicted offender’ for the purposes of the consorting law if a conviction for an indictable offence is not recorded by the court (even if the court sentences the person for the offence). A person also does not meet the definition of a ‘convicted offender’ if their conviction is ‘spent’ under the *Criminal Records Act 1991*. Generally, a person’s conviction will be considered ‘spent’ if the person completes a period of crime-free behaviour after their conviction. The crime-free period is generally 10 years, but it is three years if the person was sentenced by the Children’s Court.¹⁴

The SOPs reflect this position, stating that criminal proceedings are not to be commenced ‘unless the convicted offender has been convicted within the last 10 years.’¹⁵ Modifications to COPS in 2013 provide a safeguard for this, preventing officers from recording a consorting warning about a person unless the person has been convicted of an indictable offence within the last decade. This can, however, be overridden. COPS does not have any embedded protections for persons whose convictions are spent after a period of three years.¹⁶

Some convictions never become spent. These include sexual offences and those where a sentence of more than six months’ imprisonment has been imposed.¹⁷ Given the modifications to COPS it appears that the automated expiry after 10

¹³ *Criminal Procedure Act 1986*, s. 260.

¹⁴ *Criminal Records Act 1991*, ss. 9-10.

¹⁵ NSW Police Force. Consorting Standard Operating Procedures. State Crime Command. August 2019, p. 17.

¹⁶ Email from Statistical Services, State Intelligence Command, NSW Police Force to Senior Project Officer, Law Enforcement Conduct Commission, 26 February 2021.

¹⁷ *Criminal Records Act 1991*, s 7.

years might inadvertently apply to offences that never become spent. The Commission understands that where an officer becomes aware that a person's conviction has never been spent, and they intend to issue a warning to a person for consorting with that individual, a request can be sent to NSW Police Force IT services to enable the officer to record a warning within COPS.¹⁸

2.4 DEFENCES

There are a number of defences to a charge of consorting. The courts must disregard the charge for the purpose of section 93X if the defendant satisfies the court that the consorting was reasonable in the circumstances. Section 93Y provides the following defences:

- (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; and
- (h) consorting that occurs in the course of providing transitional, crisis or emergency accommodation.

The SOPs include the above list of defences and definitions for the following key terms, which were incorporated in the consorting law following the introduction of the amending Act.

- family member;
- Parole Authority; and
- welfare service.

Unlike the standard burden of proof, the defendant must prove the consorting was reasonable in the circumstances, and that the defence applies.

¹⁸ Discussion with Statistical Services, State Intelligence Command, 1 February 2021.

Chapter 3 of this report discusses whether officers considered if the additional defences might be relevant in legal proceedings before issuing a consorting warning, or prior to proceeding with a charge of consorting.

2.5 HOW THE CONSORTING LAW WAS USED

The Commission's analysis of COPS data from 28 February 2019 to 30 June 2020 shows there were:¹⁹

- 2,361 unique people subject to the consorting law;
- 1,487 unique people who were issued consorting warnings;
- 1,721 unique people who had others warned about them;
- 2,003 consorting incidents;
- 11,111 consorting warnings issued; and
- two charges laid.

Further statistical analysis is provided in Chapter 4 of this report.

¹⁹ Figures exclude duplicates that were identified and removed from the dataset.

3. OPERATION OF THE AMENDMENTS

This chapter reviews the operation of the legislative amendments, based on an analysis of records extracted from COPS and the Commission's review of consorting event narratives.

3.1 EXPANDED MEANING OF INDICTABLE OFFENCE

The SOPs define a convicted offender as:

... 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.

When the SOPs were amended in August 2019, the legislative meaning of 'indictable offence' was expanded to recognise that organised crime, particularly OMCGs, operate across jurisdictional borders.

As mentioned above, COPS contains a mechanism to prevent officers from recording a consorting warning about a person unless the person has been convicted of an indictable offence in NSW in the last 10 years. However, officers can override this by using a free text field. Officers can use this free text box to record the details of a person's convictions in other jurisdictions which qualify them as a 'convicted offender' about whom a warning can be given.

Of the 2,003 consorting incidents reviewed, there were 43 persons named in 104 consorting warnings who the COPS record indicated had not been convicted of an indictable offence in NSW but for whom police utilised the free text field to record the warning. From the details entered into the free text field, it appears that 16 were persons whom police believed had relevant interstate convictions. These were from Queensland (nine people), Victoria (three people), Western Australia (three people) and South Australia (one person).

Sixty three consorting warnings were issued naming the 16 individuals whom the police believed had convictions for offences in other jurisdictions which would be indictable offences in NSW. There was insufficient detail included in the free text field to determine:

- 1) whether a conviction was recorded for the offence committed in the other jurisdiction;
- 2) the date of that conviction, and
- 3) whether the offence the person committed in the other jurisdiction would fall under the definition of an indictable offence recognised by NSW law.

An officer may need more information than the title of the offence committed outside NSW. They may also need to know the facts of the person's offending,

and the definition of offences in the jurisdiction where the offence was committed and in NSW.

This is particularly challenging for offences in other jurisdictions which have no direct equivalent in NSW. For example, for two individuals named in warnings the offences recorded in the free text field were 'Being armed in a way that may cause fear' and 'Going armed so as to cause fear'. These are offences in Western Australia and Queensland respectively which have no direct equivalent in NSW. However, if the facts of those offences are known, it may be that those facts would meet the definition of a different, indictable offence in NSW (for example, the offences of possessing a firearm or prohibited weapon without a permit).

Another person's offence in Queensland was listed as 'Assault/obstruct police officer'.²⁰ In NSW assaulting a police officer is an indictable offence (section 60 of the *Crimes Act 1900*). However 'obstruct' police officer is defined in section 790 to include 'hinder or resist'. In NSW hinder or resist a police officer is a separate offence in section 546C of the *Crimes Act 1900* and is a summary offence. In order to conclude whether the offence would be indictable in NSW police would need to know whether the person assaulted or only obstructed (hindered/resisted) the police officer in Queensland.

Even if the offence in another jurisdiction on its face appears to have a direct equivalent in NSW, it may still be necessary to consider the facts of the offending. For example, in the free text field for one person it was recorded that the person had been convicted of the offence of affray in Queensland. There is an offence of affray in section 93C of the *Crimes Act 1900* (NSW) which is an indictable offence attracting up to 10 years' imprisonment. However, the definition of affray in section 72 of the *Criminal Code 1899* (Qld) is different to that in NSW, and appears to be a less serious offence, as it only attracts a maximum sentence of one years' imprisonment. To determine whether the offence committed in Queensland would meet the definition of affray (or another indictable offence) in NSW, it would be necessary to consider the facts of the person's offending.

The SOPs do not provide guidance as to the process officers should follow to determine whether a person has a conviction for an offence in another jurisdiction, and if that offence is indictable in NSW.

The NSW Police Force has advised the Commission that it is possible for police officers to identify if a person has been convicted of an indictable offence by searching the National Automated Fingerprint Identification System (NAFIS). NAFIS is an Australian fingerprint and palm print database and matching system available to law enforcement agencies to establish the identity of persons.

There is also a national search function within COPS that can assist officers in their search. It is not clear from the SOPs that these avenues are available to all

²⁰ Section 790 of the *Police Powers and Responsibilities Act 2000* (Qld)

police, or if it is expected that an officer should undertake this check in deciding whether to issue a consorting warning.

Even once a conviction for an offence in another jurisdiction is identified by an officer, further analysis and research will be required before an officer is able to conclude that the person meets the definition of a 'convicted offender' for the purposes of being named in a consorting warning in NSW. The officer may be required to consider the facts underpinning the conviction, and the criminal statutes in the other jurisdiction and in NSW, before being able to conclude that the person meets the definition of a 'convicted offender' for the purposes of being named in a consorting warning in NSW.

It is possible some people may have been incorrectly named as 'convicted offenders' in warnings because their convictions from another jurisdiction related to an offence that would be a summary offence in NSW. For example, in the case of one person the offence listed in the free text field was 'Queensland. Offence - Contravene direction or Requirement.' This is most likely a reference to the offence in section 791 of the *Police Powers and Responsibilities Act 2000* (Qld) of 'offence to contravene direction or requirement of police officer'. There is no general offence equivalent to this in NSW; in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) there are separate offences for 'failing to comply' with police directions depending on the type of direction (e.g. to disclose identity (section 12), to stop vehicle (section 39), and to move on (section 199)). These are all, however, summary offences.

The SOPs could be amended to include guidance around when officers should utilise the free text field to record a warning when COPS indicates no valid indictable conviction exists for the warning. In particular, in relation to persons who have been convicted of offences in another jurisdiction, the SOPs should give guidance to officers as to what details about the facts of the offending, equivalent offence in NSW, and record of conviction will need to be included in the free text field to enable a manual review of the validity of the basis for the warning.

The NSW Police Force has indicated that placing any requirement on operational police to conduct inquiries about the details of interstate offences for warning purposes would be onerous and unnecessary, as appropriate safeguards exist at the prosecution stage. The Commission will review the prosecution safeguards in the next stage of the review, but also believes officers should have a method of ensuring a warning is supported by sufficient, relevant information. If this is not possible, it may not be workable for officers to issue consorting warnings based on interstate offences in the field.

3.2 CHILDREN UNDER 14 YEARS ARE EXCLUDED FROM APPLICATION OF THE CONSORTING LAW

Section 93X of the amending Act specifies that any person, other than a child under the age of 14, can be warned or charged for consorting. Previously, only persons under the age of 10 years were excluded from the application of the consorting law.

The SOPs advise officers:

An Official Warning can only be given in relation to a child under 16 if you are certain that they have been convicted of an indictable offence. Do not warn a person for consorting under 14 years old.²¹

The SOPs further state that officers:

...should not target children under the age of 16.²²

The NSW Police Force records analysed by the Commission show that no person under the age of 14 was subject to the consorting law in the interim reporting period. No one under 14 was issued with a warning or had others warned about consorting with them. However, the Commission's analysis shows that 16 children aged 14-15 years were subject to the consorting law, with an overall number of 32 persons under the age of 18 subject to the consorting law. This was a significant reduction in the number of persons aged under 18 years subject to the consorting law compared to that reported by the Ombudsman in 2016.

Further analysis of data relating to children and the consorting law is provided in Chapter 6 of this report.

3.3 TIMEFRAMES FOR THE DURATION OF OFFICIAL CONSORTING WARNINGS

Prior to the introduction of the amending Act, there was no statutory time limit governing how long a consorting warning remained active. Section 93X now provides that warnings are valid for six months when issued to those under 18 years, and for two years when issued to those 18 years and over. Consorting warnings are deemed to be expired if they exceed these timeframes and cannot be used to form a charge of consorting.

There were two consorting charges in the interim period, and both were issued against one person.²³ The Commission understands that one of these charges

²¹ NSW Police Force, Consorting Standard Operating Procedures, State Crime Command, August 2019, p. 12.

²² NSW Police Force, Consorting Standard Operating Procedures, State Crime Command, August 2019, p. 22.

²³ The Commission received advice of a third charge laid in the reporting period in February 2021 and this will be reported on in the final report.

was subsequently withdrawn after pleas of guilty to the second matter.²⁴ The Commission found the NSW Police Force complied with the legislative amendments in terms of age and timeliness in laying this charge. At the time the first charge was issued the individual had previously been warned about one person on three separate occasions, and another person on three separate occasions. The duration between the first and fifth warning was 17 days. The sixth occasion of consorting and subsequent charge was issued 249 days after the first warning.

The SOPs go further than the legislative amendment and encourage officers to take a considered approach before laying a consorting charge. Despite the two year timeframe for consorting warnings issued to adults, the SOPs state that officers should ‘not commence criminal proceedings unless the different occasions of consorting occurred within a 6 month period.’²⁵

The Commission analysed the timing of warnings issued to those who received more than one consorting warning in the interim reporting period. The shortest duration between first and last warnings was one day, while the longest duration was 474 days. The average number of days between warnings issued was 17 days.

3.4 CLARITY AROUND ELEMENTS OF THE CONSORTING WARNING

The amendments in section 93X(3) of the Act provide specificity to police on the language to use when issuing a consorting warning. The Act indicates that when police warn a person they are to inform the person that someone is a convicted offender, and that habitually consorting with convicted offenders is an offence. This is reinforced in the SOPs, which indicate that officers are to say:²⁶

“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?”

The event narratives reviewed by the Commission show that the language prescribed in the SOPs and legislative amendment was used in six matters. The Commission recognises it is likely police may have used the prescribed language during the interaction without recording it in the event narrative. It is also possible that the relevant notebook entries record the actual wording used. However, given the workload in the NSW Police Force sourcing and providing

²⁴ Email from Sergeant, Professional Standards Command, NSW Police Force, 12 August 2020.

²⁵ NSW Police Force Consorting SOPs, August 2019, p. 22.

²⁶ NSW Police Force Consorting SOPs, August 2019, p. 12.

such information, the Commission did not request these entries for the purposes of informing this paper. The NSW Police Force has also indicated that in most cases the event narrative will provide a more complete record than the notebook entries.

The Commission reviewed the sample of event narratives to see if police attempted to confirm that a person knew and understood that they were being issued with a warning. The Commission was able to verify that in 81 events officers noted that they sought to confirm that the person knew and understood what it meant.

Case Study 1

General duties police were conducting a consorting operation in the Sydney metropolitan area one morning in April 2019 when they observed a person sitting on a bench. This person was known to the officers as someone who had previously been convicted of drug supply. Officers observed another person approach the bench, put down their belongings and receive some money from the known offender. This person then went and bought a coffee. On this basis, police assumed they knew each other and approached them.

The event narrative indicates the officers introduced themselves, asked each of the people if they knew each other, and enquired whether it was known that one person was convicted of an indictable offence. Police were able to establish that they were friends and the conviction was known.

The event narrative records that they advised the person “that consorting with a convicted offender is an offence”, that the person understood this, and that notes were made in their notebook with the official warning. Further to this, police records indicate that the person signed the notebook entry and was explained “the rules around consorting laws”.

In this case study, police complied with the requirements to properly inform the person given the warning that someone is a convicted offender, that habitually consorting with convicted offenders is an offence, and that the person given the warning knew and understood what this means.

3.5 ADDITIONAL DEFENCES

Amendments to section 93Y of the Act expanded the defences to a charge of consorting. These recognise that a person may, out of necessity to their health, living circumstances or welfare, need to associate with others where this may be an offence. In addition to the existing defences,²⁷ amendments were introduced to allow people to defend an interaction on the basis of consorting that occurs:

- in the course of complying with an order by the State Parole Authority or with a case plan, direction or recommendation by a member of staff of Corrective Services NSW;
- in the course of the provision of transitional, crisis or emergency accommodation.

The SOPs reiterate the legislation surrounding these defences,²⁸ and advise that:

While interactions may occur on their face in one of the contexts detailed in 93Y above that does not necessarily mean that the interaction is “reasonable in the circumstances”. If there is evidence that suggests the interaction was not in the nature that one would expect given the context, the matter may require further consideration. Exercise common sense and remember you require admissible proof not personal suspicion.²⁹

The NSW Government response to the Ombudsman’s report recommended that the NSW Police Force amend the SOPs to encourage officers to exercise their discretion *not* to issue warnings, or engage in criminal proceedings, where consorting occurs in relation to the expanded defences. While the defence does not preclude police from issuing a warning, and police discretion is a valid tool in the application of the consorting legislation, it would seem that an officer should be making a determination *not* to apply the law when a defence *can* be applied.

The Commission is unable to locate any advice in the SOPs that advises officers to use their discretion not to issue a warning when a defence can be established, and recommends that the SOPs are amended to reflect the NSW Government response.

The Commission did not identify any occasions in the first reporting period where the additional defences might apply. No warnings were issued for consorting in the course of complying with an order by the State Parole Authority or direction from Corrective Services NSW. While no consorting occurred explicitly in the course of the provision of transitional, crisis or emergency accommodation there

²⁷ Consorting with family members; in the course of lawful employment or the lawful operation of a business; in the course of training or education; in the course of the provision of a health service or welfare service; in lawful custody or in the course of complying with a court order.

²⁸ NSW Police Force Consorting SOPs, August 2019, pp. 15-16.

²⁹ NSW Police Force Consorting SOPs, August 2019, p.16.

were occasions where persons identified as homeless and/or circumstances rendered them vulnerable as demonstrated by case studies three and four below.

The proposed policy changes either supported, supported in part or supported in principle by the NSW Government include a focus on the 'prevention of organised criminal activity that establishes, uses, or builds up criminal networks.' When the additional defences are considered in isolation there is no evidence to suggest the warnings were issued unlawfully. The following case studies illustrate how the consorting law has been applied to vulnerable groups in circumstances that do not appear to align with this focus.

Case Study 2

Police attended a property in response to reports of squatting. Three of the four people at the property advised they were recently made homeless and claimed they did not know the property was supposed to be abandoned. One of them was under 18 years of age. The group were provided with details of the NSW Link2home³⁰ service and with information on how to obtain housing. A 'Child At Risk' incident was also raised.

Given the location was known for drug use, and a stolen credit card was found on the floor of the property police conducted a search of each person but found nothing adverse. All three adults were given consorting warnings. All parties were then moved on.

Case Study 3

Early one afternoon, a group of seven people were approached by general duties police in the carpark of a shopping centre in northern NSW. Security staff told police empty coat hangers were found in a store change room, and they believed the group had been acting suspiciously by walking in and out of the store for short periods of time. The group included two residents of Queensland, three residents from NSW, and one person with no fixed address.

Police activated their BWV when they approached the vehicle and advised the group they were being recorded. Police formed the opinion that the POI's and/or vehicle may contain stolen items and undertook a search of the vehicle and POI's with no items of interest located. Police undertook a check of the group on the police system, which indicated

³⁰ Link2home is a state-wide telephone service providing information, assessment and referral to specialist homelessness services, temporary accommodation and other appropriate services for people who are homeless or at risk of homelessness.

that three members had been convicted of indictable offences interstate.

On the basis the group had been spending time together and it was not a coincidental meeting, the police issued the group with a warning for consorting. Two of the people in the group were in a relationship, and police did not issue a warning to them.

The BWV indicates that police conveyed all the elements of the consorting warning to the group. They identified those who had been convicted of an indictable offence and explained that any further association with those individuals would constitute the offence of consorting. Police clarified that those receiving the warning knew and understood what that meant but did not ask them to sign their notebook.

Ten consorting warnings were issued to individuals with an address listed by police in the event narrative as 'NFPA' which the Commission has interpreted to mean 'no fixed permanent address'. In addition, the Commission identified one consorting warning that was issued to a person who police had identified as homeless. It is not clear whether officers considered whether these individuals were consorting as a direct result of the vulnerability around their living arrangements.

The NSW Police Force has indicated that the consorting laws are used to target criminal groups that operate within and target the homeless, and that it is unnecessary to place additional requirements on its officers. Given the potential impact of the consorting laws on those who are homeless, the Commission recommends the NSW Police Force consider requiring officers who issue a consorting warning to individuals who are experiencing homelessness to specify how the use of consorting power aims to prevent organised criminal activity that establishes, uses or builds up criminal networks.

3.6 EXPANDED DEFINITION OF 'FAMILY MEMBERS'

In addition to the list of defences above, section 93Y(2) of the Act was also amended to expand the definition of family members for Aboriginal or Torres Strait Islander persons. The Act defines family members to include:

... 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 (linked to defences).

Two examples were found in the Commission's analysis of a sample of event narratives where police refrained from issuing consorting warnings to Aboriginal and Torres Strait Islander people because they were in the company of family

members. The Commission identified case study 4 below as part of its broader review of the COPS records provided by NSW Police Force. It is an example of police issuing a consorting warning to Aboriginal people who were in the company of family members.

Case Study 4

In May 2019 police engaged in pursuit of a vehicle that accelerated while police were making enquiries during a random breath test.

After colliding with a kerb the driver exited and ran away from the vehicle. Police stayed with the vehicle and the three remaining occupants. Officers requested assistance to pursue the driver and conducted checks on the occupants who refused ambulance treatment. The officers obtained the details of the occupants who provided false and misleading details of the driver. The vehicle was subsequently searched and stolen goods were located. A check of the vehicle was also conducted revealing it displayed unlawful number plates.

All four occupants were arrested and issued with an oral warning in relation to consorting. It was explained to them that official warnings were issued because they were consorting with other known convicted offenders.

Two of the occupants claimed that they were family, with one stating that she was married to the cousin of the other. The persons were told that they “were to prove the relationship if ever charged with habitual consorting”.

Although not mentioned in the event narrative, all four persons identified as Aboriginal and Torres Strait Islander.

The officers appear to have taken the view that if the involved persons were kin, this could be tested if the decision was made to move to prosecution.

The SOPs do not remind officers that the expanded definitions of kinship should be considered at the stage of issuing a warning, nor is there an example of what Aboriginal kinship might look like in a consorting scenario. The Commission considers that the SOPs could be amended to include specific definitions and examples of Aboriginal kinship, to reduce the risk of police issuing consorting warnings to Aboriginal or Torres Strait Islander people who are in the company of their family members.

4. HOW THE LAWS WERE USED IN THE REPORTING PERIOD

This chapter provides an overview of who was warned, and who had others warned about them, during the interim reporting period:

- 2,361 people were subject to the consorting law on 2,003 occasions.
- 11,111 warnings were issued to 1,487 people.
- one person was charged on two occasions, with one of those charges later withdrawn.

All but four Police Area Commands (PACs) and Police Districts (PDs) used the consorting law on at least one occasion³¹ during the interim reporting period. The NSW Police Force Criminal Groups Squad within State Crime Command used the consorting law the most, and was responsible for more than three quarters (77%) of all consorting warnings issued.

4.1 SUMMARY OF ALL USE OF THE CONSORTING LAW BY NSW POLICE OFFICERS

Of those who were subject to the consorting law:

- 63% were issued with at least one consorting warning (1,487);
- 73% had others warned about consorting with them (1,721); and
- 36% were both issued a warning and had others warned about them (847).

There has been an increase in the use of the consorting law since the Ombudsman's review period. The Ombudsman reported 1,818 incidents and 9,155 official consorting warnings in the three years between 9 April 2012 and 8 April 2015,³² whereas there has been a similar number of incidents and a higher number of warnings recorded in 16 months comprising the interim review period. Table 1 provides a summary of the use of the consorting law by all police during the interim review period.

³¹ Blue Mountains PAC, Campbelltown PAC, Hawkesbury PAC and The Hills PAC did not use the consorting laws during the interim reporting period.

³² *The Consorting Law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*. NSW Ombudsman. April 2016, p. 29.

Table 1: Summary of all uses of the consorting law during the interim review period

CATEGORY	TOTAL
Consorting incidents	2,003
Official consorting warnings recorded by police	11,111
Consorting charges	2

Source: NSW Police Force - COPS (consorting dataset, 28 February 2019 to 30 June 2020).

More than 40% of the cohort were subject to the consorting law on a single occasion (1,031). More than three quarters of those who received warnings received only one warning (1,186) and more than half of the ‘convicted offenders’ had one person warned about consorting with them (881).

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

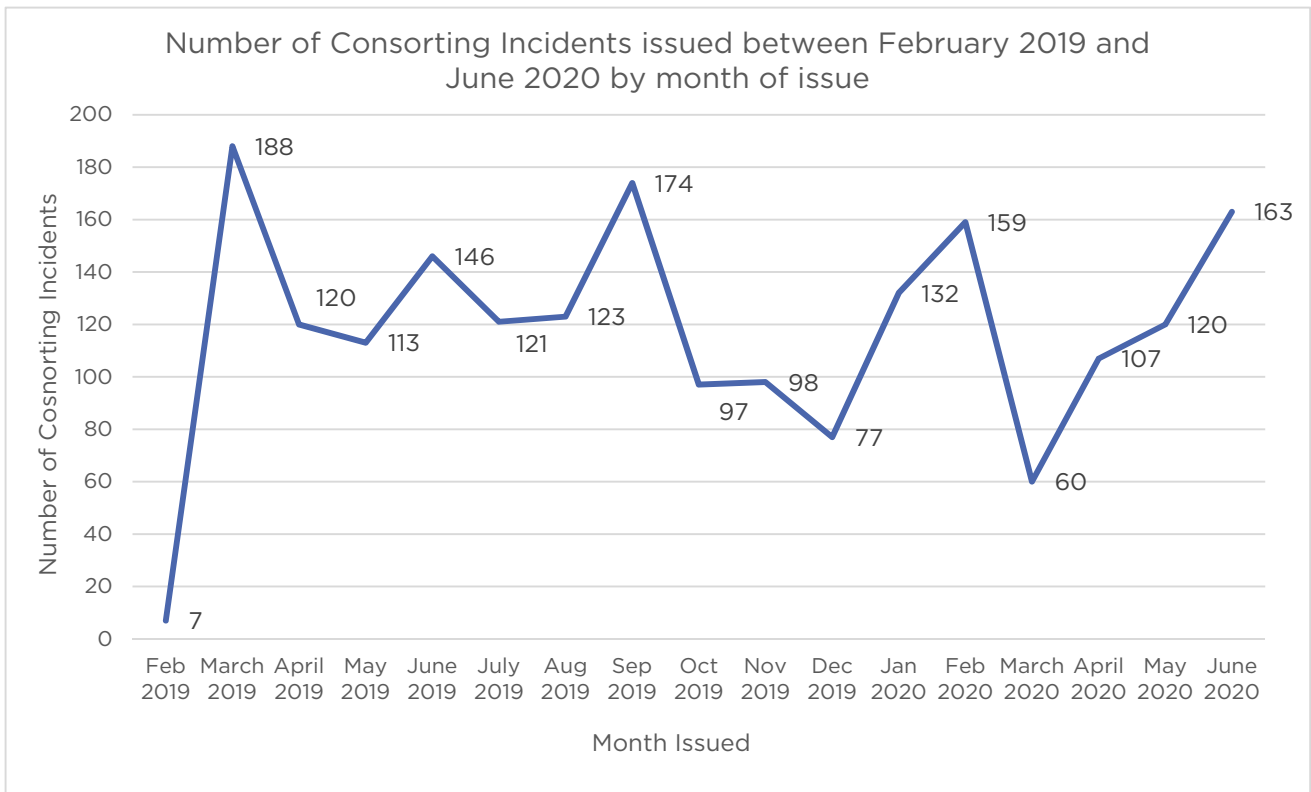
- 34% appear in three or more separate incidents (794);
- 19% appear in five or more separate incidents (450); and
- 12% appear in 10 or more separate incidents (285).

Figure 1 below shows that there was relatively high use of the consorting law just after the introduction of the amending Act on 28 February 2019. March 2019 had the highest number of consorting incidents with 188 in the reporting period. Numbers then dipped and then rose towards the end of each quarter.

The NSW Police Force has indicated that it is using the Command Performance Accountability System (COMPASS) to monitor and report on the use of the consorting laws. The Commission notes that consorting is a Key Performance Indicator of the Criminal Groups Squad Business Plan 2020-21 under the corporate plan strategy of ‘interrupt criminal behaviour to break criminal networks and bring offenders to justice.’³³

³³ State Crime Command, Criminal Groups Squad, Business Plan 2020-21, NSW Police Force, p. 2.

Figure 1: Number of consorting incidents by month



Source: NSW Police Force - COPS (consorting dataset, 28 February 2019 to 30 June 2020).

4.1.1 CHARGES AND OUTCOMES

There has been a significant reduction in the number of consorting charges laid by the NSW Police Force in the interim reporting period compared to the rate at which charges were laid in the Ombudsman’s review period. Only two charges were laid in this interim reporting period – both against the one person, compared to the 46 in the Ombudsman’s review period.

The Commission has identified 45 people who appear to have met the threshold of ‘habitually consorting’ with at least two persons on two occasions, but did not have consorting charges laid against them. Of the 45 people who met the threshold, 25 were issued warnings by the Criminal Groups Squad, while 20 were issued warnings by general duties police.

The one person charged in the interim reporting period had proceedings brought against him by general duties officers. The Magistrate who presided over this matter stated that while the court does take into consideration the nature of the consorting activity when sentencing, the person was charged with the ‘lower end of the range’ given the nature of his interactions with the known offenders. The Magistrate also observed that the focus of the consorting law should be gang related activities and organised crime.

As noted earlier, when the individual was charged with consorting they had been issued three warnings for consorting with one person, and three warnings for

consorting with another. Of the 25 persons who met the legal threshold of consorting and had been issued warnings by the Criminal Groups Squad, six persons had consorted with at least two people on three occasions, and one person had consorted with nine persons on three occasions. The Commission notes the consorting presentation either prepared and/or delivered jointly by representatives from Criminal Groups Squad and Police Prosecutions Command advises that ‘habitual’ is consorting ‘at least two times, but best practice is to get them together three times’.³⁴

It seems likely that this additional guidance has led to some restraint in the pursuit of charges by the Criminal Groups Squad, although it is acknowledged that a range of other factors would likely be relevant in a decision to lay charges.

To ensure the consorting laws are applied equally, it would seem appropriate that this same guidance should be provided to all officers. The Commission recommends the NSW Police Force give consistent guidance across the State in line with the presentation by the Criminal Groups Squad and the Police Prosecutions Command.

4.2 SUMMARY OF USE OF THE CONSORTING LAW BY GENERAL DUTIES POLICE

General duties police issued 22% (2,466) of the consorting warnings to 1,181 people across the six NSW Police Force regions on 1,447 different occasions. Overall, 1,765 different people were subject to the consorting law by general duties police, equating to 74.8% of all people subject to use of the consorting law by all police.³⁵

4.2.1 SPREAD AND LOCATION OF USE BY GENERAL DUTIES POLICE

More than half of all warnings by general duties police were issued by officers attached to PACs in the Central Metropolitan and North West Metropolitan regions. Use in these regions was concentrated in a small number of PACs. Mt Druitt PAC and Blacktown PAC issued 33% of all warnings in the North West Metropolitan region, whilst Leichardt PAC was responsible for 340, or 51% of all warnings issued in Central Metropolitan region. This was followed by Inner West PAC with 13%.

The Northern region had the third highest number of warnings of the six regions. Officers attached to Richmond and Mid North Coast PACs issued 222 warnings between them, representing nearly half of all the warnings for this region. The lowest number of warnings were issued in the Western region, with New England and Orana PDs responsible for 104 warnings, or 74% of total warnings issued by

³⁴ Letter from Assistant Commissioner Anthony Crandell APM, NSW Police Force, State Crime Command, 22 January 2020.

³⁵ This includes 177 people who were subject to the consorting law by both general duties police and specialist squads.

officers attached to Western region. These figures are displayed in Table 2 and Table 3.

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

NSW POLICE FORCE REGION	NO. OF WARNINGS
North West Metropolitan	731
Central Metropolitan	670
Northern	466
Southern	232
South West Metropolitan	231
Western	136
TOTAL	2,466

Source: NSW Police Force - COPS (consorting merged dataset, 28 February 2019 to 30 June 2020).

Table 3: Use by general duties police according to region

NSW POLICE FORCE 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 Region	670	517	402	417	247	572	1.6
North West Metropolitan Region	731	377	270	296	154	412	2.5
Northern Region	466	197	182	278	102	358	1.7
Southern Region	232	160	144	170	92	222	1.4
South West Metropolitan Region	231	85	101	119	64	156	1.9
Western Region	136	110	82	84	58	108	1.7
Total	2,466	1,446	1,181	1,364	717	1,828	2.1

Source: NSW Police Force - COPS (consorting dataset, 28 February 2019 to 30 June 2020).

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 NSW Police Force region.

*Average number of warnings is calculated by total number of warnings divided by number of people warned about.

4.3 SUMMARY OF USE OF THE CONSORTING LAW BY SPECIALIST SQUADS

The Criminal Groups Squad accounted for more than 77% of all consorting warnings issued by police in the interim reporting period. The Commission notes that one event accounted for approximately 6,000 warnings whereby 40 people were warned about approximately 150 people each. An example of one of the events linked to this Master event is provided in the case study below:

Case Study 5

Police attached to Strike Force Raptor spoke with an individual at their home address. Police served the individual with a Criminal Organisation letter regarding an OMCG. They were also given a pre-emptive consorting notice for all known convicted offenders in NSW linked to that OMCG. The interaction was recorded on BWV.

There were 773 people subject to the consorting law by officers from the Criminal Groups Squad. In total, 8,640 warnings were issued by Criminal Groups Squad officers during the review period. These warnings were issued to 361 individuals on 557 separate occasions.

Table 4 shows that of the 773 people who were subject to the consorting law by officers of the Criminal Groups Squad:

- 47% (361) were issued with at least one consorting warning;
- 71% (545) had others warned about consorting with them; and
- 18% (133) were issued with both a warning and had others warned about consorting with them.

Table 4: Use by specialist squads in the State Crime Command

SPECIALIST SQUAD	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 UNIQUE PEOPLE	AVERAGE NO. OF WARNINGS PER PERSON WARNED
Criminal Groups Squad	8,640	557	361	545	133	773	15.9

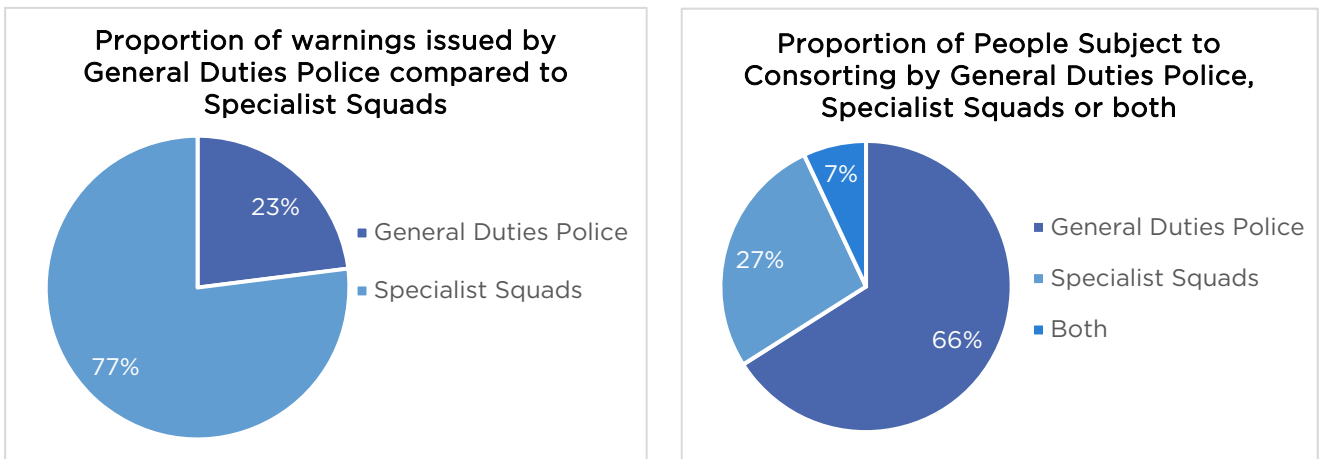
Source: NSW Police Force – COPS (consorting dataset, 28 February 2019 to 30 June 2020).

4.4 COMPARISON BETWEEN SPECIALIST SQUADS AND GENERAL DUTIES POLICE

There was a significantly higher number of warnings issued by the Criminal Groups Squad compared to general duties police, with an approximate 25% increase on the Ombudsman’s review reporting period. The Ombudsman’s report found an equal use by specialist squads and general duties police. The Criminal Groups Squad issued more warnings per person than general duties police across the regions, but more people were subject to the consorting law by general duties police.

There were 177 people who were subject to the consorting law by both the Criminal Groups Squad and general duties police. For the purpose of this analysis, these 177 people have been classified into both groups.

Figure 2: Warnings issued and all people subject to use of the consorting law by specialist squads and general duties police



The difference between the proportion of warnings issued and the proportion of people subject to the consorting law can be explained because the Criminal Groups Squad:

- usually target individuals more than once;
- use of the consorting law in relation to larger groups; and
- use pre-emptive warnings.

4.5 OVERVIEW OF PEOPLE SUBJECT TO THE CONSORTING LAW

The Commission analysed the demographics and conviction histories³⁶ of the 2,361 people subject to the consorting law during the review period to further understand the operation of the law. The analysis considered both persons who were issued warnings as well as those who they were warned about.

4.5.1 GENDER

Eighty-nine per cent of people subject to the consorting law during the reporting period were male (2,093 males, 267 females³⁷). The ratio of men and women subject to the consorting law was similar for those persons issued consorting warnings and those who had associates warned about them.

4.5.2 AGE

For the purposes of this report children are defined as those aged 14 to 17 years of age. The age referred to is the age the person was first subject to use of the consorting law. People subject to the consorting law were aged between 14 and 74 years at the time of their first interaction with police.

Of the 2,361 people subject to the consorting law, the average age of those was 34. There was no significant difference between the age of those warned and those who had others warned about them as the average age of both cohorts was 34.

Only one of the persons targeted by the Criminal Groups Squad was under 18 years. An analysis of children and the consorting law is further discussed in Chapter 6 of this report.

4.5.3 ANALYSIS OF THE CRIMINAL CONVICTIONS OF THOSE SUBJECT TO THE CONSORTING LAW

The criminal history analysis of those who have been subject to the consorting law is based on conviction history in NSW (summary or indictable), not charge history, and is reliant on COPS records from 1998 onwards. It is limited to charges that were proven and finalised on or before end November 2020.³⁸

³⁶ The Commission notes advice from Statistical Services that due to reporting system limitations, it is unable to extract convictions for offences added at court, or for offences where conditions of a sentence have been breached and no action has been recorded on the breach. This will amount to an underreporting of convictions recorded across the entire cohort.

³⁷ The gender of one person was not recorded.

³⁸ Conviction history extends beyond the reporting period to 30 June 2020, including for 423 individuals whose latest conviction fell within the July 2020 to November 2020 period.

There is no threshold requirement in terms of criminal history for a person to be issued a consorting warning. A person with no criminal history at all can be issued a warning. Consideration of any criminal history of the persons issued warnings can however give an indication of the types of criminal behaviour that the NSW Police Force are seeking to target through the use of the consorting powers.

For a person to be warned about, they must have been convicted of an indictable offence (either in NSW or another jurisdiction) prior to the date of the warning being issued. If they have not, the warning about them will be invalid. Invalid warnings are discussed in Chapter 5.

4.5.4 MOST SERIOUS INDICTABLE CONVICTION

Table 5 below outlines the most serious indictable offence of which each person subject to the consorting law has been convicted. The most serious convictions have been categorised according to the Australia and New Zealand Standard Offence Classification (ANZSOC) system developed by the Australian Bureau of Statistics to 'provide a uniform national statistical framework for classifying criminal behaviour in the production and analysis of crime and justice statistics' and 'to overcome differences in legal offence definitions across states and territories'.³⁹ Each person's most serious conviction has been determined by reference to the National Offence Index (NOI).⁴⁰ For 41% of the cohort, their most serious indictable conviction involved a type of assault other than sexual assault.

³⁹ The ANZSOC is a classification with three levels: Divisions (the broadest level), Subdivisions (the intermediate level) and Groups (the finest level). Australian Bureau of Statistics, Australian and New Zealand Standard Offence Classification (ANZSOC), 2011, cat. No. 1234.0, ABS, Canberra, 2011.

<https://www.abs.gov.au/ausstats/abs@.nsf/mf/1234.0>.

⁴⁰ The National Offence Index is a tool which provides an ordinal ranking of the offence categories in the Australian and New Zealand Standard Offence Classification (ANZSOC) according to perceived seriousness. It is used in order to determine a principal offence for an offender with multiple offences. The purpose of the NOI is to enable the representation of an offender by a single offence in instances where multiple offences occur within the same incident or where defendants have multiple charges in criminal cases. Australian Bureau of Statistics, National Offence Index, 2018, cat. no. 1234.0.55.001, ABS, Canberra, 2018.

<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/1234.0.55.001Main+Features12018?OpenDocument>

Table 5: Most serious conviction by ANZSOC Division

ANZSOC DIVISION	NO. OF UNIQUE PERSONS EVER ISSUED A WARNING	NO. OF UNIQUE PERSONS EVER WARNED ABOUT
Abduction and related offences	12	14
Acts intended to cause injury	556	805
Dangerous or negligent acts endangering persons	16	25
Deception and related offences	26	41
Homicide and related offences	11	15
Illicit drug offences	266	387
Offences against justice procedures, government security and government operations	3	6
Property damage and environmental pollution	16	17
Public order offences	17	30
Robbery, extortion and related offences	71	112
Sexual assault and related offences	17	33
Theft and related offences	45	56
Unlawful entry with intent/burglary, break and enter	44	53
Weapons and explosives offences	55	71
TOTAL	1,487	1,721

Source: NSW Police Force - COPS (Criminal history data as at November 2020).

The five most common offences appearing in the conviction histories of those subject to the consorting law are represented in Table 6 below. Almost two-thirds of people subject to the consorting law in the reporting period have at least one conviction for ‘road traffic and motor vehicle regulatory offences’ while more than 50% of people have at least one conviction for ‘illicit drug offences’, ‘acts intended to cause injury’ and ‘theft and related offences.’ Almost one in two people subject to the consorting law had a conviction for ‘public order offences.’

Notwithstanding the caveat that direct comparisons cannot be made with the Ombudsman’s report, the proportion of people who have a conviction for these offences, also reported as the most common by the Ombudsman, represent a greater proportion for each conviction type than the previous reporting period.

Table 6: Most common convictions by ANZSOC Division

ANZSOC DIVISION	NO. OF UNIQUE PERSONS EVER ISSUED A WARNING	NO. OF UNIQUE PERSONS EVER WARNED ABOUT
Road traffic and motor vehicle Regulatory Offences	916	1233
Illicit drug offences	830	1096
Acts intended to cause injury	729	1090
Theft and related offences	792	1052
Public order offences	684	971

Note: The number of people is not mutually exclusive across ANZSOC Divisions because individuals could have received multiple convictions across Divisions.

Source: NSW Police Force – COPS (Criminal history data as at November 2020).

4.5.5 INCIDENCE OF PEOPLE WITH NO CONVICTIONS, OR SUMMARY CONVICTIONS ONLY

At least 203 people who were issued a consorting warning did not have a conviction in NSW.⁴¹ This group was issued with 311 warnings.

In terms of persons warned about, there were 16 people who had no prior convictions in NSW, but whom police had reason to believe may have been convicted of an indictable offence in another jurisdiction (see 3.1 above). There

⁴¹ This number is based on data from the NSW Police Force as to the number of Persons of Interest for whom ‘no’ appeared for the category ‘Conviction for any offence’. It is anticipated there may be more than this number, as there are anomalies in the data provided by the NSW Police Force.

were however at least four people who had no convictions either interstate or in NSW at the time they were warned about.⁴²

There were also a number of people who were subjected to the consorting law who only have convictions for summary offences. There were 15 people with summary convictions who had been warned about in consorting warnings. They were named in 21 warnings. These warnings were invalid, and are discussed in Chapter 5.

According to data from police there were 145 people who were issued with a consorting warning who only had convictions for summary offences in NSW.⁴³ They were issued a total of 183 warnings.

The Ombudsman recommended that the NSW Police Force, through consorting policy, SOPs, relevant publications and training, proscribe 'the use of the consorting law to address or prevent minor offending, including offences outlined in the *Summary Offences Act 1988*'.⁴⁴ The NSW Government in response stated that the NSW Police Force would:

...review NSWPF consorting policy, SOPs, relevant publications, and training to ensure that the application of the consorting law to address or prevent minor offending is appropriate given the focus of the consorting law to prevent organised criminal activity that establishes, uses, or builds up criminal networks.

The SOPs now contain the following passage in a 'message' at the front of the document:

While this legislation can be widely used in the field, it's focused on the prevention of organised criminal activity that establishes, uses or builds up criminal networks. It's aimed at 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.⁴⁵

⁴² The total number of people named in a warning who had no prior convictions may be higher, as there are anomalies in the data provided by the NSW Police Force. This number of 17 (16 potential interstate offenders and 1 with no prior convictions at all) was based on the number of Persons Named for whom 'no' appeared for the category 'Conviction for any offence' and also for 'NSW indictable conviction existed for warning'.

⁴³ This number is based on data from the NSW Police Force as to the number of Persons of Interest for whom 'yes' appeared for the category 'Conviction for any offence' but 'null' in the categories 'ANZSOC Division/s for last court appearance - indictable offence with conviction' and 'National Offence Index/s for last court appearance - indictable offence with conviction', 'ANZSOC Group for Most Serious Indictable Conviction' and 'National Offence Index/s group for Most Serious Indictable Conviction'.

⁴⁴ *The Consorting Law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*. NSW Ombudsman. April 2016, recommendation 18.

⁴⁵ NSW Police Force Consorting SOPs, August 2019, p 5.

The SOPs however do not provide any practical guidance as to in what circumstances it will be appropriate for officers to use the consorting law to address or prevent minor offending. The Commission believes the SOPs should include such guidance, including examples, to assist officers to use the consorting law appropriately.

5. CONSORTING WARNINGS ISSUED IN ERROR

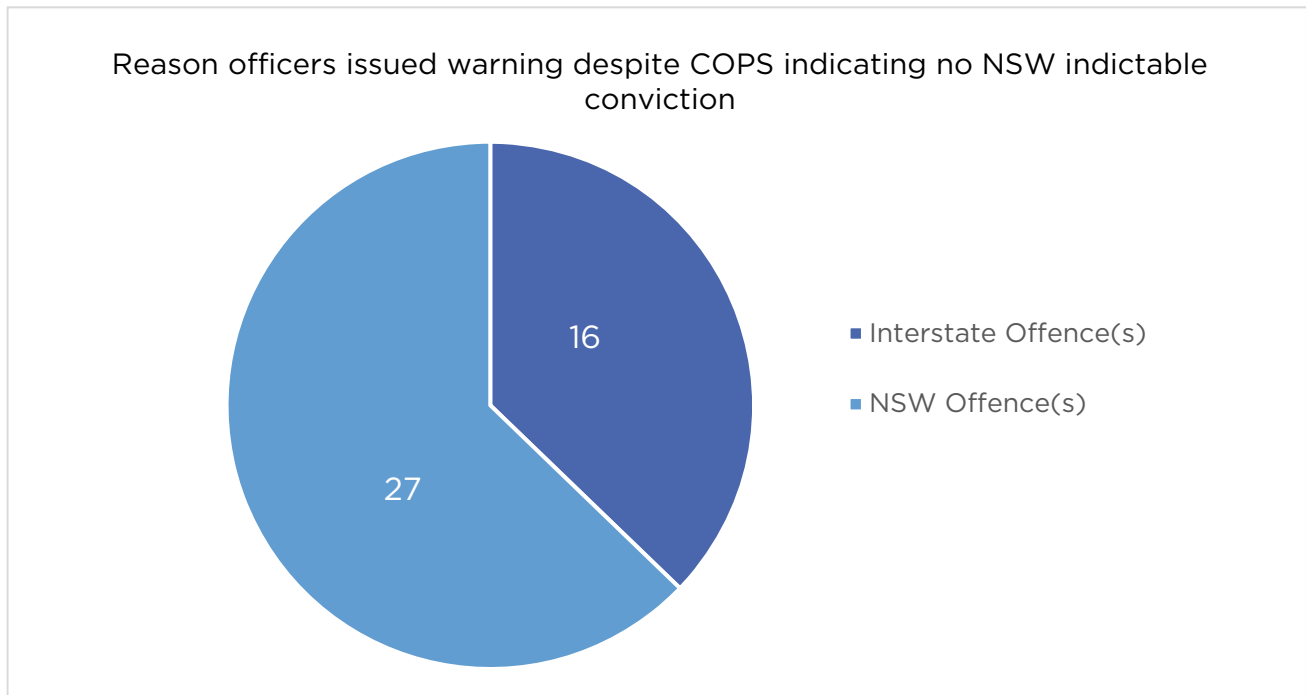
As mentioned in 2.3, while the term ‘convicted offender’ in section 93W seems simple on its face, there are some technical aspects of the definition which create complexity. In order for a person to be named as a ‘convicted offender’ in a consorting warning:

- 1) they must have been found guilty or pleaded guilty to a criminal offence (in NSW or another jurisdiction); and
- 2) the sentencing court must have recorded a conviction for that offence; and
- 3) the offence must be have been an indictable offence in NSW; and
- 4) the conviction must not be ‘spent’.

The changes made to COPS in 2013 which prevent officers from recording a consorting warning if a person does not have a conviction recorded for a NSW indictable offence in the last 10 years enable the Commission to identify where an officer has overridden this mechanism and recorded a warning. The Commission reviewed the 43 persons named in consorting warnings who COPS indicated had not been convicted of an indictable offence in NSW. For 16 of those persons, the details entered in the free text field by the officer suggested the person had a relevant indictable conviction from another jurisdiction which qualified them as a ‘convicted offender’.

As Figure 3 shows, in the majority of cases (27) the officer used the free text field to issue a warning about a person based on a belief that, despite the indication from COPS, the person had a valid conviction for an indictable offence in NSW.

Figure 3: Reason officers issued warning despite COPS indicating no NSW indictable conviction



Out of the 27 persons about whom warnings were recorded for NSW offending despite COPS indicating no NSW indictable offence, the Commission has concluded that two of those persons were ‘convicted offenders’ at the time the warning was issued. One was a person whose conviction for a NSW indictable offence was more than 10 years’ old, but that person’s conviction could not become spent as he had received more than six months’ imprisonment for the offence. The other person had been convicted of indictable offences in NSW at the time he was named as a convicted offender in the warning, but later (prior to the warning being recorded in COPS) he was acquitted of those offences.

This means there were 25 people who were warned about who were not ‘convicted offenders’ based on the details entered by police in the free text field. Table 7 contains the reasons the Commission concluded the persons named were not ‘convicted offenders’. The two most common reasons were that the offence the person was convicted of was a summary offence (48%) or because no conviction was recorded for the indictable offence (28%).

Table 7: Reasons persons were incorrectly identified as ‘convicted offenders’

REASON	NUMBER OF INDIVIDUALS
Summary Offence	12
Found guilty but no conviction recorded by Children’s Court	7
Only convicted after the time of warning issued	2
Acquitted of offence(s) on appeal	1
Charges dismissed at court	1
Found not guilty of offence(s)	1
Offence committed by different person	1
Total	25

5.1 PERSONS WHO HAD BEEN WARNED ABOUT WHO HAD BEEN CONVICTED OF SUMMARY OFFENCES

In 12 of the 25 cases of persons incorrectly identified by police as ‘convicted offenders’, the person had been convicted of a summary offence, not an indictable offence. Table 8 sets out the type of summary offences the 12 individuals had been convicted of. Over half of the individuals had been convicted of possession of a prohibited drug.

Table 8: Types of summary offences of persons warned about

SUMMARY OFFENCE TYPE	NUMBER OF INDIVIDUALS
Possess Prohibited Drug	7
Driving Offences	2
Resist or hinder police in execution of duty	1
Contravene AVO, unlawfully entering enclosed lands, possess prohibited drug, bringing drugs into detention centre and syringe into detention centre	1
Possess prohibited drug, driving vehicle with illicit drug in blood, driving while licence cancelled	1
Total	12

5.2 PERSONS WHO HAD BEEN WARNED ABOUT WHO HAD NO CONVICTION RECORDED BY THE COURT

Seven of the 25 people incorrectly warned about were people who had pleaded guilty to, or been found guilty of, an indictable offence, but the Children's Court did not record a conviction for their offending. These people were children at the time they committed the offences. They were generally over 18 years of age by the time the consorting warning was issued, and therefore were not children at the time they were subject to the consorting law for the purposes of our report.

The Ombudsman reported that 105 of the 133 persons aged under 18 years who were warned about had been incorrectly identified as 'convicted offenders', an error rate of 79%.⁴⁶ The Ombudsman explained this was due to a lack of understanding by police of the restrictions and discretion of the Children's Court in terms of recording a conviction, including for indictable offences.

In response to the Ombudsman's report, the NSW Police Force acknowledged the complexities contained in the definition of 'convicted offender' when applied to persons dealt with by the courts as children. The NSW Police Force suggested that one way forward could be to 'limit' the use of consorting provisions to 'serious indictable offences committed by persons aged 16 years or over'.⁴⁷ The SOPs now advise officers 'Do not give an official warning in relation to a child unless you are certain that they have been convicted of a serious children's indictable offence'.⁴⁸ The extent to which officers have complied with this direction during our review period is discussed in Chapter 6.

Seven people incorrectly identified as convicted offenders due to non-recording of convictions is a significant reduction. The changes to COPS to prevent warnings being recorded when a conviction was not recorded for the person named have not eliminated the issue, as officers are using the free text field to override this mechanism.

Case study 6 illustrates the issues that can arise when police do not ensure that a person has a conviction recorded by a court before naming them in a consorting warning. Neither Person 1 nor Person 2, had any convictions at the time they were named in (and received) consorting warnings. As a result police issued seven consorting warnings which were invalid. Person 1 was aged 18 years' old and Person 2 was 16-17 years' old during the time they were subjected to the consorting law.

⁴⁶ *The Consorting Law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*. NSW Ombudsman. April 2016, p 80.

⁴⁷ *The Consorting Law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*. NSW Ombudsman. April 2016, pp 81-82.

⁴⁸ NSW Police Force Consorting SOPs, August 2019, p 22.

Case Study 6

Between November 2017 and September 2019 Person 1⁴⁹ had been charged with and found guilty of 20 offences, including some indictable offences. However Person 1 was under 18 at the time he committed these offences. The Children's Court did not record a conviction for any of these offences when sentencing him.

By September 2019 Person 2⁵⁰ had been found guilty of four offences, including indictable offences. As he was under 16 at the time he committed the offences no convictions were recorded by the Children's Court.

In September 2019 general duties police stopped Person 1 (18 years' old) and another person (22 years' old) who were carrying wine and cups in a public place. Another two people joined them (18 years' old and 15 years' old). The officers conducted checks on the four people. The officers concluded that Person 1 and one of the others 'had been convicted of indictable offences' and so warned Person 1 and the other person for consorting with each other. As Person 1 had not had a conviction recorded for an indictable offence, the warning issued to the other person for consorting with Person 1 was invalid.⁵¹

In February 2020 police located Person 1, Person 2 (16 years' old) and another person in a location described by police as 'well known for drug consumption'. The event narrative recorded that 'Police were familiar with the POIs and immediately recognised who they were. Police knew [Person 1 and the other person] were known for acts of violence and stealings [sic] within the area', and 'due to the time and location' they were searched. Both Person 1 and the other person (but not Person 2) were then issued a consorting warning for consorting with each other. Again, the warning about Person 1 issued to the other person was invalid.⁵²

In March 2020 police observed a vehicle containing Person 1 and Person 2 as well as two others (who were 19 years' old). Person 1 was suspected by security staff of having vandalised a train. Person 1, Person 2 and one of the other persons were arrested for entering a conveyance without consent of the owner. Police searched the vehicle and located spray cans, cannabis and bongs. Police conducted checks on all four persons which, according to the Event Narrative, 'revealed they were all known variously for drug possession, supply, graffiti, property offences, robberies and other offences against the person'. They were each searched but nothing was found.

In the Event Narrative the officers recorded that all of the four persons except Person 2 'had been convicted of offences', and so consorting

⁴⁹ CNI 795451197.

⁵⁰ CNI 765008645.

⁵¹ E374928593.

⁵² E74062858.

warnings were issued to each of the four persons. Person 1 was named in each of the warnings issued to the other three (including Person 2). Person 2 was not named in any of the warnings, but he was warned about consorting with Person 1 and one of the others. All three warnings naming Person 1 were invalid, as he was not a 'convicted offender' at the time.

In June 2020 police observed Person 1 and Person 2 (now 17 years old) crossing the road on a red pedestrian signal. They stopped them and conducted checks on them. The Event Narrative recorded that the checks 'revealed that both POIs have been issued with one consorting warning each to not [be] in company with each other. Police issued [them] with their second consorting warning'. This was invalid because while Person 2 had been warned about associating with Person 1 in March 2020 (which in fact was an invalid warning), Person 1 had not been warned previously about associating with Person 2. The warnings issued to Person 1 and Person 2 for consorting with each other were both invalid, as neither of them had convictions.

Between September 2019 and June 2020 the NSW Police Force therefore issued seven warnings which were invalid, because they named Person 1 or Person 2 when neither of those persons met the definition of a 'convicted offender' in section 93W. From COPS it appears that police have not revoked these invalid warnings. It also appears that one of those warnings (issued to Person 2 in March 2020, warning about associating with Person 1) was not included in the data provided to the LECC by the NSW Police Force.

5.3 NEED FOR REVIEW MECHANISM WHEN FREE TEXT FIELD USED TO RECORD WARNINGS

The changes to COPS intended to prevent officers recording consorting warnings about people who have had no NSW indictable conviction in the last 10 years appear to have significantly reduced the number of invalid warnings being issued. While the Commission has not reviewed all event narratives and warnings issued, the review of all warnings which were recorded when COPS indicated no relevant conviction existed for the person revealed 36 warnings which were invalid because they warned others about associating with 25 persons who were not in fact 'convicted offenders'.

However, as noted in 3.1, there were also 63 consorting warnings issued naming 16 individuals whom police believed had convictions for offences in other jurisdictions which would be indictable in NSW. The Commission was unable to conclude whether these 63 warnings were valid, as the free text fields for those warnings did not include sufficient detail about the person's offending and the court outcomes for those matters. The details included for some of those persons raise concerns for the Commission that they might not meet the definition of a 'convicted offender' in section 93W.

The Commission acknowledges that there is a need for officers to be able to override the COPS indication and use the free text box to enter a consorting warning. As 'convicted offenders' now includes persons who were convicted of offences outside of NSW, this override option is necessary as COPS can only draw on convictions in NSW. Also, the rule built into COPS to reject as 'spent' convictions older than 10 years ago for the purpose of a consorting warning does not appear to take into account the exceptions to the spent conviction rules in the *Criminal Records Act 1991* (NSW).

However, the Commission is of the view that there is a need for the NSW Police Force to implement a quality review process for all consorting warnings recorded in COPS which override the indication and use the free text field. This will ensure that the necessary detail is included and analysis conducted to determine if the person named met the definition of a 'convicted offender', and thereby identify any invalid warnings. The lack of detail included in many of those fields underscores the need for warnings based on those entries to be reviewed. Three persons had no information entered into the free text field to explain why the officer was overriding COPS to record consorting warnings about them. Another person had a charge number provided which did not relate to that person.

It is not expected that this quality review process would be resource-intensive for the NSW Police Force. Of the 11,111 consorting warnings issued in the review period, only 104 warned about persons who COPS indicated had no valid NSW indictable conviction in the last 10 years.

The Commission believes that, in line with the Consorting SOPs, for any unlawful warnings issued about the 25 persons who were not 'convicted offenders':

- arrangements should be made to delete or update all the relevant consorting incidents, and
- all the persons warned about those 25 persons should be informed those consorting warnings were invalid and the information given to them regarding associated with that person was inaccurate.

The NSW Police Force has indicated that it will alter any COPS records related to invalid warnings that have not expired. However, the NSW Police Force has indicated it will not contact those who were issued with invalid warnings, as no legal consequence stems from the warning. The Commission believes that individuals should still be contacted and told the warning is no longer in force, as it may be having an impact on their lives.

6. CHILDREN

The Commission has not identified any children under the age of 14 who were subject to the law. This is consistent with the amendments excluding children under the age of 14 years from the application of the consorting law.

Additional measures to respond to the needs of children were introduced with the amendments, including that a warning issued to a person under the age of 18 expires six months after the date the warning was issued.

The Commission found that 32 children under the age of 18 were subject to the application of consorting laws in NSW for the interim reporting period, in 24 separate events. Of these:

- five children were 14 years old;
- eleven children were 15 years old;
- seven children were 16 years old; and
- nine children were 17 years old.

25% of the children subject to the consorting law were Aboriginal or Torres Strait Islander.

General duties officers were the primary users of the consorting law against children, and only Sydney Metropolitan Commands applied the laws to this age group. Kuring-Gai PAC was the highest user with 16 events (46%) and Parramatta PAC was the second highest user with 4 events (11.4%).⁵³ Neither of these PACs received the SOPs presentation in 2019 although other PACs from North West Metropolitan did. The State Crime Command was the responsible unit in two matters.

A review of the offending history of the 32 children subject to the consorting law shows that only three children had a criminal conviction.

There were only three children who were named in consorting warnings. One had no convictions ('Person 2' discussed in Case Study 6 in Chapter 5). The warning naming him was invalid, as he did not meet the definition of a 'convicted offender'.

One of the other children warned about had been convicted of assault occasioning actual bodily harm. The third child warned about had been convicted of multiple counts of robbery armed with an offensive weapon.

⁵³ Leichhardt and Blacktown PAC each used the laws in two separate events; and Burwood PAC used the laws in one separate event.

The SOPs direct officers 'Do not give an official warning in relation to a child unless you are certain that they have been convicted of a serious children's indictable offence'.⁵⁴ The offences which qualify as a serious children's indictable offence are prescribed in the *Children (Criminal Proceedings) Act 1987* (NSW), and include homicide, aggravated sexual assault and any offence punishable by imprisonment for life or for 25 years.⁵⁵ Committing a robbery armed with an offensive weapon is a serious children's indictable offence. Assault occasioning actual bodily harm is not. The issuing of consorting warnings about two of the children therefore did not comply with this direction in the SOPs.

There were 32 children who received consorting warnings (this includes the three children who were named in warnings, as they also received warnings about others). Only three of the children who were issued consorting warnings have criminal convictions:

- Two of those were the children mentioned above who were named in consorting warnings and who had criminal convictions for assault occasioning actual bodily harm and armed robbery respectively at the time the warnings were issued to them.
- The other child had no criminal convictions prior to receiving consorting warnings, but had been convicted of multiple indictable offences after having been issued the warnings.

The Commission is satisfied that the SOPs contain sufficient advice to officers about how the consorting law should be applied to children. The SOPs indicate that officers 'should exercise discretion when dealing with young people aged 16-17 years and remember that the *Young Offenders Act 1997* applies'⁵⁶ and that no criminal proceedings are to be commenced against children under the age of 14, and only in exceptional circumstances for children under the age of 16. In line with the amendments, the SOPs instruct officers to consult the Police Prosecutions Command before commencing criminal proceedings against under 18 year olds,⁵⁷ and there is a clear instruction that officers are 'not to target children under the age of 16'.⁵⁸

The SOPs also direct officers that a proof of conviction certificate should be obtained from the relevant court prior to commencing criminal proceedings for consorting.⁵⁹ This should act as a safeguard against prosecutions which are

⁵⁴ NSW Police Force Consorting SOPs, August 2019, p 22.

⁵⁵ *Children (Criminal Proceedings) Act 1987* (NSW) s 3, and *Children (Criminal Proceedings) Regulation 2016* (NSW) reg 4.

⁵⁶ NSW Police Force Consorting SOPs, August 2019, p. 17.

⁵⁷ NSW Police Force Consorting SOPs, August 2019, p. 17.

⁵⁸ NSW Police Force Consorting SOPs, August 2019, p. 22.

⁵⁹ NSW Police Force Consorting SOPs, August 2019, p. 10.

based on warnings which were unlawful due to the person named having had no conviction recorded by the court.

The majority of children who were issued consorting warnings had no conviction history. The Commission recognises the NSW Government supports police using consorting powers to deter children from serious criminal activity, including warning them about consorting with convicted offenders who are suspected of recruiting children for violent extremism or terror-related activities.⁶⁰ The Commission also recognises the potential deterrent and diversionary effect these laws can have preventing offending, or preventing further or more serious offending from transpiring. However the Commission notes that issuing consorting warnings to children who have no criminal convictions exposes those children to the possibility of criminal liability for associating with others, thereby bringing them into the ambit of the criminal justice system.

There appears to have been a significant decrease in the use of consorting laws on children. The Ombudsman reported there were 201 persons aged between 13 and 17 years who were subject to use of the consorting law. It is encouraging that 32 persons aged under 18 were subject to the consorting law in this interim review period, despite the increase in the number of warnings issued.

The Commission intends to conduct a close analysis of all consorting warnings issued to children during the review period, and report about this in detail in our final report.

⁶⁰ NSW Government response to the Ombudsman's Report on the operation of Part 3A, Division 7 of the Crimes Act 1900 (April 2016) p. 1.

7. ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE

Of the 2,361⁶¹ people subject to the consorting law in the interim reporting period, the Commission's analysis shows that 40% (947 people) were Aboriginal or Torres Strait Islander. This number has been taken from a count in COPS of 'whether or not the person has ever identified as Aboriginal and Torres Strait Islander in an incident recorded on COPS'.⁶²

As set out above, of the total number of children subject to the consorting law, 25% (8) were from an Aboriginal and/or Torres Strait Islander background. This finding is reflective of the Ombudsman's report, which similarly found that, as a proportion of the population, Aboriginal and Torres Strait Islander people were more likely to be issued a consorting warning than non-Aboriginal people.

It is concerning to the Commission that this issue remains current despite the introduction of the legislative amendment expanding the defences to recognise Aboriginal and Torres Strait Islander kinship systems.

The Commission acknowledges the over-representation of Aboriginal and Torres Strait Islander people reflects a broader problem in the Australian community relating to how the criminal justice system interacts with Aboriginal and Torres Strait Islander people. This is not solely derived from interactions with police. However, it is still concerning that the potential improvements sought by the amendments to the consorting law are not being achieved for Aboriginal and Torres Strait Islander people in NSW.

The Commission's analysis shows that general duties officers were more likely to apply the consorting law to Aboriginal and Torres Strait Islander people than specialist police. This perhaps suggests that Aboriginal and Torres Strait Islander people subject to the consorting law were less likely than non-Aboriginal people to be engaged in high-level organised crime (on the presumption that high-level organised crime is more likely to be policed through specialist squads).

Table 9 below reflects the Commission's findings with respect to the application of the consorting law by general duties and specialist police to Aboriginal and Torres Strait Islander people and non-Aboriginal people.

⁶¹ This total and its breakdown were reached once persons with duplicate CNIs and unknown persons had been identified and excluded from the consorting data.

⁶² The NSW Police Force has previously recorded Aboriginality as both 'ever identified' and 'probable'. The NSW Police Force has indicated to the Commission that it is now only using 'ever identified' as the indicator of Aboriginality.

Table 9: Use of the consorting law by general duties police and specialist squads on Aboriginal and Torres Strait Islander people and non-Aboriginal people

POLICE	ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE	NON-ABORIGINAL
General Duties Police	813	952
Specialist Squads	195	578
Total	1,033	1,572

Source: NSW Police Force – COPS (consorting dataset, 28 February 2019 to 30 June 2020).

Note: Numbers are not mutually exclusive across police cohorts. The count is not unique as individuals may be warned or have others warned about them by both general duties police and officers attached to specialist squads.

The Commission’s analysis of the use of consorting laws by police across the NSW Police Force regions shows that over 50% of matters involved a person who was from Aboriginal and/or Torres Strait Islander background in the Western and Northern Region. The Commission found:

- 77 of the 108 people subject to the consorting law in the Western Region were Aboriginal and/or Torres Strait Islander;
- 185 of the 358 people subject to the consorting law in the Northern Region were Aboriginal and/or Torres Strait Islander.

These figures closely match those from the Southern Region and the Central Metropolitan Region, where the Commission found that:

- 108 of 222 people subject to the consorting law in the Southern Region were Aboriginal and/or Torres Strait Islander;
- 265 of 572 people subject to the consorting law in the Central Metropolitan Region were Aboriginal and/or Torres Strait Islander.

Table 10: Use of the consorting law by NSW Police Force Region

REGION	NO. OF PEOPLE WHO ARE ABORIGINAL AND/OR TORRES STRAIT ISLANDER	NO. OF PEOPLE WHO ARE NOT ABORIGINAL OR TORRES STRAIT ISLANDER	TOTAL PEOPLE	% OF PEOPLE WHO ARE ABORIGINAL AND/OR TORRES STRAIT ISLANDER
Central Metropolitan	265	307	572	46%
North West Metropolitan	148	264	412	36%
Northern	185	173	358	52%
Southern	108	114	222	49%
South West Metropolitan	51	105	156	33%
Western	77	31	108	71%
Total	838	994	1828	N/A

Source: NSW Police Force – COPS (consorting dataset, 28 February 2019 to 30 June 2020).

Note: Numbers are not mutually exclusive across Regions. The count is not unique as individuals may be warned or have others warned about them in more than one Region.

Of the 281 event narratives analysed by the Commission, a total of 169 events (60%) involved an Aboriginal and Torres Strait Islander person who was subject to the consorting law (either issued a consorting warning or warned about).

The SOPs contain three separate references to the legislative amendment expanding the defences to Aboriginal and Torres Strait Islander kinship systems,⁶³ but do not provide clear guidance as to how this defence should be considered or applied by officers in the field.

The information contained within the NSW Police Force *Aboriginal Strategic Direction 2018-2023 (ASD)* is replicated in the SOPs. The ASD contains a priority action to reduce the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system,⁶⁴ and also conveys, in an illustrative way, why kinship is an important consideration in relation to consorting laws. It states:

⁶³ NSWPF Consorting SOPs p.16; p.26; p.42.

⁶⁴ NSWPF Aboriginal Strategic Direction 2018-2023, p. 20.

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.⁶⁵

Given the high proportion of Aboriginal and Torres Strait Islander people with indictable convictions, it is important to ensure there are practical strategies in place to ensure that the use of consorting laws does not exacerbate the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system, particularly in circumstances where the associations that are being policed do not relate to the prevention of serious criminal activity.

While the exercise of the powers in individual instances may be lawful, further consideration must be given to the systemic impact of the use of the powers in circumstances that do not involve 'organised criminal activity that establishes, uses or builds up criminal networks'. This is required to implement the NSW Government response to Recommendation 17 of the Ombudsman's report:

The NSWPF will update its internal consorting policy, SOPs, relevant publications, and training so that:

- (a) identification of people who are targeted for consorting should be intelligence-driven, and based on an identified risk that the relevant individuals are involved in recent or ongoing criminal offending; and
- (b) use of the consorting law in the circumstances is likely to assist to prevent criminal offending. The NSWPF will review internal policy to ensure that the application of the consorting law is focused on the prevention of organised criminal activity that establishes, uses, or builds up criminal networks.

The NSW Police Force has indicated that it is using the COMPASS system to track, measure, review and report on the use of consorting laws, including in relation to Aboriginal and Torres Strait Islander people. The Commission has requested additional information about these reports to inform the remainder of the review.

⁶⁵ NSWPF Aboriginal Strategic Direction 2018-2023, p. 7.

8. CONCLUSION

The Commission's review of the operation of the amendments to the consorting law highlights overarching compliance, along with a number of areas of concern. The Commission welcomes the pleasing finding that no child under the age of 14 was subject to the consorting law and the significant reduction in the number of children subject to the consorting law between 28 February 2020 and 30 June 2021 compared to the previous reporting period.

Additionally, the increase in the proportional use of the consorting law by the Criminal Groups Squad suggests that there is a greater emphasis on prevention and the targeting of serious and organised crime.

It is encouraging that no expired warning formed the basis of a consorting charge. However, there are opportunities to provide further clarity and guidance to officers about how to check the comparability of indictable convictions from other jurisdictions and record the necessary detail about them in COPS.

While the Commission cannot definitively comment on the extent to which officers ensure that individuals given warnings are aware of all elements of the consorting law, the Commission is satisfied that the NSW Police Force has taken reasonable steps to ensure officers are directed to do so. Similarly, the Commission cannot conclusively determine what the impact of the additional and expanded defences was. Our analysis of the event narratives shows few circumstances where the strict interpretation of the amendments to the defences apply, but where they did, officers were generally mindful not to issue consorting warnings.

Several of the Ombudsman recommendations that were fully or partly accepted by the government focus on the prevention of organised criminal activity that establishes, uses or builds up criminal networks. Incorporating this focus more substantively in the SOPs and further training would encourage officers to consider the context and circumstances of consorting before proceeding with the application of the law.

The development and implementation of a quality assurance process would strengthen confidence and consistency among officers in their use and recording of the consorting law. It would also provide a framework for consistent ongoing monitoring.

Despite its positive findings, the Commission remains concerned by the high proportion of those subject to the consorting law who identify as Aboriginal and Torres Strait Islander, a figure commensurate with that reported by the NSW Ombudsman. The Commission will continue to assess the use of the consorting laws against Aboriginal and Torres Strait Island peoples during the remainder of the review.

APPENDIX 1: LEGISLATIVE PROVISIONS

Crimes Act 1900

Part 3A Offences relating to public order

Division 7 Consorting

93W Definitions

(1) In this Division—

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

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

(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 convicted offenders after having been given an official warning in relation to each of those convicted offenders,

is guilty of an offence.

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

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

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

(b) the person consorts with each convicted offender on at least 2 occasions.

(3) An **official warning** is a warning given by a police officer (orally or in writing) 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 well-being of persons, including any rehabilitation, counselling, drug or alcohol service.

Criminal Legislation Amendment (Consorting and Restricted Premises) Act 2018

Schedule 1 Amendment of *Crimes Act 1900* No 40

(1) The LECC is to review the operation of the amendments made by the amending Act.

(2) The review is to be undertaken within 3 years after the commencement of this clause.

(3) The LECC is to report to the Attorney General and the Minister for Police on the outcome of the review as soon as practicable after the review is completed.

(4) In this clause, LECC means the Law Enforcement Conduct Commission constituted by section 17 of the Law Enforcement Conduct Commission Act 2016.

APPENDIX 2: NSW GOVERNMENT RESPONSE TO THE OMBUDSMAN'S RECOMMENDATIONS

The NSW Government agrees with the overarching intent of the Ombudsman's recommendations. However, the Government will make some amendments when implementing the Ombudsman's recommendations that will provide more safeguards and oversight while continuing to allow the wider application of the consorting law. This is in recognition that the consorting law is a useful diversionary tool for young people in addition to being a useful tool for the disruption and prevention of organised criminal activity that establishes, uses or builds up criminal networks.

	RECOMMENDATION	GOVERNMENT RESPONSE
1.	<p>The Attorney General propose, for the consideration of Parliament, an amendment to the consorting law to remove children and young people aged 17 years or less from the application of the consorting law.</p> <p>These amendments should prohibit:</p> <ul style="list-style-type: none"> a) the ability for police to issue consorting warnings and charge a child or young person aged 17 years or less under section 93X of the <i>Crimes Act 1900 NSW (Crimes Act)</i>, and b) the ability for police to treat a child or young person aged 17 years or less as a 'convicted offender' for the purposes of the consorting law. 	<p>Supported in part</p> <p>The NSW Government notes the concerns raised by the Ombudsman about the potential impact of the use of the consorting law on young people, particularly indigenous young people.</p> <p>However, the NSW Government believes 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. This includes the Youth on Track early</p>

RECOMMENDATION	GOVERNMENT RESPONSE
	<p>intervention program and the NSW Government's Countering Violent Extremism programs.</p> <p>If successful, the deterrent and diversionary aspects of the consorting law can be beneficial to young people by preventing offending, or preventing further or more serious offending.</p> <p>The Ombudsman's review discusses the way the consorting law was applied in respect of young people in the early stages of implementation of the consorting law. Since that time the NSW Police Force (NSWPF) has taken action to mitigate the possibility of error. This has included improvements to IT systems and delivering additional training and instruction to police officers.</p> <p>The Government proposes additional measures to respond to the needs of young people, which will include:</p> <ul style="list-style-type: none"> • removing children under 14 years of age from the operation of the consorting law; • amending the Act to provide that a warning issued to a person under the age of 18 expires 6 months after from the date the warning was issued; and • the NSWPF updating internal NSWPF consorting policy and standard operating procedures to ensure that advice is sought from the Commander,

RECOMMENDATION		GOVERNMENT RESPONSE
		<p>Police Prosecutions before a charge of consorting is laid in respect of a person aged under the age of 18.</p> <p>The NSWPF will continue to monitor the use of the consorting law on young people and further review of the consorting law will be undertaken (see Recommendation 20).</p>
2.	<p>The Attorney General propose, for the consideration of Parliament, an amendment to section 93X(3)(b) of the Crimes Act, to remove the present ambiguity and reflect the NSWPF submission that a consorting warning state: <i>'(Name) is a convicted offender. Consorting with (Name) is an offence.'</i></p>	<p>Supported in principle</p> <p>The Government will consult with the Parliamentary Counsel as to whether, and if so how, the statutory warning could be made clearer to address the Ombudsman's concern. Any warning should be both consistent with the actual elements of the offence as well as being simple and readily understandable. It is noted that a failure to use the exact wording will not invalidate an official warning under the Act.</p>
3.	<p>The NSWPF amend its consorting policy, publications, standard operating procedures (SOPs) and training, to ensure retrospective consorting warnings are issued as soon as practicable after an incident of consorting, and not later than 14 days.</p>	<p>Supported in principle</p> <p>The NSWPF proposes to amend its internal consorting policy to ensure that retrospective consorting warnings are issued without unreasonable delay after an incident of consorting is detected.</p>

RECOMMENDATION		GOVERNMENT RESPONSE
		The Government does not support requiring all retrospective consorting warnings to be issued within 14 days or other prescribed time after the consorting event as this may interfere with NSWPF investigations (for example, where the consorting is discovered by interception warrant or CCTV images in the course of an ongoing investigation).
4.	<p>The NSWPF develop and implement training for frontline officers involved in issuing consorting warnings and creating consorting Event records on COPS that includes:</p> <ul style="list-style-type: none"> a) the different types of consorting warnings; b) the difference between warnings and bookings; and c) how to ensure accurate record-keeping, including ensuring that all warnings are accurately recorded and any invalid warnings are identified and addressed according to the Consorting SOPs. 	<p>Supported</p> <p>The NSWPF has already developed and implemented a range of training in relation to the issues referred to in the recommendation.</p> <p>The NSWPF will continue to review existing training to ensure that it adequately addresses the specific issues referred to in the recommendation.</p>
5.	The NSWPF design and implement a quality assurance process for the ongoing use of the consorting law.	<p>Supported</p> <p>The NSWPF will update operational procedures to provide for information to be given, in writing, to a</p>

RECOMMENDATION	GOVERNMENT RESPONSE
<p>This process should be implemented within each command or relevant organisational unit and must ensure:</p> <ul style="list-style-type: none"> a) accurate record-keeping; b) that correct procedures are followed if invalid warnings are identified; and c) that the NSWPF consorting policy and guidelines are complied with. 	<p>person in regards to a consorting warning issued to or about the person.</p>
<p>6. On request, whether made at a police station, in writing, or the Police Assistance Line, the NSWPF provide the following information in writing to a person issued with a consorting warning, or a person about whom a warning is issued:</p> <ul style="list-style-type: none"> a) confirmation or otherwise of the validity of the relevant consorting warning b) details of the warning including the name of the person(s) warned, the name of the person(s) warned about, and the date and location of the warning. 	<p>Supported</p> <p>The NSWPF will update operational procedures to provide for information to be given, in writing, to a person in regards to a consorting warning issued to or about the person.</p>
<p>7. The NSWPF prepare and publish a fact sheet about the consorting law, on the NSWPF website.</p>	<p>Supported</p>

RECOMMENDATION		GOVERNMENT RESPONSE
	The consorting fact sheet should include relevant information about the consorting law and the police complaints system, and links to the Police Assistance Line and LawAccess NSW.	<p>The NSWPF will prepare a fact sheet about the consorting law for publication on the NSWPF website.</p> <p>Police SOPs will be updated to provide that, as soon as practicable after the warning has been given to a person, the person will be advised that this document is available on the NSWPF website or provided with the document.</p>
8.	The NSWPF refer to the requirements imposed by Recommendations 6 and 7 in the consorting policy, publications, SOPs and training.	<p>Supported</p> <p>The NSWPF will update internal consorting policy, publications, SOPs and training as part of the implementation of Recommendation 6 and 7.</p>
9.	The Attorney General propose, for the consideration of Parliament, an amendment to the consorting law to include a statutory time limit.	<p>Supported</p> <p>The Government proposes to amend the Act to provide that an official warning will cease to have effect after two years after the date of issue. A consorting warning issued to a person under the age of 18 will cease to have effect after 6 months after the date of issue.</p> <p>The NSWPF will also update the internal consorting policy and SOPs to require the advice of the Commander, Police Prosecutions before any charge for</p>

RECOMMENDATION		GOVERNMENT RESPONSE
		consorting is brought against a person when warnings were given six or months apart from one another.
10.	The NSWPF include in the Consorting SOPs practical guidance to officers to avoid unnecessary disclosure of the 'convicted offender' status of a person about whom someone is warned.	Supported The NSWPF will include the proposed guidance and instructions in the Consorting SOPs.
11.	The NSWPF include in the Consorting SOPs instructions that officers are not to disclose the details of the indictable offence a person was previously convicted of when issuing a consorting warning to others about them.	Supported The NSWPF will include the proposed guidance and instructions in the Consorting SOPs.
12.	The Attorney General propose, for the consideration of Parliament, amendments to section 93Y of the Crimes Act to include the following additional defences: a) Consorting that occurs in the course of complying with an order by the State Parole Authority or with a case plan, direction or recommendation by a member of staff of Corrective Services NSW.	Supported The Government proposes to amend the Act to include these defences.

RECOMMENDATION		GOVERNMENT RESPONSE
	<p>b) Consorting that occurs in the course of the provision of transitional, crisis or emergency accommodation.</p> <p>c) Consorting that occurs in the course of the provision of a welfare or support service.</p>	
13.	The Attorney General propose, for the consideration of Parliament, an amendment to the consorting law to include a definition of 'family members' that includes kinship relations between Aboriginal people.	<p>Supported</p> <p>The Government proposes to amend the Act to clarify that 'family members' includes kinship relations between Aboriginal people.</p>
14.	The Attorney General propose, for the consideration of Parliament, an amendment to the consorting law to include a broad definition of 'health service' that includes therapeutic, rehabilitation, drug and alcohol services, and accessing social workers and other counselling services.	<p>Supported</p> <p>The Government proposes to amend the Act to include a broad definition of 'health service', as recommended by the Ombudsman.</p>
15.	<p>The NSWPF amend its consorting policy, SOPs, publications and training to encourage officers to exercise their discretion not to issue consorting warnings or commence criminal proceedings on the basis of the following types of consorting:</p> <p>a) Consorting that occurs in the course of complying with an order by the State Parole</p>	<p>Supported</p> <p>The NSWPF will update internal consorting policy, SOPs, publications and training based, inter alia, on the amendments to be progressed in response to Recommendations 12 - 14.</p>

RECOMMENDATION		GOVERNMENT RESPONSE
	<p>Authority or with a case plan, direction or recommendation by a member of staff of Corrective Services NSW;</p> <p>b) Consorting that occurs in the course of the provision of transitional, crisis or emergency accommodation;</p> <p>c) Consorting that occurs in the course of the provision of a welfare or support service.</p>	
16.	<p>The NSWPF amend its consorting policy, SOPs, relevant publications, and training so that application of the consorting law is focused on the prevention of serious criminal offending.</p>	<p>Supported in principle</p> <p>The NSWPF will review and, where appropriate, update internal NSWPF policy, SOPs and training regarding application of the consorting law to state the application of the consorting law is focused on the prevention of organised criminal activity that establishes, uses or builds up criminal networks.</p>
17.	<p>The NSWPF amend its consorting policy, SOPs, relevant publications, and training so that:</p> <p>a) identification of people who are to be targeted for consorting should be intelligence-driven, and based on an identified risk that the relevant individuals</p>	<p>Supported in principle</p> <p>The NSWPF will update its internal consorting policy, SOPs, relevant publications, and training so that:</p> <p>a) identification of people who are targeted for consorting should be intelligence-driven, and based on an identified risk that the relevant</p>

RECOMMENDATION		GOVERNMENT RESPONSE
	<p>are involved in recent or ongoing serious criminal offending; and</p> <p>b) use of the consorting law in the circumstances is likely to assist to prevent serious criminal offending.</p>	<p>individuals are involved in recent or ongoing criminal offending; and</p> <p>b) use of the consorting law is in the circumstances is likely to assist to prevent criminal offending.</p> <p>The NSWPF will review internal policy to ensure that the application of the consorting law is focused on the prevention of organised criminal activity that establishes, uses or builds up criminal networks.</p>
18.	<p>The NSWPF proscribes the use of the consorting law to address or prevent minor offending, including offences outlined in the <i>Summary Offences Act 1988</i>, and reflect this in NSWPF consorting policy, SOPs, relevant publications, and training.</p>	<p>Supported in principle</p> <p>The NSWPF will review NSWPF consorting policy, SOPs, relevant publications, and training to ensure that the application of the consorting law to address or prevent minor offending is appropriate given the focus of the consorting law to prevent organised criminal activity that establishes, uses, or builds up criminal networks.</p>
19.	<p>The Attorney General propose, for the consideration of Parliament, an amendment to the consorting law to insert an objects clause into Part 3A, Division 7 of the Crimes Act that defines the purpose of the consorting law to be the prevention of serious criminal offending.</p>	<p>Not supported</p> <p>The Crimes Act does not contain objects clauses.</p> <p>The Government does not propose amending the Act to limit the use of the consorting laws to “serious criminal offending” only. The Government believes this would</p>

RECOMMENDATION		GOVERNMENT RESPONSE
		limit the ability for police to use the consorting law to effectively police a range of criminal activity that is of concern to local communities, but which may not fall within a prescriptive and narrow definition of “serious criminal offending.”
20.	The Attorney General require the preparation of a further public report by an independent body on the operation of the consorting law in Part 3A, Division 7 of the Crimes Act.	<p>Supported</p> <p>The Law Enforcement Conduct Commission will provide a report to the Attorney General and the Minister for Police on the operation of the consorting law for tabling in Parliament after a further three years of the law’s operation. The report will focus on consorting laws as they relate to young people and vulnerable people.</p>

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