



NEW SOUTH WALES
BAR ASSOCIATION

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Mr Bruce Barbour
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Dear Mr Barbour

Consorting provisions: issues paper

Thank you for giving the New South Wales Bar Association the opportunity to comment on the new consorting provisions.

At the time that these offences were introduced the Association wrote to the Attorney General strongly opposing their introduction. The Association's letter of 21 February 2012 stated:

The Association has a number of concerns in relation to the proposed legislation. Ultimately, what is most concerning is its 'net-widening' effect.

Both of the provisions ... have the effect of criminalising members of the community who are not otherwise engaging in criminal activity. The individuals captured are not criminal offenders or those who are members of the criminal organisations in question, merely those peripherally involved in what may be legitimate and legal aspects of the group or individual's operations.

The legislation has the effect of criminalising individuals in the interests of deterring people from associating with the 'criminal milieu'. The maximum penalty for the proposed offence is 3 years imprisonment. With respect, the ends do not justify the means...

The scope of the provision is unduly broad in a number of respects, particularly with respect to the definition of 'habitual' and the methods of communication that will be considered when determining whether the offence has been established (electronic or other forms of communication).

Practically, the operation of the proposed legislation is problematic. Requiring police to give an individual one warning before the offence of consorting can be established effectively gives police the power to select the individuals that will be subject to the operation of the legislation.

There is a very real possibility that this power may result in discrimination and corruption. Free communication and association of individuals would be circumscribed at the discretion of the police long after the person in question, with whom the consorting is done, has met the punishment for their prior indictable offence.

The Association continues to have these concerns with the offence, and the findings of the Ombudsman's investigations have only heightened these concerns.

The Association makes the following submissions in response to the questions posed in the course of the issues paper.

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

The right to freedom of association is recognised in the International Covenant on Civil and Political Rights to which Australia is a signatory. Article 22 states:

1. Everyone shall have the right to freedom of association with others....
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Similar protections for freedom of assembly are contained in Article 21. Accordingly, it is misconceived to look for 'gaps' in the laws limiting association. Instead each legislative instrument that seeks to limit association should be closely examined to consider whether it is 'necessary in a democratic society'.

As the Issues Paper notes, there are already a number of provisions that restrict association. What is significant about all of these provisions is that no criminal liability arises unless association has been expressly forbidden by a court or the Parole Board. In all cases, arguments for and against the restriction can be made prior to a decision, and the restriction on association is limited in time.

The offence in section 93T(1) Crimes Act 1900 is not an association offence. It is best characterised as an offence falling within the scope of doctrines of complicity. The behaviour is only prohibited on the basis that it facilitates the commission of crime.

The consorting provisions are fundamentally different. They do not arise by order of a court, but instead by the administrative actions of a police warning. Liability is thus derived from the discretionary action of a law enforcement officer, not a considered decision of a court or similar body. Liability is not limited by time – there is no court or corrective tribunal order that expires at a set date.

The consorting provisions allow law enforcement agencies to restrict the association of persons not otherwise subject to control by other lawful means provided by other legislative powers. These people include persons who have no pending police charges (thus making them subject to bail restrictions) or to parole or bond conditions in respect of imposed sentences following the commission and conviction of a criminal offence. The consorting provisions additionally allow for control over persons outside these categories for persons not otherwise found to have committed a criminal offence, and extend the provisions for control to association with those persons outside a prohibited criminal organisation as declared under the *Crimes (Criminal Organisations Control) Act 2012*.

Consorting thus stands apart from other provisions affecting rights of association. It requires independent justification.

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

One of the underlying problems of consorting offences is that they are blind to purpose. That is, the reason for the consorting is irrelevant, only the identity of the persons. This is an unacceptably blunt instrument with which to control crime. It may be accepted that much criminal activity occurs within family groups and friendship groups. However, both groups are also the foundations of society. It is difficult to see any convincing argument that it is 'necessary in a democratic society' for any law that prohibits association with family members and others with whom they are in relationships – other than on the basis of a court order obtained after submissions.

The current provision places the onus on an accused to prove that association with family members was reasonable in the circumstances. It is arguable that there would rarely be an instance where it would not be reasonable to speak to one's family. Consequently the Association is of the opinion that the onus of proof should be on the prosecution to prove that family gatherings are not reasonable. Further the exemption should be extended to include any persons who are in a significant personal relationship.

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

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

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

The Association believes that a reasonable basis for invoking consorting laws should exist. No warning should be given without a basis for so doing based at the very least on reasonable suspicion that the association is linked to serious criminal activity and that there is a reasonable belief that preventing such association will prevent criminal behaviour. Those bases should be able to be tested and reviewed. It should not be acceptable to charge a person with consorting if there is no likely criminal behaviour the consorting will encourage.

As all other association liability is predicated on a court order, the Association is of the view that consorting warnings should be issued by a court, and be issued where there are grounds for reasonable suspicion of criminal activity to which the association is connected. Failing a court-based approach to the issuance of warnings, a process independent of police should be instituted, with a public review process.

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

The current scope of the offence is indiscriminate and on the Ombudsman's figures approximately 200,000 people in NSW are potentially subject to the offence. The Association supports any measures that restrict the range of people potentially liable to this offence in its current form.

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

No, it was not the stated focus or intent of the revised legislation (as referred to in 1.2.1 of the NSW Ombudsman Consorting Issues Paper). Vulnerable persons, including homeless and aboriginal people are the most affected by this legislation. The Association considers that the offence should, if it remains on the books, be restricted in its applicability to suspected involvement in serious offences defined by statute.

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

Yes. The offence should be amended to only apply to consorting with a person guilty of a strictly indictable offence concerning drugs, firearms and/or violence within the previous 3 years.

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

Yes. The target of the legislation ought to be association with recidivist offenders. Given the statistics indicate that recidivism occurs within the first 3 years following the commission of an indictable offence the period ought not be extended beyond this period. Individuals should gain a benefit from a crime free period.

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

See below.

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

The consorting offence should be targeted at current criminal activity, and require police to establish an ongoing pattern of association. Allowing the occasions of consorting to be spread over long periods of time permits police to issue an initial warning and then use the consorting provisions as a 'sword of Damocles' that hangs over the person indefinitely.

The reasons for association between people change with time. Criminal behaviour is not a constant. Any powers to restrict association should be limited to evidence of ongoing criminal behaviour. In these circumstances a 6 month maximum period between alleged acts of consorting is appropriate. Further no more than 6 months should be permitted to elapse between the final alleged consorting and the laying of charges. Police should not be permitted to use this offence as a back-up offence if charges of greater criminality are unsuccessful or unavailable. This offence is only justified, if at all, as an offence to interrupt and prevent crime. A charge of consorting a significant period of time after the alleged incidents undermines the purpose of the offence, and has the potential to bring the justice system into disrepute.

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

There is significant evidence that Aboriginal people are disproportionately affected by legislation of this kind, and the evidence of police practices collected by the Ombudsman indicates that such disproportionality exists with the consorting offence. It is alarming that nearly 50% of all Aboriginal men in NSW have been convicted of an indictable offence in the last 10 years. The consorting offence thus impacts the entire community. The differential use of the offence by police is demonstrated by the extraordinarily high rate of indigenous persons warned in the sample analysed by the Ombudsman (1/3 of all men, 1/2 of all children and 2/3 of all women were Aboriginal although comprising less than 1/10 of the relevant population in those areas). The use of these provisions with reference to offences in the nature of minor theft and vandalism appears outside the contemplation of the Parliament at the time of enactment. In such a situation it is poor public policy to leave police with an unfettered discretion under the consorting provisions.

At the very least, the police Consorting SOP should be amended to prevent street sweeping operations, and to discourage the issuance of warnings in transport hubs and public places, unless previous intelligence supports a conclusion that there is a reasonable prospect that named individuals are meeting to further criminal activities, and ideally this should be subject to a court oversight. Persons the subject of warnings should have an easily accessible avenue through which to seek review of the issuance of the warning if existing police powers in this regard are retained.

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

Yes. The definitions ought be extended to concepts of kinship within cultural groups, particularly Aboriginal and Torres Strait islanders.

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

The offence should be amended so as to require any person warned to be over the age of 18, other than in exceptional circumstances. It is inappropriate for a person under the age of 18 to be the subject of a warning because, as the Ombudsman notes, it is rare for children under 18 to be classified as a convicted offender. In light of the fact that rarely would a child be able to be the subject of a warning, it is inappropriate that a child with no criminal convictions should be warned not to associate with others and face criminal liability for so doing.

If such controls on association are considered necessary, they should form part of a separate legislative scheme that takes account of the rapid development of children and the underlying intention of the law that persons enter into adulthood without an existing criminal record. In the opinion of the Association, there are no exceptional circumstances that would justify the use of an offence to criminalise the association of children and young people *per se*.

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

No. If no conviction is recorded then the person ought to be excluded from the operation of these provisions.

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

The need to breach the privacy of young people otherwise protected by legislation is a further reason why it is inappropriate to apply these offences to young people.

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

The offence, or regulations pertaining to the offence (and failing that the Consorting SOP) should be amended to prohibit the issuing of warnings to homeless people, other than in exceptional circumstances. The onus of proof should be on police to establish that the issuance of a warning was reasonable in the circumstances. The defence (discussed below) of consorting between persons living together should be drafted so as to include those currently living together on a temporary basis, and include living in open and public spaces.

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

The Association considers it should be mandatory for a warning to specify that it is only an offence to associate with the named person and that person only.

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

The warning should be in writing and specify by name the person who is the subject of non-association and the period of time the restriction is to apply. Further explanation of the meaning of consorting is desirable, including some indication of the forms of behaviour that fall within it. The fact that association is a criminal offence ought to be specified, as should the penalty that attaches to the offence.

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

There ought to be a reference to a judicial review process by a Local Court Magistrate. Police should develop a practical guide as to what is involved in consorting and have that available both in print in local police stations and easily accessible on the internet. Written warnings should contain a link to the guide and a relevant phone number that can be called for assistance.

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

Yes. Evidence of the issuance of a written warning should be required in any subsequent court proceedings.

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

The issuing of warnings at the same time, or following, an association should be required. As a general rule police warnings are intended to be applied to first-time or minor incidents of illegality to give a person a 'second chance' and to avoid charges being laid unless the behaviour is repeated behaviour. A charge under the consorting offence is intended to follow the booking of a person associating with two separate persons on two separate occasions following the issuance of an official warning not to associate with either. This anticipates between three and six separate occasions on which police interact with the person prior to charging. To pre-emptively warn a person prior to any illegal conduct turns an approach based on educative leniency into one that increases that potential liability. It in effect primes the person for liability. It is a practice that should be prevented by amendment to the offence.

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

The Consorting SOP should be amended to require the issuing of an official warning as soon as is practically possible after the event, but not later than 7 days. It is important in the interests of justice for the person warned to be able to obtain evidence as to the alleged consorting and to be able to recollect the events with clarity. Timely notification of warnings is necessary.

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

The provisions by their nature and operation impact upon privacy considerations and are therefore impossible to avoid entirely. However, the use of retrospective warnings in a relatively private environment may lessen the impact of public warnings.

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

See below.

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

Warnings should not be issued by police unless based on underlying evidence that would support a reasonable suspicion of future criminal offending being facilitated by the incident of association. Ideally warnings should be authorised via a court process to confirm that these requirements are met.

In the absence of such an originating process, all police warnings should be subject to the possibility of independent, timely review. Both are key factors. If a review were to be internal to police there would need to be transparency over the process, guarantees as to timeliness and a sufficient opportunity for the person or their representative to contribute to the review process.

Such a process cannot be achieved via internal Police procedures. As the Association believes any warnings should be on the basis of reasonable suspicion of likely criminal behaviour, and the likelihood that police would be reluctant to reveal the basis of such suspicion in some cases, an internal police review process is unlikely to be seen to be sufficiently independent. Where the underlying evidence basis for the actions is confidential an independent tribunal – such as the NSW Civil and Administrative Tribunal - would be appropriate.

26. *Should the defences to consorting be expanded to include any of the following:*

- *consorting between people who live together*
- *consorting between people who are in a relationship*
- *consorting that occurs in the provision of therapeutic, rehabilitation and support services*
- *consorting that occurs in the course of sporting activities*
- *consorting that occurs in the course of religious activities*
- *consorting that occurs in the course of genuine protest, advocacy or dissent?*

Yes. All of these activities are legitimate and lawful activities. The onus should be on the prosecution to show that association in such circumstances was not reasonable.

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

See below.

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

Yes. The list should be inclusive and should contain a general defence of reasonable excuse. The onus of proof for the listed defences should be on the prosecution to show such association was not reasonable. The onus with respect to the residual general defence may be on the accused.

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

Yes. These terms should be defined consistently with other statutory definitions

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

It is highly desirable that the application of the provision is strictly proscribed by legislation rather than police policy practices. In this way the case studies referred to in the body of the Report are likely to be avoided. As stated above, the case studies referred to indicate that the provisions have been utilised in ways not envisaged by the Parliament.

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

There should be a list of defences that by default permit association in those circumstances with the onus on the prosecution to demonstrate such association was not reasonable. In addition there should be a residual defence of reasonable association in the circumstances where the onus may be on the defence.

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

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

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

35. If you are involved in providing a service to vulnerable or disadvantaged people or ex-prisoners:

- Have clients of your service been affected by the consorting provisions and, if so, how?
- Has there been any impact on your clients' engagement with services and supports?

Please describe the impact of the provisions on your clients.

Not applicable.

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

Please see the response to question 30.

If there is anything in relation to this submission that you would like to discuss, please do not hesitate to contact me or the Association's Executive Director Mr Philip Selth on 9232 4055 or at pselth@nswbar.asn.au.

Yours sincerely



Phillip Boulten SC
President