



25 February 2014

NSW Ombudsman
Level 24, 580 George Street,
Sydney NSW 2000

By email: review@ombo.nsw.gov.au

Dear Madam / Sir,

KINGSFORD
LEGAL CENTRE

Re: Legislative review of the consorting provisions

Kingsford Legal Centre (KLC) thanks you for the opportunity to provide a submission on the legislative review of the Division 7, Part 3A of the *Crimes Act 1900* (NSW) (**Crimes Act**).

Kingsford Legal Centre

KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas since 1981. KLC provides general advice on a wide range of legal issues, including criminal matters, and undertakes casework for clients, many of whom identify as Aboriginal or Torres Strait Islander, homeless or former prisoners.

KLC also has a specialist employment law service, a specialist discrimination law service (NSW wide) and an Aboriginal Access Program. In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

Are the consorting provisions necessary?

We do not believe that the consorting provisions are necessary. The consorting provisions should be repealed because their value as a tool to combat organised crime is outweighed by the detrimental impact they have when used against vulnerable and disadvantaged people who are not necessarily involved in organised crime.

We believe that if the consorting provisions were repealed, Police would retain powers sufficient to address organised criminal activity.

The new consorting provisions were introduced as part of a package of reforms designed to 'combat organised crime in further support of police in their war on drive-by shootings'.¹

It was not the intention of the consorting provisions to criminalise people who were not establishing, using or building up criminal networks.² However, the majority of the consorting Events recorded to date have been created by general duties officers³ who have observed people they believe to be 'convicted offenders' interacting with people in public places.

¹ The Hon. Barry O'Farrell MP (Premier of NSW), *New Laws to Tackle Drive-by Shootings*, media release, NSW Government, Ministry for Police and Emergency Services, Sydney, 13 February 2012, in NSW Ombudsman, "Consorting Issues paper: Review of the use of the consorting provisions by the NSW Police Force" November 2013 (*Issues Paper*), 1.

² The Hon David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p 9091.

³ *Issues Paper*, 8.

The NSW Police Force has indicated that the people they have been targeting for consorting are currently or recently involved, or at risk of being involved, in some type of criminal offending, or are associating with people who are.⁴

Police are, therefore, using these provisions, beyond the purposes they were intended to be used – targeting people who meet the definition of ‘convicted offenders’ and people who associate with them – not necessarily people they believe are involved in establishing, using or building up criminal networks.

We believe that if Police are concerned that ‘convicted offenders’ are likely to be involved in organised criminal activity, they should instruct the prosecution to seek bail, sentencing or parole conditions preventing the defendant from associating with people they suspect to be involved in criminal enterprising and / or charge people with participating in criminal groups. These mechanisms ensure that decisions restricting who people can associate with are made in a transparent and reviewable manner.

If the consorting provisions were repealed, Police would retain the above powers, which would be sufficient to address organised criminal activity.

Recommendation 1: Division 7 of Part 3 of the *Crimes Act 1900* (NSW) be repealed.

Are the consorting provisions too broad?

We believe that the consorting provisions are too broad. The breadth of the provisions has allowed Police to issue warnings and charge people using public spaces with consorting, with little or no evidence that they are involved in organised criminal activity, subverting the original intention of the provisions.

Targeting ‘convicted offenders’ for consorting, without needing to demonstrate that they are involved in organised crime, has the effect of entrenching discrimination against people who are already marginalised in our communities due to their interaction with the criminal justice system, as well as criminalising people who have not have any prior interaction with the criminal justice system.

If the consorting provisions are not repealed, official warnings should only be valid for 12 months.

If the consorting provisions are not repealed, “convicted offender” should be redefined as an adult who has been convicted of an offence under section 93T or section 93TA of the *Crimes Act*.

If the definition of “convicted offender” is not redefined as an adult who has been convicted of an offence under section 93T or section 93TA of the *Crimes Act*, “convicted offender” should be redefined as an adult who has been convicted of an indictable offence within the last five years.

Limiting the validity of official warnings

We believe it is unjust that the official warnings, once issued, prohibit people associating with each other ever again. The current provisions have the potential of permanently severing significant relationships between vulnerable and marginalised people.

We instead believe it is in the interests of justice to limit the validity of official warnings to 12 months.

⁴ Issues Paper, p 21.

Recommendation 2: If Division 7 of Part 3 of the *Crimes Act 1900* (NSW) is not repealed, official warnings be valid for 12 months.

Restricting consorting with people convicted of criminal group offence

Section 93T of the *Crimes Act* makes it an offence to participate in a “criminal group” defined as:

- a group of three or more people who have as their objective or one of their objectives:
 - obtaining material benefits from conduct, including conduct that if it occurred in NSW, would constitute a serious indictable offence, or
 - committing, or engaging in conduct that, if it occurred in NSW, would constitute a “serious violence offences.”⁵

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

- loss of a person’s life or serious risk of loss of a person’s life; or
- serious injury to a person or serious risk of serious injury to a person; or
- serious damage to property in circumstances endangering the safety of any person; or
- perverting the course of justice in relation to any conduct that, if proved, would constitute a serious violence offence.⁶

Section 93TA of the *Crimes Act* makes it an offence to receive material benefit derived from criminal activities of criminal groups.

Redefining a “convicted offender” as an adult who has been convicted of an offence under sections 93T and 93TA of the *Crimes Act* ensures:

- the provisions are used for their intended purpose – to prevent the planning of organised criminal activity;
- Police only target people associating with adults who have been involved in organised crime, limiting the unfair use of the provisions against vulnerable and disadvantaged people not necessarily involved in organised crime;
- young people’s privacy is protected;
- the offence better reflects the penalty.

Recommendation 3: If Division 7 of Part 3 of the *Crimes Act 1900* (NSW) is not repealed, the definition of “convicted offender” within section 93W of the *Crimes Act 1900* (NSW) be redefined as an adult who has been convicted of an offence under section 93T or section 93TA of the *Crimes Act 1900* (NSW).

⁵ Section 93S *Crimes Act 1900* (NSW).

⁶ Section 93S *Crimes Act 1900* (NSW).

Restricting consorting with people convicted within the last five years

The current consorting provisions empower Police to issue warnings against people who were convicted of an indictable offence, regardless of when they were convicted. We acknowledge the Bureau of Crime Statistics and Research study which found that of adult offenders in NSW, 21 percent re-offended within one year, another 10 percent re-offended within two years and a further 6 percent re-offended within three years.

To allow Police to issue a warning in relation to a person who has been convicted of an indictable offence many years after they were convicted, can impede their attempts to reintegrate into the community and entrenches discrimination against them.

Recommendation 4: If the definition of “convicted offender” is not redefined as an adult who has been convicted of an offence under section 93T or section 93TA of the *Crimes Act 1900* (NSW), the definition of “convicted offender” within section 93W of the *Crimes Act 1900* (NSW) be redefined as an adult who has been convicted of an indictable offence with in the last five years.

Use in relation to disadvantaged and vulnerable groups

The Issues Paper clearly shows that consorting provisions are being used against disadvantaged and vulnerable groups, where there is little or no evidence of their involvement in organised criminal activity.

We believe that expanding the defences available to defendants charged with consorting and reversing the burden of proof when a defence is asserted, in addition to redefining “convicted offender”, would better ensure that vulnerable and disadvantaged groups are not unfairly affected by the provisions.

The defences to consorting should be expanded to include:

- 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; or
- consorting that occurs in the course of genuine protest, advocacy or dissent.

The defences should be an inclusive list, not exhaustive list and if the defendant asserts a defence, the prosecution should bear the burden of the satisfying the court that the consorting was not reasonable in the circumstances.

Expanding the defences and reversing the burden of proof when a defence is asserted, would not only assist vulnerable and marginalised defendants defend themselves against unfair charges, but help to ensure that prosecution is only brought against people where there is strong evidence that the consorting was not reasonable in the circumstances.

We acknowledge that Police may believe that reforming the consorting provisions in this way will make it difficult to bring charges against people for consorting. However, we believe that given the significant penalty defendants face if they are found guilty of consorting, increasing the evidentiary burden for the prosecution is warranted.

Recommendation 5: If Division 7 of Part 3 of the *Crimes Act 1900* (NSW) is not repealed, section 93Y of the *Crimes Act 1900* (NSW) be amended to include the following forms of consorting to be disregarded for the purposes of section 93X:

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

The defences within section 93Y of the *Crimes Act 1900* (NSW) be an inclusive list.

Section 93Y be amended to state that when a defence is asserted, the prosecution bear the burden of satisfying the court that the consorting was not reasonable in the circumstances.

Issues relating to the offence

We are concerned that there is no avenue, other than court, for challenging the validity of an official warning. We are also concerned that the current requirements for issuing official warnings are not sufficient.

NSW Police should establish an internal review process to assess the validity of warnings upon the request of the person warned and/or the person who is the subject of the warning. The NSW Government should establish an independent Police complaints body, which people can access if they are not satisfied with the internal review.

NSW Police should also be required to issue the person understood to be consorting with the “convicted offender” and the person who is the subject of the official warning with written official warnings.

Challenging the validity of official warnings

The Issues Paper identified that a number of official warnings had been invalidly issued in relation to people who did not meet the definition of a “convicted offender”. While the validity of the official warning can be challenged in court, this cannot be done unless charges are brought.

If a person abides by the official warning, charges cannot be brought and there is no other avenue to challenge the validity of the official warning.

Abiding by an official warning can impact significantly on people’s lives. It may mean that a person can no longer associate with family members, continue to live in shared accommodation, seek support from close friends or services or participate in community activities or events.

Given that the official warnings can impact significantly on people’s lives, people issued with, or the subject of, official warnings should have the option of challenging the validity of the official warning, without needing to be charged with what is a serious offence.

The person warned is also not likely to be in the position to know, or investigate, whether the person who is the subject of the warning meets the definition of a “convicted offender”. The

person who is the subject of the warning is in the better position to know, or find out, whether they meet the definition of “convicted offender” because they will have access to their criminal record. They would also be in a better position to challenge the validity of an official warning.

NSW Police should establish an internal review process to assess the validity of warnings upon the request of the person warned and/or the person who is the subject of the warning.

To ensure transparency and accountability of the NSW Police internal review process, the NSW Government should establish an independent Police complaints body, which people can access if they are not satisfied with the internal review.

Recommendation 6: If Division 7 of Part 3 of the *Crimes Act 1900* (NSW) is not repealed, the NSW Police should establish an internal review process to assess the validity of official warnings upon the request of the person warned, and/or the person who is the subject of the warning.

Recommendation 7: The NSW Government should establish an independent police complaints body.

The nature and content of official warnings

We are concerned that the consorting provisions allow Police to issue official warnings verbally. People issued with verbal official warnings may not understand:

- the difference between an informal warning, a move on direction and an official warning for “consorting”;
- who they are not allowed to associate with;
- that further “consorting” may lead to prosecution;
- if they are prosecuted for “consorting”, the maximum penalty is three years imprisonment and/or \$16,500; and
- the defences to consorting.

We are also concerned that there appears to be no obligation to advise the “convicted offender” that a person has been issued with an official warning not to continue to consort with them. If they do not know that a person has been warned not to consort with them, they may continue to approach the warned person, leaving the warned person vulnerable to prosecution for consorting.

These problems could be addressed by requiring Police to issue written official warnings to the person consorting with the “convicted offender” and the “convicted offender” who is the subject of the official warning. The written official warnings should include:

- the time and date the person was seen “consorting” with the “convicted offender”;
- the name of the “convicted offender”;
- how long the official warning is valid (if applicable);
- that the person may be prosecuted if they continue to consort with that particular “convicted offender”;
- is an offence punishable of up to three years imprisonment and/or \$16,500 if they continue to consort with the “convicted offender”;
- information about how to lodge an internal review if they want to challenge the validity of the official warning; and
- a referral to LawAccess for free legal advice.

We believe the seriousness of the offence warrants the additional resources needed to issue written warnings.

Recommendation 8: If Division 7 of Part 3 of the *Crimes Act 1900* (NSW) is not repealed, the definition of "official warning" be redefined as a written warning given by a police officer to a person and the person who is the subject of the "official warning" that provides:

- the time and date the person was seen "consorting" with the "convicted offender";
- the name of the "convicted offender";
- how long the official warning is valid (if applicable);
- the person may be prosecuted if they continue to consort with that particular "convicted offender";
- is an offence punishable of up to three years imprisonment and/or \$16,500 if they continue to consort with the "convicted offender";
- information about how to lodge an internal review if they want to challenge the validity of the official warning; and
- a referral to a service which provides free legal advice.

Please do not hesitate to call us on (02) 9385 9566 if you would like to discuss the content of our submission further.

Yours faithfully,
KINGSFORD LEGAL CENTRE



Anna Cody
Director



Kaleesha Morris
Aboriginal Access Worker



Kellie McDonald
Solicitor

Anna Harley
Student Law Clerk