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NSW OMBUDSMAN CONSORTING ISSUES PAPER: REVIEW OF THE USE OF THE CONSORTING PROVISIONS BY THE NSW POLICE FORCE

SUBMISSION BY THE NSW COUNCIL FOR CIVIL LIBERTIES

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INTRODUCTION

The current consorting laws impinge on human rights to a degree that far exceeds any benefit that may be obtained from them. The laws apply to all citizens. No criminal behaviour needs to be contemplation or being carried out. According to the Bureau of Crime Statistics and Research 199,945 people had been convicted of an indictable offence in the 10 year period to 30 June 2012.[1] This is a significant number and provides the potential for large scale use of the consorting laws against citizens not involved in criminal activity. The maximum penalty is severe.

The concept of 'risk' seems to be more and more the explanation justifying the undermining of civil liberties in societies that formally took pride in their association with the idea of freedom, privacy and the presumption of innocence. As Professor Denise Meyerson notes: '[t]he traditional backwards-looking, reactive response of the law to harmful conduct – is shifting and emphasis is increasingly placed on preventing harmful conduct before it occurs.'[2] Meyerson also explains that '[i]t is obvious that such measures pose numerous problems of political morality, not least by eliciting our great fear of arbitrary restraint and our aversion to the State curtailing our liberty other than as for punishment for breach of the law.'[3] Of fundamental importance to a consideration of consorting laws is Meyerson's observation that: '[t]he lower we require the likelihood of the harm to be and the lower we require our degree of confidence in the predictions to be, the higher the risk of the erroneous deprivation of liberty.'[4] That the consorting laws do not require any connection to potential or actual criminal activity takes the likelihood of harm to the lowest level of harm possible.

As noted in Waller and Williams, *Criminal Law*:

> An alternative approach is to punish a person by virtue of his or her association with known or suspected criminals. For the prosecution, this approach has the virtue of obviating the

[1] NSW Ombudsman, *Consorting Issue Paper*, (November 2013) 20.
[2] Denise Meyerson, 'Risks, rights, statistics and compulsory measures' (December 2009) Volume 31(4) *The Sydney Law Review*, 507
[3] Ibid 510.
[4] Ibid 533.

> need to prove actual involvement in a criminal act. However, it flies in the face of hard-won civil liberties and rights of the defendant, in particular the notion that a person should only be punished when it can be proved they have committed a crime.[5]

The Attorney-General when on 14 February 2012 he introduced the Crimes Amendment (Consorting and Organised Crime) Bill 2012 into the Legislative Assembly made referenced to the High Court case of (*Johanson v Dixon* (1979) 143 CLR 376. In that case, Mason J spoke for the majority, Murphy J dissenting. The case involved consideration of Victorian law concerning consorting with 'reputed thieves or known prostitutes or persons who have been convicted of having no visible lawful means of support …' The defence lay in giving the court 'a good account of his lawful means of support and also of his so consorting'.[6] Mason J stated: 'What is proscribed is habitual association with the persons of the three classes, they being undesirable or discreditable persons.'[7] Mason J also stated that: 'The legislative policy which underlies the provision … was designed to inhibit a person from habitually associating with persons of the three designated classes, because the association might expose that individual to temptation or lead to his involvement in criminal activity'.[8] Mason J also stated:

> Thus it may be a good account for the defendant to say that he associated with the person in question because they were his close relatives, for filial or family reasons, or because his occupation required him so to do and the association was not for any unlawful purpose. But to say no more than that the association was innocent or not unlawful is not to give a good account.[9]

The following points raise serious issues of concern. First, the High Court in *Johanson v Dixon* was considering consorting with three defined groups of people. Sections 93W, 93X and 93Y of the *Crimes Act* include any person 'convicted of an indictable offence'. (s 93W). As stated above, that involves 199, 945 persons in the last ten years. The definition of 'indictable offence' is wide. It is: 'means an offence (including a common law offence) that may be prosecuted on indictment'.[10] The result of the definition and the number is to raise the risk of use of the consorting laws leading to the erosion of civil liberties. Second, 'habitual' as explained in s 93X(2) of the Crimes Act arises after a specific and very low threshold. In relation to the 199,945 persons, a citizen need only consort (that is 'in person or by any other means' s 93W) two times with two of these people to be guilty of the offence. Third, after one act of consorting with one person the citizen can be given a warning that the other person is a 'convicted offender'. As consorting the second time can lead to the charge involving a maximum penalty of 3 years gaol or 150 penalty units, the consorting law has serious implications for the relationship between 199,945 citizens who are 'convicted offenders' and their fellow citizens. Finally, a 'good account' as discussed in *Johanson v Dixon* is not available in s 93Y of

[5] T Anthony, P Crofts, T Crofts, S Gray, A Loughman, B Naylor, (eds) *Waller and Williams Criminal Law Texts and Cases* (LexisNexis, 12th ed, 2013), 669.
[6] Johanson v Dixon (1979) 143 CLR, 376, 379.
[7] Ibid 383.
[8] Ibid 385
[9] Ibid 384.
[10] *Criminal Procedure Act 1986* (NSW), s 3.

the Crimes Act because a defence of 'reasonable in the circumstances' only arises in relation to six specified situations. It appears there is no defence in relation to other situations.

In an article written in 2003 about the consorting laws in NSW as they then were, Alex Steel stated:

> The degree of discretion granted to police and the extremely wide net cast by this offence create an extremely fertile ground in which corrupt conduct and practices can flourish. It is in the interests of both the community and the police that the laws should provide both a sound and detailed basis for the exercise of police powers.[11]

Article 17 of the United Nations Covenant on Civil and Political Rights states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

There is one simple question involved in the introduction of beefed up consorting laws. Do we wish to live in a liberal democracy or not?

The consorting laws should be repealed. If the Government will not repeal them then they should be amended in a significant way.

DETAILED RESPONSE TO QUESTIONS

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

There are numerous laws that restrict persons from acting together or provide for separating individual people or groups. There are also numerous provisions that relate to future behaviour. The CCL sets out a number of statutes below, including those referred to in Chapter 4 of the Consorting Issue Paper, that establish that the authorities already have vast powers to deal with crime. To add more about future behaviour which does not have to be criminal in nature is totally unnecessary. The statutes include the following provisions:

- Apprehended violence orders which evolved over a long period of time from a limited coverage in domestic situations to coverage of all persons. Some examples of reports are set out in the footnote.[12] All aspects of domestic and personal violence orders concerning future behaviour are set out in the *Crimes (Domestic and Personal Violence) Act* 2007.The 'Objects' of the *Crimes (Domestic and Personal Violence) Act* makes clear a concern about

[11] Alex Steel, Consorting In New South Wales: Substantive Offence or Police Power? (2003) 26 U.N.S.W.L.J 567, 598.

[12] Dr Greg Woods (Chairperson), 'Report of NSW Task Force on Domestic Violence to Honourable N K Wran Q.C MP, Premier of NSW' (Women's Co-Ordination Unit, NSW Premier's Department, July 1981).
Helen L'Orange (Chairperson), 'Violence Against Women and Children Law Reform Task Force Consultation Paper' (Women's Co-Ordination Unit, Premier's Department NSW 1987).
Helen L'Orange (Chairperson), 'Report to the Premier The Hon B J Unsworth by the NSW Domestic Violence Committee on a Survey of Non-Spousal Family Violence' (Women's Co-Ordination Unit NSW Premier's Deaprtment, 1987).

future activity. Section 9 concerning the 'object' in relation to domestic violence includes ensuring 'safety and protection' and reducing and preventing violence 'where a domestic relationship exists'. Section 10 in relation to the 'object' concerning personal violence states the aim includes, '(a) empowering courts to make apprehended personal violence orders in appropriate circumstances to protect people from violence, intimidation (including harassment) and stalking'. No associated charge is required. The maximum penalty for contravention of an order is 2 years in gaol or 50 penalty units or both. (s 14). Aiding, abetting, counselling or procuring the commission of an offence is an offence unless the person is a protected person. (s 14(7). In a domestic violence application the court has only to be 'satisfied on the balance of probabilities that a person who has or has had a domestic relationship with another person has reasonable grounds to fear and in fact fears…' (s 16(1). It is not necessary for a court to be satisfied that a child for whom an order is made 'fears that such an offence will be committed, or that such conduct will be engaged in…' (S 16(2). The same exception applies to a person who in the opinion of the court is 'suffering from an appreciably below average general intelligence function…'. (s 16(2)(b). The test for the making of an apprehended personal violence order is once again, 'the balance of probabilities that a person has reasonable grounds to fear and in fact fears…'(s 19).The exception as to belief by a child or by a person who in the opinion of the court is 'suffering from an appreciably below average general intelligence function also applies to personal violence orders. (s 19(2)). Interim orders are available 'if it appears to the court that it is necessary or appropriate to do so in the circumstances'. (S 22). Telephone interim orders are available when an incident occurs and 'a police officer has good reason to believe a provisional order needs to be made…' (s 26). The identity of a suspected apprehended violence order defendant may be required to be disclosed to a police officer (*Law Enforcement (Powers and Responsibilities) Act* 2002, s 13A). The same Act provides for search and seizure powers relating to domestic violence offences including entry by invitation and the overriding of objection by another person if the person providing the invitation is the alleged victim. (s 81-82);

- Bail conditions which in the current *Bail Act* 1978 and in the *Bail Act* 2013 provide for bail conditions that can require people not to associate with other persons. The current Act states in s 36B:

  Additional bail conditions as to non-association and place restriction

  (1) Either or both of the following conditions may be imposed on the grant of bail:
  (a) That the accused person enter into an agreement to comply with specified requirements prohibiting or restricting the person from associating with a specified person,
  (b) That the accused person enter into an agreement to comply with specified requirements prohibiting or restricting the person from frequenting or visiting a specified place or district.

Both the current Act and the new Act also provide the capacity for follow up by the police. Following the decision in *Lawson v Dunlevy* [13] the State Government in 2012 rushed through legislation to

[13] *Lawson v Dunlevy* [2012] NSWSC 48.

allow enforcement of conditions in relation to bail. It was the one area of bail that was not allowed to wait for the Bail Bill 2013. The legislation allowed the police to give directions enforcing directions 'in the circumstances specified in the enforcement condition' and also 'at any other time the police officer has a reasonable suspicion that the accused person has contravened the underlying bail condition in connection with which the enforcement condition is imposed' (s 37AA(6)(b) current Act, s 81(b) 2013 Act. The provision is much tougher than the recommendation of the NSW Law Reform Commission which having noted that even though conditions are imposed by courts or reviewable by courts if imposed by police:

> it would appear that too often such requirements have been imposed as a matter of routine rather than as a result of a close consideration of their need in the individual case, and that there have been occasions where curfew monitoring in particular has been excessive or unreasonable[14]

The Law Reform Commission was concerned that there be

> some reasonable limits on the frequency, location or time of any compliance check, or alcohol or drug test to ensure that the direction is not overtly onerous. Possibly it should also depend on the presence of a reasonable suspicion that the released person is failing to comply with the relevant direction.[15]

What the Law Reform Commission wanted was restrictions on police activity in relation to possible behaviour given that there had been excessive use of enforcement power in the past. Reasonable suspicion was to be an addition not an alternative for action. The Government ignored this and provided the police with a blank cheque.

Sentencing and parole as dealt with by the *Crimes (Sentencing Procedure) Act* 1999 and the *Children (Criminal Proceedings) Act 1987* can include non-association orders and can provide for a wide range of communications; See for example: s 3 of the *Crimes (Sentencing Procedure) Act* which defines 'associate with' as including 'in company' and 'to communicate with by any means (including post, facsimile, telephone and email)'; s 17A of the *Crimes (Sentencing Procedure) Act* and s 33D of the *Children (Criminal Proceedings) Act* which allow for a total or partial ban on a person associating with another person and also allows for restrictions on a place or district that may be visited; s 51A of the *Crimes (Sentencing Procedure) Act* which provides for 'Conditions of parole as to non-association and place restriction'; reg 176 of the *Crimes (Administration of Sentences) Regulation* 2008 which allows in relation to sentence being served in the community via intensive correction orders for 'a condition that required the offender to comply with any direction of a supervisor that the offender not associate with specified persons or persons of a specified description'. Contravention of the various orders set out in this section can result in a gaol term, fines and revocation of parole.

The *Crimes (Criminal Organisations Control) Act 2012* provides for a controlled member of a declared organization who associates with another controlled member of the declared organization to face an offence with a potential 2 year gaol sentence. Further, 'a controlled member of a declared organization who at any time within a period of 3 months, associates with another controlled member of the declared organization on 3 or more occasions is guilty of an offence'. The penalty is a

[14] NSW Law Reform Commission, *Report on Bail*, Report No 133 (April 2012) 250.
[15] Ibid 251.

maximum of three years in gaol with a maximum penalty of 5 years in gaol for further offences. Given the amount of discussion in a number of Parliamentary Debates of 2012 about drive-by shootings it is relevant to point out that such legislation had existed since 2009 and that the 2012 Bill became necessary to correct problems of providing judicial reasons as pointed out by the High Court. Surely this Act is enough to deal with criminal gangs without the need to erode the fundamentals of a liberal democratic society. In addition, the *Law Enforcement (Powers and Responsibilities) Act* 2002 provides in the Part dealing with 'Search and seizure powers with warrant or other authority, s 46AA 'Organised criminal activity'. It provides for search warrants for a wide range of serious offences. Section 46A provides for warrants in an even wider range of offences. Section 46D provides for 'authority to apply for criminal organization search warrant'. The sections that follow allow wide ranging power in relation to the use of search warrants. In relation to criminal organization search warrants s 62(2A) makes clear a consideration for issue is 'any person believed to have committed, or to be intending to commit, the searchable offence in respect of which the application is made'. Covert search warrants are also provided for (s 46C). Material may be downloaded from computers (S 75B). Powers to break into fortified premises are provided for in Part 16A if 'there are reasonable grounds to believe that the premises are being used, have been used or are likely to be used…'

The *Law Enforcement (Powers and Responsibilities) Act 2002* referred to above also sets out a range of other police powers. Amongst them is the power of a police officer to enter a premises without warrant if on reasonable grounds the officer believes: 'a breach of the peace is being or is likely to be committed' (s 9); there is 'imminent danger of significant physical injury' (s 9); or 'to arrest a person, or detain a person'(s 10). Numerous sections deal with the power to search without warrant, persons, vehicles, vessels and aircraft. (Part 4 'Search and seizure powers without warrant'). The power to give directions in Part 14 includes obstruction; harassment or intimidation; causing fear; unlawfully supplying drugs; procuring drugs; intoxication. The Act also provides for: the power to enter premises in a range of circumstances and require identity in a range of circumstances. The penalties vary from fines to gaol. Finally, there are the powers introduced after the so-called 'Cronulla Riot'. The 'Emergency powers – public disorder' provisions in Part 6A includes the power to 'disperse groups' and provide for 'emergency alcohol-free zones'. Division 3 'Special powers to prevent or control public disorder in public place' provides wide ranging powers. The power arises when the authorizing police officer:

(1) (a) has reasonable grounds for believing that there is a large-scale public disorder occurring or a threat of such a disorder occurring in the near future, and
(2) (b) is satisfied that the exercise of those powers is reasonably necessary to prevent or control the public disorder.

Requirements as to identity, power over vehicles, power to seize property and power to disperse groups all arise.

The legislation reinforces the point that there are already numerous ways police can deal with criminal activity involving one person towards another or groups of persons;

The *Drug Misuse and Trafficking Act* 1985 in the definition of 'take part in', includes 'any step', 'causes the step to be taken', 'arranges finance', and 'provides the premises'. (s 6). Possession is deemed where 'the order or disposition of the person jointly with another person by agreement between the persons, shall be deemed to be in the possession of the person'. (s 7). 'Permitting

another to administer prohibited drug' is an offence. (s 8). 'A person who aids, abets, counsels, procures, solicits or incites the commission of an offence' is guilty of an offence and 'liable to the same punishment … as the person would be if the person had committed first mentioned offence'. (s 19 and 27). 'A person who conspires with another person … is guilty of an offence and liable to the same punishment… ' (s 26).

The *Crimes Act 1900* provides in Part 9 deals with: Principals in the second degree; accessories before and after the fact; trial and punishment of those who aid, abet, counsel or procure the commission of a minor crime and 'Recruiting persons to engage in criminal activity'; and 'Receiving material benefit derived from criminal activities of criminal groups'.

Finally, the CCL points out that s 93S of the *Crimes Act* in relation to three or more people carrying out serious crime states:

(1) A person who participates in a criminal group is guilty of an offence if the person:
  (a) Knows, or ought to reasonably know, that it is a criminal group, and
  (b) Knows, or ought to reasonably know, that his or her participation in that group contributes to the occurrence of any criminal activity.

Surveillance is provided by the Commonwealth *Surveillances Devices Act* 2004 and the NSW *Surveillance Devices Act* 2007. In the NSW Act a 'surveillance device is '(a) a data surveillance device, a listening device, an optical surveillance device or a tracking device…' (s 4) and a warrant is a 'surveillance device warrant or retrieval warrant'. (s 4). Surveillance warrants can be obtained if a law enforcement officer 'on reasonable grounds suspects or believes that: (a) a relevant offence has been, is being, is about to be or is likely to be committed, and…' (s 17). Such warrants cover conversations, premises, vehicles, objects or class of objects (s 21). There is also the Commonwealth *Telecommunications (Interception and Access) Act* 1979 which provides that a telecommunications device; 'means a terminal device that is capable of being used for transmitting or receiving a communication over a telecommunication system'. The Act covers telephone surveillance by warrant and is available to police officers in NSW. The warrants must relate to 'serious offences' which is defined in wide terms. It includes an offence where the maximum penalty is 7 years in gaol or more. That covers a vast array of offences. Section 5D(6) explains that a serious offence can relate to

(a) aiding, abetting, counselling or procuring the commission of: or

(b) being by act or omission, in any way directly or indirectly knowingly concerned in, or

party to the commission of or'

© conspiring to commit...

Section 5D(9) explains that:

'An offence is also a serious offence if (a) the particular conduct constituting the offence involved or would involve, as the case requires

(i) Associating with a criminal organization or a member of a criminal organization or
(ii) Contributing to the activities of a criminal organization or

(iii) Aiding, abetting, counselling or procuring the commission of a prescribed offence for a criminal organization

(iv) Being, by act or omission, in any way, directly or indirectly knowingly concerned in, or party to, the commission of a prescribed offence for a criminal organization or

(v) Conspiring to commit a prescribed offence for a criminal organization and

(b) if the offence is covered by subparagraph (a)(i) – the conduct constituting the offence was engaged in, or is reasonably suspected of having been engaged in, for the purposes of supporting the commission of one or more prescribed offences by the organization or its members

Given all of the above, the *Crimes Amendment (Consorting and Organised Crime) Act 2012* was not necessary. As currently found in the *Crimes Act*, commencing at s 93W, it is also unnecessary. Any advantage in policing is more than offset by the loss of civil liberties in relation to privacy and the right to meet with other people without fear of police intervention.

Q 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 criminalized by the new consorting provisions?

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

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

Checks and balances and wide ranging defences are required because in a modern technological age the definition of 'consort' includes 'by electronic or other form of communication'. The current world wide debate about phone tapping and electronic listening is surely a matter that should lend weight to limiting the power of the police by not having a law in relation to consorting.

If there are to be consorting laws then the current provision is too wide and the defences available too narrow. Section 93W and s 93X do not restrict the consorting to criminal activity. It is a significant erosion of civil liberties that a person keeping the company of another person who has been convicted of an indictable offence at some point in their lives can be warned by a police officer for consorting. Continuation of such activity with two convicted offenders can lead to criminal conviction. Conviction can lead to a gaol term of up to 3 years or a fine of up to 150 penalty units. The erosion of civil liberties can apply to both the persons depending on relevant criminal records. The Consorting Issue Paper at page 12 points out that 'just under a quarter of people who receive official warnings had either no criminal record at all, or had only received a conviction for a summary offence or infringement notice sometime in the previous 15 years'. The Issue Paper on the same page also makes reference to a Bureau of Crimes Statistics and Research report by Jessie Holmes on 'Re-offending'. That report indicates that 'Almost 60 per cent of offenders (adults and juveniles together) convicted in 1994 were reconvicted within 15 years'.[16] However, the reports also states that:

[16] Jessie Holmes, Re-offending in NSW, *Crime and Justice Statistics Bureau Brief*, NSW Bureau of Crime Statistics and Research, Issue paper no 56, Sydney, May 2011, revised January 2012, p 1.

> Table 2 shows that of those convicted of indictable offences in 1994 and reconvicted within 15 years, the majority (88%) were reconvicted of a summary offence as their next offence and just over a tenth (12%) were reconvicted of another indictable offence as their next offence. In comparison, almost all (97%) offenders convicted of summary offences in 1994 and reconvicted within 15 years were reconvicted of another summary offence as their next offence.[17]

The report also discusses the varying re-offending rates for various offences. The consorting laws do not take into account that a person receiving a warning or charged may have no criminal record or that the person with the indictable record may, at most, have been convicted of a summary offence since or may have no further record at all. Nor do they take into account juvenile or adult status, different re-offending rates depending on the original indictable conviction or that 'most re-offending occurred within a few years of the reference offence'.[18]

There is no answer to question 2 other than to repeal the consorting laws. The massive volume of statutory power available to the police as set out in the answer to question 1 meets all reasonable concerns by the police. If the laws are not to be repealed then to protect people who are not involved in criminal activity from being criminalized there is a need for the police to meet the test in question 3, that is, associations 'linked to current or suspected criminal activity'. In addition, in accord with question 4, the police should hold a 'reasonable belief' the issues of a warning 'is likely to prevent further offending

It is important to note that in the debate in 2012 concerning enforcement conditions related to bail included the issue of whether the police should be restricted to directions 'in the circumstances specified in the enforcement condition' or should also be able to give a direction 'at any other time the police officer has a reasonable suspicion that the accused person has contravened the underlying bail condition in connection with which the enforcement condition is imposed'. (See the *Bail Amendment (Enforcement Conditions) Act 2012*.) Those provisions have found their way into the *Bail Act 2013*. If it was controversial that the police should have the power to issue directions in relation to conditions where there was 'reasonable suspicion', the fear being the power was too wide, then how much more controversial is it to have no requirement for 'reasonable suspicion' at all. In many of the Acts mentioned in the answer to question 1, there is reference to 'reasonable grounds' and reasonable suspicion. (See for example, 'good reason to believe' in relation to telephone interim orders in the *Crimes (Domestic and Personal Violence) Act* 2007; enforcement condition 'reasonable suspicion' test in the *Bail Act* 1978 and the *Bail Act* 2013; 'reasonable grounds' concerning a breach of the peace in the *Law Enforcement (Powers and Responsibilities) Act* 2002; 'reasonable grounds suspects' in relation to surveillance warrants in the Commonwealth *Surveillances Devices Act* 2004; and 'reasonably suspected of having been engaged in ' in relation to the *Telecommunications (Interception and Access) Act* 1979).In all of the Acts mentioned in the answer to question 1 the issue concerns crime or suspected crime or potential crime. It cannot be other than a serious decline in liberty of the citizen if no criteria are provided as to why the police should take an interest in the relationship between two people. In relation to the current consorting law there is no need to be concerned that a crime is being planned or to even have a 'reasonable suspicion' about the relationship.

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[17] Ibid 2.
[18] Ibid 1.

The material in chapter 3 of the Consorting Issue Paper concerning who the consorting laws are used against does not detract from three points. First, there are plenty of laws to deal with crime and the potential for crime. Second, people with criminal records are entitled to lead a lawful life in a liberal democracy. Third, it is clear from 3.3.1 of the Issue Paper that consorting laws will disproportionately affect Aboriginal people and the young. The bottom line is that as currently constructed the consorting laws can be used against anyone in a wide range of circumstances. It is not acceptable to simply say that the police will only use such laws against people they suspect in relation to crime or who have criminal records or who they suspect might be encouraged to be involved in crime by such consorting. A liberal democracy needs clear laws on such matters.

The material set out above indicates that the CCL does not in relation to the first part of **Q 5. Should the targeting of people for consorting be left wholly to police discretion…** support the police having such discretion. In relation to the second part of **Q5 Should the provisions be limited to people convicted of certain categories of offences as legislated in other jurisdictions** the CCL's primary position is that such laws should not exist. However, if it is intended to continue with them then the issue of what should be covered is difficult. The *Crimes Act* covers a vast array of topics from murder to larceny. Other laws such as the *Drug Misuse and Trafficking Act* also cover a wide range of issues. In both Acts the seriousness of the offences varies considerably. The *Drug Misuse and Trafficking Act* provides for weight of drug as a criteria in relation to seriousness. Appendix 3 to the Consorting Issue Paper indicates that Victoria uses 'organised crime offence'. If there is to be a consorting law then a refining of 'convicted offender' to apply only to those who have been convicted of the most serious offences, for example where the offence carried a maximum sentence of 15 years or more would provide a limitation on the current situation. This could be done either by reference to the maximum sentence for the offence or by reference to specific offences. The Ombudsman's Issue Paper makes the point that the package of reforms introduced on 14 and 15 February 2012 were aimed at organised crime.[19]

It follows from this submission that the CCL answer to **Q 6 Is it appropriate for police to target people for consorting who are suspected of involvement in less serious offences such as shoplifting** is that such offences should not be targeted by the police for use in the consorting laws. **Q 7 Should convictions for certain offences or offence categories be excluded from defining a person as a convicted offender, and if so which ones** would provide difficulties given the range of sentences. The proposal to limit consorting to those convicted of an offence carrying a sentence of 15 years or more is a more satisfactory way of dealing with the situation.

Q 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 time frame?

The material at 3.5.1.2 of the Consorting Issue Paper concerning reconviction rates does not detract from the need to set a limit on how long back a conviction should remain valid for the purposes of consorting laws. The material refers to almost 60% percent being reconvicted within 15 years. First, as stated above, not all offences by repeat offenders are indictable offences and second only 24% of people who were the subject of official warnings issued by the specialist squads had a conviction for a strictly indictable offence. If there is to be a consorting law then only indictable convictions in the

[19] NSW Ombudsman's Consorting Issue Paper, above n 1, 1.

past ten years and where the maximum penalty is 15 years or more should be applicable to the definition of 'convicted person'.

Q 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?

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

In the Issue Paper at 5.6 it is pointed out that the 'previous offence of consorting required police to charge a person within a six month time period starting on the first occasion of associating due to the time restrictions placed on all summary offences in NSW…' The section goes on to explain that in relation to existing charges of consorting the longest period between the first and last consorting is 7 months. There is currently no time limit on duration between events or on bringing a prosecution. At 5.6.1 it is pointed out that in a number of States there is a 6 to 12 month limit between the incidents of consorting and charge. The CCL takes the view that 'habitually consort' as found in s 93X of the *Crimes Act* should not be taken to include events that are years apart. To assume otherwise is to make the word 'habitual' meaningless. The CCL suggests the time limit from the consorting events to charge should be the same as in the old charge, that is 6 months. At 5.6 it is stated in relation to police action that the 'Consorting SOPs indicate that officers should not commence criminal proceedings for consorting unless "the occasions of consorting occurred within a six month period" except in "exceptional circumstances"'. The 6 month limit related to the consorting incidents is appropriate but there should be no general 'exceptional circumstances' provision as that would make the limit meaningless. The police warning should only be valid within the 6 month period.

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

Q12. One of the defences listed in section 93Y of the Crimes Act is 'consorting with family members'. Should 'family' be defined within the legislation or in the Consorting SOPs and if so, what definition of 'family' should be adopted?

Questions 11 and 12 point to the difficulty referred to in the CCL answer to question 2. In the Bail Act 2013, consideration of 'unacceptable risk' requires consideration of the person being an Aboriginal or Torres Strait Islander. The Law Reform Commission in its report on bail in 2012 also gave lengthy consideration to that issue. In the Issue Paper at 6.1 it is pointed out that Aboriginal people comprise approximately 2.5% of the total NSW population. At 6.1.2 it is pointed out that 'According to our analysis, 46% of all Aboriginal men in NSW have been convicted of an indictable offence in the last 10 years compared to 5.3% of all men'. The CCL believes that the most appropriate way to deal with this issue and those referred to in the answer to question 2 is to have a general defence of 'reasonable excuse'. That defence is available in most Australian jurisdictions (See appendix 3). If that defence is not provided for then there is a need to provide a definition of 'family'. The NSW Law Reform Commission in its Report on bail in 2012 recommended that:

'A new Bail Act should provide that, in making a decision in relation to an Aboriginal person or Torres Strait Islander regarding release or a condition or conduct direction, the authority must take into account (in addition to any other requirements):

(a) any matter relating to the person's Aboriginal or Torres Strait Islander identity, culture and heritage, which may include:
    (i) connections with and obligations to extended family
    (ii) traditional ties to place
    (iii) mobile and flexible living arrangements
    (iv) any other relevant cultural issue or obligation'[20]

The words in (a)(i) to (iv) would extend the definition of family and provide a fairer approach when police are considering whether consorting arises in relation to Aboriginal or Torres Strait Islander persons.

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

Q 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?

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

CHILDREN

As pointed out at 2.2 in the Consorting Issue Paper the penalty for consorting before the *Crimes Amendment (Consorting and Organised Crime) Act 2012* was a maximum of six months in gaol or a fine of $400. The maximum in the new Act is three years in gaol or a fine of 150 penalty units. Children are not excluded from this severe increase in penalty. The modification provided by the *Children (Criminal Proceedings) Act 1987* where the matter is dealt with summarily or because the matter has been remitted to the Children's Court under s 20 is 2 years under a control order or 10 penalty units or the maximum prescribed by law 'whichever is the lesser'. A whole range of other penalties including community service also apply. The overall situation is far more severe than the original penalty. Given all of the laws covering criminal behaviour by groups set out above there is no justification for including children in the new consorting laws. At 6.3.5.2 it is pointed out that 'Services involved in providing support to vulnerable children and young people, such as homeless youth, advised that many of their clients would be unable to abide by this legislation as their clients "have very little control over their circumstances" and furthermore, much of their offending involves "crimes of poverty" such as stealing'.

The connection between young people and being an Aboriginal person should also be taken into account. The Issue Paper points out at 6.2.1.1 that 'Aboriginal children and young people were issued with official warnings at a higher rate than Aboriginal people in general by officers from this select group. Just over half (n=25) of all children and young people issued with warnings are Aboriginal, whereas 38% of all people issued with warnings are Aboriginal (n=200)'.

[20] NSW Law Reform Commission Report on Bail, above n 14, 185.

A central feature of the three year long debate over bail from 2010 to 2013 related to reducing the number of young people in Juvenile Justice Centres. The new consorting law will do nothing to assist the effort to reduce those numbers. The NSW Law Reform Commission Report on Bail in 2012 gave great emphasis to the needs of children in bail applications and conditions. The NSW Government did not implement all of those recommendations but it did introduce some in the Bail Act 2013. Section 74 allows a child to make two applications before the severe restrictions for repeat bail applications that apply to adults take effect. Section28 requires accommodation requirements in relation to children to be the subject of report back every two days where accommodation is not found. If the trend is towards trying to work out better ways of dealing with young offenders why is there a need to stiffen severely the consorting laws as they apply to such young people?

The consorting laws should not apply to young people but if they are to apply then the penalty should not include control orders. Fines should be limited to the$400 limit set out in the legislation before the new Act was introduced.

The CCL strongly recommends that existing privacy provisions in relation to children be maintained. If that makes consorting laws in relation to children unworkable then so be it. As stated at the beginning of the answer to the questions on children, the CCL does not believe there is any reason consistent with a belief in liberal democracy that would justify consorting laws in relation to children.

Q 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?

Several points need to be made generally and in particular about homeless people in relation to the expanded quote. The Bill does not restrict 'consort' to criminal behaviour. It would be for the homeless person to satisfy a court that it was reasonable in the circumstances to find one of the six named defences was made out. While the police do have to make judgments about observed behaviour there are many laws available to them, some of which are set out at the beginning of this submission, and which are also to be found at 6.4.3.2 of the Consorting Issue Paper. Amongst other powers the police have the power to move people on. The police should not be put in the position where in making their judgment in relation to the homeless, one option is the consorting laws.

A major reason why consorting should not apply to the homeless is because society does not deal with the homeless as it should and because the homeless include homeless young people. The Law Reform Commission noted in its report on bail at page 219 that: 'There is a lack of public facilities for the accommodation of homeless adults and young people who have nowhere to live and who should be released on all other grounds. The lack of such facilities has been pointed out in several reports'. A number of reports are then referred to in a footnote. They include: 'NSW Law Reform Commission, *Young Offenders*, Report No 104 (2005) 260-263; J Wood, *Report on the Special Commission of Inquiry into Child Protection Services in NSW* (2008) vol 2, 558-562; Noetic Solution, *A Strategic Review of the New South Wales Juvenile Justice System*, Report for the Minister for Juvenile Justice (2010) 71-72; Parliament of Australia, House of Representatives Standing Committee of Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) 222.

Case study 2 at 6.4 of the Consorting Issue Paper concerning a homeless man with pancreatic cancer being penalized for consorting shows how the law in its current form is not suitable for use against the homeless. At 6.4.1 it is stated that 'It is estimated that up to three quarters of the homeless

population in some areas have a significant mental illness'. It should be noted that the Law Reform Commission pointed out in its report on bail at page 179 that: 'Australia has ratified the Convention on the Rights of persons with Disabilities which requires parties to ensure that people with disabilities enjoy, on an equal basis with others, the right to liberty and security of person, and are not deprived of their liberty unlawfully or arbitrarily'. At page 180 the report went on to state:

> In addition, in light of the Convention on the Rights of Persons with Disabilities and to avoid direct or indirect discrimination against people with cognitive or mental health impairments, we recommend that decision makers be required to take certain matters into account. These matters include a person's ability to understand and comply with conditions, the person's need to access treatment or support in the community, the person's need to undergo assessment, and any additional impact of imprisonment as a result of the cognitive or mental health impairment'.

How are such responsibilities and concerns to be met by the police in considering whether to issue a caution or charge for consorting? These matters overlap with the answers to **Q 17-19** concerning official warnings. Is the view to be taken that it is a matter for the courts? That is not acceptable in a liberal democracy.

There is no suggestion in the Parliamentary Debate that the Bill is part of a major offensive against the homeless. That the consorting provisions can make it possible for the police to deal with the homeless by its use rather than by other means is unacceptable in a liberal democracy. It is further proof that the consorting provisions should be repealed. If they are not going to be repealed then it must be made clear that the consorting laws are not to be applied to homeless people.

General point concerning special vulnerability: youth; being an Aboriginal or Torres Strait Islander; or having cognitive or mental health impairment.

Bail can be provided by a police officer as well as a court. In the *Bail Act 2013* a police officer considering whether there is an 'unacceptable risk' in granting bail must in s 17, consider:

'(j) any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment'. There is no such requirement in relation to what should be required in relation to warnings and charges in relation to consorting. The CCL recommends that if there are going to be consorting laws then the issues addressed in the *Bail Act* must be addressed in the consorting laws.

Q 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?

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

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

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

In relation to question 17 the CCL, having considered the material in 7.1 and 7.1.1 of the Consorting Issue Paper, is of the view that the Act should be amended as suggested in the question. It seems from that material that the Police Consorting Standard Operating Procedures in relation to s 93X, while reflecting the wording of the section, does not in all cases lead to the law's intent being met. The statement, 'We identified examples where the record of the official warning suggests that the person was warned that they are not to associate with a particular named individual, and some examples of warnings which implied that further association with any convicted offender would be an offence' reinforces the need for change.

In relation to Q 18 and leaving aside for the moment issues of privacy, there is a need to modify the Consorting SOPs as set out at 7.1.1. The wording does reflect wording in the current s 93X. However, the result would be for many people receiving the warning, an impression that consorting with any convicted offender, not just the named convicted offender, is an offence. That is not what Division 7 of the *Crimes Act* on consorting is intended to convey.

Questions 19 and 20 overlap in relation to the issues they raise. The CCL has set out above its concern for vulnerable groups because of youth, being an Aboriginal or Torres Strait Islander or having a cognitive or mental health impairment. In 7.2 the Consorting Issue Paper also mentions being intoxicated and being from a culturally or linguistically diverse background. For the reasons mentioned above all such cases the warning should be in writing even if an oral warning has been issued. However, the Consorting Issue Paper explains at 7.3 that, 'Our analysis of the consorting records for the select group of LACs and squads revealed a range of different approaches in the way police issued warnings, such as whether the warning was given orally or in writing, and whether it was given at the time of an incident of consorting or at another time'. If citizens are going to be stopped in the street and issued with warnings concerning consorting then there must be a uniform approach. All warnings should be in writing and all should be at the time of the incident of consorting.

Q 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?

Q 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?

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

It is noted from 7.3.1.1that pre-emptive and retrospective warnings do not form the majority of warnings. However, it is also noted that 'Officers from one LAC told us that they regularly issued warnings retrospectively because this meant they were able to go back to the station and properly check the convicted offender status of particular individuals and assess how appropriate it would be to use the consorting provisions before issuing warnings'.

Pre-emptive warnings to citizens that they are consorting erode civil liberties in a fundamental way. Without seeing any criminal behaviour the police officer nevertheless issues a warning to a citizen about consorting with certain people. That is an unacceptable intervention in the right to privacy in a liberal democracy. The same approach is taken by the CCL to retrospective warnings. While the police state that they never issue warnings more than a few days to a week after observing

consorting, there is nothing in the legislation to restrict warnings to that time limit. The same unlimited time frame applies to warnings issued pre-emptively. One of the reasons given by the police for retrospective warnings is intoxication. There are alternative means available to the police to deal with intoxicated people other than the use of consorting laws and warnings as part of the consorting process. At 7.3.1.1 it is explained that in a pre-emptive warning case then two occasions of consorting with the named person must follow for the offence to be made out. It is not clear if the police regard the observed consorting in a retrospective warning case as one of the two occasions. As s 93X(1)(b) states, 'consorts with those convicted offenders after having been given an official warning in relation to each of those convicted offenders' then it seems all consorting used to prove the case must occur after the warning and that would not include consorting before a warning.

The CCL supports the concerns set out in the statement at 7.3.2 :

> Both the NSW Law Society and the NSW Young Lawyers have raised the concern that this is a serious invasion into the privacy of the person who is the subject of the warning. The warning recipient would not otherwise be legally entitled to know about their associate's criminal record. The disclosure has the potential to affect a person's social relationship and employment opportunities (if disclosed to work colleagues), among other things beyond simple privacy concerns.
>
> Particularly privacy issues are raised by the consorting provisions when it comes to convicted offenders who are children or young people and this is discussed in section 6.3.7.

There is no practical way that the police can reduce the impact on people's privacy when issuing official warnings. In many cases, given human nature, word will quickly spread to many other people. The damage done to personal and employment relationships may, in many cases be disproportionate to the concerns that led to the warning for consorting. The whole area of pre-emptive warnings, retrospective warnings and privacy is further proof that there should be not consorting laws.

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

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

The point at 7.3.3 that '… approximately 50 of the 200 people were wrongly treated as convicted offenders resulting in official warnings to an estimated 100 individuals being wrongly issued' reinforces the point made above concerning privacy and damage to reputation that can follow from a warning for consorting. It will be of little comfort to persons wrongly warned or charged that they can go to court or complain. At 6.3.4 it is explained that 'Our analysis of the statewide consorting Event records in the first tranche of data (9 April to 16 December 2012) identified occasions where the NSW Police Force had wrongly issued warnings about young people who were not "convicted offenders" as defined in the consorting provisions'. Inevitable mistakes by humans are another reason why there should be no consorting laws. Mistakes are always going to be made no matter how much effort is put into improving the system. The point has even greater force in relation to children.

If there are going to be consorting laws then the proposal at 7.3.3 of not being able to create an Event record in the circumstances where a person subject of a warning is not a convicted offender is supported. It will not resolve the problem of mistakes.

The CCL supports the idea of a swift and cheap form of review where a person feels a warning was not justified. It would be unreasonable to expect people to go to the expense of a court application for review of a warning. The CCL believes the suggestion of an internal police review mechanism with a right of appeal to the Administrative Decisions Tribunal is, like the idea of not being able to create an Event record, worthy of consideration. A difficulty with the internal police component of this approach may be that the information needed to be provided by the person appealing puts them at risk in relation to what in the end is the potential to be charged with an indictable offence. To that extent the situation differs from licensing reviews. If that is to be the appeal mechanism then how does the approach ensure people who feel the warning is unfair do not incriminate themselves? The issues are complex and there should be no consorting laws.

Q 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?**

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

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

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

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

Q 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?

The defences concerning family, employment, training or education, health service, legal advice or complying with a court order in custody simply do not cover the wide range of perfectly lawful activities that all citizens carry out in their day to day activities. Why should the defendant be restricted to only those matters when attempting to satisfy the court in accordance with s 93Y of the *Crimes Act* 'that the consorting was reasonable in the circumstances'? Should we all, after introducing ourselves to someone we have not met before enquire, before continuing the conversation, as to whether they have an indictable conviction for a criminal offence? Should we email our friends and ask if any of them has an indictable conviction so we know where we stand?

The point to be made out of these two extreme examples is that having consorting laws based on a blank cheque power to the police is not healthy for a liberal democratic society.

If there are going to be consorting laws then the key issue in relation to defences is set out in **Q 28.** A 'reasonable excuse' defence added to the existing defences would be a step in the right direction. Such a defence arises in a wide enough range of matters in the *Crimes Act* 1900 to require its own section. 'Division 2 Lawful authority or excuse' contains s 417 which states:

'Proof of lawful authority or excuse

Wherever, by this Act, doing a particular act or having a specified article or thing in possession without lawful authority or excuse, is made or expressed to be an offence, the proof of such authority or excuse shall lie on the accused'.

Some examples in the *Crimes Act* where reasonable excuse arises include: s 38A(4) which in relation to spiking drinks (maximum penalty 2 years gaol or 100 penalty units) indicates the person does not commit the offence 'if the person has reasonable cause to believe that each person who was likely to consume the drink or food would not have objected to consuming the drink or food if the person had been aware of the presence and quantity of the intoxicating substance…'; s 43A 'Failure of persons with parental responsibility to care for child' (maximum penalty 5 years gaol) states at s 43A(2)(b) 'who without reasonable excuse, intentionally or recklessly fails to provide the child with the necessities of life,'; s 60E 'Assaults etc at schools' which provides in s 60E(5) 'Nothing in subsection (1) applies to any reasonable disciplinary action taken by a member of staff of a school against a student'; s 61AA 'Defence of lawful correction' which states at s 61AA(1)(b) 'the application of that physical force was reasonable having regard to the age, health, maturity or other characteristics of the child, the nature of the alleged misbehavior or other circumstances'; s 61HA 'Consent in relation to sexual assault offences' which states at s 61HA(3)(c) in relation to knowledge that the other person does not consent, 'the person has no reasonable grounds for believing that the other person consents to the sexual intercourse'; s 91HA 'Defences' in relation to producing, disseminating or possessing child abuse material provides in s 91HA(1) that 'the defendant did not know, and could not reasonably be expected to have known' and in ss (2) in relation to possession that the material 'came into the defendant's possession unsolicited and the defendant, as soon as he or she became aware of its nature, took reasonable steps to get rid of it'.

It is of interest in relation to s 91HA dealing with production, dissemination or possessing of child abuse material that s 91HA(6) states:

'Law enforcement officers

It is a defence in proceedings for an offence against section 91HA that:

(a) the defendant was, at the time of the offence, a law enforcement officer acting in the course of his or her duties, and
(b) the conduct of the defendant was reasonable in the circumstances for the purpose of performing that duty'.

A general defence of 'reasonable excuse' should be available to law enforcement officers. Why is it not going to be provided to citizens when they are talking to each other, whether that be face to face or by electronic means?

A general defence is also available in s 93T for those accused of 'Participating in criminal groups' (maximum gaol term of 5 years). Section 93T states '(1) A person who participates in a criminal group is guilty of an offence if the person:

(a) knows, or ought reasonably to know, that it is a criminal group, and
(b) knows, or ought reasonably to know, that his or her participation in that group contributes to the occurrence of any criminal activity'.

Persons accused of 'Membership of terrorsit organisations' also have a defence in that s 310J(2) states: 'Subsection (1) does not apply if the person proves that he or she took all reasonable steps to cease to be a member of the organization as soon as practicable after the person knew that the organization was a terrorist group'.

It seems therefore that in particular parts of the *Crimes Act* law enforcement officers, persons accused of being in criminal groups and persons accused of being terrorists have access 'reasonable in the circumstances', 'ought reasonably to know' and 'took all reasonable steps' provisons while the defendant accused of consorting has no such provisions. Unlike a person alleged to be involved in producing, disseminating or possessing child abuse material or involvement in criminal groups or terrorism the citizen alleged to have been consorting need not be involved in any preparation of or carrying out of criminal activity at all. However, that citizen is not thought worthy of a 'reasonable excuse' defence.

The judgment of Mason J in *Johanson v Dixon* and the implications for the consorting provisions of the *Crimes Act* have been discussed at length and with footnotes in the introduction to this submission. The CCL simply reiterates that the Victorian legislation required the defendant to give a 'good account' of his or her relationship with specific groups of people. The NSW 'indictable offence' test is wide and involves 199,945 people with an indictable conviction in the last ten years. 'Habitual' arises after very limited contact (two meetings with two people) according to s 93X of the *Crimes Act*. A warning can arise after one meeting according to s 93X.

Section 93Y of the *NSW Crimes Act* makes clear it is for the defendant to 'satisfy the court that the consorting was reasonable in the circumstances. Section 93Y limits the opportunity for proving the consorting was 'reasonable in the circumstances' by restricting the defence to certain categories. No other perfectly reasonable explanation is allowed to be used. Is that sort of approach the hallmark of a liberal democracy? It follows from these points that the all of the categories in **Q 26** should be covered by a 'reasonable excuse' defence. See also the answers to **Q 11-16** in relation to issues concerning the need to cover broad groups within families, young people and the homeless.

In relation to public assemblies it is important to note that 'Public assemblies' must be authorised in accordance with s 22 – s 27 of the *Summary Offences Act* 1988. The Commissioner of Police may apply to a court for prohibition of a particular public assembly. Section 24 states:

> a person is not, by reason of any thing done or omitted to be done by the person for the purpose only of participating in that public assembly, guilty of any offence relating to participation in an unlawful assembly or the obstruction of any person, vehicle or vessel in a public place.

Simpson J in Commissioner of *Police v Rintoul* [2003] NSWSC 662 stated in relation to s 24:

> 'An authorised assembly would protect participants only if the assembly were held substantially in accordance with the application. It does not protect against criminal prosecution of any person who engages in acts of violence or vandalism in that assembly. … and participants should be aware of the very limited nature of the protection that the Act affords them.

Consorting between those involved in an authorised protest would not be covered by the protection within the *Summary Offences Act*. Are people discussing any issue while participating in a march to be open to warnings and charges for consorting if one of them has in their background an indictable conviction? It is not good enough to leave such matters to police discretion. Once again, the question arises, do we wish to live in a liberal democracy or not?

For all of the reasons set out in this submission the answer to **Q 31,** if there are going to be consorting laws, is that it should be for the prosecution to prove that the consorting was not reasonable in the circumstances. The right of citizens to communicate is fundamental to a liberal democracy. If the Government wishes to make such communication an offence in circumstances where there is no need to prove criminal planning or activity then the onus should lie on the prosecution to establish the meeting, conversation (face to face or electronic) was not reasonable in the circumstances.

CONCLUSION

Consorting laws raise serious issues for the civil liberties of citizens living in a liberal democracy. No connection with criminal behaviour is required and the potential for a warning or a charge arises out of communication with just under 200,000 people. Citizens with and without indictable convictions are entitled to live lawful lives in a liberal democracy. The laws have serious implications for Aboriginal person, the young, the poor, the mentally ill and the homeless. Habitual consorting arises after a very limited range of communication and a warning can arise after one act of consorting. In relation to concerns about crime and potential crime the police have massive existing powers without consorting laws. As a primary position the CCL states that the consorting laws should be repealed.

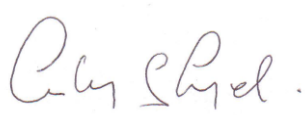
If there are going to be consorting laws then as a secondary position the CCL states that major changes are required. Various recommendations are found throughout the submission. Some general points should be made. The inclusion of all 'indictable offences' in the definition of 'convicted offender' is too wide. Offences carrying a maximum penalty of 15 years or more should be the only ones to which consorting laws can be applied. There should be a six month limit on the time between consorting events and a six month limit on the time between a warning and the second act of consorting relied upon. The proof of 'habitual' arising after two episodes with two people is too restrictive and more consorting should be involved before the law can be applied. One act of consorting before a warning invites the erosion of civil liberties and the diminishing of relationships between citizens. Once again, it is to be remembered that just under 200,000 people have been convicted of an indictable offence in the last ten years. The defences need to be widened significantly. A general defence of 'reasonable excuse' needs to be introduced. If the current list of defences is to be continued with then issues related to the definition of 'family members' need to be addressed, particularly as it relates to Aboriginal persons. Even if the consorting laws are to continue they should not be available for use against young people and the homeless. Use of such laws

against young people will increase incarceration rates amongst the young when the emphasis should be upon reducing the number of young people in custody. If there is going to be a specific list it will have to be extended to deal with the many other issues that can arise in life. The right of citizens to participate in demonstrations and other forms of freedom of expression is one example.

The NSW Council for Civil Liberties thanks the Ombudsman for the opportunity to respond to this issues paper. We are hopeful that our submission will be of assistance in the review process. NSWCCL would appreciate an opportunity to discuss the issues in this submission further with the Ombudsman and relevant officers involved in the review.

This submission was prepared on behalf of the NSWCCL by Max Taylor a member of the NSWCCL Committee.

Yours sincerely



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The NSWCCL was founded in 1963 and is one of Australia's leading human rights and civil liberties organisations. Its aim is to secure the equal rights of everyone (as long as they don't infringe the rights and freedoms of others) and oppose any abuse or excessive power by the State against its people. To this end NSWCCL attempts to influence public debate and government policy on a range of human rights issues. It seeks to secure amendments to laws, or changes in policy, where civil liberties and human rights are not fully respected. It listens to individual complaints and, through volunteer efforts, attempts to help members of the public with civil liberties problems. NSWCCL prepares submissions to government, conducts court cases defending infringements of civil liberties, engages regularly in public debates, produces publications, and conducts many other activities.