



Review of the New Consorting Provisions
NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

5 March 2014

Dear Sir/Madam

RE: Review of the New Consorting Provisions

The Youth Justice Coalition (**YJC**) thanks the NSW Ombudsman (**Ombudsman**) for the opportunity to comment on the impact of the new provisions contained in Division 7, Part 3A of the *Crimes Act 1900* (NSW) (**consorting provisions**) on young people in NSW.

About the Youth Justice Coalition

The YJC is a network of youth workers, children's lawyers, policy workers and academics working to promote the rights of children and young people in NSW.

The YJC aims to promote the rights of children and young people, to promote appropriate and effective initiatives in areas of law affecting children and young people, and to ensure that children's and young people's views, interests and rights are taken into account in law reform and policy debate.

The YJC's comments and recommendations

In response to the Ombudsman's Consorting Issues Paper dated November 2013 (**Issues Paper**), in the context of young people (those aged 18 years and under), this submission endeavours to:

- set out the disproportionately detrimental impact the new consorting provisions have had on young people, particularly on young Aboriginal people; and
- set out the YJC's resulting recommendations for law reform to protect the interests of young people, whilst still allowing the provisions to operate against the intended purpose of the provisions, namely participation in organised crime.

1. Disproportionate and unintended use of the consorting provisions on young people

Apart from the YJC's general concerns about the impact of the consorting provisions on people's general right to freedom of association, the YJC is concerned about the unintended and disproportionate use of the consorting provisions on young people.

The YJC is particularly concerned with the following preliminary findings set out in the Issues Paper that:¹

- 83 children and young people aged between 13 and 17 were subject to the consorting provisions in the first year of use;
- two-thirds of the 83 children and young people aged between 13 and 17 were Aboriginal;
- there was significant variance between the local area commands (**LAC**) which participated in the study in terms of whether they did, or did not, use their discretion to utilise the consorting provisions to target young people;
- of those LACs that did target young people using the consorting provisions, the basis on which LACs made use of the provisions. For example, some LACs advised that they used the consorting provisions to target young people spending time in certain locations merely in response to complaints received from local businesses about concerns that these young people may steal or distribute prescription drugs. This is in stark contrast with the finding that other LACs and specialist squads did not consider there was any need to use the consorting provisions in relation to children or young people; and
- there were multiple occasions of NSW Police wrongly issuing warnings in respect of young people who were not "convicted offenders" as defined in the consorting provisions. The Issues Paper does not indicate whether and, if so, the extent of any action NSW Police has taken to retract wrongly issued warnings.

The YJC considers the following factors (some of which were identified in the Issues Paper²) contribute to the statistics above, and submits that these factors will continue to result in young people being targeted by police using the consorting provisions unless the provisions are amended:

- the substantial discretion that the consorting provisions provides to police across all LACs to target young people. Apart from very limited policy guidance provided to LACs on how to approach the consorting provisions with respect to young people, this discretion appears to be unfettered and inconsistently applied;
- the fact that many police in all LACs tend to police public space, including public transport. These are areas in which young people typically socialise and spend a lot of time, given their lack of private space; and

¹ Paragraph 6.3 of the Issues Paper

² Paragraph 6.3 of the Issues Paper

- young people and Aboriginal people are vulnerable groups which are long-known to be over-represented in the criminal justice system.³ As a result, these groups have a significantly increased likelihood of being given a warning (as a result a greater likelihood of interacting with those who have been convicted for an indictable offence), or being the subject of a warning (as a result of having been convicted of an indictable offence).

The YJC is concerned about the continued use of the consorting provisions by NSW Police against young people, thereby criminalising otherwise normal social activity between young people, and increasing the risk that:

- young people are brought in contact with the criminal justice system, when they have not otherwise engaged in criminal activity; and
- the young people who are seeking to rehabilitate themselves following convictions for indictable offences may be further punished and socially isolated.

Parliament's stated intent in enacting the consorting provisions was to ensure that "the provisions of the [Crimes] Act remain effective at combating criminal groups in NSW" and to ensure that the NSW Police Force "has adequate tools to deal with organised crime"⁴. The data set out in the Issues Paper indicate that young people, particularly Aboriginal young people, are being disproportionately targeted and prejudiced by legislation that was not intended to affect them.

2. The YJC's recommendations for law reform

The YJC recommends that the consorting provisions be amended to:

- restrict the offence of consorting to preventing associations related to serious and organised crime, by making it an offence to habitually consort with a person who has been convicted of an organised crime offence. This is a similar position to that in equivalent legislation in Victoria and South Australia;⁵
- expressly exclude the applicability of the provisions to young people aged 18 years and younger; and
- as an alternative to the above, to the extent that the consorting provisions continue to apply to young people aged 18 years and under, an additional provision is inserted which requires NSW Police to record each incident involving the use of the consorting provisions by LACs against young people, each of which must be reported to the Ombudsman.

In the mean time, the YJC recommends that NSW Police's *Consorting Standard Operating Procedures (SOP)* be updated to instruct LACs that the consorting provisions, including the provisions on warning, should not be used against children and young people under any circumstances. This would be substantial practical improvement on the only existing carve out in respect of young people in the present form of the SOP, which provides that criminal proceedings for consorting are not to

³ Young people are known to be over-represented as public nuisance offenders, per the Crime and Misconduct Commission's Policing Public Order: A Review of the Public Nuisance Offence, dated May 2008.

⁴ The Honourable David Clarke MLC, NSWPD, (Hansard), Legislative Counsel, 7 March 2012, p. 9091.

⁵ *Summary Offences Act 1966* (Vic), section 49; *Summary Offences Act 1953* (SA), section 13.

be brought against young people under the age of 16 unless in exceptional circumstances.

The YJC considers that the existing mechanisms, as identified by the Issues Paper, are adequate to prevent young people from associating with persons who have been convicted of indictable offences, including bail conditions restricting association;⁶ non-association orders that may be made in addition to other penalties imposed by a sentencing court;⁷ and non-association conditions that may be imposed as part of the conditions of release from custody on parole.⁸

Thank you for considering this submission. The YJC would welcome the opportunity to be involved in any further consultation regarding the review into the consorting provisions. If you require further information please contact the Youth Justice Coalition on (02) 9559 2899, or at yjc@clc.net.au.

Yours faithfully,

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⁶ *Bail Act 1978* (NSW), section 36B.

⁷ *Crimes (Sentencing Procedure) Act 1999* (NSW), section 17A.

⁸ *Crimes (Sentencing Procedure) Act 1999* (NSW), section 51A.