

**RESPONSE TO THE CONSORTING ISSUES PAPER**

**Review of the use of the consorting provisions by the NSW Police Force**

**Division 7, Part 3A of the *Crimes Act 1900***

**Legal Aid NSW submission**

**to the Ombudsman New South Wales**

**February 2014**

**Summary**

Legal Aid NSW is pleased to have the opportunity to respond to the questions raised in the Consorting Issues Paper. Our position in relation to the revised consorting powers can be summarised as follows.

Legal Aid NSW believes these provisions should be repealed in their entirety because of their inappropriately high impact on the socially and economically disadvantaged.

If this proposition is not accepted, then the provisions would benefit from greater judicial oversight and a narrowing of their scope and operation by the following means:

- Limit the power to issue warnings and charge under the consorting provisions to police working in specialist organised crime squads.
- Amend the definition of 'convicted person' to:
  - a person convicted of a strictly indictable offence, or
  - a person convicted of an offence carrying a maximum sentence of 15 years or more, or
  - a person convicted of an 'organised crime-type' offence.
- Introduce a 5 year time frame within which a 'convicted offender' must have been convicted of a relevant offence.
- Introduce a 6 month time period for warnings to remain valid.

- Limit the application of the consorting provisions to persons aged 18 years and older or, if this position is not accepted, require warnings issued to persons under 18 years to be given in the presence of an independent support person.
- Amend the provisions to require a person to knowingly contravene a prior consorting warning.
- Require warnings to be issued in writing using a standard form, to contain details of persons subject to the warning.
- Allow warnings to be subject to judicial review using a court election process similar to that which applies to penalty notices.
- Require that warning notices contain review and referral information.
- Amend section 93Y to:
  - require the prosecution to establish that a consorting incident was not reasonable in all of the circumstances, or
  - replace the existing enumerated defences contained in section 93Y with a 'catch-all' defence of reasonable excuse

### **Introduction – Why repeal?**

Legal Aid NSW provides legal assistance to economically and socially marginalised community members. As such, we have concerns regarding the use of the revised consorting provisions in relation to those marginalised communities. Our concerns relate to the broad application of the powers and the inappropriately high impact of the powers on vulnerable and public space clients.

The case studies included in the Issues Paper as well as our own in-house experience reflects the fact that the powers are being routinely used in relation to members of the public with no connection to organised crime. This is out of step with the purported Parliamentary aims of the provisions outlined in the second reading speech, namely to ensure that the NSW Police Force 'has adequate tools to deal with organised crime.'<sup>1</sup>

Only a limited number of consorting charges have been laid under the revised provisions. Of those charges, four have been set out in some detail as case studies in the Issues Paper. Two were young people under the age of 18 and one was homeless and chronically ill. None of these people could be described as having links to organised crime. While the number of charges remains low, these examples represent a high number of non-targeted uses of the provisions.

The Issues Paper identifies that during the first 12 months of operation, 1,260 different people have been warned or the subject of a warning under the provisions. Despite the high number of people spoken to by the police about consorting, only 14 charges of consorting were laid as of August 2013.

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<sup>1</sup> The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9091.

Given the emphasis is clearly on the warning stage, it could be argued that the provisions have been utilised as a public space police power rather than as a substantive charge power.<sup>2</sup> Given that there have been no documented occasions of electronic consorting to date, the only way that intelligence relating to consorting can be gathered is through police surveillance of public spaces. This practice lends itself to police using the provisions to 'street-sweep' and target people occupying public spaces for intelligence gathering. Legal Aid NSW understands that the need for police to have the ability to gather intelligence publicly is real and relevant. However, this is 'not the same as permitting a discriminatory use of the threat of prosecution to obtain information or to disrupt a person's social activities.'<sup>3</sup>

In the second reading speech to the provisions, emphasis was given to maintaining a high level of police discretion, putting '...police in a position to do what they do best every day and make a judgment about whether observed behavior reaches the level sought to be addressed by the bill...'.<sup>4</sup> Given the data results from the first 12 months of operation of the provisions, Legal Aid NSW has serious concerns about the use of police discretion, the demographics of those people who are targeted and the subsequent effects for the vulnerable community members who are our clients.

It is our submission that the aims of the provisions are not well served by the provisions in their current form. Nor do we believe that these provisions strike the right balance between law enforcement attempts to curtail organised crime activity and network-building and the rights of members of the public to engage in normal social activity without fear of prosecution. There is strong evidence within the Issues Paper to support repealing the provisions due to inadequate protection for Aboriginal communities, young people, homeless people and other people who have previous convictions and are attempting to access services that will assist in their reintegration into the community.

### **Are the consorting provisions necessary?**

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

It is our submission that the new consorting provisions do not cover any gaps regarding limiting association powers. If the purpose of the provisions is to reduce criminal ties<sup>5</sup> and to deal with organised crime,<sup>6</sup> this can be done effectively using the existing non-association powers comprehensively discussed in Chapter 4 of the Issues Paper.

In addition, we submit that the police could make more use of move-on powers available to them under Part 14 of the *Law Enforcement (Powers and Responsibilities) Act 2002* to deal with public space concerns rather than using the consorting provisions.

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<sup>2</sup> Steele, Alex (2003) Consorting in New South Wales: Substantive Offence or Police Power? [2003] UNSWLawJl 40. Accessed on 31/1/14 at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/UNSWLawJl/2003/40.html>

<sup>3</sup> Ibid at 28

<sup>4</sup> The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9091.

<sup>5</sup> Ibid at p9093

<sup>6</sup> Ibid at 9091

The advantages of relying on the above options as an alternative to consorting are significant. The consorting provisions have broad and discretionary application. Warnings are not subject to judicial review. With so few matters coming before the courts, there is very little oversight regarding the provisions' use. Move-on powers and the other legislative measures outlined in the Issues Paper allow for a better balance between the need for police discretion and the need for appropriate safeguards and oversight.

### **Are the consorting provisions too broad?**

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

One practical step to ensure that the use of the consorting powers is more appropriately targeted towards organised crime associations would be to limit the power to issue warnings and charge to police working in specialist organised crime squads. This limit would significantly reduce the risk of disproportionately affecting already marginalised public space communities and criminalising people not involved in offending behaviour.

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

See our response to Question 4.

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

One significant concern regarding the operation of these provisions in relation to Legal Aid NSW clients is the risk that rehabilitative and protective relationships for former offenders are potentially criminalised. Support services and social connections are vital for a former offenders' reintegration into the community. Where there is a chance that such connections could lead to warnings or charges under these provisions, community members may be fearful of continuing to access services or maintaining contact with family or social networks.

In addition to this, people who have limited or no connection with the criminal justice system can find themselves facing serious charges for social connections that may be legitimate.

If the provisions are to have continued operation, it is the submission of Legal Aid NSW that the risk of criminalising everyday social interaction must be significantly reduced. As such, we support the propositions contained in Questions three and four, namely, that police should be required to show a link to criminal activity, and to hold a reasonable belief that the issuing of the warning is likely to prevent future offending. We would further recommend that the police be required to hold a reasonable suspicion that a consorting incident is for a criminal purpose before a warning can be given.

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

If the provisions are retained, Legal Aid NSW recommends that the definition of 'convicted offender' be narrowed. This could be done by amending the definition of convicted person to:

- Persons with convictions for strictly indictable offences, or
- Persons convicted of offences with a maximum sentence of 15 years or more, or
- The Victorian or Northern Territory model definition of 'organised crime offence', which could include drug supply offences, firearms offences or more serious crimes of violence.

This amendment would seriously reduce the number of vulnerable and public space community members that are currently being warned or charged under the provisions and target people with more serious criminal involvement consistent with the legislative intent.

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

Legal Aid NSW believes that it is not an appropriate use of the provisions to target people who are suspected of being involved in less serious offences. There is nothing in the wording of the provisions to preclude the provisions being used in this way. However, it is hard to see how targeting less serious offences furthers the stated aim of the provisions to tackle organised crime unless a link back to organised criminal groups can be established.

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

If the provisions continue their operation, we recommend the following:

- That a person with juvenile convictions only should not be considered a 'convicted offender'.
- That a person with spent convictions should not be considered a 'convicted offender'.

These recommendations are in line with rehabilitative principles.

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

Legal Aid NSW recommends a person must have been convicted of an indictable offence within the last five years to fall within the scope of the provisions.

In our submission the provisions as they now stand do not provide for a proper balance between the protection of the community and the ability of convicted persons to rehabilitate and reintegrate back into the community. A clear timeframe would assist to address this imbalance.

The issue of time spent in custody was raised in the Issues Paper. This could be overcome by specifying that the time period commence from the date of conviction, or where the person has spent time in custody, from the convicted person's most recent release date.

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

See our response to Question 10.

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

There should be a time limit of 6 months applying to both the period during which the occasions of consorting should occur and the length the warnings remain valid. The purpose of the provisions is to curtail *habitual* consorting which could lead to the creation of criminal ties and activities. If a person does not consort with another person within 6 months, it can hardly be considered habitual.

The current provisions provide no time limit on their application beyond police policy guidelines. This is an unacceptable level of uncertainty, especially for our clients who need to access a number of different support services to aid in their rehabilitation.

### **Use in relation to disadvantaged and vulnerable groups**

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

The recommendations we have made regarding the narrowing of the scope of the provisions throughout this paper may provide some protection for Aboriginal people. However, we submit that the best protection against Aboriginal people being unfairly affected would be to repeal the provisions entirely.

There is an unacceptably high risk of further criminalisation within Aboriginal communities for the following reasons:

- Statistically, Aboriginal people are more likely to have an indictable offence in the last 10 years than non-Aboriginal people.

The Issues Paper notes at 6.1.2 that 46% of all Aboriginal men and 15% of Aboriginal women in NSW have been convicted of an indictable offence in the last 10 years, as compared to 5.3% of all men and 1.3% of all women in NSW. The chances of spending time with a 'convicted offender' are higher for Aboriginal communities regardless of the purpose of that interaction.

- Current police practice in identifying incidents of consorting relies on surveillance of public space. Aboriginal community members spend more social time in public than other community members.

The Issues Paper goes further than providing evidence for the potential for unfair treatment of Aboriginal community members. It shows that in the reporting period, Aboriginal people represented an unacceptably high proportion of people targeted by the police. This is particularly evident in relation to women and young people.

We note that the number of Aboriginal people warned or the subject of warnings by the specialist police squads was far lower than for the LAC police groups. This is significant as it suggests that when police are focused on using the powers in relation to organised crime gang activity, it is far less likely that Aboriginal people will be unfairly affected by the provisions.

Lastly, we note Recommendation 88 of the Royal Commission into Aboriginal Deaths in Custody.

That Police Services in their ongoing review of the allocation of resources should closely examine, in collaboration with Aboriginal organisations, whether there is a sufficient emphasis on community policing. In the course of that process of review, they should, in negotiation with appropriate Aboriginal organisations and people, consider whether:

- a. There is over-policing or inappropriate policing of Aboriginal people in any city or regional centre or country town;
- b. The policing provided to more remote communities is adequate and appropriate to meet the needs of those communities and, in particular, to meet the needs of women in those communities; and
- c. There is sufficient emphasis on crime prevention and liaison work and training directed to such work. (3:43)

As such, we recommend that consultation with relevant and appropriate Aboriginal community organisations be undertaken regarding the operation of the provisions if their operation is to continue.

Please refer to our answer at Question 13 for more detail regarding Aboriginal young people.

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

Given the high number of Aboriginal people being warned or the subject of warnings in the first year of the new provisions, a definition of family and kinship that is consistent with Aboriginal cultural practice should be included in the legislation.

In addition, we have concerns that the section 93Y defences do not cover situations where people live in group situations but are not in a family or romantic relationship, such as flat mates in a share house or residents in emergency accommodation services. This gap may, for example, lead to someone recently released from custody and urgently needing accommodation avoiding accessing housing services. Clearly, finding available housing is a strong protective factor against further offending.

See our responses to Questions 26-30 for more detail.

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

If the provisions are retained, Legal Aid NSW believes that the best protection for young people is for the provisions to be amended to exclude anyone under the age of 18 years from the operation of the consorting provisions. The key reasons for this position are as follows:

*The provisions run contrary to the aims of rehabilitation of young people involved in the criminal justice system.*

The legislative framework for the Children's Court criminal jurisdiction is underpinned by the principle that children and young people should have the opportunity for rehabilitation.

Young people's access to services that will enhance their rehabilitative prospects may be restricted by the potential of being warned or charged under these provisions. Many services will not fall into the existing defences under the provisions, for example, community youth centres, PCYC services where that attendance is not court ordered or refuge accommodation.

*Young people have been wrongly warned and charged under the provisions*

It is clear from the case study in the Issues Paper that mistakes are being made by police in relation to warning and charging young people with consorting. In one case, this has led to a situation where a young person has spent a night in custody whilst wrongly charged under these provisions.

*Young peoples' privacy is compromised by the operation of the provisions*

The disclosure of a young person's criminal record is an unacceptable breach of the protections provided by the *Children (Criminal Proceedings) Act*<sup>7</sup> and the *Young Offenders Act*.<sup>8</sup> These sections prohibit the disclosure of a young person's involvement with the criminal justice system and should not be capable of being overridden by the operation of these provisions.

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<sup>7</sup> s15A

<sup>8</sup> ss 65-66

*Young people are vulnerable and visible community members*

Consorting provisions rely on public space surveillance for their application. As a consequence, public space communities will be more frequently targeted by police under these provisions than other parts of our community.

*Aboriginal young people*

Legal Aid NSW is particularly concerned about the extremely high number of Aboriginal young people being warned or the subject of warnings under these provisions. The Issues Paper notes at 3.3.1 that two thirds of the 83 children and young people subject to the consorting provisions in the reporting period were Aboriginal.

The Royal Commission into Aboriginal Deaths in Custody made the following recommendation regarding Aboriginal young people and the juvenile justice system:

62. That governments and Aboriginal organisations recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise. (2:252)

It is clear that these provisions have the potential for increasing rather than decreasing Aboriginal young people's contact with the criminal justice system and as such serious consideration should be given to excluding young people from the operation of the provisions.

*Other points for consideration*

- Young people have far less control than adults about who they interact with on a day-to-day basis.
- The Issues Paper notes that very young people are being warned despite police policy advising against this practice.

If the provisions continue to apply to persons under 18 years, Legal Aid NSW recommends that any warning should be issued in the presence of an independent support person.

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?

Young people sentenced but not convicted should not be included in the definition of 'convicted offender'. This would run counter to the rehabilitative purpose underlying the children's criminal justice system. Our primary submission is for young people to be excluded from the operation of these provisions for the reasons outlined at Question 13.

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

There should be no circumstance in which an official warning should be issued against a young person. The disclosure of a young person's criminal record is inappropriate given other legislative protections against disclosure.

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

The potential and the actual impact of the consorting legislation on communities whose public behaviour is most frequently observed by police is disproportionate in comparison to the impact on other communities. These communities include, among others, homeless people.

Case study 2 in the Issues Paper clearly highlights an example where the provision requirements are technically satisfied, but where the offender was highly vulnerable and certainly not part of a target group envisaged by the parliament.

Many homeless people experience multiple disadvantage and have complex support needs. Many homeless people also have an offending history which means that they are a 'convicted offender' under the consorting provisions. The Issues Paper goes into some detail about the use of the consorting provisions in relation to homeless people and the results of these interventions. Of concern is the fact that some people experiencing homelessness report that they are no longer accessing support services in their local area out of fear of further warnings or charges. We submit that it is inappropriate for police to use the provisions in a manner that further marginalises people experiencing homelessness.

Should the provisions be retained, our recommendations in relation to the narrowing of the scope and operation of the provisions will have a flow-on effect in reducing the impact of the provisions on all vulnerable public space communities. We would however, further recommend that the consorting SOPs include guidelines discouraging police officers from warning or charging homeless people under the provisions.

## Issues relating to the offence

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?

Legal Aid NSW would support any amendment to the provisions that increases certainty about the meaning and effect of a consorting warning. A warning under these provisions already has the effect of potentially criminalising everyday social interactions in some communities. It is important that the wording of the provisions does not lead to community members mistakenly avoiding people who are not named in a warning. It is our further submission that all warnings should be in writing.

Please refer to our answer at Question 20 for more detail.

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

If the provisions are to be retained, Legal Aid NSW recommends that all warnings be standardised written warnings in plain language that would allow people who are warned under these provisions to fully understand the scope and implications of the warning.

Should an appeal process be introduced, it is our submission that written warnings should detail how to access that appeal process and referral options.

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

If the provisions are to be continued, Legal Aid NSW recommends an amendment to section 93X to the effect that someone commits an offence under the provisions if they *knowingly* contravene a prior consorting warning. This bar should protect vulnerable community members and has precedent in domestic and personal violence legislation.

In the absence of legislative amendment, police policy and practice should give specific guidance regarding a person's capacity to understand a warning. If police are in any doubt as to a person's ability to understand the warning, Consorting SOPs should advise deferring the warning until a time when a person is not intoxicated or when an appropriate support person or an interpreter is available in line with police questioning policy.<sup>9</sup>

See also our answer to Question 20 in relation to the need for reviewable written warnings.

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<sup>9</sup> NSW Police Force, Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence), February 1998, updated January 2012, pp. 66-69

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

The Issues Paper identified a very low number of written warnings issued by police, only four in total during the first year of the provisions' operation.<sup>10</sup>

A requirement for police to issue a pro forma written warning would increase the likelihood that the content of warnings is clearly expressed, standardised and better understood by people receiving a warning. Written warnings could contain information related to the warning itself, for example, the names of people who are the subject of the warning, the time and place that police observed the consorting incident as well as the consequences for further association.

A written warning could also include referral information to ensure that people who received warnings could get more information or advice regarding the implications of the warning.

As raised in the Issues Paper, there is precedent for compulsory written notice under the Northern Territory consorting provisions.<sup>11</sup>

A written warning is especially important where police issue warnings retrospectively or when dealing with members of the public who may have difficulty understanding or remembering the content of a warning.

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?

Legal Aid NSW can think of no circumstance where it would be appropriate for police officers to issue official warnings pre-emptively and thereby, criminalise somebody for something they have not yet done.

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

The purpose of the provisions is to prevent further consorting and to reduce the possibility of criminal networks being established. As such, the timeframe between observing a consorting incident and issuing a warning should be as short as possible allowing a reasonable time period for officers to be able to check a person's record.

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

The breach of privacy inherent in the provisions is of great concern, especially in relation to young people. There is no way to reduce the potential impact of having one's criminal history made public without significantly amending the requirements for an offence under section 93X.

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<sup>10</sup> Pg 42

<sup>11</sup> *Summary Offences Act* (NT), s. 55A(1)(a)

A policy guideline stipulating that the warning should only be administered in the presence of people who are covered by the warning may limit the impact to some extent. For example, if the people who are being warned or the subject of the warning are observed to be consorting in a park or on the street, police should move to an area where other people cannot overhear the content of the warning or the purpose of the police intervention.

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

Legal Aid NSW notes that the current provisions contain no review mechanism in relation to warnings. There is no practical process by which wrongly issued warnings can be challenged until a person is charged with consorting and appears before a court.

A standardised written warning issued to people suspected of consorting could form the basis of a warning review mechanism. Penalty notices issued in New South Wales include information in relation to court election options on the notice itself. Written consorting warnings could also contain similar information, including referral information for legal advice.

Building in a process to challenge consorting warnings allows for mistakes such as are outlined in Case Study 1 to be addressed at a much earlier stage of the process. Further, if someone believes that they fit into one of the defence categories but police used their discretion to warn, the court could consider those circumstances before a charge is laid.

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

Should the provisions be retained, we recommend an external and transparent review process. Please refer to our response to Question 24 for more details on a suggested model.

It is our experience that our clients would be more likely to challenge the validity of a warning at court than to engage in an internal police review process.

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?

Please see our response to Question 29.

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

Please see our response to Question 29.

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

Please see our response to Question 29.

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

The provisions have a very broad scope of application and rely heavily on police discretion to decide who to warn and charge. One way to ameliorate the potential for non-criminal associations to be the basis for an offence would be for the provisions to have strong and inclusive defence provisions. This is not currently the case. Section 93Y has a short and uncertainly defined list of circumstances which could, *after* the matter has come to a Court's attention, be a defence to consorting. It is our submission that the structure and content of the defences contained in the provisions is inadequate, can lead to uncertainty for community members and could be the basis for unnecessary court proceedings.

Legal Aid NSW recommends that section 93Y be amended to require the prosecution to establish that a consorting incident was not reasonable in all of the circumstances. There are myriad reasons for legitimate social activity which are difficult to capture within a list of defences. The inclusion of a reasonable excuse defence is common to all other jurisdictions that have consorting provisions. A general defence of reasonable excuse and clear policy guidelines as to how discretion should be used in determining warnings and charges would have created far more certainty for the defendant in Case Study 3 of the Issues Paper.

Current attempts at enumerating examples of legitimate social interaction are already fraught with definitional issues. Aboriginal concepts of family are not well recognised under the family defence. The range of support services needed by post-release clients is not well covered by the current defences. We support the broadening of circumstances that allow legitimate social activity to continue, if no other alternative defence structure is accepted. However, the application of enumerated defences still depend on police discretion to determine whether consorting, even as contemplated under section 97Y, is reasonable in the circumstances.

### Case Study

An older male client of the Legal Aid NSW was released from custody six years ago after being found guilty of some very old indictable charges. Our client became friends with another male while in detention and they remained friends post-release. The friend also provided practical support in the form of shopping as our client was infirm. The police issued a warning to both men. The police also issued a warning against our client's girlfriend. Our client's family was estranged due to his past offending. In addition, there was discussion about warning the client's Salvation Army support worker.

This case study refers to warnings made under the old consorting provisions. However, it is clear that it is open to police to issue warnings in relation to this social support network under the new provisions now. The relationships discussed do not fit into the section 93Y defence categories. The warnings would serve to deprive a vulnerable client of important rehabilitative and protective relationships.

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

If the provisions are to be retained, there should be clearer guidance given to police in relation to the exercise of their discretion. The Issues Paper identifies at 7.4 that there is already inconsistency between LACs as to how discretion is to be used in relation to the defences under s93Y. Some officers have been encouraged to use discretion when issuing warnings under the provisions. Other LACs are reported to have issued warnings whether or not a 'consorting incident' appeared to be one covered by the defences in section 97Y.

Legal Aid NSW submits that the best method for achieving certainty and fairness under these provisions would be to introduce an amendment to the provisions requiring the prosecution to establish that a consorting incident was not reasonable in all of the circumstances.

See also our response to Questions 26 - 29.

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?

If the provisions are to be retained, the current reversal of the onus of proof contained in these provisions should be corrected in line with usual criminal law rules. The impact of the provisions on the rights of community members to associate and engage in everyday activities is significant and has already been used in relation to vulnerable communities as detailed at some length in the Issues Paper.

## About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 women's domestic violence court advocacy services.

The Legal Aid NSW criminal law practice provides legal assistance and representation in criminal courts at each jurisdictional level throughout the State, including proceedings in Local Courts and Children's Courts, Committals, Indictable sentences and trials, and appeals. Our specialist criminal law services include the Children's Legal Service, the Prisoners' Legal Service and the Drug Court.

Legal Aid NSW welcomes the opportunity to provide comments on the Consorting Issues Paper

Should you require further information, please contact Julianne Elliott, Policy Officer, Legal Policy Branch at [Julianne.Elliott@legalaid.nsw.gov.au](mailto:Julianne.Elliott@legalaid.nsw.gov.au) or by telephone on (02) 9219 5983 or Annmarie Lumsden, Executive Director, Strategic Policy and Planning at [Annmarie.Lumsden@legalaid.nsw.gov.au](mailto:Annmarie.Lumsden@legalaid.nsw.gov.au) or by telephone on (02) 9219 6324.