Public Interest Advocacy Centre

Submission to the Law Enforcement Conduct Commission: Review of the operation of the amendments to the consorting law under Part 3A Division 7 of the *Crimes Act 1900*

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for First Nations people
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

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- *direct officers to exercise their discretion not to issue consorting warnings or commence criminal proceedings on the basis of the expanded defences; and*
- *include specific definitions of Aboriginal kinship, to reduce the risk of police issuing consorting warnings to Aboriginal or Torres Strait Islander people who are in the company of their family members.*

1. Introduction

We welcome the Law Enforcement Conduct Commission's (LECC) review of the operation of amendments to the consorting law under Part 3A Division 7 of the Crimes Act 1900, which came into effect on 28 February 2019 ('the consorting law').

While we acknowledge the LECC's preliminary findings that there has been some improvement in the operation of the consorting law, we submit that the offence of consorting should be repealed.

We make this submission on the following bases:

- The consorting law infringes upon fundamental human rights, namely freedom of association, in a manner disproportionate to its objective.
- There is no available data which demonstrates that the consorting law is in fact targeted at preventing organised crime.
- There are other pre-emptive tools available to police officers in lieu of the consorting law.

If the consorting law is not repealed, we recommend that the full suite of recommendations contained in the Ombudsman's 2016 Report, *Consorting law: Report on Part 3A, Division 7 of the Crimes Act 1900,* be implemented. The three key recommendations made by the Ombudsman which the NSW government either failed to implement, or only implemented in part, are:

a. removing children and young people from the application of the consorting law (Recommendation 1); and
b. NSWPF proscribes the use of the consorting laws to address or prevent minor offending (recommendation 18); and
c. clarifying that the intent of the consorting law was for the prevention of serious crime (Recommendation 19).

In its current form, the consorting law is far too broad in its application. It lacks sufficient legislative safeguards and restraints on discretion to ensure that it is not used disproportionately against already marginalised communities with no involvement in serious organised crime.

2. History of the consorting law

In 2012, the NSW Government introduced the *Crimes Amendment (Consorting and Organised Crime) Act 2012* in response to organised criminal activity conducted by motorcycle gangs. Part 3A, Division 7 of the *Crimes Act 1900* ('the Crimes Act') made it an indictable offence for a person to continue to associate or communicate with people who have been convicted of an indictable offence after receiving an official police warning.

The bill was ostensibly introduced in 2012 to ensure that New South Wales Police Force (NSWPF) had adequate tools to deal with organised crime[1]. Despite this rationale, NSWPF officers have used consorting laws to target minor suspected criminal activity.[2] This has had a

[1] New South Wales, *Parliamentary Debates,* Legislative Assembly, 7 March 2021, 65 (David Clark, Parliamentary Secretary) <https://www.parliament.nsw.gov.au/bill/files/38/Crimes%20Amdt%20(Consorting)%20-%20LC%202nd%20Read.pdf>

[2] Professor John McMillan, *The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*. (Report, NSW Ombudsman, April 2016) 1. <https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0005/34709/The-consorting-law-report-on-the-operation-of-Part-3A,-Division-7-of-the-Crimes-Act-1900-April-2016.pdf.> ('*Ombudsman's Report*').

disproportionate effect on already marginalised and overpoliced communities. The application of the law has continuously departed from the legislative intent.

In 2016, the Ombudsman[3] published his report, *Consorting law: Report on Part 3A, Division 7 of the Crimes Act 1900* ('Ombudsman's Report'). The Ombudsman's Report found that the consorting law was often used 'in relation to a broad range of offending, including minor and nuisance offending',[4] and in relation to 'disadvantaged and vulnerable people, including Aboriginal people, people experiencing homelessness, and children and young people'.[5] The disproportionate impact of the law on disadvantaged people was one of the Ombudsman's primary concerns.

After reviewing the law and noting the excessive manner in which it was applied by the NSWPF, the Ombudsman published 20 recommendations which sought to mitigate the unintended impacts of the consorting law, particularly where there was no crime prevention benefit or where this benefit was only minor.

3. Current Consorting law

In response to the Ombudsman's recommendations, on 28 February 2019, the *Criminal Legislation Amendment (Consorting and Restricted Premises) Act 2018* ('2018 Amending Act') came into effect.

The 2018 Amending Act provides that it is an offence for a person over 14 years of age to consort, including by way of electronic communication, on at least two occasions, with each of two or more named offenders who have been convicted of an indictable offence (in any state) after having been given a warning, orally or in writing, by a police officer in relation to those offenders. Warnings issued to a person under 18 years of age expire after six months and warnings issued to a person over 18 years of age expire after two years.

The following substantive changes were introduced by way of the 2018 Amending Act:

- The definition of 'indictable offence' was expanded to include an indictable offence committed in another jurisdiction.
- Children under the age of 14 were excluded from the application of the consorting law.
- The elements of the consorting warning were clarified.
- New defences were added.
- The definition of 'family members' was extended to recognise Aboriginal kinship systems.
- The Commission was required to review the operation of the amendments for three years.

Despite these changes, the 2018 Amending Act did not go far enough to strike the balance between allowing NSWPF to respond effectively to disrupt and prevent serious organised crime and ensuring that the consorting law did not disproportionately impact and criminalise already marginalised people.

[3] The NSW Ombudsman at the time was Professor John McMillan AO, Acting Ombudsman.
[4] Ombudsman's Report (n 2) iii.
[5] Ibid.

4. An argument for repeal

The problems with the consorting law are fundamental to the nature of this law and thus unlikely to be remedied by further reform. The laws clearly derogate from fundamental human rights and do this in a disproportionate way which departs from the purported legislative objective. There is no data that demonstrates use of the laws in pursuit of this objective. Finally, there are other pre-emptive tools available to police officers to target organised crime.

We recommend repeal of the law but in the event that the consorting law is retained, we make recommendations for amendment in section 5 below.

4.1 Derogation from fundamental human rights

The consorting law infringes upon fundamental human rights in a manner which is disproportionate and not reasonably adapted to the objective of the laws. Despite the disruption of organised crime being a legitimate objective, the laws reach far beyond what is necessary to target organised crime and, as a result, have harmful effects on the lives of those to whom the legitimate objective does not apply.

The High Court held in *Tajjour v New South Wales* [2014] HCA 35 that consorting laws were constitutionally valid. However, the High Court made no findings about the compatibility of the consorting law with the rights enshrined in the International Covenant on Civil and Political Rights (**ICCPR**). The Court concluded that, regardless of whether the executive arm of government has ratified an international treaty, until this treaty had been given effect by Australian statute and incorporated into domestic law, Parliament is not constrained by it.[6]

Despite the findings of the High Court and despite the freedom of parliament to legislate inconsistently with international treaty, any independent review of the consorting law should be approached within a human rights framework. The LECC review should consider the inconsistencies between the consorting law and international law, and the manner in which the application of the consorting law derogates from fundamental human rights.

The consorting law clearly impinges on a person's right to freedom of association and other rights and principles enshrined in international human rights law. Most significantly, the ICCPR, to which Australia is a party, specifically protects an individual's right to freedom of association.[7] Not only is the right to freedom of association important in itself, but it also serves as a vehicle for the exercise of many other civil, cultural, economic, political and social rights – to meet for common purpose, to socialise, to assemble peacefully – and is therefore an essential component of any democratic society.[8] Further, social interaction, community networks and personal relationships are contingent upon the exercise of this right.

The infringement of the consorting law upon fundamental international human rights, along with the implied constitutional rights to freedom of association and political communication, is so significant, no legislative amendment or policy change could fully cure its deficiencies. Particularly given the consorting law's reliance on police discretion (discussed at section 5.2 below), the law

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[6] *Tajjour v New South Wales* [2014] HCA 35. [48] (French CJ), [95] (Hayne J).

[7] *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*') art 22.

[8] See generally Human Rights Council, *The Rights to Freedom of Peaceful Assembly and of Association*, 15th sess, 32nd mtg, Agenda Item 3, UN Doc A/HRC/RES/15/21 (6 October 2010); Public Interest Advocacy Centre, Submission to the NSW Ombudsman, *Review of the use of the consorting provisions buy the New South Wales Police Force* (27 February 2014) 3.

is not capable of being amended to be reasonably appropriate and adapted, or proportionate, and should be repealed.

4.2 No evidence of the use of the consorting law to disrupt organised crime

The consorting law has always been justified on the basis that it assists the NSWPF to protect the public against the dangers of organised crime. This intention was clear when Parliament introduced the 2012 amendments,[9] and stated again upon the introduction of the 2018 amendments:

> …this bill will continue to ensure police are able to respond effectively to the threat caused by serious and organised crime, including outlaw motorcycle gangs…[10]

Despite this, there is no evidence that the laws are mobilised toward this end. The Ombudsman found that NSWPF had made a policy choice to extend the application of the consorting law to ordinary street crime.[11] This was confirmed when NSWPF, in response to the Ombudsman's Report, undertook to 'ensure the application of the consorting law to address or prevent minor offending is appropriate'.[12]

The LECC's discussion paper contains no evidence that the consorting law is being used to target, and is effective at targeting, organised crime. The discussion paper notes that during the review period the NSWPF Criminal Groups Squad issued 77% of warnings. However, it is not clear from the data that the people targeted by the Criminal Groups Squad were in fact engaging in organised crime. While the Criminal Groups Squad might have issued the largest number of warnings, the LECC discussion paper reports that 74.8% of all people subject to the consorting law were subject to it by general duties police.

The LECC's discussion paper also set out the conviction histories of those targeted by the laws. The most common convictions were for 'road traffic and motor vehicle regulatory offences'.[13] This again, points to the ongoing use of the consorting law to target ordinary street crime.

4.3 Other police powers

The NSWPF has a myriad of mechanisms to disrupt organised crime by targeting non-association and pre-crime behaviour. These include:

- s 36B of the *Bail Act 1978* (NSW), under which a person charged with an offence may have bail conditions imposed which include non-association restrictions;
- s 17A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) which provides for non-association orders when sentencing a person for an offence punishable with six months imprisonment or more;
- participation in a criminal group under s 93T of the *Crimes Act 1900* (NSW);
- a declaration that an organisation is a criminal organisation under ss 5(1) or s 7(1) of the *Crimes (Criminal Organisations Control) Act 2012* (NSW);

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[9] New South Wales, *Parliamentary Debates,* Legislative Assembly, 7 March 2021, 65 (David Clark, Parliamentary Secretary) ,https://www.parliament.nsw.gov.au/bill/files/38/Crimes%20Amdt%20(Consorting)%20-%20LC%202nd%20Read.pdf>

[10] New South Wales, *Parliamentary Debates,* Legislative Assembly, 19 September 2018, 1 (Mark Speakman, Attorney General)

[11] Ombudsman's Report (n 2) 16.

[12] Law Enforcement Conduct Commission, *Review of the operation of the amendments to the consorting law under Part 3A Division 7 of the Crimes Act 1900* (Discussion Paper, October 2021) 64 ('*LECC Discussion Paper*').

[13] Ibid 34.

- associating with a member of a declared criminal organisation under s 26 of the *Crimes (Criminal Organisations Control) Act 2012* (NSW);
- the 'reputed criminal declaration' provisions of the *Restricted Premises Act 1943* (NSW) (added by the *Firearms and Criminal Groups Legislation Amendment Act 2013* (NSW));
- the 'serious crime prevention orders' that can be issued by the District and Supreme Courts under the *Crimes (Serious Crimes Prevention) Act 2016* (NSW); and
- the 'public safety orders' that can be issued by a senior police officer under Part 6B of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (added by the *Criminal Legislation Amendment (Organised Crime and Public Safety) Act 2016* (NSW)).[14]

Many of these alternate measures are better tailored to the objective of targeting organised crime. They are also less likely to be misused against marginalised groups because they rely on court orders rather than police discretion. In addition, the provisions of the *Crimes (Criminal Organisations Control) Act 2012* (NSW) rely on a finding that an organisation is in fact a criminal organisation.

Recommendation 1

The offence of consorting in s 93X of the Crimes Act 1900 (NSW) should be repealed.

5. Key concerns regarding the current Consorting law

5.1 Key recommendations from the Ombudsman not implemented

The amendments introduced by the 2018 Amending Act failed to fully implement all of the Ombudsman's recommendations, despite the Ombudsman's warning that, if these recommendations were not implemented, it was 'likely that the [NSW] consorting law will continue to be used to address policing issues not connected to serious and organised crime and criminal gangs and in a manner that may impact unfairly on disadvantaged and vulnerable people in our community'.[15]

The three key recommendations that the government failed to implement were:

a. removing children and young people from the application of the consorting law (Recommendation 1); and
b. NSWPF proscribe the use of the consorting laws to address or prevent minor offending (recommendation 18); and
c. clarifying that the intent of the consorting law was for the prevention of serious crime (Recommendation 19).

In failing to implement these recommendations, the 2018 Amending Act maintained a consorting law that is too broad in its application and lacks sufficient safeguards to ensure that police power is not misused.

[14] Centre for Crime, Law and Justice, Submission to the Law Enforcement Conduct Commission, *Review of the operation of the amendments to the consorting law under Part 3A Division 7 of the Crimes Act* (4 February 2022) 11.
[15] Ombudsman's Report (n 2) iii.

Removing children and young people from the application of the consorting law

The NSW Government Response[16] supported Recommendation 1 in part only, removing children under 14 years of age from the operation of the consorting law. The government justified the application of the consorting law to children aged between 14 – 18 by framing consorting laws as a gateway to diversionary programs:

> Consorting warnings are also a useful diversionary tool for young people and can provide a gateway for young people accessing and participating in diversionary programs. This includes the Youth on Track early intervention program and the NSW Government's Countering Violent Extremism programs.[17]

We take the firm view that:

1. consorting warnings are punitive and proactive policing measures;
2. punitive and proactive policing should not be applied to children and 18 years of age; and
3. punitive and proactive policing is an ineffective gateway to a diversionary program.

Diversionary and therapeutic services for young people should be decoupled from a criminal justice and policing response. It is counter intuitive that a young person first needs to come into contact with police and the criminal justice system, by way of overt and proactive policing, in order to access diversionary services.

Police officers acting as the source of referral for young people to youth supports is inappropriate. Whilst police already engage with youth services in a variety of interagency settings, decisions about which services are appropriate for individual young people should be made by the services themselves with the participation and agency of the young person and their families. It is not appropriate for police to make these determinations and to direct young people to the service.

Holistic, multi-agency services should be provided to young people in community settings and, as far as possible, be designed and led by those communities. In addition to the problematic power asymmetries between police and young people, the shortcomings of police being the providers or facilitators of support services include:

- Police control over the provision of the services, which is disempowering for young people and communities. This removes the ability of young people and communities to lead their own solutions;
- Police are not integrated into communities, and do not understand the needs of young people, families and communities. As a result, police are ill-placed to understand what services are appropriate for young people;
- Community concern that police will engage in evidence gathering in the course of community policing work;
- The intergenerational harms of over policing for First Nations children; and

[16] NSW Government response to the Ombudsman's Report on the operation of Part 3A, Division 7 of the Crimes Act 1900 (April 2016) <https://www.justice.nsw.gov.au/Documents/NSW-govnt-response-Ombudsman-consorting-report.pdf> ('*Government Response to Ombudsman's Report*').

[17] Ibid 1.

- Pre-existing tensions between the police and young people, including a lack of trust, particularly where the young people involved have been subject to a pattern of targeting and monitoring by police.

In addition, consorting warnings can have an extremely isolating and stigmatising effect on convicted offenders. The use of consorting warnings as part of overt targeting by police officers risks destabilising positive efforts being made by that person create a pro-social environment for their rehabilitation, diversion and reintegration into their community.

Where consorting warnings are directed towards young people, this will inevitably increase that young person's contact with the police and the criminal justice system and potentially produce criminogenic effects. Early contact with the criminal justice system is a key predictor of future contact with the justice system.[18] The LECC's discussion paper notes that general duties officers were the primary users of the consorting law against children, with only one person under the age of 18 being targeted by the Criminal Groups Squad. This demonstrates that the consorting law is being used against children to target minor offending.

Recommendation 2

Young people under the age of 18 years old be removed from the application of the consorting law.

Proscribing the use of the consorting law to address minor offending

With respect to recommendation 18 of the Ombudsman's Report, the NSW Government Response sought to continue to use consorting laws to target minor offending where it was 'appropriate':

> The NSWPF will review NSWPF consorting policy, SOPs, relevant publications, and training to ensure that the application of the consorting law to address or prevent minor offending is appropriate given the focus of the consorting law to prevent organised criminal activity that establishes, uses, or builds up criminal networks.[19]

Given that the stated objective and justification of the consorting law is the disruption and prevention of serious, organised crime, use of the consorting law to prevent minor offending is not appropriate. The application of the consorting law to minor offending departs from the legislative intention and thwarts the purported rationale underlying the consorting law.

The consorting law in its current form is not a proportionate legislative mechanism to prevent serious, organised crime, and should be constrained in its application to serious offending. Consorting warnings made in respect of minor offences increase contact with the criminal justice system for the person subject to the warning. This in turn leads to criminalisation of the person subject to the warning and the increased likelihood of being charged with policing related offences.

The people that consorting warnings are issued in respect of

[18] Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) 19.
[19] Government Response to Ombudsman's Report (n 15) 64.

Part 3A, Division 7 of the *Crimes Act* should be amended to create a threshold of offending which attracts the provision. To achieve this, the definition of 'convicted offender' in s 93W(1) could be amended as follows:

> ***convicted offender*** means a person who has been convicted of ~~an~~ a serious indictable offence (disregarding any offence under section 93X).

Alternatively, the definition in s 93W(1) could be dispensed with, with and s 93X(1) could be amended as follows:

> (1) A person (other than a person under the age of 18 years ~~14 years~~) who –
>
> (a) Habitually consorts with ~~convicted offenders~~ a person convicted of a serious indictable offence, and
>
> (b) Consorts with those ~~convicted offenders~~ a person convicted of a serious indictable offence after having been given an official warning in relation to ~~those~~ ~~convicted offenders~~ a person convicted of a serious indictable offence
>
> is guilty of an offence

We are also concerned that a warning can be issued even after an unreasonably long period of time has lapsed since the conviction. We recommend that the 'serious indictable offence' should have been committed in the past five years as historical offending should not continue to inform policing responses to a person.

People that consorting warnings are issued to

As it currently stands, there is no threshold requirement of criminal history for a person to be issued with a consorting warning. Any person can be issued with a consorting warning, even where that person has no prior convictions. It is nonsensical that the criminal status of one person should criminalise another person who may not have committed any offence.

For the consorting law to have any proper connection to the objective of disrupting organised crime, consorting warnings should only be issued to people (as well as in respect of people) who have been convicted of a serious indicatable offence in the past ten years.

Reflecting legislative amendments in the SOPs

Should the legislation be amended as recommended above, the NSWPF consorting policy, standard operating procedures and training materials should be updated to reflect these thresholds and explicitly proscribe the use of the consorting laws to address or prevent minor offending.

Curtailing the ability of NSWPF to apply the Consorting law to minor offending would not limit the ability of the NSWPF to realise the legitimate objective of preventing serious, organised crime.

Recommendation 3

Part 3A Division 7 of the Crimes Act 1900 should be amended, to only apply to persons convicted of a 'serious indictable offence'.

Recommendation 4

NSWPF should update its consorting policy, standard operating procedures and training materials to proscribe the use of the consorting laws to address or prevent minor offending.

Clarifying that the intention of the consorting laws is to prevent serious crime

The NSW Government Response did not support Recommendation 19 and clearly stated the intention that the consorting law be used to prevent a range of criminal activity that is not necessarily 'serious':

> The Government does not propose amending the Act to limit the use of the consorting laws to "serious criminal offending" only. The Government believes this would limit the ability for police to use the consorting law to effectively police a range of criminal activity that is of concern to local communities, but which may not fall within a prescriptive and narrow definition of "serious criminal offending".[20]

The consorting law should be prefaced by a clearly stated objective, being to disrupt and prevent organised criminal activity. This is the objective that was used to justify the laws and is the only objective to which the consorting law is a proportionate response.

Recommendation 5

Part 3A Division 7 of the Crimes Act 1900 should be prefaced with a clearly stated legislative objective, being to disrupt and prevent serious organised criminal activity.

5.2 Unfettered police discretion

The consorting law is extremely broad and relies almost wholly on police discretion to control the scope of its application. This was recognised in the Second Reading Speech of the Crimes Amendments (Consorting and Organised Crime) Bill 2012:

> This bill puts police in a position to do what they do best every day and make a judgment about whether observed behaviour reaches the level sought to be addressed by the bill, that is, behaviour which forms or reinforces criminal ties.[21]

In a communication issued by the Acting Ombudsman when the Ombudsman's report was released, he noted:

> The breadth of the new consorting law means that the main constraint on its application is the sensible exercise of discretion by police officers.
>
> Police have significant discretion in deciding who they will warn, who they will be warned about, and whether to bring charges. There is no legal requirement for the associations targeted by police for consorting to have any link to planning or undertaking criminal activity.[22]

The 2018 Amending Act does not implement robust legislative safeguards to ensure that the consorting law is not improperly used against already marginalised and disadvantaged groups.

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[20] Ibid 64-65.

[21] New South Wales, *Parliamentary Debates,* Legislative Assembly, 7 March 2021, 68 (David Clark, Parliamentary Secretary) <https://www.parliament.nsw.gov.au/bill/files/38/Crimes%20Amdt%20(Consorting)%20-%20LC%202nd%20Read.pdf>.

[22] New South Wales, *Parliamentary Debates,* Legislative Assembly, 19 September 2018, 1 (David Shoebridge).

Instead, it continues to rely on the reasonable and sensible exercise of police discretion. The reliance on police discretion risks that communities who already experience marginalisation and over-policing will be disproportionately targeted by these laws. As was recognised by Justice Beazley, writing extrajudicially, s 9X3 has 'the potential to authorise subjectivity and arbitrariness as to who will be affected by the law'.[23]

Scholars have also argued that 'all the available evidence demonstrates that discretionary decisions that are made work against the interests of Indigenous people'.[24]

The Ombudsman's Report found that, as a proportion of the population, Aboriginal and Torres Strait Islander people were more likely to be issued a consorting warning that non-Aboriginal people. The LECC's Discussion Paper notes that:

- General duties officers were more likely to apply the consorting law to Aboriginal and Torres Strait Islander people than specialist police, which suggests these people are not engaged in high-level organised crime.
- Of the people subject to the consorting law in the interim reporting period, 40% were Aboriginal or Torres Strait Islander.

Pre-emptive criminalisation is problematic because it punishes people for what they might do, rather than what they have done.[25] In the case of the consorting law, there is no threshold safeguard requiring that the conduct carries a risk of harm. O'Sullivan and Lauchs have referred to consorting law as 'pre-crime law' and noted that, since pre-crime law doesn't necessarily rely on evidence of wrongdoing, a pre-crime approach can lead to 'race, ethnicity, and religion … [being] … used as proxies for risk' and 'mobilises prejudice around identity and intensified politicisation of policing and law.'[26]

This unfettered discretion, and the associated possibility of discriminatory policing, could be effectively constrained if there was a threshold requirement that a police officer must believe, on reasonable grounds, that issuing a consorting warning would prevent or disrupt serious organised criminal activity. Not only would this provide an appropriate safeguard on the use of the consorting law but, by requiring a nexus between the relevant association and serious criminal activity, it would also tie the application of the law to its purported objective.

Recommendation 6

Part 3A Division 7 of the Crimes Act 1900 should be amended to introduce a threshold requirement that, prior to issuing a consorting warning, a police officer must believe, on reasonable grounds, that issuing a consorting warning would prevent or disrupt serious organised criminal activity.

5.2.1 Guiding discretion

[23] Justice Margaret Beazley and Myles Pulsford, 'Discretion and the Rule of Law in the Criminal Justice System' (2015) 89 *Australian Law Journal* 158, 164.

[24] Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford Univeristy Press, 2015) 153.

[25] Lucia Zedner, 'Fixing the future? The pre-emptive turn in criminal justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart, 2009).

[26] Carmel O'Sullivan and Mark Lauchs, 'A Spoiled Mixture: The Excessive Favouring of Police Discretion over Clear Rules by Queensland's Consorting Laws' (2018) 42 *Criminal Law Journal* 108, 110.

If the legislative amendments proposed by Recommendation 4 above are not supported, it is our view that the SOPs and police training on use of the law should be amended to guide officers on how to exercise their discretion when issuing consorting warnings. For the same reasons set out in section 5.2 above, the SOPs should be amended to direct police officers not to issue a consorting warning unless they believe that it would prevent or disrupt serious criminal activity.

As noted in the LECC Discussion Paper, the SOPs have not been updated to direct officers to use their discretion not to issue consorting warnings if it appears that one of the expanded defences may be relied on. The NSW Government indicated support for the NSW Ombudsman Recommendation 15, that:

> the NSWPF amend its consorting policy, SOPs, publications and training to encourage officers to exercise their discretion not to issue consorting warnings or commence criminal proceedings on the basis of the expanded defences.

Despite this indication of support, there is little guidance on how to apply discretion when considering whether to issue a consorting warning.[27]

For example, the LECC's discussion paper notes that the SOPs do not remind officers that the expanded definitions of kinship should be considered at the stage of issuing a warning, nor is there an example of what Aboriginal kinship might look like. We support the LECC's recommendation that the SOPs be amended to include specific definitions of Aboriginal kinship, to reduce the risk of police issuing consorting warnings to Aboriginal or Torres Strait Islander people who are in the company of their family members.

In setting out acceptable and unacceptable bases for the exercise of discretion, policies and guidelines can prevent discrimination in decision-making.[28]

Consistent with the NSW Ombudsman's Recommendation 15, we also recommend that, if a police officer forms the view that the involved people were kin, a consorting warning should not be issued. As noted in the LECC discussion paper, some officers appear to take the view that if the involved persons are kin this can be tested at the stage of prosecution.

We reiterate the NSW Ombudsman's Recommendation 15, that it is not sufficient to rely on safeguards at the point of prosecution due to the unnecessary stress and police contact caused by the issuing of the warning.

Recommendation 7

The NSWPF Standard Operating Procedures should be amended to:

- *direct officers to exercise their discretion not to issue consorting warnings or commence criminal proceedings on the basis of the expanded defences; and*
- *include specific definitions of Aboriginal kinship, to reduce the risk of police issuing consorting warnings to Aboriginal or Torres Strait Islander people who are in the company of their family members.*

[27] LECC Discussion Paper (n 12) 7.
[28] Simon Bronitt and Philip Stenning, 'Understanding discretion in modern policing' (2011) 35 *Criminal Law Journal* 319, 321.