DISCUSSION PAPER: CONSORTING LAWS FOR THE ACT

PROPOSALS FOR A MODEL OF CONSORTING LAWS TO TARGET AND DISRUPT SERIOUS AND ORGANISED CRIMINAL ACTIVITY IN THE TERRITORY

JUSTICE AND COMMUNITY SAFETY DIRECTORATE
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CONTENTS

OVERVIEW 4

PART 1 – SERIOUS AND ORGANISED CRIME 5
What does it look like? 5
How is it being addressed? 6

PART 2 – CONSORTING LAWS 7
History of consort ing laws 7
Consorting laws in Australia today 7

PART 3 – ACT LEGISLATIVE AND POLICING FRAMEWORK 9
Legislative & policing approaches 9
The need for reform in the ACT 10

PART 4 – HOW COULD CONSORTING LAWS WORK IN THE ACT? 12
Proposed model 12
Key issues for consideration 15

PART 5 – NEXT STEPS 19
Call for submissions 19
How to comment 19
OVERVIEW

The purpose of this discussion paper is to inform public consultation on the potential introduction of consorting laws in the ACT.

On 5 June 2015, the Chief Minister Mr Andrew Barr MLA outlined the government’s strategic priorities for 2015-16, including ‘Enhancing liveability & social inclusion’. Under this priority the government has committed to ‘[t]ackling Organised Crime’ which includes ‘implement[ing] new laws to combat organised criminal groups, including outlaw motorcycle clubs’.

This priority is consistent with the ACT Government’s ongoing approach to addressing serious and organised crime, which includes pursuing considered and targeted responses to the threats posed by this type of crime within the Territory.

This is the approach that the Government continues to take. In June 2016 the Attorney-General will introduce the Crimes (Serious and Organised Crime) Legislation Amendment Bill 2016 to make a number of amendments to the ACT’s laws targeting serious and organised crime and other criminal activity. These amendments are primarily aimed at individual criminal activity with the goal of disrupting the work of the organised group.

Given this approach and the nature of consorting legislation, the Government recognises the importance of further comprehensive public consultation on consorting laws in the ACT. This provides a significant opportunity for the Government, key stakeholders and the community to more broadly examine the utility of consorting laws and provide input on whether they would be a suitable and useful response to serious and organised crime in the ACT, with a particular focus on preventative capabilities.

The discussion paper provides background information about serious and organised crime in Australia (part 1), and specific detail about the historical operation and current form of consorting laws in Australian jurisdictions (part 2). Part 3 outlines the legislative and policing approach to serious and organised criminal activity in the Territory and the reasons that the Government is considering further legislative tools to combat this type of crime. Part 4 provides a draft model of consorting laws that could be used in the ACT, including details about the availability of the offence and potential defences. Importantly, this part also highlights a number of key issues that the Government is seeking feedback on during this consultation.

As noted in part 4, this model is not final and is subject to changes based on the feedback to this paper, as well as further consultation with key stakeholders. In particular, the government will seek further input on the operational implications of, and practical considerations in relation to, the model as presented.

This public consultation paper is an important step in the development of Government policy on consorting laws for the ACT. The input received from interested parties will significantly assist the Government in assessing options and in raising further issues for consideration.

The Government may undertake targeted consultation with a range of government agencies, non-government organisations, and other relevant parties.

The Government invites stakeholders and members of the public to make a submission in response to this consultation paper by 7 July 2016 at the latest. Details about how to make submissions are outlined in part 5 at the end of this paper.
PART 1 – SERIOUS AND ORGANISED CRIME

WHAT DOES IT LOOK LIKE?

In December 2015 the Australian Crime Commission (ACC) reported that serious and organised crime costs the Australian economy at least $36 billion per year. This equates to $1,561 per year for every person in Australia.

The most successful serious and organised criminal groups operate across many sectors and crime types but are typically involved in some form of financial crime or money laundering. They will also usually have some connection with the illicit drugs market and may be involved in crimes such as people or firearms trafficking, fraud, or cybercrime.

Organised crime in Australia exhibits a number of features that largely reflect patterns in organised crime internationally, including financial gain as a primary motivator. It also ‘generally involves systematic and careful planning, the capacity to adapt quickly and easily to changing legislative and law enforcement responses and the capacity to keep pace with, and exploit, new technologies and other opportunities’.1

Organised criminal groups are characterised by their disregard for the rule of law,2 and these groups ‘embody a deliberate, considered and persistent defiance of the authority of the law’.3 In addition, organised crime syndicates are now, in the main, more fluid in size, structure and make-up. They form, coalesce and dissolve, crossing environmental and social boundaries, infiltrating a diverse range of crime markets, adjusting to new technologies, and adapting to law enforcement interventions.4

Outlaw motorcycle gangs (OMCGs) are ‘one of the most high profile manifestations of organised crime’.5 OMCG members play a prominent role in Australia’s domestic production of amphetamine-type stimulants and are also involved in other illicit drug markets, vehicle re-birthings, and firearms trafficking. Some OMCG members are also involved in serious fraud, money laundering, environmental crime, extortion, prostitution, property crime, and bribing and corrupting officials.

The traditional model of most organised crime groups is changing. For example, the three capabilities that the ACC considers are being most exploited by contemporary organised crime in Australia are integration with legitimate markets, online technology and transnationality.6

In contrast, the OMCG model of organised criminality is a quite traditional, even old-fashioned, one of ‘militaristic hierarchy’, ‘chapters’ and formal officeholders.7 However, the ACC’s 2013 profile on OMCGs stated that chapters do not usually engage in organised crime as a collective unit. The threat in these circumstances arises from small numbers of members leveraging off the OMCG and conspiring with other criminals for a common purpose. In this way, OMCGs demonstrate some of the characteristics of other organised criminal gangs in their flexibility and an ability to adapt.

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HOW IS IT BEING ADDRESSED?

The flexible and fluid nature of serious and organised criminal groups is why governments and law enforcement agencies must continuously review and improve their responses to this type of crime.

There has been an increase in activity in state and territory parliaments over the last decade to introduce legislation targeting the operations of organised criminal groups. All jurisdictions, apart from Tasmania and the ACT, have criminal organisation declaration legislation — that is, legislation that involves the declaration of organisations as criminal organisations, with powers to make control orders as a result of that declaration. In addition, all jurisdictions, apart from the ACT, have fortification removal laws, and some jurisdictions have used anti-consorting provisions to target OMCG activities.

The South Australian and New South Wales legislative schemes were found to be invalid by the High Court in 2008 and 2009 (respectively). In 2013 and 2014, the High Court held that certain challenged provisions in Queensland’s 2009 and 2013 suites of legislation were valid, and on 8 October 2014 the High Court upheld the New South Wales anti-consorting laws, which make it an offence for convicted criminals to ‘habitually’ associate with each other after being issued with a warning not to consort. At this time, however, there is little evidence that specific anti-gang laws such as those mentioned above are having an impact on OMCG members or their activities. This may be because there is also limited evidence that the laws have actually been put into use by law enforcement authorities. Across all Australian jurisdictions except the ACT, in seven years of control order legislation, there has only ever been one valid control order made, imposing only limited restrictions, in relation to one individual. Additionally, public safety orders have only been used with any success in one Australian jurisdiction.

Recent evidence strongly suggests that traditional, assertive investigation of alleged criminal activities, combined with proactive targeting of OMCG members, are key elements to disrupt their activities. Essentially, the key proposition of the criminal law that a person’s criminality should be determined by their individual conduct is central when dealing with this type of crime. This is supported by the recent findings outlined in the Final Report of the Queensland Taskforce on Organised Crime Legislation (Queensland Taskforce Report) that reviewed the extensive suite of laws which was introduced by the Newman Government in 2013, and experience from other Australian and international jurisdictions.

Based on this shifting focus to addressing individual criminal responsibility, a key Queensland Taskforce recommendation is the introduction of consorting laws to replace the existing criminal organisation anti-association provisions. Additionally, other jurisdictions with existing consorting laws are using national taskforce connections to explore ways that they can be used more effectively in targeting serious and organised criminal activities.

13. Ibid 135.
15. Taskforce on Organised Crime Legislation, Department of Justice and Attorney-General (Qld), Final Report (2016).
16. Ibid Chapter 11.
PART 2 – CONSORTING LAWS

HISTORY OF CONSORTING LAWS

Consorting laws originated from 14th century British vagrancy laws, and in Australia originally targeted former convicts who were no longer compelled to work. The laws are directed towards inchoate criminality, ‘...intended as prophylactics, targeting activities that lie outside the reach of the traditional criminal law but that nevertheless conduce criminal conduct’.18

The first specific consorting law in Australia was the Aboriginals Ordinance 1978 (NT) which created the offences of habitually consorting with a female Aboriginal or half-caste Aboriginal person, and other consorting laws tended to address consorting with ‘undesirable’ classes of people (for example, prostitutes and thieves).

The first specific consorting law in the ACT was introduced by section 2(b) of the Police Offences Ordinance 1948, which inserted section 22(h) (idle and disorderly persons) into the Police Offences Ordinance 1930.

In the 1970s and 1980s there was a shift of focus to consorting with criminals, and then to consorting with criminals with the knowledge that the person had been convicted of a serious offence.19 This trend of narrowing offences swept across Australian jurisdictions and the ACT offence was repealed by section 6(2) of the Police Offences (Amendment) Ordinance 1983.

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Consorting offences in all Australian jurisdictions are to be interpreted in line with the High Court decision in Johanson v Dixon21 which established that consorting need not occur for any particular unlawful or criminal purpose. The High Court also found that consorting means ‘associates’ or ‘keeps company’, and denotes some seeking or acceptance of the association on the part of the defendant.22

CONSORTING LAWS IN AUSTRALIA TODAY

New South Wales, the Northern Territory, Victoria, South Australia, Western Australia and Tasmania currently have consorting laws. Each jurisdiction limits the application of consorting offences either by type of previous conviction or by the maximum penalty for that conviction. Apart from New South Wales and South Australia, the other jurisdictions have tailored their consorting laws to specific offending groups or those convicted of more serious offences. For example, New South Wales and South Australia limit application to people who have been convicted of an indictable offence, while Victoria limits the application to those convicted of an organised crime offence.23 Western Australia is slightly different in that consorting provisions are only available in relation to declared drug traffickers and child sex offenders.

South Australian law also provides for the issue of a consorting prohibition notice, with conditions attached. A notice may only be issued to a person who has been convicted of a prescribed offence in the previous three years. A consorting prohibition notice can also be issued to a person reasonably suspected of having committed a prescribed offence in that same time frame.

19. For example, Crimes Act 1900 (NSW) s 546A, as inserted by Crimes (Summary Offences) Amendments Act 1979 (NSW) s 4, sch 5 item 3
22. (1979) 143 CLR 376 (383 (Mason J); 395 (Aickin J)).
Table 1 at the end of the discussion paper provides further information about the consorting laws that currently operate in each jurisdiction.

New South Wales

On 4 November 2013 the New South Wales Ombudsman released the 'Consorting Issues Paper – Review of the use of consorting provisions by the NSW Police Force – Division 7 Part 3A of the Crimes Act 1900' (NSW Issues Paper). The paper outlined the main issues emerging from the use of the consorting provisions in their first year of operation and the Ombudsman sought comments and submissions about these issues and any other aspect of the provisions and their operation.

The NSW Issues Paper raised matters relating to the age at which the New South Wales consorting laws apply, the available defences, and the impact that the provisions have on vulnerable people in that jurisdiction.

The NSW Ombudsman has completed the Final Report. At the time of finalising this discussion paper it had not yet been published.

Queensland

While Queensland does not currently have consorting provisions, the Premier Annastacia Palaszczuk has committed to introducing legislation in August 2016 to adopt New South Wales-style consorting laws.24 While a final model has not yet been released, the Queensland Taskforce recommended the development of an offence that only applies to those who are convicted of offences in the schedule to the renewed Organised Crime Framework, and only where all three people who are consorting have convictions. The Queensland Taskforce recommended the provision only apply to those with organised crime offence convictions for which the rehabilitation period under the Criminal Law (Rehabilitation of Offenders) Act 1986 (QLD) has not expired.25

23. See Table 1 for definition.
PART 3 – ACT LEGISLATIVE AND POLICING FRAMEWORK

LEGISLATIVE & POLICING APPROACHES

In June 2009, in response to a motion passed by the ACT Legislative Assembly, the Attorney-General Simon Corbell MLA published the Government Report to the Legislative Assembly: Serious Organised Crime Groups and Activities providing advice on laws available in the ACT to combat serious organised crime groups. The report also considered laws adopted in other Australian jurisdictions and developments internationally relevant to combating OMCGs.

In 2010 the Crimes (Serious Organised Crime) Amendment Act 2010 was passed in response to recommendations in the Government Report. The Crimes (Serious Organised Crime) Amendment Act 2010 introduced the offences of affray, participation in a criminal group, and recruiting people to participate in criminal activity into the Crimes Act and the Criminal Code 2002. It also extended the existing offences relating to the protection of people involved in legal proceedings contained in division 7.2.3 of the Criminal Code, and introduced the criminal liability concepts of ‘joint criminal enterprise’ and ‘knowingly concerned’ into the Criminal Code.

In addition, a court may make a non-association or a place restriction order as part of a sentence under part 3.4 of the Crimes (Sentencing) Act 2005. The Bail Act 1992 also allows the court to impose an association or place restriction when granting bail to adults. These orders can be used strategically to target serious and organised criminal activity where it is appropriate and required.

The Attorney-General Simon Corbell MLA will introduce the Crimes (Serious and Organised Crime) Legislation Amendment Bill 2016 (the Bill) in June to make a number of amendments to the ACT’s laws targeting serious and organised crime and other criminal activity. The amendments in this Bill include modernising move-on powers to clarify their operation in relation to groups of people, expanding the categories of offence which are subject to non-association and place restriction orders, and the introduction of a new bail power of review for the Director of Public Prosecutions (DPP).

In terms of operational policing, ACT Policing (ACTP) actively monitors OMCG activity through Taskforce Nemesis which commenced in June 2014. Taskforce Nemesis is a dedicated team from within ACTP’s Criminal Investigations Unit that is tasked with tracking, disrupting and arresting those members of OMCGs involved in criminal activities such as drug trafficking, illegal firearms, money laundering, extortion and serious assaults.

Taskforce Nemesis also works closely with Operation Morpheus, which was established by the Serious and Organised Crime Coordination Committee and subsequently endorsed by the ACC Board on 11 September 2014 as a national task force. Operation Morpheus capitalises on the commitment that has already been invested by state and territory police as well as Commonwealth law enforcement and regulatory agencies through the Attero National Task Force.

THE NEED FOR REFORM IN THE ACT
The organised crime environment in the ACT is varied and OMCGs constitute only one type of organised criminal group. As the most obvious of these groups, their influence in the criminal market is significant in consideration of their membership numbers – largely due to their willingness to openly exert dominance, a key feature of their methodology.

The Government recognises that it is important that the ACT does not enact legislation targeted specifically at serious and organised criminal activity without evidence that clearly demonstrates a compelling need. While the level of OMCG activity is relatively low in the ACT, there have been signs that it may be increasing. ACTP and policing bodies in other jurisdictions such as New South Wales have concerns about the prevalence of ‘patching over’ in the Territory, whereby members of one club change allegiances and join another club. There is evidence that there are now three OMCGs in the Territory, up from one in early 2014. The instability and tension created by membership changes of this nature pose a public safety risk to communities through OMCG linkages to crime, the use of violence and their ability to create fear in the community. While it may be true to some extent that OMCGs have an ‘image problem’ due to their visible and intimidating presence, their history demonstrates a clear link with random but recurring acts of public violence that require an appropriate legislative and operational response. This is particularly important where individuals who have no involvement in serious and organised criminal activity can become innocent victims of violent events, such as drive by shootings and public fights.

In addition, ACTP has expressed concerns about an increase in the incidence of OMCG group motorcycle outings known as ‘runs’ through the Territory and further increased OMCG activity due to displacement from NSW and the application of consorting laws and other legislative tools.

In terms of numbers, ACC data shows that members in Australia have increased from 4,483 in 2012 to 6,000 in 2015. This is a 34% increase over three years. The ACT currently has three OMCG groups with a total membership of 45 as at May 2016. This does not include associates, that is, those people who actively engage with OMCG members in furtherance of their criminal activity, which significantly increases the number of persons participating in the organised criminal network.

Due to the ACT’s location within New South Wales and between Sydney and Melbourne, the Government is aware that the ACT must maintain a law enforcement focus on OMCG activities. This focus must have a strong component of long-term preventative capability to ensure that police have the tools to disrupt and dismantle organised crime networks.

This is why the ACT Government takes this issue very seriously, and included ‘Tackling Organised Crime’ as a Strategic Priority for 2015–16. Under this priority the government has committed to ‘implement new laws to combat organised criminal groups, including outlaw motorcycle clubs’.

This priority is consistent with the ACT Government’s ongoing approach to addressing serious and organised crime, which includes pursuing considered and targeted responses to the threats posed by this type of crime within the Territory. These have traditionally focused on using specific criminal offences to target the behaviour of individuals within organised criminal groups and ACT and cross-border criminal investigation laws, as well as relying on the cooperation of ACT and federal law enforcement agencies. This national cooperation has afforded the ACT an important opportunity to monitor the progress of relevant legislative and operational responses to serious and organised crime over the past decade.

27. Taskforce on Organised Crime Legislation above n 16, 15. OMCGs are viewed as the public face of organised criminal activity, despite the most reliable statistical data indicating that they are only charged with no more than 0.52% of all offences across Queensland: Queensland, Commission of Inquiry into Organised Crime, Final Report (2015) 25.
28. Governments have a positive obligation to take measures necessary within their jurisdiction to protect the individual’s right to life (s.9 (1) of the HR Act): Osman v UK (1999) 29 EHRR 245.
29. Assistant Professor Terry Goldsworthy, Submission Nos 5.17 and 11.11 to Department of Justice and Attorney-General (Qld), Taskforce on Organised Crime Legislation, 4 March 2016, 17.
This is the approach that the Government continues to take. As mentioned previously, the Attorney-General will introduce the *Crimes (Serious and Organised Crime) Legislation Amendment Bill 2016* to make a number of amendments to the ACT’s laws targeting serious and organised crime and other criminal activity. These amendments are primarily aimed at individual criminal activity with the goal of disrupting the work of the organised group.

Given this approach and the nature of consorting legislation, the Government recognises the importance of further comprehensive public consultation on consorting laws in the ACT. This provides a significant opportunity for the Government, key stakeholders and the community to more broadly to examine the utility of consorting laws and provide input on whether they would be a suitable and useful response to serious and organised crime in the ACT, with a particular focus on preventative capabilities.
PART 4 – HOW COULD CONSORTING LAWS WORK IN THE ACT?

PROPOSED MODEL

The Government has worked closely with ACTP, the New South Wales Police Force, and various key stakeholders to design a model for consorting laws in the ACT outlined below. This work has included consideration of the models in other Australian jurisdictions, of academic and media commentary on consorting provisions, and on the New South Wales Ombudsman’s and Queensland Taskforce’s reviews of these types of laws. The proposed model outlined in the Queensland Taskforce Report has proven particularly helpful in formulating a potential model. This model was developed with considerable regard to the ACT’s human rights framework.

While the model provided below is not complete, it provides a framework that could potentially be used in the ACT. There are a number of matters highlighted in the next section that require consideration and may affect the way in which the final model operates.

It is important to note that this model is not final and is subject to changes based on the consultation feedback to this paper, as well as further consultation with key stakeholders. In particular, the government will seek further input on the operational implications of, and practical considerations in relation to, the model as presented.

30. Taskforce on Organised Crime Legislation above n 16, Chapter 11.
TIER 1 – MAGISTRATE ISSUED

Where a convicted offender or a member of a criminal group is consorting with a person who is not a convicted offender or member of a criminal group, ACT Policing can apply to the Magistrates Court to issue a consorting warning.

This consorting warning commences when the relevant party has been served, and lasts for a period of two years.

TIER 2 – POLICE ISSUED

Where the consorting is between a convicted offender or a member of a criminal group and another person who is a convicted offender or member of a criminal group, a consorting warning may be issued by an officer at the rank of Sergeant or above.

This consorting warning commences when the relevant party has been served, and lasts for a period of two years.

DEFINITIONS

Convicted offender = someone who has been convicted of an indictable offence, punishable by five or more years imprisonment.

Member of a criminal group = as defined in s 651 of the Criminal Code 2002

- Three or more people who have either or both of the following objectives:
  - to obtain a material benefit from conduct engaged in or outside the ACT (including outside Australia) that, if it occurred in the ACT, would constitute an indictable offence under a territory law;
  - to commit serious violence offences (whether in or outside the ACT).

Consort = in person or by any other means, including by electronic or other form of communication.

Warning = written warning with information (name, known aliases, address, photograph) about the other party that the person must not consort with.

OFFENCE

- A person will be taken to commit an offence where they have received a consorting warning (strict liability), and intentionally consort on two or more occasions.
- The offence will be punishable by up to two years imprisonment.

EXCLUSIONS AND DEFENCES

- Not available in relation to a person under 18 years of age.
- Does not include coincidental contact.
- Defendant satisfies the court (evidential burden) that the consorting was reasonable in the circumstances;
  - Consorting with family members;
  - Consorting that occurs in the course of lawful employment or the lawful operation of a business;
  - Consorting that occurs in the course of training or education;
  - Consorting that occurs in the course of the provision of a health service;
  - Consorting that occurs in the course of the provision of legal advice; and
  - Consorting that occurs in lawful custody or in the course of complying with a court order.
The draft model is accompanied by a number of important safeguards that would assist in ensuring that the power to issue consorting warnings is appropriately framed.

- For Tier 1 ACTP will need to rely on criminal intelligence to support applications. Information protections will need to be included to prevent the disclosure of sensitive criminal justice information to the respondent in an application and to the general public. It is proposed that provisions for these protections will be based on part 16A of the Liquor Act 2010 which deals with the disclosure of criminal intelligence by the Chief Police Officer.

- In relation to the definition of member of a criminal group, ACTP would rely on criminal intelligence about the person’s activities to support decisions about whether these activities satisfy this criterion.

- ACTP could develop a Standard Operating Procedure (SOP) in relation to consorting laws which could include the following information:
  - guidance on the impact of consorting warnings on vulnerable people (with specific reference to Aboriginal and Torres Strait Islander peoples);
  - details that must be recorded when a warning is issued including:
    - basic antecedents;
    - demographical information including whether the person identifies as Aboriginal or Torres Strait Islander;
    - the location of the incident;
    - police observations at the time; and
    - whether the person is a convicted offender or a member of a criminal group; and
  - a directive not to disclose the details of the offence a person was previously convicted of when issuing a consorting warning to others about them.

- ACTP would also develop and implement training for those officers to be authorised to issue consorting warnings that includes information about the scheme and how to ensure accurate record-keeping.

- The person who is subject to a police issued consorting warning will be able to seek immediate independent administrative merits review in relation to the warning in the ACT Civil and Administrative Tribunal (ACAT).

- In relation to defences, a broad definition of family will be used to ensure that kinship relations, with particular reference to Aboriginal kinship relations, are included. In addition, the definition of ‘health service’ will include access to therapeutic, rehabilitation, drug and alcohol services, and accessing social workers and other counselling services.

- The consorting offence and exercise of power under it will be subject to review after two years of operation of the scheme. The review provision could require that the Attorney-General table a copy of the review in the ACT Legislative Assembly within three years of the operation of the scheme.

- Part 2.7 of the Criminal Code will apply in relation to the consorting laws by extending the application of a territory law that creates an offence beyond the territorial limits of the ACT (and Australia) if the required geographical nexus exists for the offence.
KEY ISSUES FOR CONSIDERATION

In combination, the historical operation of consorting provisions, the High Court challenges in relation to New South Wales and South Australian legislation, and the reviews conducted by the New South Wales Ombudsman and the Queensland Taskforce, raise a number of issues that must be addressed in any consideration of consorting laws. Some of the issues are highlighted below as they are particularly relevant to whether consorting laws would fulfil the purpose of providing a useful preventative policing tool in the ACT.

Engagement with human rights and potential impact on vulnerable groups

By their very nature, consorting laws engage and limit a number of human rights enshrined in the Human Rights Act 2004 (the HR Act). Accordingly, it is vital that the Territory’s human rights framework is carefully considered in relation to any proposal to introduce consorting provisions. Specifically, it is important to ensure that the model takes the least restrictive approach so that human rights are only limited as necessary to allow the proposed law to appropriately target and disrupt serious illegal criminal activity in the ACT and protect the community from the activities of organised crime groups and serious criminals.

The consorting model outlined above would engage a number of rights in the HR Act including:

- recognition and equality before the law (s8 of the HR Act);
- protection of the family and children (s11 of the HR Act);
- privacy and reputation (s12 of the HR Act);
- freedom of movement (s13 of the HR Act);
- freedom of association (s15 of the HR Act);
- freedom of expression (s16 of the HR Act); and
- liberty and security (s18 of the HR Act).

It is important to note that proposals to introduce legislative schemes also engage the ‘doctrine of positive obligations’ which has been discussed in European human rights jurisprudence and defined as the responsibility of governments to undertake measures to protect their citizens. This encompasses the notion that governments not only have the responsibility to ensure that human rights are free from violation, but that governments are required to provide for the full enjoyment of rights.31

This concept is reflected in section 28(1) of the HR Act which provides that human rights may be subject to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28(2) states that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including the following non-exhaustive list:

(a) the nature of the right affected;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relationship between the limitation and its purpose; and
(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

An examination of the human rights issues connected to consorting laws also provides an opportunity to consider the potential impact that these types of laws may have on vulnerable people in our community. Of particular concern is that consorting laws do not disproportionately affect homeless people, Aboriginal and Torres Strait Islander peoples, and young people.

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As mentioned in part 2, consorting laws were historically used to address consorting with ‘undesirable’ classes of people. This often meant that, in practice, the recipients of consorting warnings and convictions in Australian jurisdictions were vulnerable people. A key issue raised by the NSW Issues Paper was that consorting laws have significant potential to criminalise associations that include a range of normal interactions otherwise unrelated to criminal activity. This concern was also referenced by the Hon David Clarke MLC when he stated that the Government had been criticised for the potential application of consorting laws to everyday, innocent relationships which should not be the subject of prosecution.  

The NSW Issues Paper noted that the Ombudsman reviewed 1,247 people targeted by police for consorting. About 7% of these were children and young people aged between 13 and 17, while 40% of all people subject to the consorting provisions in their first year of use were Indigenous, despite making up only 2.5% of the New South Wales population. This highlights that, in practice, the historical impact on vulnerable groups continues to be a concern today in New South Wales where the offence applies to anyone convicted on an indictable offence, regardless of its seriousness.

The model has been drafted to ensure that any limitation on the rights listed above is reasonable and demonstrably justified in a free and democratic society. The model also attempts to ameliorate concerns about the impact on vulnerable groups by including a number of safeguards to ensure that the focus of the provisions is on serious and organised crime.

The following safeguards have been included in the draft model to ensure that the powers would not be used in an arbitrary or inappropriate manner:

- limiting the class of people who may be subject to police-issued consorting warnings to those who have been convicted of an offence that carries a penalty of five years or more imprisonment and members of a criminal group as defined in section 651 of the Criminal Code;
- requiring that warnings issued to those who do not fit into the categories above are issued by the Magistrates Court;
- providing that consorting warnings cannot be issued to people under 18 years of age;
- providing a broad list of defences to consorting that recognise the importance of protecting the human rights listed above, such as consorting with family (broad definition including kinship relations) and consorting in the course of employment;
- ensuring that ACTP prepares a SOP that includes guidance on the impact of consorting warnings on vulnerable people (with specific reference to Aboriginal and Torres Strait Islander peoples) and details that must be recorded when a warning is issued;
- requiring warnings to be in written form;
- ensuring that an officer must not disclose the details of the offence a person was previously convicted of when issuing a consorting warning to others about them;
- providing for administrative merits review of police issued warnings in the ACAT;
- limiting the duration of a warning to two years; and
- legislating that the consorting provisions are subject to review two years post commencement of the offence.

32. The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9093.

In the Queensland Taskforce Report and the NSW Issues Paper further potential defences were raised for consideration. These defences are:

- consorting that occurs where the person has a ‘reasonable and sufficient excuse’;
- consorting for genuine political purposes; and
- consorting for religious purposes.

In terms of the ‘reasonable and sufficient excuse’ defence, examples may include being a member of a sporting team, residing in a boarding house or refuge, attending a funeral, attending outreach services (such as food kitchens, etc.) or attending a community or support group which may not be classified as a ‘health service’.34

The Queensland Taskforce Report and the NSW Issues Paper also highlighted the importance of ensuring that consorting laws are focused on serious and organised criminal activity. At present, in New South Wales an officer does not need to have a belief or suspicion that the consorting warning will prevent some form of future offending, and a suspected link to criminality is not required. Similarly, the model proposed by the Queensland Taskforce would not require a link to criminality.

Concerns about casting a wide net with the consorting provisions could be addressed by implementing the Commonwealth threshold requiring the decision-maker to be satisfied on reasonable grounds that issuing the warning will prevent consorting where a person engages or proposes to engage in conduct that constitutes, or is part of conduct constituting, an offence against any law; and the association facilitates the engagement or proposed engagement in the commission of or intention to commit the offence.35

Efficacy of consorting laws in response to organised crime

Given that the success of many serious and organised criminal groups is predicated on their ability to associate and communicate, consorting legislation arguably has the potential to effectively disrupt, displace and ultimately deter this type of criminal activity. An issue raised in the NSW Issues Paper and referenced in the Queensland Taskforce Report is whether consorting provisions do actually impact on and prevent serious and organised criminal activity.

In March 2016 the New South Wales Police Gangs Squad publicly released information on the use of consorting provisions since their 2012 introduction.36 The data showed that in the nine months to September 2015, 32 people were charged with the consorting offence; of those charged in 2015, 20 people have been convicted; 2500 people have received warnings since the scheme was introduced and 842 people received a warning in the nine months to September 2015.37 Overall, 39 of the 50 people charged with consorting offence were OMCG members.38

An analysis of these figures included in the Queensland Taskforce Report found that ‘it would seem a fair assumption that a significant number of the people who were warned not to associate heeded the warning, and did not go on to commit the offence’ and that evidence that people are changing their association behaviour because of a warning is an example of an efficient use of the limited resources of the criminal justice system.39

In contrast, the NSW Issues Paper notes that of the 391 official warnings issued by officers from a select group, three quarters were created by general duties police (n=292), with the remainder created by officers from two specialist gang squads (n=99).40 Despite having been designed to combat organised crime, general duties police were the majority users of the consorting provisions in this sample.

34. Taskforce on Organised Crime Legislation above n 16, 198
38. Taskforce on Organised Crime Legislation above n 16, 195.
The drivers behind this data are, however, not entirely clear. Arguably, the consorting offence in New South Wales casts a wide net, mostly capturing associations between low-level criminals, rather than serious organised criminals as intended.40

Additionally, as previously mentioned, the Queensland Taskforce Report recommends the introduction of consorting provisions in that jurisdiction in anticipation that it will be an effective tool to combat serious and organised criminal activity. The recommendation comes with a number of important caveats, relating to the manner in which the provisions should be drafted and the safeguards that must be applied to avoid the issues evident in New South Wales.

Arguably, the concerns about consorting laws lacking the efficacy to deal with serious and organised criminal activity can be addressed by ensuring that the provisions are targeted and specific with a number of procedural safeguards included.

40. Queensland above n 8, 204.
PART 5 – NEXT STEPS

This public consultation paper is an important step in the development of Government policy on consorting laws for the ACT. The input received from interested parties will significantly assist the Government in assessing options and in raising further issues for consideration.

The Government may undertake targeted consultation with a range of government agencies, non-government organisations, and other relevant parties.

The Government is also closely monitoring the work of the other jurisdictions and welcomes any further engagement on this important issue.

CALL FOR SUBMISSIONS

The Government invites stakeholders and members of the public to make a submission in response to this consultation paper by 8 July 2016 at the latest.

Submissions are welcomed in respect of any matter raised by this consultation paper.

HOW TO COMMENT

Any and all comments about consorting laws for the ACT are welcome. Comments may be submitted in any form.

You can email your comments to: JACSLPP@act.gov.au

Or post them to:
ATTENTION: Consorting Laws Submission
Criminal law Group
Justice and Community Safety Directorate
PO Box 158
CANBERRA CITY ACT 2601

Closing date for comments is 7 July 2016.

Generally, submissions will be made public. In the absence of a clear indication that a submission is intended to be confidential, the submission will be treated as non-confidential.

Non-confidence submissions may be made available to any person or organisation on request.

Confidential submissions may include personal or sensitive information where privacy is required. Any request for access to a confidential submission is determined in accordance with the Freedom of Information Act 1989, which has provisions designed to protect sensitive information given in confidence.

Anonymous submissions may be accepted, but the Justice and Community Safety Directorate reserves the right not to publish or refer to a submission whose author is not reliably identified.

If you have any questions about the paper or would like to receive a hard copy please phone (02) 6207 4520.

This paper can be accessed online at timetotalk.act.gov.au or justice.act.gov.au.
Proposals for a model of consorting laws to target and disrupt serious and organised criminal activity in the Territory

**TABLE 1: CONSORTING LAWS BY JURISDICTION**

<table>
<thead>
<tr>
<th>To whom does it apply?</th>
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<th>Defences</th>
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<tbody>
<tr>
<td><strong>New South Wales</strong></td>
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<tr>
<td><em>Crimes Act 1900</em></td>
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<td></td>
<td>Three years imprisonment or a fine of 150 penalty units ($16,500) or both.</td>
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<tr>
<td>sections 93W – 93Y</td>
<td></td>
<td></td>
<td>There is no time limit on the consorting warning.</td>
</tr>
</tbody>
</table>

A person who habitually consorts with convicted offenders, and consorts with those convicted offenders after having been given an official warning in relation to each of those convicted offenders.

A convicted offender means a person who has been convicted of an indictable offence (disregarding an offence of consorting under section 93X).

A person does not “habitually consort” with convicted offenders unless:

- the person consorts with at least two convicted offenders (whether on the same or separate occasions), and
- the person consorts with each convicted offender on at least two occasions.

An “official warning” is a warning given by a police officer (orally or in writing) that:

- a convicted offender is a convicted offender, and
- consorting with a convicted offender is an offence.

A suspected link to criminality is not required.

The following forms of consorting are to be disregarded for the purposes of section 93X if the defendant satisfies the court that the consorting was reasonable in the circumstances:

(a) consorting with family members,
(b) consorting that occurs in the course of lawful employment or the lawful operation of a business,
(c) consorting that occurs in the course of training or education,
(d) consorting that occurs in the course of the provision of a health service,
(e) consorting that occurs in the course of the provision of legal advice,
(f) consorting that occurs in lawful custody or in the course of complying with a court order.
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<td>Victoria</td>
<td></td>
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<td></td>
</tr>
<tr>
<td><strong>Summary Offences Act 1966 section 49F</strong></td>
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</tbody>
</table>

A person must not habitually consort with a person who has been found guilty of, or who is reasonably suspected of having committed, an organised crime offence.

An organised crime offence means an indictable offence against the law of Victoria, irrespective of when the offence was or is suspected to have been committed, that is punishable by level five imprisonment (10 years maximum) or more and that—

- involves two or more offenders; and
- involves substantial planning and organisation; and
- forms part of systemic and continuing criminal activity; and
- has a purpose of obtaining profit, gain, power or influence.

A suspected link to criminality is not required.

**Note:** the *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015* was assented to on 13 October 2015. This Act has not yet commenced but will come into operation on a day or days to be proclaimed, or if not before 1 July 2016, on that day. A purpose of this Act was to **repeal consorting laws in the section 49F**.

Reasonable excuse.

- Two years imprisonment.
- There is no time limit on the consorting warning.
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<tr>
<td><strong>South Australia</strong></td>
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<tr>
<td><strong>Summary Offences Act 1953</strong> section 13 &amp; part 14A</td>
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<tr>
<td><strong>Section 13</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A person who habitually consorts with convicted offenders (whether in this State or elsewhere); and consorts in this State with those convicted offenders after having been given an official warning in relation to each of those convicted offenders.</td>
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<tr>
<td>A convicted offender means a person who has been convicted of an indictable offence.</td>
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<tr>
<td><strong>Part 14A</strong></td>
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<tr>
<td>Section 66A of the Summary Offences Act 1953 (SA) provides that a senior police officer may issue a notice prohibiting a person (the &quot;recipient&quot;) from consorting with a specified person or specified persons.</td>
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<tr>
<td><strong>Section 13</strong></td>
<td></td>
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<td>A person does not habitually consort with convicted offenders for the purposes of this section unless—</td>
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<tr>
<td>- the person consorts with each convicted offender on at least two occasions.</td>
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<tr>
<td>• An official warning means—</td>
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<td>• a warning given by a police officer (orally or in writing) that—</td>
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<td>• a convicted offender is a convicted offender; and</td>
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<tr>
<td>• consorting with a convicted offender is an offence; or</td>
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<tr>
<td>• a warning or other notification given under a corresponding law.</td>
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<td></td>
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</tr>
<tr>
<td><strong>Section 13</strong></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>The following forms of consorting are to be disregarded for the purposes of this section if the defendant satisfies the court that the consorting was reasonable in the circumstances:</td>
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<td></td>
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<tr>
<td>(a) consorting with family members;</td>
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<td>(b) consorting that occurs in the course of lawful employment or the lawful operation of a business;</td>
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<tr>
<td>(c) consorting that occurs in the course of training or education;</td>
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<tr>
<td>(d) consorting that occurs in the course of the provision of a health service;</td>
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<td>(e) consorting that occurs in the course of the provision of legal advice;</td>
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<td>(f) consorting that occurs in lawful custody or in the course of complying with a court order.</td>
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<tr>
<td><strong>Section 13</strong></td>
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<td></td>
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<tr>
<td>Two years imprisonment.</td>
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<tr>
<td>There is no time limit on the consorting warning.</td>
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<tr>
<td><strong>Part 14A</strong></td>
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<tr>
<td><strong>Summary Offences Act 1953</strong> section 13 &amp; part 14A</td>
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</tr>
<tr>
<td>A prescribed offence means—</td>
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<tr>
<td>• an offence against Part 5 Division 2 of the Controlled Substances Act 1984 or a corresponding offence against a previous enactment; or</td>
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<tr>
<td>• an indictable offence against the Firearms Act 1977; or</td>
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<tr>
<td>• an indictable offence of violence; or</td>
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<tr>
<td>• a serious and organised crime offence; or</td>
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<tr>
<td>• an offence involving extortion or money laundering; or</td>
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<tr>
<td>• any attempt to commit, or assault with intent to commit, any of the foregoing offences; or</td>
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<tr>
<td>• an offence against the law of another jurisdiction that would, if committed in this State, constitute any of the foregoing offences.</td>
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<tr>
<td>A suspected link to criminality is not required.</td>
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<tr>
<td><strong>Part 14A</strong></td>
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<tr>
<td>If the officer is satisfied that—</td>
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<tr>
<td>• the specified person or each specified person—</td>
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<tr>
<td>• has, within the preceding period of three years, been found guilty of one or more prescribed offences; or</td>
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<tr>
<td>• is reasonably suspected of having committed one or more prescribed offences within the preceding period of three years; and</td>
<td></td>
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<tr>
<td>• the recipient has been habitually consorting with the specified person or specified persons; and</td>
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<tr>
<td>• the issuing of the notice is appropriate in the circumstances.</td>
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<tr>
<td><strong>Part 14A</strong></td>
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<tr>
<td>A consorting prohibition notice—</td>
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<tr>
<td>(a) does not prohibit associations between close family members; and</td>
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<tr>
<td>(b) does not prohibit associations occurring between persons—</td>
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<tr>
<td>(i) for genuine political purposes; or</td>
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<tr>
<td>(ii) while the persons are in lawful custody; or</td>
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<tr>
<td>(iii) while the persons are acting in compliance with a court order; or</td>
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<tr>
<td>(iv) while the persons are attending a rehabilitation, counselling or therapy session of a prescribed kind; and</td>
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<tr>
<td>(c) may specify other circumstances in which the notice does not apply.</td>
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<tr>
<td>A person does not commit an offence against this section in respect of an act or omission unless the person knew that the act or omission constituted a contravention of, or failure to comply with, the notice or was reckless as to that fact.</td>
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</table>
### Table 1: Consorting Laws by Jurisdiction

<table>
<thead>
<tr>
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<tr>
<td><strong>Northern Territory</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Summary Offences Act</strong> section 55A</td>
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</tbody>
</table>

A person who has been convicted of a prescribed offence who consorts with another person who has been convicted of a prescribed offence after being given written notice by the Commissioner.

A prescribed offence is one that is:

- prescribed by regulation; and
- the maximum penalty for which is imprisonment for 10 years or more.

The *Summary Offences Regulation* Reg 9 prescribes the following offences:

The convicted offenders consort by:

- being in company with one or more specified persons;
- communicating in anyway (including by post, fax, phone and other electronic means, and whether directly or indirectly) with one or more specified persons.

The Commissioner may give a notice to a person (the notified person) only if:

- the notified person and each person specified in the notice (a specified person) have each been found guilty of a prescribed offence; and
- the Commissioner reasonably believes that giving the notice is likely to prevent the commission of a prescribed offence involving:
  - 2 or more offenders; and
  - substantial planning and organisation.

It is a defence if the defendant proves that:

(a) the defendant has a reasonable excuse; or
(b) the defendant, having unintentionally associated with a person specified in the notice, terminated the association immediately.

Two years imprisonment.

The warning prohibits consorting for up to 12 months.
### TABLE 1: CONSORTING LAWS BY JURISDICTION

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</table>
| **Northern Territory** | *Summary Offences Act* section 55A | The notice must specify:  
- the notified person's obligations under the notice; and  
- the consequences of contravening the notice.  
The Commissioner must ensure all reasonable steps are taken to explain to the notified person (in language the notified person can readily understand) the matters mentioned above.  
In addition, the Commissioner must give each specified person a imposing similar obligations in relation to prohibiting the specified person from one or both of the following:  
- being in company with the notified person and each of the other specified persons;  
- communicating with the notified person and each of the other specified persons. | | |

- An offence against any of the following provisions is prescribed for section 55A(10)(a) of the Act:  
  - sections 162 and 163 as in force immediately before the commencement of the  
  - Criminal Code Amendment (Criminal Responsibility Reform) Act 2005  

- Firearms Act sections 61, 61A and 63A  

- Misuse of Drugs Act sections 5, 6, 7, 8, 9 and 11
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<td><strong>Western Australia</strong></td>
<td><strong>Criminal Code 1913</strong> sections 557J and 557K</td>
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<tr>
<td><strong>Section 557J</strong></td>
<td>It applies to a person who is a declared drug trafficker and who, having been warned by a police officer —</td>
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<tr>
<td></td>
<td>• that another person is also a declared drug trafficker; and</td>
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<tr>
<td></td>
<td>• that consorting with the other person may lead to the person being charged with an offence under this section, habitually consorts with the other person.</td>
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<td></td>
<td>It is a defence to a charge of an offence to prove that the accused person —</td>
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<tr>
<td></td>
<td>(a) was the spouse or de facto partner of the other person; or</td>
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<tr>
<td></td>
<td>(b) was a de facto child or a lineal relative (as those terms are defined in section 329(1)) of the other person.</td>
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<tr>
<td><strong>Section 557K</strong></td>
<td>It applies to a person who is a child sex offender and who, having been warned by a police officer —</td>
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<tr>
<td></td>
<td>• that another person is also a child sex offender; and</td>
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<tr>
<td></td>
<td>• that consorting with the other person may lead to the person being charged with an offence under this section, habitually consorts with the other person.</td>
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<td></td>
<td>(6) A child sex offender who, without reasonable excuse, is in or near a place that is —</td>
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<tr>
<td></td>
<td>(a) a school, kindergarten or child care centre; or</td>
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<td></td>
<td>(b) a public place where children are regularly present, and where children are at the time is guilty of an offence and is liable to imprisonment for 2 years and a fine of $24,000.</td>
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<tr>
<td><strong>Both sections 557J</strong></td>
<td>Two years imprisonment and $24,000 fine.</td>
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<td></td>
<td>There is no time limit on the consorting warning.</td>
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<th>To whom does it apply?</th>
<th>How does it apply?</th>
<th>Defences</th>
<th>Maximum penalty &amp; timeframes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Tasmania</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Police Offences Act 1935 section 6</strong></td>
<td>A person consorting with a reputed thief. Where the person habitually consorts (on more than two occasions).</td>
<td>A person must prove to the satisfaction of the court that they have sufficient lawful means of support and good and sufficient reasons for consorting with the persons with whom the person is charged with having consorted.</td>
<td>Six months imprisonment. There is no time limit on the consorting warning.</td>
</tr>
</tbody>
</table>

Queensland does not have a consorting law scheme. However, the recent Taskforce on Organised Crime Legislation recommended section 60A of the *Criminal Code* should be repealed and replaced with a consorting offence (outlined in Chapter 11 of the Taskforce Report). Section 60A provides an offence of “participants in criminal organisation being knowingly present in public places” with “2 or more other persons who are participants in a criminal organisation”, which carries a minimum penalty of 6 months imprisonment, and a maximum penalty of 3 years imprisonment.