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The Hon Lea Drake, Commissioner
Law Enforcement Conduct Commission
Level 3, 111 Elizabeth St, Sydney NSW 2000

By email: Tom.Millett@lecc.nsw.gov.au

Dear Commissioner,

Thank you for the opportunity to make this submission to the LECC's review of consorting laws.

This submission was written by members of the Centre for Crime, Law and Justice (CCLJ), a research centre at the Faculty of Law and Justice, University of New South Wales. CCLJ was established in 2018, building on a long tradition of criminal justice research and scholarship at UNSW. The Centre produces high quality scholarship on important topics in criminal law, criminal justice, criminology, crime prevention and policing that are of pressing local, national and international significance. Core themes for the Centre's research are: the relationship between criminal justice administration and social justice and human rights; and the relevance of race, Aboriginality, gender, disability and socio-economic disadvantage to victimisation, criminalisation, the criminal process and punishment.

We submit that the available evidence supports repeal of the consorting offence in s 93X of the *Crimes Act 1900* (NSW) in the public interest. We urge the LECC to consider repeal of the offence in its final review and recommendations.

Our submission is in five parts:

> **Part 1** sets out how the purpose of consorting has been expanded beyond the Parliament's intention in 2012 – that is, to combat organised crime – to targeting 'serious crime' or crime generally. We argue the available data does not disclose a convincing basis that consorting in practice is targeted at preventing organised crime.
> **Part 2** reviews how consorting law undermines the core principles of criminal responsibility.
> **Part 3** contests the assumption that consorting functions as beneficial crime prevention with reference to the social harms of disruption and incapacitation, particularly for First Nations peoples.
> **Part 4** argues that statutory reforms to expand the available defences have been insufficient to remedy fundamental problems with the offence.
> **Part 5** concludes by reviewing Productivity Commission and other frameworks for assessing and repealing criminal laws where the perceived benefits of criminalisation do not outweigh the costs.

Part 1: The consorting offence is not achieving its stated purpose

In introducing the 2012 amendments, Parliament intended that consorting laws were for the purpose of preventing and disrupting organised crime.[1] This represented a shift in the purpose of consorting laws since first introduced in NSW. In sum, the 'first generation' of consorting laws created a new subset of vagrancy, proscribing mere association between those understood to share the same marginalised status ('reputed thieves' and 'prostitutes') in order to protect a stratified class, race and gendered status quo that maintains wealth, power and inequality.[2] The 'second generation' (marked by the 2012 amendments) was intended to target organised crime, promising a shift away from the archaic criminalisation of public order, theft and the regulation of 'danger' defined as poverty and social marginality, and towards threats to security posed by organised criminal organisations.[3]

The promise of the 2012 amendments to 'modernise' consorting laws, so that they targeted only organised crime, has not been realised. In the absence of any elements of the offence geared to this end, the shift appears largely in parliamentary discourse in introducing the 2012 amendments. Concerningly, government has explicitly sought to post-haste *expand* the purpose of consorting law to general crime prevention, and we submit that this departs from parliament's original intent and continues the anti-democratic and harmful legacy of first generation consorting laws.

The Ombudsman reports and LECC discussion paper contain important analysis, documenting the distinct difference in how government and the police interpret the purpose of consorting law, in contrast to these bodies. The Ombudsman's report documents several government representations in 2013, after the amending legislation was introduced, that the policy focus on consorting laws is crime generally, as well as organised crime.[4]

The NSW Government ultimately rejected the Ombudsman's Recommendation 19 that Parliament consider an objects clause that 'defines the purpose of the consorting law to the prevention of serious crime', stating it did not propose

> … to limit the use of the consorting law 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.[5]

The 2016 Ombudsman's Report also found that the New South Wales Police Force (NSWPF) had made a policy decision to extend consorting laws to ordinary street crime.[6] When NSWPF was asked by the

[1] See discussion in NSW Ombudsman, *The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900* (April 2016), 14-16.

[2] A Loughnan, 'Consorting, then and now: Changing relations of responsibility for crime (2019) 45(2) *University of Western Australia Law Review* 8; A McLeod, 'On the Origins of Consorting Laws' (2013) 37(1) *Melbourne University Law Review* 103; A Steel, 'Consorting in New South Wales: Substantive Offence or Police Power?' (2003) 26(3) *University of New South Wales Law Journal* 567. See also the dissenting judgement of French CJ in *Tajjour v State of New South Wales; Hawthorne v State of New South Wales; Forster v State of New South Wales* [2014] HCA 35, at [25], tracing NSW consorting laws to the vagrancy statutes of medieval England.

[3] Loughnan, above n 2.

[4] NSW Ombudsman, above n 1, 16.

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

[6] NSW Ombudsman, above n 1, 16.

Ombudsman to 'proscribe the use of the consorting law to address or prevent minor offending' and reflect this in its policies and training, this recommendation was supported in principle but the response is significant in understanding the fundamental problems of consorting law. NSWPF committed to review its policies and training,

> ... to ensure *the application of the consorting law to address or prevent minor offending is appropriate* given the focus of the consorting law is to prevent organised criminal activity that establishes uses or builds up criminal networks.[7] (emphasis added)

We are concerned that Government and NSWPF have expanded the original purpose of the 2012 amendments from organised crime to general crime prevention, notwithstanding their agreement in principle that policy and intelligence be directed to prioritising serious and organised crime. Police understand minor offending as the proper targets for consorting *if appropriate*. As we explain in Parts 2 and 3, the nature of disruption policing and the broad construction of the offence means the extent of any nexus between minor offending and organised crime *is left entirely up to the police to decide without any legislative limits*. Vesting day to day accountability for consorting law to police policy represents criminal justice failure. In effect, there is little that substantively distinguishes consorting law on the books from its archaic 'first generation' versions which targeted marginalised persons.

Does consorting prevent or disrupt organised crime in practice?

The LECC suggests the 2016 Ombudsman review found 'consorting effective at targeting and disrupting organised criminal networks'.[8] This conclusion is contested when read alongside the significant evidence in the Ombudsman's report that suggested consorting was not, in the majority, focused on organised crime, and resulted in an unfair burden on marginalised populations. A significant proportion of the Ombudsman recommendations were directed to ensuring consorting laws were focused on remedying these problems in future.

The LECC's October 2021 discussion paper does not directly investigate whether consorting laws have the effect of targeting or preventing serious and organised crime. There is no available evidence that consorting is only applied to, or is targeted primarily to, those that are involved in organised crime groups. The data set out in the LECC discussion paper confirms consorting is used more broadly beyond organised crime. Police use of the laws does not reflect their stated legislative purpose.

The LECC discussion paper sets out three important sources of data:

i) <u>The NSW Police Force Criminal Groups Squad issued 77% of all warnings issued:</u>

The discussion paper considers the increased proportional use of the laws by the Criminal Groups Squad 'suggests greater emphasis on prevention and targeting serious and organise crime'.[9] However, this data cannot be relied on to support this conclusion. It assumes that Criminal Groups Squad activity is presumptively directed to organised crime. As the discussion paper notes, consorting is a Key Performance Indicator for the Squad under its Business Plan.[10] The data is therefore only a measure of the *activity* of the Criminal Groups Squad. This data does not disclose

[7] LECC, above n 5, 64.
[8] LECC, above n 5, 2.
[9] LECC, above n 5, 51.
[10] LECC, above n 5, 25.

how many people targeted by the Squad were involved in or reasonably suspected of involvement in organised crime.

Importantly, while the Criminal Groups Squad issued the most warnings, it only interacted with a minority of all people subject to consorting (773 out of 2361 unique people). General duties police interacted with 74.8% of all people subject to consorting.[11] The high contact of general duties police with targeted people is indicative of the NSWPF policy decision to broaden consorting to crime disruption generally.

ii) Conviction histories of those issued a warning and people warned about:

On its own, the data on the conviction histories of the 2, 361 people subject to consorting is disturbing. The most common convictions were for traffic and vehicle regulatory offences (almost 2/3rds of all targeted people) followed by illicit drug offences, acts intended to cause injury, theft and public order offences. The most serious offence people were convicted of related to types of assault excluding sexual assault (41%).[12] Critically, the mere fact a person has been convicted of a serious offence cannot stand in as proxy for having met the objectives of Parliament. This is not evidence of organised crime being disrupted. Moreover, one in two people had a conviction for public order offences.[13] At least 203 people who were issued with the consorting warning did not have convictions at all, and 145 people warned only had convictions for summary offences.[14] There is nothing in this data capable of inferring consorting law has a relationship to targeting organised crime.

iii) Case Study narratives:

The six case studies disclose that all but one person were subject to warnings not on the basis of being engaged in organised crime. This includes marginalised and homeless people, and those suspected of shoplifting and of drug possession and graffiti. Only one case study (number 5) discloses any basis that a warning may have related to involvement in organised crime (in the form of a Criminal Organisation designation).

No analysis is provided of what proportion of those total number of persons targeted are in fact engaged in (or suspected of engagement in), organised crime, and by what measures this is known. We suggest that this would need to be evidenced in the final report to support any claims that consorting effectively targets organised crime. A broader and deeper narrative analysis of targeted people is critically important as it gives qualitative data on the context and indication of police intelligence and reasons for why the warning was necessary to prevent organised and criminal activity.

The sole person prosecuted for consorting was 'charged with the 'lower end of the range' given the nature of his interactions with known offenders.' The LECC note that 'the magistrate also observed that the focus with consorting law should be gang related activities and organised crime'.[15] It is concerning that the only prosecution in this reporting period was not related to disrupting organised crime, the very purpose of the laws.

[11] LECC, above n 5, 27.
[12] LECC, above n 5, 32.
[13] LECC, above n 5, 33-34.
[14] LECC, above n 5, 35.
[15] LECC, above n 5, 26.

The evidence as a whole indicates that recommendations made by the Ombudsman in 2016 to 'increase the fairness of the operation of the power' through changes to police policy and practice did not materialise, as also noted in the LECC discussion paper.[16]

Part 2: The consorting offence is incompatible with criminal justice principles

Once the consorting offence has been shown to be ineffective as an 'extraordinary' measure directed at organised crime, we submit that it then falls to be evaluated according to conventional criminal justice principles, including the traditional justification for the attribution of criminal responsibility and punishment. Specifically, our legal system expects crimes to be defined by clear *conduct* elements (typically involving harmful or high-risk behaviour) and *fault* elements. The combination of these two components (actus reus and mens rea) gives rise to culpability and the justification for criminal punishment.[17]

The consorting offence departs radically from the recognised legitimate limits of criminal responsibility. Some offences strain those limits because harmful conduct is criminalised without necessarily requiring proof of subjective fault. That is, the fault standard may be objective, or liability may be 'strict' or 'absolute'. The consorting offence goes even further: it has no actus resus component in the traditional sense. A person may be charged with consorting on the basis of communications (with a person with a relevant criminal record) that are entirely devoid of criminal content.

Pre-emptive criminalisation is controversial because it punishes people for what they *might do*, rather than what they *have done.*[18] However, for most such crimes (including terrorism offences) it is at least necessary for the Crown to establish that the accused has engage in specific conduct which carries a risk of harm or other criminal wrongdoing. There is no such requirement in the NSW consorting offence. *Status* – rather than behaviour or conduct – animates criminality in the context of the consorting offence, noting that there has generally been a move *away* from status offences (eg vagrancy, begging, public drunkenness, sex work) because they are inherently unfair and don't meet the standards required by established principles of criminal responsibility. Moreover, it is not even a person's own status that exposes them to criminal punishment via the offence of consorting; it is the *status of another person* (the 'convicted offender') with they are in communication that is said to render them a criminal. For these reasons, it is commonly argued that consorting laws should not be adopted in liberal legal systems.[19]

In 2012, the Legislation Review Committee raised concerns that the consorting amendment bill could 'create discrimination against those who have been previously convicted of indictable offences' and 'criminalise individuals who may not have committed any offence'.[20] These were not hypothetical concerns, but realities that came to pass precisely because they are built into how the offence is constructed, and justified.

[16] LECC, above n 5, 6.

[17] D Brown, D Farrier, L McNamara, A Steel, M Grewcock, J Quilter, M Schwartz, T Anthony & A Loughnan, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 7th ed, 2020), 151.

[18] L Zedner, 'Fixing the future? The pre-emptive turn in criminal justice' in B McSherry, A Norrie and S Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart, 2009).

[19] Brown et al, above n 15, 1240f.

[20] Cited in NSW Ombudsman, above n 1, 15.

Part 3: Consorting law as an oppressive police power with a long history of criminogenic effects

Although located in the *Crimes Act 1900* (NSW) rather than the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), consorting laws are more akin to police powers provisions, or at least best understood as a hybrid police power-serious offence aimed at pre-emptive disruption rather than primarily prosecution. This characterisation is also supported by data presented in the LECC Discussion Paper, which shows that the issuance of police warnings (11, 000) outstrips the laying of charges (2) by a very large margin.[21] The combined effect of consorting law is serious and generates social harms through: i) expanded, highly discretionary police powers and ii) increased penalties that produce criminogenic effects which lower community safety, as explained below.[22]

In this section, we challenge both dimensions of crime prevention that are used to justify consorting – disruption policing and criminal penalties as 'deterrence'. In particular, we address the harmful impacts of the effects of consorting laws and policing particularly on First Nations peoples.

The harms of disruption policing

We share the LECC's concern that First Nations peoples remain grossly over targeted by police since the last review period and make up 40% of all consorting warnings. We submit this disturbing practice compels repeal of the laws as the only viable solution. The harms of consorting laws to First Nations peoples far outweighs any perceived benefits. No evidence is provided in the paper as to how the targeting of First Nations peoples furthers the original parliamentary intent that consorting prevent organised crime. The final report would benefit from an extensive interrogation of the circumstances in which First Nations people were targeted by police.

In practice the 'disruption' policing at the core of consorting means police disruption of people's everyday lives. Disruption involves increased police surveillance, unnecessary interactions, and exposure to unnecessary and often unlawful police power and violence. Disruption strategy is targeted to social networks, regardless of whether they are in fact criminal networks – the objective is to alienate and atomise to disrupt future crime. In this sense, disruption is a classic form of pre-emptive criminalisation targeted to presumptive and racialised and classed categories of 'dangerousness'. Because the purpose of disruption policing is *not* prosecution, it is not concerned with gathering evidence to prove the commission of offences, but with interfering with people's lives in the hope of general deterrence.[23] There is a large body of statistical work both claiming increased policing deters crime and an equally large body of work empirically disputing that policing on its own deters crime. We submit that what is important for the LECC, is whether consorting law and policing on balance are likely to produce social harms that outweigh any evidenced benefits.

Given the disproportionate rates of First Nations peoples incarcerated for indictable offences, consorting law is structured to target First Nations peoples. In this context, consorting law qualifies as an instance of institutional racism. Police disruption of the everyday lives of First Nations peoples continues the intergenerational trauma and colonial violence of extensive and oppressive police involvement in people's lives. It is well evidenced that over-policing in different forms since

[21] LECC, above n 5, 13.

[22] This characterisation has been applied to earlier incarnations of consorting laws in NSW: see Steel, above n 2.

[23] For a discussion of disruption policing see M Innes & J Sheptycki 'From Detection to Disruption', 14(1) (2004) *International Criminal Justice Review* https://doi.org/10.1177/105756770401400101

colonisation has a central role in ongoing dispossession.[24] At a time when innovative, Aboriginal-led initiatives are building communities capacities and self-determination as solutions to community safety and countering the devastating impacts of the formal criminal justice system,[25] consorting laws are an archaic throwback that have no place. The gap between these effects and the stated rationale for modern consorting law should no longer be overlooked.

Criminal penalties and the false promise of deterrence

Implicit in the legitimation of the 2012 consorting amendments is a reliance on extraordinary penalties for general deterrence. The 2012 consorting penalties substantially increased from a maximum $400 fine to a $16,500 fine, and from a maximum of six months imprisonment as a summary offence to three years imprisonment as an indictable offence.

Decades of research findings disprove political claims about custodial penalties 'deterring' crime. In their 2021 meta-analysis, Petrich and colleagues confirmed that 'prior meta-analytic reviews have indicated *prisons have a null or slight criminogenic effect*… the results of the current study illustrate that incarceration is not achieving one of its oft-desired goals of deterrence' [emphasis added]. They conclude:

> while there is certainly a subset of high-risk offenders for whom incapacitation is warranted, in general, placing individuals in *custodial sanctions appears to contribute to, rather than reduce, reoffending* [emphasis added].[26]

The most consistent and predictable result of the drive to increase custodial penalties across the board, has been a rapidly growing prison population. Lives and families are disrupted, creating multi-generational suffering, for zero or negative return on community safety.[27] Even if incarceration is avoided, it is axiomatic that high financial penalties magnify poverty when imposed on people in low-income households, such as First Nations children.[28]

Consorting law is not crime prevention

In its summary of the High Court 's 2014 decision in *Tajjour*, [29] the LECC notes *'a majority of the seven judges ruled the law was reasonably appropriate and adapted, or proportionate, to serve the legitimate end of the prevention of crime'*.[30] We do not argue that deterrence of organised crime is an illegitimate statutory purpose. Rather, our submission is that consorting law is not crime prevention, properly conceived.

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[24] C Cunneen, *Conflict*, *Politics* and *Crime*: Aboriginal Communities and the *Police* (Allen & Unwin, 2001).

[25] See for example KPMG, *Maranguka Just Reinvestment Project: Impact Assessment*, 2018 at https://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf; R McCausland et al, 'CommUNIty-Led development: A partnership to realize Aboriginal Elders' vision for change' (2021) *Community Development*, DOI: 10.1080/15575330.2021.1923044

[26] D Petrich et al, 'Custodial Sanctions and Reoffending: A Meta-Analytic Review' (2021) 50(1) *Crime and Justice* https://doi.org/10.1086/715100

[27] D Dolling et al, 'Is Deterrence Effective?: Results of a Meta-Analysis of Punishment' (2009) 15(1-2) *European Journal on Criminal Policy and Research* 201.

[28] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*. Final Report (ALRC Report 133, 2017), Ch 12; J Quilter & R Hogg, 'The hidden punitiveness of fines' (2018) 7 (3) *International Journal For Crime, Justice and Social Democracy* 10.

[29] Tajjour, above n 2.

[30] LECC, above n 5, 1.

Crime prevention involves a holistic set of cross-disciplinary and 'whole of government' approaches and tools to address the individual and structural causes of serious criminal offending. Consorting law is not designed to *prevent* organised crime in terms of addressing the individual, systemic and structural causes of offending. *Pre-emptive* criminalisation is not only distinct from crime prevention, but the disruption and incapacitation strategies that it employs can undermine crime prevention. There is a fundamental illogic to 'deterring non-criminals from consorting in a criminal milieu'.[31] It is a disturbing irony that the state itself forces convicted offenders to assemble and associate – to consort – in police stations, watch houses and prisons. When the 'non-criminal' is convicted and incarcerated for consorting, they are placed in circumstances where it is *impossible to avoid* consorting 'in a criminal milieu'.

Historical analysis also support our contention that consorting is not a crime prevention tool. Accounts of the social outcomes produced by 1920s consorting laws reveal that legislative reform intended to 'eradicate crime' had the opposite effect: the laws first enabled the construction of criminality, and then laid the foundations for vice to become 'a growth industry'.[32] Consorting laws – old and new – have well-documented criminogenic effects. Criminogenic policies, laws and practices lead to reduced (rather than enhanced) community safety and cause net social and fiscal deficits.[33]

The better approach, therefore, is to repeal consorting laws. This will also decrease opportunities for police to target members of groups identified by the LECC as most likely to be subject to misuse or overreach.

Part 4: The 2018 statutory reforms offer insufficient protections and do not address core problems

We submit that the reforms introduced following the Ombudsman's review of the consorting laws[34] fail to address the core problems with the offence and offer insufficient protection to disproportionately burdened communities. The 2018 reforms responded to concerns about fairness in the operation of consorting laws raised by the Ombudsman in 2016. Key aspects of the 2018 reforms included confining the operation of consorting laws to individuals of and above the age of 14 years and expanding the exhaustive list of defences in s 93Y.[35] Notably, the Attorney-General characterised these reforms as implementing 'safeguards' in response to the Ombudsman's concerns 'ensuring police can continue to use the consorting law effectively'.[36] This statement reflects our core concern that consorting laws are deliberately constructed as proxy police powers that are designed to facilitate and legitimate police disruption of the ordinary, non-criminal, activities of community members. We have argued that such interactions operate to increase contact with the criminal justice system in ways that marginalise individuals and communities. Rather than preventing organised criminal networks, in practice these powers are likely to miss their intended mark and produce criminogenic effects in their operation. As such, further reforms are unlikely to remedy the enduring concerns associated with the operation of consorting laws and we call for its repeal.

[31] *Tajjour*, above n 2, [41].
[32] L Writer, *Razor: Tilly Devine, Kate Leigh and the Razor Gangs* (Pan Macmillan, 2002).
[33] Karakatsanis, Alec, 'The Punishment Bureaucracy: How to Think About "Criminal Justice Reform"', The *Yale Law Journal Forum*, 28 March 2019, https://www.yalelawjournal.org/forum/the-punishment-bureaucracy
[34] NSW Ombudsman, above n 1.
[35] *Crimes Legislation Amendment (Consorting and Restricted Premises) Act 2018* (NSW), sch 1.
[36] M Speakman, 2nd Reading Speech, Crimes Legislation Amendment (Consorting and Restricted Premises) Bill 2018, NSW *Parliamentary* Debates, Legislative Assembly, 19 September 2018.

Children

The LECC's discussion paper demonstrates that the statutory reforms introduced in 2018 have not effectively addressed the key concerns raised by the Ombudsman in 2016. First, the Ombudsman recommended that children be excluded from the operation of consorting laws. The subsequent limited reform to exclude children under 14 from the offence, disregards the concerns raised about increasing police contact with young people and the exposure of young people with no criminal record to criminal convictions for consorting. The LECC found that of the 32 young people subject to the consorting laws during the interim reporting period, only one was targeted by the Criminal Groups Squad. The overwhelming use of the consorting laws against young people by general duties officers in a limited number of Sydney metropolitan PACs does not support the NSW Government's assertion that consorting powers are a tool for deterring and preventing the recruitment of young people into extremist or terrorist activity. Indeed, given that the vast majority of the children targeted by police using consorting laws had no criminal record, the LECC acknowledges the highly undesirable potential for young people to be drawn into the criminal justice system for consorting alone without any evidence of criminal activity. The decrease in the use of the consorting laws against young people observed in the interim reporting period demonstrates that while the powers are being used less frequently, they are not being used in ways that align with the stated aims of the laws. As such, we submit the 2018 reforms have done little to effect meaningful change in the way the laws operate and to protect children from contact with the criminal justice system.

Defences undermined by expansive police discretion

Similarly, the expanded list of defences in s 93Y are ineffective in implementing protections and addressing the core problems with the consorting laws. The failure to amend the NSWPF's SOPs to give greater guidance on the exercise of police discretion in using the consorting laws undermines the effect of expanding the defences in s 93Y. This demonstrates the deleterious impacts of consorting laws in practice and their role as proxy police powers. Statutory reforms are an inadequate mechanism for remedying fundamental problems with the consorting laws.

We submit that while police retain broad discretion to issue warnings despite the availability of a defence, the expansion of s 93Y fails to protect individuals from police interactions or contact with the criminal justice system. We submit that the LECC's recommendation that the SOPs be amended to advise police officers not to issue warnings where defences are available offers insufficient protection.[37] Where warnings are issued, police are not required to provide reasons as to their determination that the consorting was not reasonable despite the defence. The NSWPF has resisted calls to implement such accountability mechanisms, arguing that they place too great a burden on the officers using the consorting laws. In relation to the use of consorting laws against people experiencing homelessness, the NSWPF has rejected calls to require police officers to identify how the exercise of consorting laws furthers the stated purpose of the laws to prevent the use, establishment or building up of criminal networks.[38] Police argue that criminal networks operate within and target homeless populations, though without an accountability mechanism for the exercise of consorting powers in this context, the evidentiary basis for this claim is unclear.

The statutory reforms have not been effective at preventing the use of consorting laws in situations where no other criminal activity can be established. This is a fundamental concern with the

[37] LECC, above n 5, 20.
[38] LECC, above n 5, 22.

consorting laws in that they criminalise interactions and communications entirely unrelated to criminal behaviour. We submit that the police rely on consorting laws to exert power in situations where criminal conduct cannot be established. In such situations, the purpose of preventing or disrupting the use, establishment or building up of criminal networks is not evident. Case Studies 2 and 3 in the LECC discussion paper highlight situations where consorting warnings were issued after police failed to detect any criminal conduct following investigations involving the exercise of search powers which raise questions about the lawful basis of the searches as described. This demonstrates how consorting laws facilitate police intervention that would otherwise constitute misconduct.

Finally, as we have discussed in part 3, the LECC's findings regarding the over-representation of Aboriginal and Torres Strait Islander peoples subjected to the consorting laws is a predictable structural effect of the laws. The amendment of the definition of family in s 93Y to include Indigenous kinship networks has not served to remedy the concerns about fairness raised by the Ombudsman with regard to the heavy burden imposed on First Nations by consorting laws. Case study 4 demonstrates that the discretion police exercise to determine whether family interactions are 'reasonable in the circumstances', supported by a lack of guidance in the SOPs, means that warnings continue to be issued against and between members of Aboriginal and Torres Strait Islander families.[39]

We submit that the breadth of police discretion in exercising consorting laws highlights the character of these laws as unaccountable proxy police powers. They are a coercive tool exercised with minimal accountability and in ways that continue to disproportionately burden marginalised and vulnerable groups. The 2018 reforms made to police policy and practice do not address the core problems with the use of consorting laws. The absence of effective, independent accountability mechanisms enables the continued use of the powers for purposes beyond preventing or disrupting the use, establishment or building up of criminal networks. The restriction of consorting laws to those of and above the age of 14 years and the expansion of defences in s 93Y provides insufficient protection against police interactions that increase contact with the criminal justice system and have criminogenic effects.

Pat 5: Conclusion - Why repeal is in the public interest

We recognise that a call for repeal of the consorting offence may be seen as out of line with the generally *expanding* trajectory of criminalisation over several decades. In re-affirming our call for the abolition of consorting, we make three concluding observations.

First, there is growing recognition in the scholarly[40] and public policy literature that the proliferation of criminal offences and the ever-increasing reach of the criminal justice system are neither inevitable or desirable. In 2018, the Law Council of Australia suggested that *all* proposed changes to criminal justice policy and law should be required to undergo a 'justice impact test' to 'better account for the downstream impacts of new laws and policies on the justice system, particularly in assisting

[39] LECC, above n 5, 21.

[40] L McNamara, J Quilter, R Hogg, H Douglas, A Loughnan and D Brown, 'Theorising criminalisation: The Value of a Modalities Approach' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 91; V Sentas, 'The Poverty of Criminal Law: Criminalisation and the Limits of Access to Justice' in A Durbach, B Edgeworth and V Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017).

disadvantaged groups.'[41] In 2019 the Queensland Productivity Commission recommended that the Queensland Government should 'reduce the scope of the criminal law' and look outside the criminal justice system for solutions to some currently criminalised harms, risks and behaviours, as follows:

> The Queensland Government should seek to remove those activities from the Criminal Code Act 1889 and other relevant legislation for which the benefits of being included do not outweigh the costs.
>
> When assessing whether an activity should be redefined, consideration should be given to:
>
> - the extent to which the activity causes harm to others and the nature and level of that harm
> - whether the use of criminal sanctions imposes costs on offenders that are proportionate to the harm caused to others
> - whether the act of criminalisation creates more positive effects for society than negative ones—this should include an assessment of deterrence and any unintended consequences that might cause harm
> - whether there are other, non-criminal options that might better prevent harm
> - whether criminalisation undermines public perception of the legitimacy of the law.[42]

These criteria function as practical tools for assessing the utility of consorting laws and could be applied by the LECC in its final evaluation.

Secondly, there is precedent for the abolition of criminal offences in NSW. Examples include the decriminalisation of public drunkenness and begging in 1979,[43] and decriminalisation of abortion in 2019.[44]

Thirdly, repealing consorting laws will not give a 'green light' to organised crime. Police have a wide range of other coercive pre-emptive tools available to them that make consorting law redundant, given each has a focus on serious and organised crime, that consorting does not.

They include:

- participation in a criminal group under s 93T of the *Crimes Act 1900* (NSW);
- 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)).

Each regime aims to stigmatise and stifle the activities of groups considered to be regularly engaged in criminal activities, before there is evidence of a specific crime being committed, and even before

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[41] Law Council of Australia, *Justice Project.* Final Report (August 2018), 46. https://www.lawcouncil.asn.au/justice-project/final-report. This recommendation was based on United Kingdom Ministry of Justice, *Guidance: Justice impact test* (2 November 2016) https://www.gov.uk/government/publications/justice-impact-test.

[42] Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism: Final Report* (2019), 204 https://qpc.blob.core.windows.net/wordpress/2020/01/FINAL-REPORT-Imprisonment-Volume-I-.pdf

[43] *Summary Offences (Repeal) Act 1979* (NSW).

[44] *Abortion Law Reform Act 2019* (NSW).

there is a specific agreement to commit an offence (ie conspiracy). Whilst these pre-inchoate offences and powers also present significant problems in eroding principles of criminal responsibility, we argue that consorting is the outlier.

We welcome the opportunity to discuss this submission with the LECC.

Yours sincerely

Professor Luke McNamara, Director

Dr Ingrid Matthews

Dr Vicki Sentas

Ms Leah Williams