

CONSORTING IN NEW SOUTH WALES: SUBSTANTIVE OFFENCE OR POLICE POWER?

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INTRODUCTION

Consorting is an offence of habitually being in the company of specified other persons or classes of person who are 'criminals', either by reputation or conviction. The offence was introduced into New South Wales law at the height of public concern over the so-called 'razor gangs' of East Sydney, and has remained in force ever since. It is an extraordinarily broad offence that relies almost entirely on police discretion to control its scope. Historically it can be seen to lie between the more primitive offence of vagrancy and the recently enacted 'move on' police powers¹ and non-association and place restriction orders.²

This article argues for the repeal of the offence. It does so by analysing the elements of the offence, examining the historical context in which the offence was introduced and examining the subsequent use of the offence by police.

One important issue in analysing the offence is whether it is to be seen as a substantive offence or as a general police power. David Dixon has argued that it is often a mistake to see public order and summary offences as instances of the substantive criminal law. Instead he argues that they are best viewed as broad discretionary police powers dressed up as substantive offences.³

As consorting is in form a substantive offence it is first analysed as such. Consorting is relatively rare among public order offences in that a significant number of appellate court decisions have created a complex web of legal interpretation on each of the concepts within the offence. Any repeal or reform of the offence would therefore need to take this into account.

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1 *Summary Offences Act 1988* (NSW) as amended by *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW).

2 *Crimes (Sentencing Procedure) Act 1999* (NSW), as amended by *Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001* (NSW). The operation of the Act is currently subject to review by the NSW Ombudsman.

3 David Dixon, *Law in Policing: Legal Regulation and Police Practices* (1997) 68 ff.

In light of its long history on the statute books, and the fact that it appears to be a novel Australian contribution to the criminal law, the political issues surrounding its introduction are also examined. In so doing, the justifications for the offence are exposed and shown to be no longer sufficient to warrant the continued use of the offence.

The article, however, also recognises that the New South Wales Police appear to have, from the start, seen the offence as an intelligence gathering power or an informal means of gaining compliance. In light of this the article examines the history of the use of the offence by police and questions whether it remains a justifiable or effective police 'power'.

A Outline of the offence

The offence was introduced into New South Wales law by means of amendment to the *Vagrancy Act 1902* (NSW). The *Vagrancy (Amendment) Act 1929* (NSW) added to the existing offences a new offence of 'habitually consorting' with reputed criminals or prostitutes:

4(1) Whosoever

(j) habitually consorts with reputed criminals or known prostitutes or persons who have been convicted of having no visible lawful means of support

shall on conviction before any justice, by his own view of otherwise, be liable to imprisonment with hard labour for a term not exceeding six months [with certain exceptions for females].

The offence had already been introduced into South Australia in 1928, and was subsequently introduced into Queensland in 1931, and Western Australia in 1955.⁴ A modified form of the offence was introduced into Victoria in 1931 and Tasmania in 1935, these versions giving the defendant the defence of a 'good account' and 'good and sufficient reasons' respectively. The Queensland offence has since been repealed. Currently, consorting remains an offence in s 56 *Summary Offences Act* (NT), s 13 *Summary Offences Act 1953* (SA), s 6 *Police Offences Act 1935* (Tas), s 6 *Vagrancy Act 1966* (Vic) and s 65 *Police Act 1892* (WA).

In New South Wales the offence remains in force. It was modified in 1979 and is now found in s 546A of the *Crimes Act 1900*:

Any person who habitually consorts with persons who have been convicted of indictable offences, if he or she knows that the persons have been convicted of indictable offences, shall be liable on conviction before a Local Court constituted by a Magistrate sitting alone to imprisonment for 6 months, or to a fine of 4 penalty units.

4 There is, however, reference in the NSW parliamentary debates in 1929 to its 'recent' introduction to Western Australia, though this is probably a mistaken reference to South Australia.

Thus under the current offence in New South Wales it must be proved that:

- a person consorted with persons who have committed indictable offences;
- the defendant knew that the persons had been so convicted; and
- the consorting with such persons is habitual.

It is no defence to prove that the consorting was either innocent or for good reason.

Until 1979 there was also no requirement that the person with whom the defendant consorted had been convicted of any indictable offence. Instead all that was required was that the person be a 'reputed criminal'.

I THE ELEMENTS OF THE OFFENCE

The analysis in this Part is organised around the key concepts of the offence rather than the elements that a prosecution would need to prove. Thus while a prosecution would allege a single element of 'habitually consort' this article looks first at the concept of consorting and then at the element of whether the consorting is habitual.

This ordering allows an analysis of the concepts that function to narrow the breadth of the offence. Beginning with the broadest concept of 'consorts', the article then examines the extent to which the scope is narrowed by the additional concepts of 'habitually', the 'reputation' of the person with whom the defendant was consorting, the requisite knowledge of the defendant, and the number of persons with whom the defendant must consort.

However, the breadth of the concepts is such that as Rich J said in *MacDonald v The King*:

The offence connotes frequenting the company of reputed criminals and is a question of degree. It is inadvisable and, perhaps, impossible, to attempt an exhaustive definition of the offence.⁵

One of the arguments of this article is that the very inability to define the offence strongly suggests that it is in fact a police power.

A Consorts

The key concepts of 'consorts' and 'habitually' are linked. Consorting itself has been held to be an easily proved element. The real issues of proof relate to whether the consorting is habitual and who it is with.

In the leading South Australian case of *Dias v O'Sullivan*, Mayo J discussed the meaning of consort:

'Consorting' ... requires, of course, some form of overt activity. The notion of association by persons comprehends (*inter alia*) the grouping of two or more persons where the individuals enjoy, or at least tolerate, the presence and proximity

5 (1935) 52 CLR 739, 743.

of each other, whether they congregate for no more than a few moments or for longer periods. The congregating together may be merely upon an accidental meeting of the group and without any discoverable motive whatsoever. The idea implicit in consorting, however, suggests a more or less close personal relationship, or at least some degree of familiarity, or intimacy with persons, or attraction from, or an enjoyment of, some feature in common. That results in a tendency towards companionship. Where there is consorting it may be expected to be in obedience to an inclination, or impulse, to gravitate into the presence of, or, if accidentally in such presence, to remain in a group with some other person or persons. The fundamental ingredient is companionship. The fact the people meet (*inter alia*) to carry on some trade or occupation is not inconsistent with a fraternising contemporary therewith amounting to consorting.⁶

In *Johanson v Dixon*, the leading High Court decision on the offence, Mason J stated:

In its context ‘consorts’ means ‘associates’ or ‘keeps company’ and it denotes some seeking or acceptance of the association on the part of the defendant (*Brown v Bryan* [1963] Tas SR 1 at 2) ... It is not for the Crown to prove that the defendant has consorted for an unlawful or criminal purpose. The words creating the offence make no mention of purpose: cf s 6 (1) (b) where the proviso refers to ‘upon some lawful occasion’. Nor does the word ‘consorts’ necessarily imply that the association is one which has or needs to have a particular purpose.⁷

These extracts emphasise that consorting in itself is a value-neutral concept and that legitimate gatherings, such as an incident of business trading, fall within the concept. There is also no implication in the term that the meeting be of any particular length. It can be extremely short.

1 *Can some consorting be innocent?*

The breadth of the notion of consorting has led to attempts to imply some limit into the offence and to carve out a defence of ‘normal’ or ‘innocent’ consorting which can be contrasted with the notion of a criminal or ‘nefarious’ consorting. There has been little support for this in the case law.

In *Gabriel v Lenthall*⁸ it was argued that driving a person to court to enable that person to appear in a matter could not be construed as consorting. Justice Richards disagreed stating that ‘[t]he offence is not being with thieves on occasions when it might be suspected that they are about their nefarious occupation, but simply habitually consorting with them; it is not companionship in thieving but with thieves.’⁹

Similarly, in *Auld v Purdy*, Purdy was charged with consorting with known prostitutes. One of the bases of the charge was that she shared a flat with a known prostitute. The magistrate dismissed the charge. On appeal, Street J had no difficulty in seeing this as consorting:

6 (1949) SASR 195, 200–1.

7 (1979) 143 CLR 376, 383.

8 [1930] SASR 318.

9 *Ibid* 327.

If he intended to hold that persons who live together, in the sense that of associating in intimate companionship in the same flat or room, could not be convicted if both were known prostitutes, then I think the magistrate fell into error.¹⁰

Similar arguments that exceptions should be recognised for ‘a minister of religion seeking to reform criminals or a mother visiting her sons’,¹¹ ‘to carry on some trade or occupation’¹² or that a person was merely a flatmate of a ‘known prostitute’ have been rejected by the courts.¹³ Even conversing with a reputed criminal at a court house was given short shrift. In *Beer v Toms* the Court held:

I hope it is not suggested that a Court House or its vicinity is a sanctuary or Alsatia wherein person may habitually consort with reputed criminals ... with impunity, whereas the same or similar habitual consorting outside that area would render them liable to prosecution ...

The section does not deal with the motive or purpose of the consorting at all, and no suggestion can be validly made that the prosecution has to establish anything sinister either in the initial meeting or in the subsequent remaining in company.¹⁴

Some magistrates still looked to find ways around this. In *Benson v Rogers*¹⁵ the magistrate tried to find an implication that the defendant must show a ‘taste for thieves’. On appeal, Burbury CJ repeated that there was no limitation:

The essence of consorting is in seeking or accepting the companionship of reputed thieves as a habit and it matters not whether it proceeds from feelings of friendship for persons who happen to be reputed thieves or from a ‘taste for thieves’ ... The defendant’s motives are irrelevant. The court is only concerned with the fact of seeking or accepting the companionship of reputed thieves.¹⁶

Despite all this case law to the contrary, in the New Zealand case of *Davis v Samson* a limitation was recognised.¹⁷ This decision was approved by Murphy J in the High Court’s decision in *Johanson v Dixon*:

‘Habitually consorts’ in this context does not include association for relationships such as doctor-patient, landlord-tenant, teacher-student, minister of religion-church member, solicitor-client, employer-employee, employee-employee, family relationships, or association for necessary transactions such as the association of storekeeper and customer. Association for such purpose is not consorting. As FB Adams J said in *Davis v Samson* (1953) NZLR 909, 911:

I do not think it need be feared that social workers, or probation officers, or members of the legal profession engaged in criminal practice, are likely to find themselves in danger of being convicted under s 49(d). They do not ‘consort’ with reputed thieves within the true meaning of that word.

Leaving aside circumstances where persons are together and are not consorting, consorting includes ‘innocent’ consorting.¹⁸

10 *Auld v Purdy* (1933) 50 WN (NSW) 219, 219–220.

11 *Clarke v Nelson* [1936] QLR 17, 19 (Macrossan SPJ).

12 *Dias v O’Sullivan* (1949) SASR 195, 200–1.

13 *Auld v Purdy* (1933) 50 WN (NSW) 219.

14 (1952) QSR 119, 126 (Townley J).

15 *Benson v Rogers* [1966] Tas SR 97.

16 *Ibid* 100–2.

17 [1953] NZLR 909.

18 *Johanson v Dixon* (1979) 143 CLR 376, 391–2.

However, Justice Murphy's attempt to put some purposive limit on the meaning of the term was not accepted by the other members of the court. Justice Mason, for the majority, put the matter beyond doubt. He held:

It is not for the Crown to prove that the defendant has consorted for an unlawful or criminal purpose. The words creating the offence make no mention of purpose ... Nor does the word 'consorts' necessarily imply that the association is one which has or needs to have a particular purpose. What is proscribed is habitual association with persons of the three classes, they being undesirable or discreditable persons.¹⁹

Thus the High Court has made it clear that any attempts to find implied limits in the offence by reference to its apparent purpose will fail.

B Habitually

The offence is not aimed at merely accidental or one-off meetings but at 'habitual' dealings. A definition often referred to in the cases is that given by Stout CJ in *O'Connor v Hammond*:

The term 'habitually' is used often as an antithesis to 'occasionally.' It would have to appear that it was the habit of the person accused to consort with the kind of persons mentioned – 'thieves' or 'prostitutes', &c. 'Consort' has in a sense the meaning of frequent companionship. But I must assume that the Legislature, in placing the word 'habitually' before 'consorts', meant to require proof of a companionship other than one that was merely occasional. The companionship must have been so constant as to have created a habit.²⁰

This raises the question of the distinction between 'occasionally' and 'habitually'. The key issue is determining the minimum level of companionship that will be recognised as 'habitual'. In *Dias v O'Sullivan*, Mayo J attempted a more exhaustive explanation:

'Habitually' requires a continuance and permanence of some tendency, something that has evolved into a propensity, that is present from day to day. A habit results from a condition of mind that has become stereotyped. In terms of conduct its presence is demonstrated by the frequency of acts that by repetition have acquired the characteristic of being customary or usual; behaviour that is to be regarded as almost inevitable when the appropriate conditions are present. The tendency will ordinarily be required to be demonstrated by numerous instances of reiteration.

The word 'habit' refers to the practice of an individual and may be applied to his ways of thinking, or of behaving, which have become so much in the ordinary routine through repetition by him, that the course of action is in part almost in the nature of a muscular reflex. Habitual manoeuvres will be carried out with little or no premeditation or design. If an act can properly be designated 'extra-ordinary' or 'exceptional' it is not incidental to habit. A habit may nevertheless become part of or, if not part of, be associated with, conduct that is essentially in performance of some recurrent duty. Something additional to, and no actual part of, such obligations may become an accessory or incident of regular routine.²¹

Justice Mayo's analysis inevitably relies on psychological concepts. His simplistic reliance on notions such as 'stereotyped' and 'muscular reflex' echoes

¹⁹ Ibid 385.

²⁰ (1902) 21 NZLR 573, 575–6.

²¹ *Dias v O'Sullivan* (1949) SASR 195, 200–1. This approach was approved in *Johanson v Dixon* (1979) 143 CLR 376, 383.

the difficulties courts have encountered in elaborating the nature of volition in elements of homicide and associated defences.²² On Justice Mayo's analysis, mere repetition of meetings does not constitute proof of habit. Instead what must be shown is some mental reflex in favour of such meetings. Despite this, the frequency of meeting remains the usual method of proof of habit.

In *Brearly v Buckley*, Gavan Duffy J noted:

To be in the company of reputed thieves on one occasion is not evidence of habit; to be in their company twice is evidence of the slightest; but no rule can be laid down as to the number of times that will suffice... Incidents weak in themselves may gain significance from others, and a number of incidents each trivial in itself may together make a damning whole.²³

This cumulative approach to proving habit appears to lie behind a longstanding practice by New South Wales police of making six 'bookings' before laying a charge.²⁴ This practice appears to result from police cautiousness. Certainly the cases quoted above suggest that two meetings could suffice to enable a finding of habit, if the surrounding circumstances supported the inference of habit. On the other hand, six 'bookings' may be insufficient depending on the circumstances.²⁵

A further implication not explored in the case law is the issue of whether habit is related to the intention or expectation of meeting, or whether an expectation of conversation in an accidental meeting is sufficient. It is arguable that the offence is limited to the former, so that the habit relates to an intention to seek out the company and actively further the relationship.

1 *Six months: the effective restraint*

Despite the fact that the courts have held that two or more instances of consorting could be sufficient, the enforcement of the offence has been significantly restricted by the need for police to make their 'bookings' within the six month period required by the relevant criminal procedure legislation. Currently, the requirement is contained in s 179 of the *Criminal Procedure Act 1986* (NSW).²⁶ As consorting is a continuing offence, police were and still are required to show that all the alleged instances of consorting occurred within six months before the information was laid.²⁷

This procedural requirement prevents police from storing up consorting 'bookings'. When combined with the practice of recording six bookings before

22 See, eg, *Ryan v R* (1967) 121 CLR 205; *Falconer v R* (1990) 171 CLR 30.

23 [1934] ALR 371, 372. See also *Auld v Purdy* (1933) 50 WN (NSW) 219, 220.

24 Apparently this is based on dicta of Bavin J in *Ex parte Corbett re Kelly* 57 WN (NSW) 51 that '[e]vidence that an accused was seen in the company of reputed criminals on seven occasions within six months ... is sufficient to support a charge of habitually consorting': in Cheryl-Ann Brunskill, 'Consorting' (2003) 11 *Policing Issues and Practice Journal* 1, 2.

25 Six bookings of meetings at a racecourse might suggest habit, but six bookings made in various stores such as supermarkets might not. In such environments, politeness might necessitate the exchange of pleasantries although the meeting was accidental.

26 Previously this requirement was contained in s 56 of the *Justices Act 1901* (NSW).

27 The initiating procedure is now achieved by the issuing of a court attendance notice – see *Criminal Procedure Act 1986* (NSW) s 173.

charging, the enforcement of consorting requires police to devote significant policing resources in order to gain the requisite number of ‘bookings’ within six months.

C Reputed criminals, etc

1 *Reputed criminals: 1929–1979*

The offence as originally enacted throughout Australian jurisdictions required habitual consorting with ‘reputed criminals’, ‘known prostitutes’ or persons convicted of having no visible means of support (that is, vagrancy in its traditional sense).²⁸ This was seen to create three classes of persons with whom it was an offence to consort. Two of these classes – prostitutes and vagrants – required proof that the persons with whom the defendant was consorting had in fact been convicted of the relevant offence.²⁹ However, the class of reputed criminal did not require proof of conviction, merely proof of a reputation that the person was a criminal. Consequently, reported cases tended to rely on proof of reputed criminality.

In *Dias v O’Sullivan* Mayo J engaged in a detailed analysis of the meaning of reputation. His Honour held that reputation was a fact, but that a person’s reputation need not accurately reflect reality.

A person who has acquired an unsavoury reputation may actually be virtuous and law abiding. Another individual, generally given a good character by those who know him, can be vicious and dishonest. Such errors arise from a variety of causes, ancestry, gossip, mistaken understanding of conduct. A person with a reputation of being a thief may be a praiseworthy citizen.³⁰

It was therefore possible for a person to be convicted of habitually consorting with a reputed criminal when the defendant knew or believed that the person was in fact innocent and upstanding. In light of the possibility for unjust conviction it is important to understand the nature and extent of the reputation that needed to be proved. Again, Mayo J in *Dias v O’Sullivan* outlined the various factors:

The fact, that is acceptable in evidence as reputation, must represent the state of mind held by the public (*R v Vincent* (1839) 9 C&P 275). It must be borne by the particular section of the community that is collectively aware of the individual. If opinions are divided, and the stage has not been reached where the repute is *more or less* generally accepted by those who know the person, these conflicting viewpoints can not be proof. There can only be one reputation. ... As to locality, the belief must

28 Conviction based on reputation remains the approach taken in jurisdictions other than NSW. In South Australia, Victoria and Tasmania however it must be proved that the defendant consorts with ‘reputed thieves’. There is some judicial support for the argument that this is a narrow concept and that a reputation as a fraudster would fall outside the scope of the offence: see *Dias v O’Sullivan* (1949) SASR 195, 204.

29 See, eg, the discussion in *Dias v O’Sullivan* (1949) SASR 195, 202.

30 *Ibid* 203.

be held where the individual resides, or where he is known. Testimony as to reputation must be from a witness who has personal knowledge of that fact. Information acquired upon a visit to the place or neighbourhood, with the object of discovering what the repute may be, is not property receivable from a witness who can only repeat what he has collected in that manner.³¹

This may appear to have provided some protection for defendants and a sizable evidentiary burden for prosecutors. However, as Mayo J accepted in the next sentence of his judgment:

It has been accepted, however, that in such a case as the present, a reputation known only to police is sufficient. A criminal reputation may often be known only to, and circulated amongst, the police gaol authorities, and the more intimate associates of the person himself. Where that is so, a limited notoriety is inevitable.³²

This and many earlier cases made it clear that the opinion of a police officer was sufficient to prove a reputation. Combined with the fact that the reputation did not need to represent the true character of the person, proof of a belief amongst police that certain persons were criminals was sufficient proof of reputation.³³ Reliance on the evidence of the arresting police officers became the standard method of proving the reputation of the persons consorted with.³⁴

Such approval is of course entirely circular and undercuts all of the restrictions outlined by Mayo J in the earlier extract. What the broader community thought of the person was entirely irrelevant if the view of a police officer could be accepted. Further, police would only charge this offence if they already believed that such a reputation existed. Reputation was an element of the charge. Consequently, unless the charging officer could be shown to be a rogue officer acting out of step with other local police the element was effectively proved on charge.

2 *Reputed prostitutes, drug dealers and criminals: 1970–1979*

There was no amendment to the law until the *Summary Offences Act 1970* (NSW) introduced a further element to the offence. Section 25 enacted:

A person who habitually consorts with reputed prostitutes or with reputed drug offenders or other reputed criminals or with persons who have been convicted of [having no lawful means of support] is guilty of an offence.

Penalty: Four hundred dollars or imprisonment for six months.

The change was more cosmetic than substantial, as drug offenders fell within the scope of criminals, but it did highlight the Askin Government's concern

31 Ibid.

32 Ibid (citations omitted).

33 The often referred to judgment of Stout CJ in *O'Connor v Hammond* (1902) 21 NZLR 573, 576 stated:

In my opinion, if persons had been several times convicted of theft, and this was known, they would properly be classed as 'reputed' thieves. They might, however, obtain that unenviable reputation without conviction. Nor need their reputation be known to all the community. It would be sufficient if several in the community believed, or if the police believed it and acted on their knowledge, and person who associated with them knew of this repute amongst the police.

34 See, eg, *Brealy v Buckley* [1934] ALR 371; *Gabriel v Lenthall* [1930] SASR 318; *Reardon v O'Sullivan* (1950) SASR 77; *Young v Bryan* [1962] Tas SR 323.

about drug trafficking. However, 'known prostitute' was replaced with 'reputed prostitute'. There was little relevant debate on the amendment, but the wording change suggested a loosening of the term to allow police to arrest a person on the basis of complaints or rumour rather than on evidence sufficient to support a conviction.

3 Conviction: 1979–present

Changing societal values made the opinion of a police officer a less desirable base for criminality. In 1979 the New South Wales Wran Labor Government decided to alleviate the harshness of the law by changing the basis of the offence to one of habitually consorting with someone convicted of an indictable offence, in circumstances where the defendant knew the persons were convicted criminals.

The Attorney-General in his second reading speech announced that the reforms were for three reasons:

This offence is presently objectionable for the following reasons: first, because it equates association with a particular class of individuals with the commission of a criminal offence. Unless there are exceptional and compelling reasons for otherwise providing, the basis of criminal liability should be what a person does, or, in appropriate cases, omits to do, rather than the identity of the person; second, it includes reference to reputed prostitutes and reputed drug offenders. There is no requirement to prove that such persons were in fact prostitutes or drug offenders: mere reputation is deemed sufficient. Third, in any event, it is not considered that association with vagrants or prostitutes warrants the imposition of criminal sanctions unless such persons are also concerned with more serious criminal activities. The new section 546A will be limited to the offence of consorting with persons who have been convicted of indictable offences. A similar penalty of imprisonment for six months or a fine of \$400 will apply.³⁵

Peter Anderson (who later became Minister for Police) also referred to the reform, drawing on his experience as a police officer:

I am aware that some concern has been expressed about the offence of habitually consorting. If one reads the proposals, the statute has been strengthened and made better to enable it to deal effectively with the hardened criminals in the State who have committed indictable offences. ... The indictable offences provision makes it a much wiser and saner piece of legislation. ... Under this provision there will be greater control. Charges will not arise out of people being in a halfway house or in a church, or using the facilities of a church – which was attempting to help ... But, people who do not want to be helped and carry on with their criminal activities will be caught by the net cast by these provisions.³⁶

It seems no-one was aware of the earlier discussion in 1929, where the use of 'reputed' was defended as giving convicted criminals a chance to reform. Of course, the use of 'reputed criminal' had made the offence more useful to police – in that one could be proved to be a reputed criminal on the evidence of police intelligence rather than a need to rely on convictions. But although the aim was

35 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 April 1979, 4924 (Mr Walker, Attorney-General).

36 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 April 1979, 4951–2 (Peter Anderson).

to remove this degree of police discretion, the result was also that the 1979 amendments created the very thing the 1929 law had been designed not to do – to make a pariah of convicted criminals irrespective of whether they continued to have a reputation as a criminal.³⁷ Peter Anderson's argument that people would not be charged for running a halfway house merely emphasised that such a charge was possible and the decision on whether one was acting appropriately in those circumstances was a matter entirely for police discretion.

D The knowledge of the defendant

One limitation the courts have implied into the offence is that a person could not be found guilty of consorting if they were unaware that the persons they were consorting with were reputed criminals.³⁸ In practice though, the habitual nature of such consorting operated to make it difficult to maintain an argument that there was no such knowledge.

As Ligertwood J noted in *Reardon v Sullivan*:

As a theoretical consideration this may well be so, but as a practical matter the question is largely academic. The very fact of frequent association with persons who are reputed to be thieves raise a presumption of knowledge and the more frequent the association the stronger becomes the presumption.³⁹

It would also appear that it became standard police practice to 'book' potential defendants and inform them that the persons they were associating with were reputed criminals.⁴⁰ Such notification removed the lack of knowledge defence.

E With persons

Another aspect of the breadth of the offence is that the persons the defendant is found consorting with need not be the same persons. In *O'Connor v Hammond* Stout CJ held that '[i]t need not be associating with the same person or person. If a person consorted with one thief on one day and another on another, and so on, that would be consorting with thieves.'⁴¹

This passage has been used repeatedly in the cases as authority for the proposition that a list of meetings with a range of persons who were reputed criminals was sufficient evidence, even if the defendant only met each person once, and fleetingly.

However, in *Johanson v Dixon*, the High Court did manage to impose one minor restriction on the scope of the offence by emphasising that the word 'persons' was in the plural and therefore required consorting with more than one reputed criminal. Justice Mason stated:

37 This had been previously recognised in *Waterman v Police* [1968] NZLR 689, 690 where McCarthy J noted that: 'Persons may be reputed thieves even though they have never been convicted ... Conversely, it may be that people have convictions yet have no such reputation,' however, he went on to say the general practice was to prove reputation by relying on prior convictions.

38 Since 1979, the offence has explicitly required proof of knowledge as an element of the offence: s 546A *Crimes Act 1900* (NSW). Prior to 1979, knowledge was an implied element of the offence.

39 (1950) SASR 77, 81. See also *Stevens v Andrews* (1909) 28 NZLR 773 and the cases cited therein.

40 See, eg, *Auld v Purdy* (1933) 50 WN (NSW) 218.

41 *O'Connor v Hammond* (1902) 21 NZLR 573, 575–6.

However, it seems reasonably clear that to constitute the offence, habitually consorting with more than one person, with a plurality of persons, is required. Association with a reputed thief would not be enough. The legislative policy which underlies the provision negatives the statutory rule of construction requiring that the reference in the plural should be read in the singular. It is a policy which was designed to inhibit a person from habitually associating with persons of the three designated classes, because the association might expose that individual to temptation or lead to his involvement in criminal activity.⁴²

The same comments could be applied to the current New South Wales law in that it too refers to persons. These comments are the only judicial limitation read into the otherwise broad wording of the offence.

II PROBLEMS WITH THE PRESENT FORM OF THE OFFENCE

Despite the problems that the use of ‘reputed’ had for labelling and branding persons who did not fit well into society as criminals, there remained the possibility that an otherwise upstanding member of the community could commit one crime and then be rehabilitated. The present law makes no such allowance. Once a person is convicted of an indictable offence, the conviction can be used as the basis of charging that person’s associates with consorting. Indictable offences form the majority of statutory offences in NSW and a considerable percentage of citizens have committed such offences. However, it is only a minority of these offenders who could be regarded as reputed criminals. In form, the 1979 amendment has, therefore, unintentionally widened the scope of the offence rather than narrowing it (although the practical effect is to narrow its scope).⁴³

In New South Wales an indictable offence is any offence that may be dealt with on indictment. The only offences that cannot be dealt with on indictment are offences described as summary offences, required to be dealt with as summary offences or which impose a maximum penalty of not more than two years imprisonment. It is therefore, for example, an offence in New South Wales to habitually consort with persons the defendant knows have been convicted of:

- aiding or abetting a suicide;⁴⁴
- neglecting to provide food for children;⁴⁵
- modifying data in a computer;⁴⁶
- tenants stealing fixtures in a rented premises;⁴⁷ and
- polluting water.⁴⁸

There are many prominent members of the community who have been convicted of an indictable offence. For example, a number of journalists and

42 *Johanson v Dixon* (1979) 143 CLR 376, 385.

43 It has, however, prevented the ‘booking’ of persons associating with persons considered ‘undesirable’ by police – unless police have previously gained a conviction against that person for an indictable offence.

44 *Crimes Act 1900* (NSW) s 31C.

45 *Crimes Act 1900* (NSW) s 44.

46 *Crimes Act 1900* (NSW) s 308D.

47 *Crimes Act 1900* (NSW) 154.

48 *Protection of the Environment Act 1977* (NSW) s 120.

presenters have been convicted of administration of justice offences such as contempt of court or perjury. Any person who is interviewed by persons commits the offence of consorting and would be liable to up to six months imprisonment.⁴⁹ This creates the unfortunate situation that politicians who discuss 'law and order' initiatives with such journalists may be committing a consorting offence. As there is no defence of lawful excuse and as the politicians are likely to be 'repeat offenders', a gaol term may be an appropriate sentence.

It remains more than possible for any of the following to be in breach of the offence:

- a person giving interviews to radio personalities who have been found to be in contempt of court;
- a priest or social worker seeking to reform criminals;
- anyone assisting ex-inmates in halfway houses or community centres;
- a mother visiting her sons in prison;
- driving convicted criminals to court in order that they could appear in a case in which they were concerned;
- sharing a flat with convicted persons;
- drinking with one's brothers; or
- a shopkeeper selling goods to patrons.

The majority of these instances have been either the basis of convictions or referred to in judgments or parliamentary debate.

The offence also applies to anyone convicted summarily of an indictable offence. Further, there is no requirement that a custodial sentence be imposed, or indeed any sentence. If a magistrate records a conviction under s 10 of the *Sentencing (Criminal Procedure) Act 1999* (NSW), but imposes no sentence, the person would be a convicted person for the purposes of consorting. However, it does not seem appropriate to label such a person a convicted person for the purposes of consorting when the judiciary has decided not to punish that person.

In addition, there is no limiting requirement that the convicted person be an adult. This is particularly important when the stated current police use of the offence includes using it to control street activity,⁵⁰ activity largely engaged in by youths. The offence, therefore, could be used by police to prevent juveniles from meeting.

Finally, it is inconsistent with the principle of justice and fair punishment that a person who has served and completed the punishment for a crime imposed by a court should then be subject to further punishment. In this case the person with a conviction is not committing the offence of consorting, but the effect is to punish that person by forbidding others from being in their company. Such indirect punishment is unjust. This is particularly as the punishment could be lifelong, that is, once convicted of an indictable offence, a person will always be a 'convicted person' for the purposes of consorting.

49 See, eg, *R v Laws* (2000) 116 A Crim R 70; *Attorney General (NSW) v Radio 2UE Pty Ltd and Jones* [1992] NSWCA 40762/91 (Unreported judgement, 28 August 1992); *ICAC v Cornwall* (1993) 38 NSWLR 207.

50 See below, Part III.

It is hoped that this description of the elements demonstrates the extraordinary scope of the offence. The offence applies indiscriminately to large sections of the public and without any clear justification. It is clearly not consistently applied, and no attempts have been made to broadly enforce it. This serves to underline the fact that the offence is really deployed as a discretionary police power.

In light of this it is important to consider whether there are any non-legislative boundaries limiting the scope of the offence. The article examines two such areas in which boundaries might exist.

First, the forces behind the introduction of the offence in 1929 are examined to see whether they provide a lasting justification for the use of the offence. Put another way, an examination is made as to whether the current scope of the offence was intended by the framers of the law.

Secondly, the police use of the offence is examined from the perspective that the offence is really a discretionary police power. This is done in order to consider whether there is evidence of an internal and principled restraint on its use that could be relied on to draw practical boundaries around the doctrinal expansion of the offence.

III THE INTRODUCTION OF THE OFFENCE: MEDIA PRESSURE AND PARLIAMENTARY JUSTIFICATIONS

This Part examines the historical origins of the offence and the debate surrounding its introduction into New South Wales in 1929.

A Vagrancy

In discussing the origins of consorting it is useful to begin with an outline of the common law offence of vagrancy. The rationale for and enforcement of crimes of vagrancy have a long and voluminous literature. Vagrancy offences, or their offshoots, remain in force in many jurisdictions.

Most of the academic debate concerning vagrancy laws centres on the reasons behind the enactment and expansion of the laws and whether the offences can be seen as part of a class struggle.⁵¹ These controversies aside, it is probably fair to say that the introduction of vagrancy laws was in some measure aimed at itinerant and unemployed workers,⁵² beggars and the homeless, and others considered undesirable or likely to form part of what was seen as the working

51 See Jeffrey Adler, 'A Historical Analysis of Vagrancy' (1989) 27 *Criminology* 209; Chambliss, 'A Sociological Analysis of the Law of Vagrancy' (1964) 12 *Social Problems* 67.

52 Sir James Stephen traces the vagrancy laws back to the passing of the *Statutes of Labourers 1349* and *1350*. These statutes required every man and women under the age of 60, and not having means of their own, to work for anyone who required it of them. Payment was at the customary rate of wages. This form of wage slavery was apparently in response to the breakdown of serfdom and an acute labour shortage caused by the Black Death. Labourers were not permitted to move away from their existing place of residence and anyone refusing to work could be imprisoned: Stephen, *A History of the Criminal Law of England* (1883) vol III, 203–5.

class criminal milieu.⁵³ The point to be made is that despite the underlying reasons behind the introduction of various forms of the vagrancy laws, they were seen to have what we would today describe as a strong ‘law and order’ function. It is also possible to see the laws as a reaction to ‘moral panics’ about undesirables.

Vagrancy in its classical form required a person to prove that he or she had means of support or income. If no acceptable explanation was given or if the means of support were unlawful – often a more objective test of ‘visible means’ was employed – the person could be gaoled or removed from the district.

B Consorting

Vagrancy as a means of keeping bound labourers in certain districts or of removing the poor from public places might have been to some extent effective, but as a means of controlling crime it was less than optimal. As long as the undesirable had some form of employment – or in many cases, money in their pocket – they could not be convicted of vagrancy. As a result, legislatures began enacting increasing numbers of variants or additions to the original offence of vagrancy.

One of these variants, developed in the Antipodes, was the offence of consorting. This resulted from a shift in legislative focus from the finances of ‘undesirables’ towards the company they kept. In New South Wales the first laws against undesirable association were enacted in s 2 of the *Vagrancy Act 1835*. In its original form it prohibited every person who was not a ‘black native or the child of any black native’ from ‘wandering’ in company with ‘black natives’. It also made it an offence to be found in a house in company with reputed thieves or persons who had no lawful means of support, where the person could not satisfy a magistrate that they were in the house ‘upon some lawful occasion’. These provisions appear to have been a colonial innovation, possibly due to the penal nature of the colony at that time.⁵⁴

This was taken further in New Zealand. The *Police Offences Amendment Act 1901* (NZ) s 4 made it an offence to ‘habitually consort with reputed thieves or prostitutes or persons who have no lawful means of support’. This variation was designed to deal with a class of vagrants who could not be moved on because they had enough money in their pockets to escape the definition of vagrant.⁵⁵ Specifically, the provision appears to have been aimed at catching pimps.⁵⁶

It took almost 30 years for the offence of consorting to cross the Tasman and enter the Australian statute books. However, when the offence was introduced into Australia it was justified as a means of breaking up of criminal gangs, rather than as a vagrancy measure.

53 James Sharpe, *Crime in Early Modern England: 1550–1750* (1984) 100 ff.

54 Enid Campbell and Harry Whitmore, *Freedom in Australia* (2nd ed, 1973) 135.

55 Ibid 136.

56 New Zealand, *Parliamentary Debates*, 10 July 1901, 272 (Mr G W Russell).

C Introduction of habitual consorting in New South Wales

A combination of the development of slums in East Sydney and restrictions and prohibitions on gambling, prostitution and drugs provided fertile ground for the growth of a number of organised criminal gangs in the 1920s and 1930s.⁵⁷ In order to curb the growing number of shootings, the Government passed the *Pistol Licencing Act 1927* (NSW) which provided gaol terms for any person found carrying an unlicensed pistol.

In response to this initiative, the East Sydney gangs began to carry razors.⁵⁸ As the razor was a weapon of intimidation and its effect was usually to maim rather than kill, it did not need to be used in as restrained a way as a pistol. One could razor-slash a victim and not be faced with the prospect, if caught, of a charge of attempted murder. This could explain the high numbers of altercations in which razors were used in this period.

From 1927 to 1930, there would be more than 500 recorded razor attacks and many, many more where the victims nursed their wounds in private.

In late 1927 alone, in the early days of the razor-gang wars, police confiscated sixty-six razors from suspects searched in connection with crimes. But finding the razor was one thing, convicting its owner of possessing a concealed weapon quite another. All men shaved, so proving that a victim was carrying the razor with bad intentions, and was not merely on his way home from the chemist to shave, was not easy. To make such a charge stick, the victim's blood, literally, had to be on the blade.⁵⁹

Outlawing razors was not initially considered a viable option. On 7 January 1928 the *Sydney Morning Herald* ('*Herald*') reported the Commissioner of Police as stating:

Amending legislation ... is of little use. Experience showed that when the legislation with regard to poisons was tightened up, people adopted other methods of suicide. In the same way, criminals have abandoned revolvers for razors.⁶⁰

In the same article the *Herald* reassured readers that despite the 'alarming number of cases of razor slashing' in recent months, the 'law-abiding citizen need have no fear' as the 'razor is a weapon used almost exclusively in underworld feuds'. The vast majority of the razor attacks appear to have been amongst gang members and revolved around territorial disputes or personal conflicts. However, this made it harder for police to prosecute as the victims largely refused to identify their attackers and kept a code of silence.

A weekly tabloid paper, *Truth*, began a campaign to bring the razor slashings to the attention of a broader public and agitate for law reform. Under banner headlines such as 'The Razor Gang: Terrorists of Darlinghurst Underworld:

57 See, eg, Peter Grabosky, *Sydney in Ferment: Crime, Dissent and Official Reaction 1788 to 1973* (1977).

58 Popular imagery, most probably assisted by the reporting of the *Truth*, saw the typical razor as a straight edge 'cut-throat' razor. It appears, however, that it was more likely to be a safety razor inserted into a cork – a weapon more easily concealed: see, eg, New South Wales, *Parliamentary Debates*, Legislative Council, 3 October 1928, 533 (F S Boyce, Attorney-General).

59 Larry Writer, *Razor: A True Story of Slashers, Gangsters, Prostitutes and Sly Grog* (2001) 48.

60 'Razor-slashing: A Terrible Weapon', *Sydney Morning Herald* (Sydney), 7 January 1928, 26.

Slashed and Disfigured Victims',⁶¹ 'Wipe Out Gang Terrorism'⁶² and 'Sweep the Gangsters from Sydney's Streets',⁶³ the paper whipped up a campaign to bring in more effective laws. The paper claimed its agitation had directly led to the subsequent law reforms.⁶⁴

The trajectory of the *Truth's* campaign is also interesting. Initially, and similar to the early *Herald* reports, the *Truth* in 1927 described the assaults as occurring only between gangs.

They are too wily to slash open the features of respectable citizens who would be good enough witnesses in a court of law to send the slashers to gaol.

Instead, they batten on men of their own calibre. They hold up fellow criminals and low associates for money, rewarding them with barbarously inhuman slashes if they refuse, and often after extracting cash from their pockets, treating them to a slash to keep them from protesting too vigorously.⁶⁵

However, as the slashings continued the *Truth* saw a widening trend and began to describe the assaults as threatening the general public, claiming, 'ordinary, decent citizens are being marked down as victims of this soul-sickening blood letting'.⁶⁶

The *Truth* called for harsher punishment, lionising judges who handed down maximum sentences. It also, predictably, called for stronger police powers and harried the Government about introducing a consorting law.⁶⁷ The paper argued that the police were powerless to use the existing vagrancy laws because of scams such as having a confederate work on a road gang in the defendant's name who could then disappear on the defendant's arrest leaving a record of employment, or the simpler ruse of obtaining a country bookmakers' licence.⁶⁸ Both methods stymied police attempts to prove that the defendant was without visible means of support.

The Government responded with a number of extremely repressive and regressive Bills. The Bills were introduced in two waves.

1 *Being in possession of a razor and bringing back the lash*

First, the *Crimes Act 1900* (NSW) was amended to provide for up to six months imprisonment for being in possession of a razor when arrested. Further, the penalties for the offences of malicious wounding and grievous bodily harm were amended to include whipping in addition to imprisonment. These provisions were contained in an omnibus amendment Act, the *Crimes (Amendment) Act 1929*.⁶⁹

61 'The Razor Gang', *Truth* (Sydney), 12 June 1927, 15.

62 'Wipe Out Gang Terrorism', *Truth* (Sydney), 15 January 1928, 23.

63 'Sweep the Gangsters from Sydney's Streets', *Truth* (Sydney), 16 September 1928, 24.

64 See, eg, 'Wipe Out Gang Terrorism', above n 62; 'Battle Between Police and Crooks', *Truth* (Sydney), 12 January 1930, 15.

65 'The Razor Gang', above n 61.

66 'Wipe Out Gang Terrorism', above n 62.

67 See, eg, 'Police Powers Must Be Extended', *Truth* (Sydney), 25 March 1928, 12.

68 'Sweep the Gangsters from Sydney's Streets', above n 63.

69 In addition to the razor gang provisions it contained a large number of disparate amendments ranging from fraudulent appropriation to NSW's first drink-driving offences.

The amendment inserted a new s 353B into the *Crimes Act*:

Where a person is in lawful custody upon a charge of committing any crime or offence and is found to have been carrying at the time or immediately before he was apprehended any razor blade or other cutting weapon, he shall, unless the justice before whom he is brought is satisfied that he was carrying the same for a lawful purposes the proof of which shall lie upon the accused, be liable to imprisonment for a term not exceeding six months.

There was almost no mention of this clause in the parliamentary debates, largely because it was placed with an amendment to the schedule of offences that allowed judges to order the lash. The amendment was to extend the lash as a permissible punishment to offences of ‘wounding, &c, with intent to do bodily harm’ and ‘Maliciously wounding or inflicting bodily harm’. Extremely heated debate ensued on whether such a barbaric punishment was appropriate. It appears that the Government’s intention was to give the judges the discretion to order the lash, but with no expectation that it would actually be used.⁷⁰ The Attorney-General asserted that the mere proposal had gang members ‘already so terrified by the thought of the lash that they are quaking under their skins, and the offence has already lessened’.⁷¹

It seems that the sentence of the lash was in fact never passed on gang members. However, the hope that the new offence would act as a deterrent appeared to have little effect. Instead, 1929 saw continued and more organised violence with a number of highly publicised pay-back shootings and slashings. These allowed the *Truth* to urge more effective law and order reforms.

The *Truth* only had one objective: consorting laws. This is epitomised in its editorial of 30 September 1928. Under the heading ‘The First Blow’, the paper stated in its editorial:

This measure [the introduction of the lash for wounding offences and the offence of carrying a razor when arrested] is certainly a step in the right direction, and is, as far as it goes, along the line strenuously advocated by this paper. But the Government’s policy does not go far enough.

The Vagrancy Act, with its loopholes through which criminals escape with ease, as yet remains unchanged; and nothing is done to make consorting with or among criminals a punishable offence.

Most of the crimes under which this community suffers, particularly crimes of violence, are the outcome of the gang system, and until the underworld gangs are broken up, there is little hope of improvement.⁷²

2 *Consorting*

With the continuing violence and the pressure exerted by the *Truth* it was probably inevitable that the Government would copy the New Zealand legislation and introduce a general crime of consorting. The Government was hurried along by the *Truth* under banner headlines such as ‘Get to work on the Vag. Act!

70 New South Wales, *Parliamentary Debates*, Legislative Council, 3 October 1928, 533 (F S Boyce, Attorney-General).

71 *Ibid* 540.

72 ‘The First Blow’, *Truth* (Sydney), 30 September 1928, 12.

Cabinet Must Bring in Bill that Will Aid Police to Break Up Gangs'.⁷³ The paper claimed the consorting clause in Western Australia had had a 'remarkable effect in checking crime'.⁷⁴ It was in the *Vagrancy (Amendment) Act 1929* (NSW) that the new offence of 'habitually consorting' with reputed criminals or prostitutes was created. Interestingly, the legislation was not introduced by the Attorney-General but by the Colonial Secretary, Captain Chaffey, who was the minister responsible for police. The matter had apparently ceased being a legal one and was instead now a police powers issue. Concern was expressed that the offence would merely reinforce misdirected police efforts:

It would be a very good thing indeed if our police could be brought to such a state of efficiency as would enable them to cope with the garroters and razor slashers who are at large to-day. Their activities, however, seem to be chiefly directed to sneaking around corners in order to discover whether a man is going to put half-a-crown upon a horse.⁷⁵

Further, during parliamentary debate, concern was expressed that the powers the new offence gave to police would lead to abuse. The Colonial Secretary justified the offence as necessary to combat a situation where 'there are in our midst many persons who having come from other parts of the world have been engaged in an orgy of crime in this city and suburbs'.⁷⁶ The Colonial Secretary was 'assured that if the powers which are being asked for by the police are given to them they will not be abused'.⁷⁷ This did not satisfy Premier John Lang who responded:

Glancing through the bill, it seems to me that it might be possible for some grave injustice to be done under it to persons who are perfectly innocent. ... Under the bill as it now stands it appears to me that if a woman was frequently seen speaking to women of bad character she might be committed to prison or at the discretion of the magistrate she might be taken in hand to be reformed ... If a decent woman can be hauled up because she is found in conversation with another woman who has been found to be guilty of certain practices and can be sent to a reformatory or a gaol, although she may have been talking to the other only for the purpose of reforming her, the position is intolerable. ... I am merely offering a word of caution against going too rapidly and making criminals of persons who, though they mix with these particular people, are with them not for a bad purpose but probably for a very good one.⁷⁸

Lang's concerns in 1929 have been echoed by judges, magistrates and academics ever since. The issue of police abuse of the offence remains a live issue and is discussed below. Whether the offence is being used in inappropriate

73 'Get to Work on the Vag Act!', *Truth* (Sydney), 16 September 1928, 21.

74 *Ibid.*

75 New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 September 1929, 327 (Francis Burke).

76 New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 September 1929, 325 (Captain Frank Chaffey, Colonial Secretary).

77 New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 October 1929, 682 (Captain Frank Chaffey, Colonial Secretary).

78 New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 October 1929, 683–4 (John Lang). The same concerns were expressed by William Davies: New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 October 1929, 686 (William Davies).

ways hinges on the question of the role of the offence – is it a substantive offence or a discretionary police power?

3 *Conviction or reputation*

During Committee in the Legislative Assembly it was suggested that the words ‘reputed thief’ – which were later amended to ‘reputed criminal’ – be replaced with ‘felons’ or ‘persons who have committed offences other than minor offences against the criminal law of the State’.⁷⁹

It was pointed out, however, that this was not appropriate:

If the word ‘felons’ were employed a person who had been convicted of a felony and had been released and was trying to reform would become a pariah in the community. Because, if this provision stands as it is, it would be an offence for anybody to associate with him! ... ‘Consorting with felons’ means consorting with a person who had been convicted of a felony and had been released. That man would practically become a pariah in the community because any person who associated with him would be guilty of an offence under this bill. The amendment suggested by the Hon Member would be too dangerous to embody in a measure of this kind.⁸⁰

This idea of rehabilitation was overlooked in the 1979 amendments.

4 *Conclusions*

Although from the perspective of 2003 it is difficult to be certain about the exact reasons for the introduction of the offence,⁸¹ some comments appear valid. The operation of the razor gangs, which had initially been seen as inter-gang turf wars, had been turned into a general public concern by media reports. As such, some form of parliamentary response was called for. It seems that initially this was considered to be an operational issue for police and that legislative reform was considered to be neither necessary nor efficacious. But as so often happens in such circumstances, public pressure led to legislative response.

The initial response was to create a crime of possession of razors and to make a symbolic increase in penalty for assault. Such legislative reforms were, however, essentially tokenistic and underlined the fact that the passing of new legislation, in itself, would not have any real impact. It seems that the *Truth*, having apparently achieved this success, wanted more. The second focus of its campaign was much more specific. This time it demanded a specific new offence, which it claimed police had said they needed. This was the offence of consorting.

From this it seems clear that consorting was not initially considered by the Government to be an effective means of dealing with the razor gangs. There is therefore doubt as to whether the offence was ever introduced to deal with a perceived gap in the law. It is just as likely that the offence’s introduction was merely to satisfy tabloid ‘law and order’ demands. If this is the case, there is little

79 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 1929, 730 (Harold Jaques).

80 New South Wales, *Parliamentary Debate*, Legislative Assembly, 23 October 1929, 731 (Andrew Lysaght).

81 It is also worth noting that this article draws on parliamentary debate and tabloid newspaper agitation, neither of which is necessarily a reliable source for the real decisions. Further research into Cabinet papers and Police archives – where available – may be able to shed some better light on the issue.

historical justification for the offence as a substantive offence, and no clear reason for the expansion of police powers. In any event, the razor gangs have long since disappeared from Sydney streets.

Such a campaign and the Government's rhetorical response resonate with the notion of a moral panic or activity – first popularised by Stanley Cohen.⁸² This is the idea that in some circumstances public concern about a deviant group and the government's response to the group is disproportionate to the threat the group poses. In large measure this comes about because of the role of the media, authorities and government in identifying a deviant group and defining the distinctions between broader society and the group in the simplistic bright line terms of 'us' and 'them'. The media is said to give exaggerated coverage to the issue and as a result create public anxiety. This exaggeration is normally achieved through the creation of stereotypical images. This leads to public demands that something be done, often backed up by calls for action by authority figures such as politicians and police. In response, the government introduces new laws that often involve the removal of civil liberties and the imposition of stiff penalties for breaches of public order offences.⁸³

The role of the *Truth* and the Government response to the 'threat' of the razor gangs appears to have followed this trajectory. While there was undoubtedly a serious degree of gang violence, the imagery of the 'razor gang' and its menace was significantly the creation of the media, encouraged by the police and the parliamentary opposition. The ultimate Government response was a broad-ranging offence that, at least on paper, significantly eroded civil liberties.

It is beyond the scope of this article to examine whether the introduction of consorting precisely fits the theoretical model of a moral panic and what any differences might mean. For present purposes it is sufficient to note that there are obvious resonances. The importance of this is that situations that can be characterised as moral panics are considered to be situations in which there has been a legislative over-reaction to a perceived threat. When the panic recedes, there is therefore a strong argument to repeal the relevant legislation.

Such moral panics are of course not monolithic. As the parliamentary debates show, many people felt that the new offence was inappropriate. It seems clear from the start that there was disquiet over the breadth of the offence. This disquiet was countered by assurances that the police would not abuse the power given to them. In fact, from its inception, the use of the offence has not had conviction as a major aim. This is probably because the police saw consorting as a power rather than as an offence.

82 See, eg, Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (3rd ed, 2002).

83 See, eg, Erich Goode and Nachman Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (1994).

IV POLICE USE OF CONSORTING

This Part provides historical snapshots of the use of consorting by New South Wales Police. While not an empirical study, the following examples give an indication of how the offence has been used by police as an intelligence-gathering tool and general police power, rather than as the substantive offence the *Truth* painted it as in its 1929 campaign.

A The 1930s

During parliamentary debate in 1929 the Colonial Secretary made it clear that the police did not intend to make a habit of charging people under the offence. Instead the aim was to use the offence to enable the police to caution persons and to use the threat of prosecution to move them on:

experience has shown that if the police have the necessary powers, all that is necessary in many cases is a warning, which has the desired effect in preventing people from committing offences. That is the definite and considered opinion of the police authorities.⁸⁴

Despite a report in the *Herald* that there had been a migration of criminals to Melbourne in response to the new law and its enforcement,⁸⁵ the *Truth* was unimpressed. On 12 January 1930 a banner headline asked:

Battle between Police and Crooks –
CRIMINALS STILL AT LARGE.
Why Has There Been No Raid in the Underworld?
'Consorting Clause' SO FAR IS A FARCE.⁸⁶

The emphasis in this article was that although some well-known criminals had gone to Tuggerah for a 'holiday' there were still large numbers of street prostitutes and sly grog shops in Sydney that should be prosecuted. The next week another editorial again pushed the line that the police should use the powers that the *Truth* had got for them.

Implicit in these articles is the idea that police saw the offence from the start as another discretionary police power rather than as a substantive offence in its own right. By contrast the *Truth* saw it as a substantive offence – one to be used to gaol gang members.

84 New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 October 1929, 723 (Captain Frank Chaffey, Colonial Secretary).

85 'Criminals Migrate to Victoria: Effect of New Law', *Sydney Morning Herald* (Sydney), 9 January 1930, 12.

86 'Battle Between Police and Crooks', *Truth* (Sydney), 12 January 1930, 15.

However, on 2 February 1930, the *Truth* trumpeted results. The banner headline proclaimed:

Hard Hit by Consorting Clause.
THEIR WINGS WELL CLIPPED.
Underworld Birds Will Now Find it Hard to Fly Together.
LAST WEEK'S MANY CONVICTIONS.⁸⁷

Unfortunately, this headline was not matched by the story that unfolded below it. The full-page story told in lurid detail the trial of seven women for consorting, four of whom were convicted and gaoled. They were all arrested in a room of an alleged brothel and charged with consorting with women of ill-fame. The women claimed that they were resting. The convictions were based on police evidence that there were indications that the house was a brothel and that the police had seen the women taking men into the house or talking to men on the street. Accompanying the main article was a smaller one, outlining convictions of between six months and two months for four men, three of whom had criminal records. The police evidence was that they were seen acting suspiciously at a bus stop in each other's company and the company of reputed criminals.

These articles give some indication of how the consorting laws were initially enforced. It would appear that once the police decided that a person was a criminal they might proceed to arrest him or her for consorting on any convenient ground.⁸⁸ In 1930, police arrested 54 males and 62 females, 68 receiving terms of imprisonment. In 1931, 68 males and 81 females were arrested, with 121 imprisoned.⁸⁹ These figures suggest that while there was an enormous 'success' with the new law, the fact that the majority of arrests were of females meant that predominantly street prostitutes were easy targets. On 16 February 1930, the *Truth* editorialised, '[t]he streets have been cleared of women by the *Consorting Act*, but the police have still the razor gangsters and underworld thugs to deal with'.⁹⁰

Such use of the offence lends support to the argument that the offence was in reality a crude form of public order police power. Removing prostitutes from the streets did little to combat crime, but probably had a positive impact on citizens' perceptions of crime. In fact the arresting of street prostitutes forced individual operators out of business and into the arms of the organised brothel owners. It is therefore no surprise that despite the passing of the consorting law, the power of Sydney's biggest organised crime figures, Tilly Devine⁹¹ and Kate Leigh,⁹² continued unabated. Both their empires had been built on brothels. On the few

87 'Hard hit by Consorting Clause', *Truth* (Sydney), 2 February 1930, 15.

88 Interestingly, it seems that there was at this stage no requirement of a minimum number of 'bookings'.

89 Writer, above n 59, 130.

90 'Whistling Bullets', *Truth* (Sydney), 16 February 1930, 12.

91 Despite going overseas initially (see 'Tilly Told to Get Her Ticket in a Hurry', *Truth* (Sydney), 9 February 1930, 20), Devine returned in 1931: see 'Lively "Welcome Home" for Tilly Devine', *Truth* (Sydney), 11 January 1931, 18. For a general history of Devine see, eg, Alfred McCoy, *Drug Traffic: Narcotics and Organised Crime in Australia* (1980) ch 2; Grabosky, above n 57; Writer, above n 59.

92 See 'Underworld Hag Queen of Long Bay', *Truth* (Sydney), 1 February 1931, 1. For a general history of Leigh see, eg, Writer, above n 59; Grabosky, above n 57; McCoy, above n 91.

occasions that they were charged with consorting, huge celebrity trials ensued, enabling the women to flaunt their power.

Given the amount of discretion the offence places in police hands, control of its use has been a point of contention from the start. In the 1929 parliamentary debate on the clause, the Colonial Secretary attempted to allay the concerns of members:

It is not intended that the power shall be given to every police constable to interpret as he thinks fit. Instructions will be given to the police as to how they are to exercise these powers. It will be for senior officers to decide what charges shall be laid, on the evidence which the police will obtain.⁹³

He pointed out that similar discretion was already available under the existing provisions of the *Vagrancy Act*.

The use of these powers by police, or at least the mythology surrounding consorting that developed within the police, has been recounted in interviews with retired police officers who were members of the Consorting Squad. Two such interviews are illustrative:

The Consorting Clause was the best thing ever, ... It broke up the razor gangs, because we'd see these criminals going about, see them together or even near each other, and we could say, 'I'm booking you for consorting'. But while it stopped the street crime, it didn't stop criminals getting together in private and planning their schemes.⁹⁴

We'd go out with our notebooks and make a note of where the criminals were and who they were with ... And then we'd come down on them. We could bust them on the spot, but generally, six bookings in a statutory period of six months and they'd go to gaol. It was very effective. We were allowed a bit of licence in those days. I don't believe in violence, but you met fire with fire. To be a good copper in Sydney then, you had to be able to beat your weight in wildcats.⁹⁵

Although, both interviewees regarded the offence as very effective, its effectiveness appears to be in the ease of gaining convictions. As one acknowledges, it had no effect on preventing crime other than opportunistic street crime.

The role of the Consorting Squad was to coordinate enforcement of the consorting law.⁹⁶ There is evidence that in the early years it was used quite aggressively. Police compiled dossiers on people discharged from gaols and used the threat of a consorting booking to extract information about others. The threat of a charge became the major use of the offence in later years.⁹⁷ It allowed police to arrest most people they regularly dealt with if those people proved to be uncooperative. It fitted easily into the culture of discretion and power that produced systemic corruption. However, it did little to counter serious or

93 New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 October 1929, 723 (Captain Frank Chaffey, Colonial Secretary).

94 Detective Bill Harris interviewed in Writer, above n 59, 128.

95 Superintendent Ray Blissett, former Head of the Consorting Squad interviewed in Writer, above n 59, 129.

96 The Consorting Squad was a part of the Criminal Investigation Branch and was in existence from 1929–1987: NSW Police Service, *Comprehensive Review of Criminal Investigation*, 25 September 1995, 93.

97 Writer, above n 59, 132.

organised crime and would have required very high levels of police resources – particularly as the ‘bookings’ had to all be achieved within a six month period.

B Concerns with police use of the offence: 1947 and 1979

At times during the history of the offence concerns have been raised about the reliance on police discretion to control the scope of the offence. For example Alderson, in his study of police powers and responsibilities in New South Wales, has noted that concerns were raised in the New South Wales Legislative Assembly in 1947 that there was a de facto quota system for consorting arrests, and that this was being enforced by the police hierarchy. A proposal to tighten the law and restrict it to those convicted of serious offences was taken to Cabinet, but not proceeded with.⁹⁸

As noted above, a similar proposal to tighten the law did succeed in 1979 when the Wran Labor Government introduced wide-ranging reforms to the law on summary offences in an effort to cure what they saw were the excesses of the previous law.⁹⁹ Speeches in Parliament on the amendment to consorting make clear that the rationale for the change was an attempt to restrict the degree of police discretion. At the time there was strong police opposition to the package of reforms which they saw as a restriction of necessary discretionary powers.¹⁰⁰ One complaint made by police following the amendment was that the offence had been rendered unusable due to the requirement that the persons the defendant consorted with were known to have been convicted of an indictable offence.¹⁰¹ Police still, however, considered the offence a valuable tool for obtaining what

98 Karl Alderson, *Powers and Responsibilities: Reforming NSW Criminal Investigation Law* (PhD thesis, University of New South Wales, 2001) 45–7. Of interest was the fact that such a proposal faced strong opposition from both police and the two tabloid papers of the day – the *Daily Mirror* and *Daily Telegraph*: at 46.

99 This involved the repeal of the *Summary Offences Act 1970* (NSW) and its replacement with a range of offences that placed ‘reasonable person’ constraints on police use of public order powers. As part of this reform package, consorting was moved into the *Crimes Act 1900* (NSW). In so doing, the elements of the offence were amended to remove reliance on the reputation of the person consorted with and replaced with knowledge that the person had been convicted of an indictable offence. There does not appear to have been much detailed debate about the amendment to the offence of consorting itself. The repeals and reforms were rushed through Parliament as a package of cognate Bills and little time for discussion was permitted. As the Bills were part of a package that included laws on prostitution, demonstrations, public drunkenness, offensive behaviour and nude bathing, the reform of consorting was given little attention. It was, however, discussed in two Government speeches, the Attorney-General’s second reading speech and a speech by Mr Anderson.

100 This campaign is reviewed in Sandra Egger and Mark Findlay, ‘The Politics of Police Discretion’ in Mark Findlay and Russell Hogg (eds), *Understanding Crime and Criminal Justice* (1988) 209. The chapter recounts the highly political campaign waged by the Police Association, the organisation representing police officers. It included placing a full page advertisement in the *Daily Telegraph* warning that the repeals meant that police could ‘no longer guarantee your safety’ on public streets, and numerous radio and television interviews. Given that consorting was merely being amended in comparison to the repeal of the *Summary Offences Act 1970* (NSW), little direct debate centred on consorting, though it can be assumed that the general police concerns about the restriction in police discretionary powers would have applied to the reform of consorting.

101 Keenan, ‘Bring Back Old Consorting Laws, Detectives Say’, *Sydney Morning Herald* (Sydney), 17 July 1985, 3.

the police called ‘information reports’ on suspects and that it remained an effective intelligence gathering exercise.¹⁰²

C Recent resurgence?

1 *Research and Parliamentary Reports*

Despite these complaints, consorting continues to be used sporadically by police, primarily as a crude form of intelligence gathering. Dixon and Maher report the following comments by a Cabramatta based police officer:

I don't think there is enough street hassling going on, there should be more police speaking to them, getting their details, 'What are you doing here? Where've you been today? What are you gonna do?' There should be more of that. Like there used to be a lot of police in the consorter of hassling people in snooker rooms and pubs and things have dropped off a bit, and that intelligence can be valuable in Cabramatta, 'cause there's always groups of Asians, you know 2 or 3, up to 10 to 15 people at a time.¹⁰³

In a footnote, the authors note:

Regarding practice in Cabramatta, some user dealers interviewed in fieldwork reported being threatened with consorting charges. Some officers appear to have exploited their lack of legal knowledge, suggesting that after a certain number of ‘bookings’ consorters could be imprisoned without a court appearance. A more mundane reality was depicted by one LAC officer: ‘We’ve kicked it [use of consorting provisions] off again. It seems ... [as] if the bosses like to run it and get people to put in consortings and then the people out there on the street, whether through laziness or ineptitude ... [it] just dies off and I think most of the time the police out there think, ‘Well, I’m putting it in, but nothing’s happening ... Why should I put it in?’ ... But we’re trying that again.¹⁰⁴

In what probably constitutes a parallel to New South Wales Police practice, similar uses of consorting appear to have been made by Victoria Police. In 2002 a Victorian Parliamentary Committee recommended the repeal of Victoria’s consorting offence.¹⁰⁵ In submissions to the Committee, police argued against this on the grounds that consorting was ‘useful as a “strategic tool” for crime prevention’.

The Committee’s report noted:

Victoria Police also submitted that internal police procedures ensured that persons were only charged with consorting if formally reported on numerous occasions within a defined timeframe, and that while rare, such prosecutions were generally successful.

The Police Association ... in contrast to the Victoria Police, suggested that the internal police procedure requiring multiple reports of consorting before charging an individual for this offence was unnecessary and was responsible for the under-utilisation of the provision.

102 NSW Police Service, *Comprehensive Review of Criminal Investigation*, 25 September 1995, 93.

103 David Dixon and Lisa Maher, ‘The Policing of Drug Offences’ in J Chan, David Dixon, Lisa Maher and Julie Stubbs, *Policing in Cabramatta: Report for the NSW Police Service* (1998, unpublished) 73.

104 Ibid 73, fn 13.

105 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Vagrancy Act 1966: Final Report* (2002). The Government is still considering the recommendations.

Victoria Police and the Police Association gave evidence to the Committee that the consorting provisions are used by police to intervene in situations where known criminals are meeting in a public environment for the purpose of planning criminal activities.¹⁰⁶

Senior Victoria Police suggested that the need to constantly be out making consorting bookings was useful in creating a community perception that the police were being proactive.¹⁰⁷ It was also suggested in evidence that only persons with extensive criminal records were targeted by police for consorting bookings.¹⁰⁸

This use of the powers both illustrates the limitations of the offence and also the breadth of discretion that lies with police. Of some concern is the tension between the position of senior police who recognise the need for a limit on the discretion, and the Police Association who argue for what is effectively an unfettered discretion. But while there is support for its continued use by police, no systematic information on use of the consorting offence is available.

2 *Police rhetoric and encouragement*

There is evidence, however, that with the disbanding of the Consorting Squad in 1987, the procedures for recording and collating consorting ‘bookings’ or ‘information reports’ broke down. A major New South Wales Police report on investigation practices, the Comprehensive Review of Criminal Investigation¹⁰⁹ (‘CROCI Report’), investigated the issue and concluded that insufficient ‘bookings’ were being made. The Report found that there was a lack of police knowledge of the use of the offence and that the procedures for recording the ‘bookings’ were inadequate.

One of the strongest indications in the CROCI Report that Police continued to jealously protect consorting and saw it as a discretionary power rather than as a substantive offence was the disturbing endorsement of a Police Academy lecture which:

106 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Vagrancy Act 1966: Final Report* (2002) 11. One particular concern of the Committee was that breaking up meetings of criminals merely displaced their meeting venues and constituted no more than harassment. The police responded:

Senior Sergeant Mullett: It is a real preventative tool. In terms of harassment, our members are more accountable – and rightly so – than they ever have been. They have to act professionally. It is not a matter of arresting people for consorting. It is about criminals habitually consorting with each other; it is about going through a proper professional process. At present we have no problem in the retention of certain policy accountabilities from a management perspective within the Victoria Police Force. We would like to think our members these days act extremely professionally and are absolutely accountable.

107 Evidence of Acting Commander Ditchburn quoted in Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Vagrancy Act 1966: Final Report* (2002) 12.

108 Evidence of Detective Inspector Sitlington and Detective Senior Sergeant Chidgey quoted in Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Vagrancy Act 1966: Final Report* (2002) 12.

109 *Comprehensive Review of Criminal Investigation*, NSW Police Service, 25 September 1995, 92–104.

warned that since its introduction in 1929, even as changed from time to time, the legislation has proved extremely valuable, 'so we must treat it with the utmost care and discretion to see that no precedent' is established to 'defeat its object'.¹¹⁰

The report noted:

It cannot be ignored that the enforcement of guilt by association legislation is a sensitive issue. The need for care and discretion has always existed and perhaps even more so today. ... Even as the matter stands, whatever the real or perceived (and some appear to be no more than that) problems in certain situations, there appears to be still ample opportunity to enforce the consorting provisions in respect of known criminals.¹¹¹

These passages suggest an official police view that criminality can still be determined through guilt by association and that persons that police 'know' to be criminals can be prosecuted or harassed as a result of their association with convicted persons. The main control on this discretionary power appears to be a fear that over-zealous prosecution could lead to a negative precedent which could restrict the power. As long as no such precedents arose, the practice of 'bookings' would remain unfettered by judicial interference.

The report concluded that 'the enforcement of the consorting provisions was a valuable pro-active and intelligence gathering strategy' and that the level of enforcement should be increased. This recommendation again highlights the emphasis on the use of the consorting 'booking' as a police power, rather than the charging of consorting as an offence.¹¹²

Reports also have appeared in the media suggesting police efforts to revive the use of consorting in a large-scale way. In July 2001, the *Daily Telegraph* reported that New South Wales Police were again using the consorting offence in a coordinated manner. The paper reported the existence of Operation Consort, which attempted to 'drive gang members and criminal groups out of the city'.¹¹³ There was no comment on the degree of actual or perceived effect this operation was having.

The *Manly Daily* has also reported that Manly police began a concerted consorting sweep in early 2002. The article reported police as reviving the offence to 'isolate criminals'.¹¹⁴

On 28 April 2003, the *Daily Telegraph* reported that the Minister for Police had highlighted plans by Ku-ring-gai police to blitz their local area which involved, amongst other measures, 'use of the Government's gangs and consorting legislation'.¹¹⁵ Such statements suggest that at the highest levels consorting continues to be viewed as a viable approach to policing. In addition, there have been calls by police to extend consorting laws into a national scheme – based on current concerns over bikie gangs.¹¹⁶

110 Ibid 99.

111 Ibid 104.

112 Ibid.

113 'Consorting Laws Hit City Gangs', *Daily Telegraph* (Sydney), 5 July 2001, 13.

114 'Criminals Warned', *Manly Daily* (Sydney), 1 February 2002, 5.

115 Charles Miranda, 'Boys Are Back In Town – 10 Gangs Spreading Fear and Violence', *Daily Telegraph* (Sydney), 28 April 2003, 5.

116 Chulov, 'War on Bikies Goes National', *The Australian* (Sydney), 18 March 2002, 5.

As further evidence of the continued encouragement given to police to enforce the offence, an article on the scope of the offence and the procedures for 'bookings' has recently appeared in *Policing Issues and Practice Journal*, a publication that provides ongoing education to police officers.¹¹⁷

3 Use as an offence

But despite all of the encouragement and rhetoric, in recent years there have been very few prosecutions. Statistics obtained from the Bureau of Crime Research and Statistics show that almost no charges or convictions have been recorded in the last decade.

| Year | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 |
|----------------------------------|------|------|------|------|------|------|------|------|------|------|
| Total charges | 1 | 1 | 6 | 1 | 1 | 1 | 2 | 7 | 1 | 2 |
| Guilty ¹¹⁸ | 1 | 1 | 6 | 1 | 1 | 1 | 1 | 3 | 1 | 2 |
| Principal offence ¹¹⁹ | 0 | 1 | 3 | 1 | 1 | 1 | 1 | 2 | 1 | 0 |

These figures are highly instructive. They show that the level of use of the offence is extraordinarily low with only one charge being made in most years. As would be expected with such an easily proved offence, it also seems clear that prosecuting tends to lead to a determination of guilt on that charge, except in 2000 when an aberrant number of not guilty determinations appears to have occurred. It is unlikely that one defendant was charged with more than one charge of consorting¹²⁰ and so the figures probably record seven separate defendants.

The reason for the lack of guilty findings in 2000 may be related to the fact that in that year five of the seven charges were not the principal offence with which the defendant was charged. The four charges that did not result in a guilty determination may have been additional charges not pursued at trial. In any event, if one concentrates on the charging of consorting as a principal offence most years show that there have been very few prosecutions.

The six charges in 1995 may also be explicable on the basis that the CROCI Task Force interviewed many officers about the offence and may have prompted a few to try using it again. If so, the enthusiasm waned.

117 (2003) 11 (1) *Policing Issues and Practice Journal* 1.

118 Number of charges with a guilty determination, not the number of convicted persons.

119 Principal offence is defined as the charge for which a guilty determination was reached and received the most serious penalty.

120 As consorting is a continuing offence, the bookings would all be instances of the one ongoing activity.

4 *A Case Study: Consorting in Bowral*

Another fascinating insight into the conviction figures is that the two convictions in 2002 have been reported as a case study in the internal New South Wales Police journal, *Policing Issues and Practice Journal*. We are therefore able to get detailed information on the two most recent consorting convictions.

The case study is deeply worrying. The article holds it up as best practice for policing and it represents the only convictions for consorting in 2002. The consorting occurred in Bowral, a country town in New South Wales which has become highly popular as a weekend destination for the more affluent members of Sydney society, and as a result has real estate prices on a par with Sydney prices and a shopping precinct that caters to affluent tourists. It does not appear to have been regarded as a crime hot-spot. The rationale for police use of consorting can be ascertained from the article:

The selection of two local targets was relatively easy because they were always causing concern for the community and operational police in the Bowral Central Business District (CBD). There was some intelligence to support previous drug sales, but the major concern was their constant attendance in the Bowral CBD, as this seemed to attract other criminals into the area to meet up with them, formulating untidy congregations. ... '[M]ove on' legislation could not really apply and 'stop, search and detain' legislation was already being applied with little or no effect.¹²¹

A coordinated effort to collect consorting 'bookings' on these two persons was undertaken and over seven bookings were made in less than three weeks. These were then used as the basis of charges. In June 2002 the defendants pleaded guilty to consorting and were both sentenced to three months imprisonment.

These facts raise some troubling issues. First, the claimed issue for police was the formulation of 'untidy congregations'. It is unclear whether this phrase is the author's or that of local police. But the phrase suggests police disregarded as justifications for the defendants' activities fundamental issues of freedom of association and the fact that they were meeting in the social centre of the town. Particularly worrying is the use of the word 'untidy', which suggests that the major concern was that the meetings detracted from the aesthetics that the Bowral shopkeepers were trying to present to consumers. There seems to be no suggestion of danger to other citizens or the possibility that forms of street crime were being perpetrated. While of course police may have felt these were also issues, it is interesting that the article does not mention them.

Secondly, the fact that 'move-on' powers and search powers were considered to be having little or no effect is of interest. The search powers require that the officer have a reasonable suspicion that the person is carrying something that is either stolen, dangerous, an illegal drug or is intended to be used in the commission of a crime.¹²² Clearly, a person who is merely meeting with others for no criminal purpose is unlikely to be carrying such items and any police

121 Cheryl-Ann Brunskill, 'Consorting', (2003) 11(1) *Policing Issues and Practice Journal* 1, 1. Apparently these strategies had been highly effective for the Police Crime Coordinator in his previous work in Cabramatta.

122 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 21.

suspicions would need to be supported by some other intelligence to be reasonable. Conducting such searches is of course a highly effective way of harassing persons the police wish to discourage from frequenting an area. One suspects the reason why it was not effective on the main street of Bowral was due to the fact that, unlike Cabramatta, police were unable to base their reasonable suspicions on the surrounding environment.

The 'move-on' powers are much more likely to have aims congruent with consorting. The power of police to give directions to a person to 'move-on' is contained in s 28F of the *Summary Offences Act* 1988. It authorises an officer to give a direction to a person (most often a direction to 'move on') if the officer has reasonable grounds to suspect that the person is causing an obstruction, harassing or intimidating others, could cause fear to others, or is buying or selling drugs. In the event that the person refuses to comply with the direction, the direction can be given again. If on the second occasion the person continues to refuse to comply an offence is committed. The maximum penalty is \$220.

A person given a direction by police could be subjected to the same degree of harassment as a person being 'booked' for consorting. However, the basis on which an officer can give a 'move-on' direction is limited by clear criteria based on public harm. If the person is behaving in a quiet and orderly manner, such as having a drink with friends, there is no basis on which the direction can be made. Furthermore, if the officer does in fact make the direction and the person complies with that direction, or a second direction, no offence is committed.

By contrast, the attraction of consorting to the Bowral police may well have been that there was no restriction on when the 'booking' could have been made. In essence this use of consorting relies on the fact that 'innocent' consorting is a crime. Also, any compliant dispersal by the persons 'booked' would be of no avail. The 'booking' would still remain an available instance for a later charge.

Finally, the handing down of terms of three months imprisonment to each defendant appears extraordinary. Section 5(2) of the *Sentencing Procedure Act* 1999 (NSW) requires a judicial officer imposing a sentence of less than six months to state reasons why no other form of penalty was appropriate. It seems unclear why a court would sentence a person to imprisonment for this offence. It would be forcing the defendant to consort with other prisoners, thereby continuing the crime for which the person was punished. Such a sentence merely reinforces the illegality of the offence.

5 Problems with the current use of the offence by police

This article is not a detailed empirical study of the use of consorting by police and much of what has been outlined above is anecdotal. The comments of the interviewees in Cabramatta, however, reflect a well-known history of the use of consorting by police as a way of hassling persons that they consider 'undesirable' or who could be a possible source of intelligence. This method is highly contentious. It effectively amounts to institutionalised process corruption for a police officer to suggest that they intend to charge a person with a criminal offence unless that person provides a *quid pro quo* for the officer.

It is indisputable that police need freedom to obtain intelligence in informal and non-bureaucratic ways.¹²³ But that is not the same as permitting a discriminatory use of the threat of prosecution to obtain information or to disrupt a person's social activities. With such a wide discretion, claims by police of professionalism or appropriate internal controls over the use of the discretion become problematic.¹²⁴

On the other hand, the Bowral use of consorting as a substantive offence is also of concern. Consorting appears to have been used to remove undesirables from the streets of Bowral in circumstances where there is no modern police power to do so. In such circumstances the police appear to be utilising an anachronistic offence to achieve an end that modern police powers do not permit.

There seems to be little if any attempted use of the offence by police for the purpose of preventing crime, in that prosecutions under the offence are minimal, and the Bowral prosecution does not appear to have been justified on this ground. Any concerns over public safety or the meetings of criminal gangs are much better dealt with by the recent 'move on' powers and non-association orders which, by contrast, provide a much more principled approach and are less amenable to process corruption by police.

6 *An unlikely safeguard: police ignorance*

One of the greatest limits on the use of the offence in recent times has been the general police ignorance of the offence and its breadth. The 1995 CROCI Report surveyed police officers and found that significant numbers were unaware of the offence or how it could be used. They consequently recommended further training be given to police on the use of the offence.

That need for further education could well lie behind the recent *Police Issues and Practice Journal* article. The article goes into elaborate detail on how police should take 'bookings', even giving set questions and likely answers. However, even this article evidences the lack of knowledge police have of the offence. In the article's conclusion there is a warning to police that a whole series of professional and business relationships are not consorting, quoting the passage from Murphy J in *Johanson v Dixon* referred to earlier. The writer seems to be unaware that she is quoting a dissenting judgment. However, reliance on continuing police ignorance of the scope of the offence is neither an appropriate nor safe approach to reform.

V CONCLUSIONS

In light of both the expansive reach of the offence and its inappropriate use by police, it is considered that the best course is to repeal the offence. The degree of discretion granted to police and the extremely wide net cast by this offence create

123 Rule-bound approaches to policing have been effectively criticised: see, eg, David Bradley, Neil Walker, and Roy Wilkie, *Managing the Police* (1986).

124 See, eg, the claims made by Victoria Police discussed above in the text accompanying nn 105–108.

an extremely fertile ground in which corrupt conduct and practices can flourish. It is in the interests of both the community and the police that the law should provide both a sound and detailed basis for the exercise of police powers.

It seems clear that the 1979 amendments were made in order to prevent the harassment of persons by police on the basis that the police considered that the person had a reputation as a criminal – even in circumstances where they had no conviction.

However, if the 1979 amendments were to be consistently enforced, anyone convicted of an indictable offence could be subjected to a lifetime of solitude. While the old law at least held out the possibility that a criminal might reform and cease to have the reputation of a criminal, or that an otherwise upstanding citizen might have a momentary lapse into criminality, the current law is not so forgiving. In other words, the law is not designed to be enforced consistently. It is instead designed to be used selectively.

In the most recent reported case on the offence, *Jan v Fingleton*,¹²⁵ King CJ of the South Australian Supreme Court began his judgment with the following words:

The offence of consorting presents special difficulties to a sentencing court. Apart from the statute the conduct to be punished may be quite innocent. A person may find, by reason of the family into which he was born and the environment in which he must live, that it is virtually impossible to avoid mixing with people who must be classed reputed thieves. He is to be punished not for any harm which he has done to others, but merely for the company which he has been keeping, however difficult or even disloyal it might be to avoid it. The wisdom and even the justice of such a law may be, and often has been, questioned.¹²⁶

It is clear that the offence is an anachronism introduced as a result of a media campaign and used in an era when police were not as accountable for their actions.

Consorting is best understood as a police power rather than as a substantive offence.¹²⁷ This perspective provides a way of understanding both the history of use of the offence by police and their apparent concern to retain the offence. However, the breadth of the power granted to the police and the lack of any real external or objective way of creating principled boundaries for its use are a matter of deep concern.

As Dixon argues, what is appropriate in such circumstances is a ‘double-track strategy’ which combines elements of both external and internal control.¹²⁸ The current consorting offence relies entirely on internal and opaque police controls over the discretion and is therefore objectionable. What is appropriate is an offence/power that provides enough discretion for internal police control but is still limited by externally set boundaries and open to review. This is the form that modern police powers now take. Powers such as the ‘move-on’ powers do grant the police discretion – but within boundaries clearly defined by legislation.

125 (1983) 32 SASR 379.

126 Ibid 380.

127 See Dixon, above n 3, 68 ff.

128 Ibid 310.

In New South Wales there has recently been an extensive clarification and codification of many police powers, culminating in the enactment of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). This Act collates a large number of significant police powers, such as powers to investigate, question, search and arrest. The aim of the Act is to both grant police discretionary powers but also to provide safeguards on the use of those powers. It does this largely by requiring certain prerequisite circumstances or procedures without which an exercise of the powers would not be lawful. The offence of consorting by contrast contains no safeguards or restrictions on its use. It is, therefore, an outmoded approach to police powers that should have no place in modern policing.

In addition, the enactment of the right for police to request non-association orders means that the offence of consorting is now redundant. These non-association orders constitute a modern form of consorting laws – one that contains safeguards on the use of the power.¹²⁹ The law makes it an offence to associate with named persons or in designated places without reasonable excuse and in this way resembles consorting.¹³⁰ However, it differs in that it is only an offence to do so if such association occurs in violation of a court order.¹³¹ Such an order can only be made following conviction of an offence.¹³² Thus the restriction on the freedom to associate can only be imposed on a person who has been convicted of an offence, whereas under the consorting offence, an otherwise innocent person can be charged. Additionally, the orders must specify each person with whom the offender may not associate, and the court must be satisfied that the offender is aware of who these people are.¹³³

Non-association may itself contain unacceptable infringements on a person's civil liberties. However, it is a significant improvement on consorting and the availability of the orders would appear to remove any residual argument for the continuation of consorting as an offence.

Given that the offence is outmoded, and the ills that it is intended to combat have been now comprehensively dealt with by the new non-association regime, there is no justification for its continued existence on the statute book. Far less is there justification for its use in the way it appears to have been used in Bowral. Such use seems to be an attempt by police at a local level to exercise powers beyond what the legislature has intended them to have by reviving an obsolete offence. To avoid such attempted revivals, the offence should be repealed.

Law reform bodies in Australia that have examined the offence have similarly recommended its repeal. In 1992 the Law Reform Commission of Western Australia, in recommending repeal, stated it was:

129 *Crimes (Sentencing Procedure) Act 1999* (NSW) pts 4A and 8A.

130 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100E.

131 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100E. The order cannot prohibit the offender from associating with his or her close family: s 100A(1).

132 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A(2).

133 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100B.

inconsistent with the principles of the criminal law to make it an offence to associate with particular people. Offences should proscribe conduct thought deserving of punishment. Merely associating with people, whether they are known to be in a particular category or are merely reputed to be in a particular category, should not be criminal.¹³⁴

The Victorian Scrutiny of Acts and Regulations Committee similarly recommended repeal in 2002. They concluded the problems with the offence were that it:

- [is] predicated on the principle of guilt by association (in breach of community belief in the principle of freedom of association);
- confer[s] an undesirably wide power to charge individuals in the absence of a substantive offence;
- appl[ies] a reverse onus of proof in breach of modern legislative practice and the right to remain silent [such a defence does not exist in NSW];
- may require an inappropriate allocation of police resources to enforce;
- very rarely forms the basis of a charge;
- may have a negative impact on police-community relations;
- may unfairly discriminate against certain already marginalised individuals, in that the provisions are most likely to be used against young persons and petty criminals that are forced to congregate in public spaces where they may be observed to be ‘consorting’; and
- [is] based on spurious logic that is generally at odds with contemporary principles of jurisprudence and criminal justice.¹³⁵

These points are self-explanatory and compelling. They emphasise that consorting is an offence that dates from a more simplistic era when people gathered in public to plot crime (if such an era ever existed). It takes no account of the technological means by which crime can be planned and organised. Consequently, as recent press reports suggest, it concentrates police resources on low-level street disturbances and ‘undesirable’ behaviour rather than on preventing or investigating substantive criminal offences. It also violates the fundamental tenet of freedom of association on the spurious logic that convicted criminals remain ‘criminal’ for the rest of their lives.

As Dixon has stated

A fundamental task of police reform must be to help police (and ‘the community’) to see eg, the Vietnamese heroin user, the westie ‘hoodlum’, or the Aboriginal suspect as part of, not an alien threat to, ‘the community’.¹³⁶

Consorting does not do this. It assumes that convicted persons are alien to the community and are to be prevented from being reintegrated by forbidding their association with any person. It is not an offence or police power that builds safer

134 Law Reform Commission of Western Australia, *Report on Police Act Offences*, Project No 85 (1992) 41–2.

135 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Vagrancy Act 1966: Final Report* (2002) 12–13.

136 Dixon, above n 3, 316.

communities. Instead its whole rationalisation is to atomise individuals. Leaving the choice of which individuals to turn into pariahs to individual police officers with no external control is no longer a degree of discretion that should be afforded to police.