

# MEAN streets

By Henry Pill



New police powers from reformulated consorting laws and stop-and-search laws pose a significant threat to civil liberties around Australia. The NSW consorting laws were enacted recently with relatively little fanfare, but these laws, and others like them, are critically important. They expand police powers in a way not seen for two generations.

**T**he new police powers are concerning not only from a civil liberties perspective but also from a professional one. They may impact upon the personal and professional lives of those working in and around the legal profession.

'Consorting' is the criminal act of association. Consorting laws make it an offence for a person to associate with various types of 'known offenders'. Essentially, if you spend time in the company of individuals who have prior convictions for a range of offences, you can be arrested, convicted and imprisoned.

That may sound like a gross oversimplification. Scarily, it's not. That's all there is to it.

If you think it sounds like some sort of long-ago abandoned Dickensian-era statute, you are half-right. Consorting is indeed an archaic law. Its introduction into Australian statutes well predates human rights mainstays such as the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*.

And it shows. The law's criminalisation of association clearly falls foul of Article 20<sup>1</sup> and Article 22<sup>2</sup> of those conventions respectively.

However, in our current law-and-order loaded political climate, with intense media reporting over organised crime and the 'war on drugs', consorting laws may be making a comeback in Australia. At least one revamped law is now on the statute books and another is being proposed.

The formulation (or reformulation) of a law designed to curb civil rights would be a worrying trend in itself, but the broader picture is even more concerning. As consorting laws expand to test the limits of freedom of association, stop-and-search powers are also changing, with two states now looking at broadening these powers.

### CRIMINALISING SOCIETY

Once the police decided to get Charlie Foster, there probably wasn't much he could have done.

The intellectually disabled 21 year old had previously been in trouble with the law, but nothing could have prepared him for the expansive mandate given to police by the NSW consorting laws.

According to an account given to the ABC, Foster was walking down the street with a friend when sighted by local police, who took exception to the pair associating.

The two were flatmates and had been friends since childhood. Their criminal history together? One joint charge of affray.

At the time of the arrest, Foster was on his way to the local shops. There was no suggestion that he was committing any offence, he was just walking down the street in the company of a friend.

In July 2012, Charlie Foster was sentenced to a 12-month term of imprisonment. His case is now under appeal.<sup>3</sup> The provisions under which Foster was arrested come from a 2012 amendment to the *Crimes Act 1900*. The new s93X of that Act provides that a person who 'habitually consorts' with convicted offenders, and continues to do so after being given an 'official warning', can be imprisoned for up to three years.

Under the section, the term 'habitually' is defined as associating 'on at least two occasions' with more than one convicted offender. Section 93W defines consorting as 'in person or by any other means, including by electronic or other form of communication'. This means that any person who has had two or more dealings with any two people who have committed an indictable offence (over an infinite period of time, no less) could be issued a warning under the consorting laws and potentially convicted soon after.


### BEYOND ACTUS REUS

Ostensibly, these consorting laws were aimed at curbing the activities of NSW motorcycle gangs in the wake of the disastrous High Court decision of *Totani*, which struck down the validity of anti-bikie 'control order' laws.<sup>4</sup>

The arrest and conviction of Charlie Foster shows that despite the reasons given for their passage, these consorting laws have nothing to do with bikie gangs. In reality, the effect of these laws is to grant NSW police discretion to arrest any individual without even having to allege the commission of a wrongful act.

As far as civil liberties are concerned, consorting laws may represent a crossing of the Rubicon in law enforcement. Some laws in the past have sought to abrogate or remove the *mens rea*, or mental element of the offence, creating strict (and occasionally absolute) liability offences. Consorting laws, however, do away not with the mental element but with the >>

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*actus reus*, or criminal act. Those convicted of consorting are guilty not of any particular criminal act itself, preferring to infer an intention based on the accused's associations. This criminalisation of the individual, rather than the act, may come to transform our understanding of criminal justice in Australia.

And if past history is anything to go by, other states will follow the NSW example. Police in Tasmania have already requested new consorting powers as part of a 2011 consultation,<sup>5</sup> and other states are likely to follow suit.

### CONSORTING AND PROFESSIONALS

While defences do exist in the NSW Act for purposes such as 'employment', 'education' and 'the provision of legal advice',<sup>6</sup> these defences do not operate unless the association is, in the terms of the act, 'reasonable in the circumstances'. These provisions may empower police to arrest first and ask questions later, particularly when dealing with lawyers.

Essentially, the breadth of these laws, coupled with the inadequacy of the statutory defences, is going to limit a lawyer's ability to keep in contact with a former client, a witness who has a criminal record, or even associate with members of the general public.

This was certainly how it worked back in the 1970s. Hobart lawyer, John White, was working for the Deputy Commonwealth Crown Solicitor's Office at that time, when the 'consorting squad' was known and feared for its broad-ranging powers and its willingness to use them. He recalls:

"On occasions, the senior legal officer would enjoy a quiet drink during his lunch hour in the pub below the office.

Being an inner city pub, a number of locals would also be drinking there at the same time. One or two of them had been prosecuted by the Deputy Commonwealth Crown Solicitor's Office in relation to social security fraud and customs offences.

Because of those gentlemen's prior convictions, if our senior legal officer was talking to them or just having a punt on the horses he might find himself in trouble.

The consorting squad would visit once every couple of months just to throw their weight around, and if they saw anybody they knew who had prior convictions they would simply arrest them, and then arrest anyone who they were talking to. Often that included our senior legal officer.

I occasionally had to go down to the police station and bail out the senior legal officer. He was never charged, but they locked him up two or three times."

Given this history, it is telling that when the new Tasmanian consorting laws were proposed in the public consultation paper, the narrow defences provided by the NSW legislation were omitted. Further developments may yet see consorting laws used once again to prevent lawyers contacting their clients.

Even if we never see a lawyer prosecuted under consorting laws, the police power to issue statutory warnings on pain of conviction may have untold consequences for lawyers who might find themselves forced to choose between their duty to their client and the threat of being charged with consorting.

Ultimately, the difficult choice presented by statutory

warnings might be the real way in which consorting laws will affect people. Confronted with a choice between asserting their rights and risking prison on one hand, or simply acquiescing to police instructions on the other, many will simply go along with the warning and hope that the police leave them alone.

As a result, the legacy of these laws may be not safer streets, but rather a culture of widespread intimidation by 'official warning', where individuals lose their rights to freedom of association not through official prosecution, but through fear of falling foul of the law.

### TOWARDS A GENERAL STOP-AND-SEARCH POWER

While consorting laws are a grave concern, the trend towards broad stop-and-search powers for police may also have worrying consequences.

In Queensland, the *Police Powers and Responsibilities and Other Legislation Amendment Bill 2011* proposed sweeping new powers which allow police to conduct so called 'pat-downs' (actually invasive physical searches) on teenagers based solely on the suspicion of possession of alcohol. The bill<sup>7</sup> was introduced to the parliament last year.<sup>8</sup>

While the bill has since lapsed with the change of government, the prospect remains that it will be reintroduced. Similar laws are being proposed in Tasmania, where police are seeking the power to stop and search individuals in public places on a number of grounds, including the incredibly broad 'annoying conduct'.<sup>9</sup>

While search provisions for items such as weapons or illicit drugs have long been used, stop and search on suspicion of intoxication alone (or, in the Tasmanian example, on even less than that) allows a wide discretion to stop and search in public places.

Offences relating to the possession of alcohol in a public place are relatively minor ones that are often dealt with by way of a warning and confiscation or 'tip out' request (where police request that the alcohol is tipped on to the ground). Given the trivial nature of the offence and the penalties, and the fact that these laws will overwhelmingly affect young, homeless and vulnerable people who spend large amounts of their time in public places, the wisdom of granting police such invasive powers to deal with them needs to be questioned.

### THE COMMUNITY IMPACT

A broadly applicable stop-and-search power for public possession of alcohol is not only grossly disproportionate to the offence which it notionally seeks to prevent, it may also have wider social consequences. Many young people might find that their first contact with police is an invasive and unwarranted frisk search. Some might even find themselves regular targets of such conduct.

Since 2007, police in the United Kingdom have used a law designed for the prevention of terrorism to conduct searches on youths in public places. Public perception (now backed up by research<sup>10</sup>) has long been that these laws have led to racial profiling against black teenagers. When the 2011 riots threw London into chaos, some pointed to the years of resentment bred by police intimidation and warrantless

searches as a contributing cause.<sup>11</sup> In the wake of the riots, the Metropolitan Police conceded that the use of stop-and-search laws has been counterproductive in terms of crime prevention, and indicated that their use will be reviewed.<sup>12</sup>

The London experience should be a lesson about the value of restraint in police powers. Not only is granting police unnecessary power ineffective at preventing crime, but also it risks alienating individuals and groups and turning them against the police and against the justice system in general.

### INCREASED POLICE POWERS: THE SMART ALTERNATIVE

It is too early to say whether toughened consorting laws or sweeping police stop-and-search powers will become the norm in Australian law. What is clear, however, is that movements to expand police powers in these directions could have dire consequences for civil liberties.

Both consorting laws and proposed stop-and-search provisions confer new powers so broad as to fundamentally change the relationship between police and the community. Furthermore, these laws are being considered (and, in the NSW example, enacted) in an environment where there is no obvious need for such drastic reforms. If laws this restrictive can pass through state parliaments in a time of relative stability, the question arises as to what our legislators would be capable of during a time of actual turmoil?

The proposed new stop-and-search laws may yet fail to materialise, and consorting legislation might meet a difficult fate in the High Court. But the history of High Court challenges indicates that when laws are struck down, lawmakers are more likely to redraft than relent.

So whatever happens to these laws, a fundamental problem will remain. As long as Australian governments retain unchecked power to legislate contrary to civil liberties, the temptation to do so will remain.

As the successful passage of consorting legislation demonstrates, the benevolence and self-restraint of our political leadership cannot always be counted on to protect us from legislative overreach.

Among developed nations, we in Australia have become an outlier with our lack of enshrined civil liberties protections, and this deficit has begun to show. Now more than ever, the lack of checks and balances on lawmakers is in desperate need of review. ■

**Notes:** **1** *Universal Declaration of Human Rights* Article 20: 'Everyone has the right to freedom of peaceful assembly and association'. **2** *International Covenant on Civil and Political Rights* Article 22: 'Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests'. **3** Sean Rubinsztein-Dunlop, 'Disabled man's jailing angers consorting law critics', ABC News, 13.7.12 <[www.abc.net.au/news/2012-07-12/disabled-mans-jailing-angers-consorting-law-critics/4127194](http://www.abc.net.au/news/2012-07-12/disabled-mans-jailing-angers-consorting-law-critics/4127194)> On 14 August, after six weeks of the sentence had been served, Foster's conviction was set aside. Judge Clive Jeffreys ordered the charge be tested again in a local court after prosecutors conceded the conviction relied on an inadequate police case. Sean Rubinsztein-Dunlop reported that NSW Premier Barry O'Farrell defended the laws and the way police are using them. 'Until such time as there is an adverse finding by a court or magistracy I'll continue to have my confidence in the law and in its operation,' he said. <<http://www.abc.net.au/news/2012-08-14/consorting-release/4197522/?site=illawarra>> **4** *South Australia v Totani* [2010] HCA 39. **5** Department of Police and Emergency Management (Tas), *Public Consultation Paper – Police Offences Act 1935*, 2011. **6** *Crimes Act 1900* (NSW), s93Y. **7** Police Powers and Responsibilities and Other Legislation Amendment Bill 2011 (Qld). **8** Bill Potts, 'Police frisk powers will scar teens', *The Courier Mail*, 14 September 2011 <[www.couriermail.com.au/news/opinion/police-frisk-powers-will-scar-teens/story-e6frerd-1226136235534](http://www.couriermail.com.au/news/opinion/police-frisk-powers-will-scar-teens/story-e6frerd-1226136235534)> **9** Department of Police and Emergency Management (Tas), *Public Consultation Paper – Police Offences Act 1935*, 2011. **10** Mark Townsend, 'Stop and search 'racial profiling' by police on the increase, claims study', *The Guardian*, 14 January 2012 <[www.guardian.co.uk/law/2012/jan/14/stop-search-racial-profiling-police](http://www.guardian.co.uk/law/2012/jan/14/stop-search-racial-profiling-police)> **11** Emma Youle, 'London Riots: Police stop and search blamed for tension that sparked Tottenham riots' *London 24*, 10 August 2011 <[www.london24.com/news/crime/london\\_riots\\_police\\_stop\\_and\\_search\\_blamed\\_for\\_tension\\_that\\_sparked\\_tottenham\\_riots\\_1\\_990635](http://www.london24.com/news/crime/london_riots_police_stop_and_search_blamed_for_tension_that_sparked_tottenham_riots_1_990635)> **12** Mark Townsend, see note 10 above.

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