Serious and Organised Crime Legislation Review

A review of certain provisions enacted by the Serious and Organised Crime Legislation Amendment Act 2016 (Qld).

JANUARY 2023

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Serious and Organised Crime Legislation Review
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31 January 2023

The Honourable Shannon Fentiman MP
Attorney-General and Minister for Justice,
Minister for Women and
Minister for the Prevention of Domestic and Family Violence
1 William Street
Brisbane Qld 4000

Dear Attorney-General,

I am pleased to present to you my report pursuant to section 736 *Criminal Code 1899* (Qld) in relation to the 'consorting provisions', and section 98 *Peace and Good Behaviour Act 1982* (Qld) in relation to Public Safety Orders, Restricted Premises Orders, and Fortification Removal Orders.

Further, the report also considers the serious organised crime circumstance of aggravation contained in Part 9D of the *Penalties and Sentences Act 1992* (Qld).

The report has also reviewed the compatibility of the aforementioned legislative provisions with the rights protected under the *Human Rights Act 2019* (Qld).

This report complies with the Terms of Reference.

Yours sincerely

Julie Dick SC
The Reviewer
Serious and Organised Crime Legislation Review

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ABBREVIATIONS

BAQ	Bar Association of Queensland
CCC	Crime and Corruption Commission
circumstance of aggravation	serious organised crime circumstance of aggravation contained in Part 9D *Penalties and Sentences Act 1992* (Qld)
the *Code*	*Criminal Code 1899* (Qld)
COA Review	Review of the Criminal Organisation Act 2009
DCHDE	Department of Communities, Housing and Digital Economy
FRO	Fortification Removal Order
HRA	*Human Rights Act 2019* (Qld)
LAQ	Legal Aid Queensland
ODPP	Office of the Director of Public Prosecutions
OMCG	outlaw motorcycle gang
PGBA	*Peace and Good Behaviour Act 1982* (Qld)
OWFC	official warning for consorting
PIM	Public Interest Monitor
PPRA	*Police Powers and Responsibilities Act 2000* (Qld)
PSA	*Penalties and Sentences Act 1992* (Qld)
PSO	Public Safety Order
QLS	Queensland Law Society
QPS	Queensland Police Service
RPO	Restricted Premises Order
SOCLAA	*Serious and Organised Crime Legislation Amendment Act 2016* (Qld)
The Taskforce	Taskforce on Organised Crime Legislation
the / this Review	Serious and Organised Crime Legislation Review

FOREWORD

The *Serious and Organised Crime Legislation Amendment Act 2016* (‘*SOCLAA’*)[1] introduced a new organised crime regime for Queensland. This regime drew on three reviews commissioned by the Government into organised crime: the Queensland Organised Crime Commission of Inquiry;[2] the Taskforce on Organised Crime Legislation (‘the Taskforce’);[3] and the statutory Review of the *Criminal Organisation Act 2009* (‘COA Review’).[4]

The new organised crime regime largely implemented the recommendations of these three reviews to repeal most of the 2013 suite of legislation introduced by the former Liberal National Party Government to combat organised crime, including the *Vicious Lawless Association Disestablishment Act 2013* (Qld).

SOCLAA replaced the 2013 suite of laws with a number of alternative measures intended to ensure a strong legislative response would continue to apply to organised crime in all its forms.

To ensure the organised crime regime remains effective and responsive, *SOCLAA* inserted section 736 in the *Criminal Code 1899* (Qld) (‘the *Code*’) and section 98 in the *Peace and Good Behaviour Act 1982* (‘*PGBA’*) which each require certain elements of the organised crime regime be reviewed as soon as practicable five years after commencement.

[1] *Serious and Organised Crime Legislation Amendment Act 2016* (Qld) ('*SOCLAA*').
[2] Queensland Organised Crime Commission of Inquiry, (Report, October 2015).
[3] Report on the Taskforce on Organised Crime Legislation, (Final Report, 31 March 2016).
[4] Review of the Criminal Organisation Act 2009 (Department of Justice and Attorney-General), (Final Report, 15 December 2015).

SECRETARIAT

The Review has been supported by a small secretariat provided by the Department of Justice and Attorney-General. The fact the secretariat is small no doubt reflects the targeted nature of the terms of reference. I have been assisted by Nikki Larsen, Principal Legal Officer seconded from Legal Aid Queensland and Ella Beutner, an Administration and Research Assistant, and law student at the University of Queensland. The task of this Review has been made very much easier by their contributions of initiative and intelligence as well as hard work. I would also like to thank Adele Bogard for her assistance.

THE REVIEW PROCESS

TERMS OF REFERENCE

The Terms of Reference set the objectives of this Review. They are significantly narrower than the Terms of the Taskforce and the COA Review but for the addition of the serious organised crime circumstance of aggravation contained in Part 9D *Penalties and Sentences Act 1992* (Qld) ('*PSA'*), are limited to those legislatively required.

TERMS OF REFERENCE

REVIEW OF CERTAIN PROVISIONS ENACTED BY THE *SERIOUS AND ORGANISED CRIME LEGISLATION AMENDMENT ACT 2016*

I, Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, ask Julie Dick SC to conduct a review under section 736 of the Criminal Code and section 98 of the *Peace and Good Behaviour Act 1982* (PGBA).

In undertaking this reference, you will:

1. review the operation of 'consorting provisions' of the Criminal Code and *Police Powers and Responsibilities Act 2000* (PPRA), as defined by section 736(5) of the Criminal Code;
2. consider and decide whether the consorting provisions have been effective in disrupting serious and organised crime;
3. if you decide that the consorting provisions have not been effective in disrupting serious and organised crime, you must recommend any amendments you consider necessary to improve the effectiveness of the provisions;
4. in relation to the consorting provisions, consider whether:
    a) any demographic (for example, Aboriginal people, Torres Strait Islanders, homeless people, drug dependent people) has been disproportionately or adversely affected; and
    b) whether there have been any unintended consequences (for example, whether section 77C of the Criminal Code has operated to ensure reasonable consorting is disregarded);
5. review the operation of the PGBA, excluding Part 2 (Peace and Good Behaviour Orders), including the amendments contained in the *Justice and Other Legislation Amendment Act 2020*;

6. consider and decide whether the PGBA, other than Part 2, is meeting the objects of the PGBA;
7. if you decide that any part of the PGBA, other than Part 2, is not meeting the objects of the PGBA, you must recommend any amendments you consider necessary to improve the effectiveness of the provisions in meeting the objects;
8. when reviewing the relevant parts of the PGBA, consider the information contained in the register of enforcement acts kept under section 678 of the PPRA about the exercise of powers under the PGBA;
9. ensure that you do not disclose any information about enforcement acts where such disclosure may not be in the public interest because it may prejudice or otherwise hinder an investigation to which the information may be relevant or may cause embarrassment to, or otherwise adversely affect, a person to whom the information relates or someone else associated with the person including, for example, a family member; and
10. consider whether any demographic (for example Aboriginal people, Torres Strait Islanders, homeless people, drug dependent people) has been disproportionately or adversely affected by the PGBA, other than Part 2.

In addition to undertaking the statutory review, you will:

(a) consider and decide whether the serious organised crime circumstance of aggravation in Part 9D of the *Penalties and Sentences Act 1992* (PSA) is achieving its objects, including the disruption of criminal organisations by way of disincentivising involvement and encouraging cooperation with law enforcement agencies; and

(b) advise and make recommendations as to any legislative changes required to improve the effective operation of the circumstance of aggravation.

In conducting this review, you may invite or receive submissions or information from stakeholders and other external sources as relevant.

Without limiting the scope of any recommendations you may wish to make, the recommendations should:

- advise whether any part of the consorting provisions in the Criminal Code or PPRA should be repealed or amended;
- advise whether any part of the PGBA, other than Part 2, should be repealed or amended;
- advise whether Part 9D of the PSA should be amended;
- provide details of the form any proposed amendments should take;
- determine whether the PGBA remains the most appropriate Act for the provisions relevant to the review; and
- advise whether the legislative provisions you review, and any recommendations you make, are compatible with rights protected under the *Human Rights Act 2019*.

You may also advise and make recommendations on any other matters relevant to this reference.

You will provide your report on the outcome of this review to the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence by 31 January 2023.

Dated the day of 2022

SHANNON FENTIMAN

Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence.

SCOPE OF THE TERMS OF REFERENCE

This Review has been tasked with examining the operation of consorting provisions of the *Code* and the *Police Powers and Responsibilities Act 2000* (Qld) ('*PPRA*'), as defined by s 736(5) the *Code.* Further, the Review is asked to consider and decide whether the circumstance of aggravation in Part 9D *PSA* is achieving its objects, including the disruption of criminal organisations by way of disincentivizing involvement and encouraging cooperation with law enforcement agencies.

It is to be noted that the legislation being considered arose out of a result of three much larger reviews conducted over significantly longer time. These laws are not restricted in their application to outlaw motorcycle gangs ('OMCGs') but to organised crime groups more generally.

Some of the submissions received by this Review urge the repeal of some or all of the legislation. This Review is not tasked to devise an entirely new scheme to combat serious and organised crime, but rather to review certain provisions to see if they have been effective, and, if not, to recommend any amendments to improve the effectiveness of the provisions.

In addition, this Review is to advise whether the legislative provisions reviewed, and any recommendations, are compatible with rights under the *Human Rights Act 2019* (Qld) ('*HRA*').

The statutory requirements for this Review, from which the Terms of Reference are derived, are found in both the *Code* and the *PGBA*.

Section 736 the *Code* provides for the review of consorting provisions as follows:

736 Review of consorting provisions

1) The Minister must, as soon as practicable after the day that is 5 years after the commencement of the consorting provisions, appoint a retired judge (the ***reviewer***) to—

   a) review the operation of the consorting provisions; and

   b) prepare, and give the Minister, a written report on the outcome of the review.

2) The terms of reference for the review are the terms decided by the Minister.

3) Without limiting subsection (2), the terms of reference for the review must state the following matters—

   a) the object of the review is for the reviewer to decide whether the consorting provisions have been effective in disrupting serious and organised crime;

   b) if the reviewer decides the consorting provisions have not been effective in disrupting serious and organised crime, the reviewer must recommend any amendments of the provisions the reviewer considers necessary to improve the effectiveness of the provisions;

   c) in conducting the review, the reviewer must consider whether any demographic has been disproportionately or adversely affected by the consorting provisions.

   Examples of a demographic—

   Aboriginal people, Torres Strait Islanders, homeless people, drug dependent people

4) The Minister must, within 14 sitting days after receiving the reviewer's report for the review, table a copy of the report in the Legislative Assembly.

5) In this section—

   consorting provisions means—

   a) part 2, chapter 9A; and

   b) the following provisions of the Police Powers and Responsibilities Act 2000—

      - section 30(i)
      - section 32(2)(b)

- section 41(p)[5]
- section 41A
- section 43B
- chapter 2, part 6A
- section 60(3)(k).

6) retired judge means—

   a) a retired Supreme Court judge; or

   b) a retired District Court judge.

The *PGBA* also provides for review under s 98 which states:

98 Review of Act

1) This section applies if the Minister appoints, under the Criminal Code, section 736, a retired judge (the ***reviewer***) to review the operation of the consorting provisions.

2) The Minister must also appoint the reviewer to—

   a. review the operation of this Act, other than part 2; and

   b. prepare, and give the Minister, a written report on the outcome of the review.

3) The terms of reference are to be decided by the Minister.

4) Without limiting subsection (3), the terms of reference for the review must state the following matters—

   a. the object of the review is for the reviewer to decide whether this Act, other than part 2, is meeting the objects of this Act;

   b. if the reviewer decides this Act, other than part 2, is not meeting the objects of this Act, the reviewer must recommend the amendments to the provisions the reviewer considers necessary to improve the effectiveness of the provisions in meeting the objects;

   c. in conducting the review, the reviewer must consider the information contained in the register of enforcement acts about the exercise of powers under this Act;

[5] In the *Police Powers and Responsibilities and Other Legislation Amendment Act 2020,* s41(m) was omitted from s41 *Police Powers and Responsibilities Act 2000* (Qld), and s41 was renumbered as s41(m) to (o). This accounts for a discrepancy in the 'consorting provisions' as defined in s736(5)(b) *Criminal Code 1899* (Qld), which refers to s41(p) *Police Powers and Responsibilities Act 2000* (Qld).

d. in conducting the review, the reviewer must consider whether any demographic has been disproportionately or adversely affected by this Act, other than part 2.

Examples of a demographic—

Aboriginal people, Torres Strait Islanders, homeless people, drug dependent people

5) The reviewer has access to, and the commissioner may disclose to the reviewer, the information mentioned in subsection (4)(c) despite any other law.

6) The Minister must, within 14 sitting days after receiving the reviewer's report for the review, table a copy of the report in the Legislative Assembly.

7) In this section—

consorting provisions, see the Criminal Code, section 736(5).

register of enforcement acts see the *Police Powers and Responsibilities Act 2000*, schedule 6.

MATERIAL CONSIDERED BY THE REVIEWER

The following materials are amongst those which have been considered:

- The finding and recommendations of the *Queensland Organised Crime Commission of Inquiry* (Report, October 2015).
- The findings and recommendations of the *Report on the Taskforce on Organised Crime Legislation* (Department of Justice and Attorney-General) (Final Report, 31 March 2016).
- The findings and recommendations of the *Review of the Criminal Organisation Act 2009* (Final Report, 15 December 2015).
- Extrinsic material for the *Serious and Organised Crime Legislation Amendment Act 2016* (Qld).
- Extrinsic material for the *Justice and Other Legislation Amendment Act 2020* (Qld).
- Information from the QPS in relation to use of the consorting and *PGBA* provisions.
- Public Interest Monitor Annual Reports:
    - Public Interest Monitor, *Annual Report 2021 – 2022* (Report, October 2022).
    - Public Interest Monitor, *Annual Report 2020 – 2021* (Report, October 2021).
    - Public Interest Monitor, *Annual Report 2019 – 2020* (Report, September 2020).

- Public Interest Monitor, *Annual Report 2018 – 2019* (Report, October 2019).
- Public Interest Monitor, *Annual Report 2017 – 2018* (Report, October 2018).
- Public Interest Monitor, *Annual Report 2016 – 2017* (Report, October 2017).

- Academic articles and research including:
  - Adrian Leiva and David Bright, '"The usual suspects": media representation of ethnicity in organised crime' (2015) 18(4) *Trends in Organized Crime* 311.
  - Annette Flanagin, Tracy Frey and Stacy L. Christiansen, 'Updated Guidance on the Reporting of Race and Ethnicity in Medical and Science Journals' (2021) 326(7) *Journal of the American Medical Association* 621.
  - Arlie Loughnan, 'Consorting, then and now: Changing relations of responsibility' (2019) 45(2) *University of Western Australia Law Review* 8.
  - Carmel O'Sullivan and Mark Lauchs, 'A spoiled mixture: The excessive favouring of police discretion over clear rules by Queensland's consorting laws' (2018) 42(2) *Criminal Law Journal* 108.
  - Carmel O'Sullivan, 'Casting the net too wide: the disproportionate infringement of the right to freedom of association by Queensland's consorting laws' (2019) 25(2) *Australian Journal of Human Rights* 263.
  - Emily Farris and Heather Silber Mohamed, 'Picturing immigration: how the media criminalizes immigrants' (2018) 6(4) *Politics, Groups & Identities* 814.
  - Greg Pogarsky, 'Identifying "deterrable" offenders: Implications for research on deterrence' (2002) 19(13) *Justice Quarterly* 431.
  - Kathryn Benier, Rebecca Wickes and Claire Moran, ''African gangs' in Australia: Perceptions of race and crime in urban neighbourhoods' (2021) 54(2) *Journal of Criminology* 220.
  - Luke McNamara and Julia Quilter, 'The 'Bikie Effect' and Other Forms of Demonisation: The Origins and Effects of Hyper-Criminalisation' (2016) 34(2) *Law in Context* 5.
  - Robert Adelman et al, 'Urban crime rates and the changing face of immigration: Evidence across four decades' (2017) 15(1) *Journal of Ethnicity in Criminal Justice* 52.
  - Wai-Yin Wan, Steve Moffatt, Craig Jones and Don Weatherburn, *The effect of arrest and imprisonment on crime* NSW Bureau of Crime Statistics and Research (2012) Number 158.
- Brian Francis et al, 'Understanding Criminal Careers in Organised Crime' (Research Report No 74, The Home Office UK, October 2013).

- Department of Justice and Community Safety, Victorian State Government *Review of Victorian Criminal Organisation Laws Stage One* (Report, 2020).
- Donald Ritchie, Sentencing Advisory Council, *Does Imprisonment Deter? A Review of the Evidence* (Issues Paper, 2011).
- Georgina Fuller, Anthony Morgan and Rick Brown, 'Criminal histories of Australian organised crime offenders' (*Trends & issues in crime and criminal justice No 567*, Australian Institute of Criminology, January 2019).
- Law Enforcement Conduct Commission *Discussion Paper: Review of the operation of the amendments to the consorting law under Part 3A Division 7 of the Crimes Act 1900* (2021).
- National Alliance of Gang Investigators' Associations, *Quick guide to gangs* (National Gang Intelligence Center – Federal Bureau of Investigation, 2009).
- New South Wales Ombudsman, *The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900* (Report, April 2016).
- Parliamentary Joint Committee on the ACC, *Inquiry into the Future Impact of Serious and Organised Crime on Australian Society* (Report, September 2007).
- Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report (appendices), August 2019) 595.
- Queensland Sentencing Advisory Council, '*The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld)* (Final Report, May 2022).
- Media Reports
- Relevant laws in other Australian States and Territories

CONSULTATIONS AND SUBMISSIONS

Consultations have been held with the Office of the Director of Public Prosecutions ('ODPP'), the Public Interest Monitor ('PIM'), and the Queensland Police Service ('QPS'). Additionally, the Review published the terms of reference on a website and made requests for submissions from key agencies and stakeholders, including:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd
- Alcohol and Other Drug Service
- Bar Association of Queensland
- Brisbane Youth Service
- Crime and Corruption Commission Queensland
- Department of Communities, Housing and Digital Economy
- Legal Aid Queensland
- Office of the Director of Public Prosecutions
- Associate Professor Dr Terry Goldsworthy
- Public Interest Monitor
- Queensland Human Rights Commission
- Queensland Law Society
- Queensland Police Service

The Review received submissions and information from the following agencies and stakeholders:

- Aboriginal and Torres Strait Islander Legal Service
- Bar Association of Queensland
- Crime and Corruption Commission Queensland
- Department of Communities, Housing and Digital Economy
- Legal Aid Queensland
- Office of the Director of Public Prosecutions
- Associate Professor Dr Terry Goldsworthy and Assistant Professor Dr Gaelle Brotto
- Public Interest Monitor
- Queensland Law Society
- Queensland Police Service

No submission or information was received from the remaining agencies, including the Queensland Human Rights Commission, and two submissions were received from individuals.

THE *HUMAN RIGHTS ACT 2019* (QLD)

This Review has been tasked to advise whether the legislative provisions being reviewed, and any recommendations being made, are compatible with rights protected under the *HRA*.

The *HRA* commenced 1 January 2020 with the aim to:

- protect and promote human rights;
- help build a culture in the Queensland public sector that respects and promotes human rights; and
- help promote a dialogue about the nature, meaning, and scope of human rights.

The *HRA* applies to all individuals in Queensland,[6] and functions in addition to other rights and freedoms provided for under another law.[7] However, such rights are not absolute, and may be subject to reasonable limits that are necessary, justifiable and proportionate.[8] When considering whether a limitation is reasonable and justifiable, regard may be had to:

a) the nature of the right;
b) the nature of the purpose of the limitation, including consistency with free and democratic society based on human dignity, equality and freedom;
c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
e) the importance of the purpose of the limitation;
f) the importance of preserving the human right, taking into account the nature and extent of the limitation of the human right; and
g) the balance between matters mentioned in (e) and (f).[9]

The *HRA* applies to acts and decisions made on or after commencement, unless expressly overridden by Parliament in exceptional circumstances.[10] As such, all Bills introduced from 1 January 2020 must include a statement setting out whether, in the opinion of the Member

[6] *Human Rights Act 2019* (Qld) s 11 ('*HRA*').
[7] Ibid s 12.
[8] Ibid s 13.
[9] Ibid s 13(2).
[10] Ibid s 43.

who has introduced the Bill, the Bill is compatible or incompatible with the *HRA*, and the nature and extent of any incompatibility.[11] The Queensland Human Rights Commission in its annual Human Rights Act Annual Report 2021-22 notes that no Bills were passed with an override declaration, and no declarations of incompatibility were made in the 2021-22 financial year.[12]

Many of the rights in the *HRA* are relevant to the provisions the Review has been tasked to consider, including the right to freedom of association, property rights, privacy and reputation, and right to a fair hearing. These will be examined within each provision being reviewed.

[11] Ibid s 38.
[12] Queensland Human Rights Commission, 2021-2022 Annual report on the operation of the Human Rights Act 2019, 9.

THE PUBLIC INTEREST MONITOR

Section 742 *PPRA*, provides:

742 Monitor's functions

(1) The public interest monitor has the functions mentioned in subsection (2) for surveillance device warrants, retrieval warrants, approvals of the use of surveillance devices under emergency authorisations, and covert search warrants.

(2) The functions are—

(a) to monitor compliance by police officers with chapter 9 in relation to matters concerning applications for covert search warrants; and

(b) to monitor compliance by law enforcement officers with chapter 13 in relation to matters concerning applications for surveillance device warrants, retrieval warrants and approvals of the use of surveillance devices under emergency authorisations; and

…

(e) to gather statistical information about the use and effectiveness of covert search warrants and surveillance device warrants; and

(f) to report as required by this Act on any matter about which this Act expressly requires the public interest monitor to report; and

(g) whenever the public interest monitor considers it appropriate—

(i) to give to the commissioner a report on noncompliance by police officers with chapter 9; or

(ii) to give to the chief executive officer of a law enforcement agency a report on noncompliance by law enforcement officers of the law enforcement agency with chapter 13.

…

(4) Also, the public interest monitor has the following functions—

…

(c) to gather statistical information about the use and effectiveness of control orders and preventative detention orders under the Acts mentioned in paragraphs (a) and (b);

…

(e) to gather statistical information about the use and effectiveness of official warnings for consorting;

(f) to gather statistical information about the use and effectiveness of public safety orders made by commissioned officers under the *Peace and Good Behaviour Act 1982*.

The Explanatory Notes to the *Serious and Organised Crime Legislation Amendment Bill 2016* (Qld) state:

> The PIM's new function will be to gather statistical information about the use and effectiveness of official warnings for consorting and public safety orders issued by commissioned officers. The PIM will be required to provide an annual report setting out how many warnings and orders are issued each year and the extent to which the requirements of the legislation has been complied with by police officers. The PIM will also be required to report on the use of official warnings and commissioned officer issued public safety orders generally. The PIM will be required to provide a copy of that report to the Ministers administrating the Peace and Good Behaviour Act, the Criminal Code and the Police Powers and Responsibilities Act and that report must then be tabled in the Legislative Assembly within 14 sitting days … The Bill provides that many of the new powers listed above with respect to official warnings and the public safety protection order scheme will have to be recorded as 'enforcement acts'. This will ensure that there is an appropriate source of data available when these powers are reviewed five years after commencement.[13]

O'Sullivan and Lauchs argue the PIM '… only covers the use of warnings and does not review individual cases of warnings.'[14]

In referencing this required statutory review, the authors further opine that major developments can happen in five years, and in any event, 'there is no requirement for Parliament to take the remedial action if the laws are excessive, disproportionate or not effective' and no consequences to an individual officer (subject to the detection of corruption).[15] In addition, there are no criteria that determine *SOCLAA's* effectiveness in 'disrupting serious and organised crime'.[16]

[13] *Explanatory Memorandum Serious and Organised Crime Legislation Amendment Bill 2016 (Qld) 25 ('SOCLA Bill')*.
[14] Carmel O'Sullivan and Mark Lauchs, 'A Spoiled Mixture: The Excessive Favouring of Police Discretion over Clear Rules by Queensland's Consorting Law' (2018) 42(2) *Criminal Law Journal* 108, 117.
[15] Ibid 118.
[16] Ibid.

PART 1: CONSORTING PROVISIONS

A BRIEF HISTORY OF CONSORTING

Consorting offences, as they are now known, are rooted in vagrancy laws which targeted poverty and other 'disorderly' activities. Previous iterations of vagrancy laws can be traced back to the *Vagrants Act 1824* (UK), and even as far back as 1349 when the Black Death had arrived in the United Kingdom. The imprisonment of the homeless seemed to be justified as a public welfare measure - their idleness and unwillingness to work lead to crime, therefore imprisonment would discipline them.[17]

Australian jurisdictions began introducing their own vagrancy laws in the late 1800's. These laws were designed to help police 'break up gangs and coteries of swindlers, thieves and persons living on immorality.'[18] Queensland enacted the *Vagrants, Gaming and Other Offences Act 1931* (Qld), with a view to 'make better provision for the prevention and punishment of offences by vagrants and disorderly persons', among other objectives including supressing unlawful gaming.[19] It criminalised and deemed a person to be a 'vagrant' on numerous grounds such as 'having no visible lawful means of support', or pretending or professing to tell fortunes for gain or payment.[20]

Section 4(1)(d) *Vagrants, Gaming and Other Offences Act 1931* (Qld) provided the offence of habitually consorting with reputed criminals or known prostitutes or persons who had been convicted of having no visible means of support. Those convicted of such an offence would be 'deemed to be a vagrant' and could be fined $100 or imprisoned for 6 months. While similar provisions in New South Wales were repealed in 1979, the *Vagrants, Gaming and Other Offences Act 1931* (Qld) was only repealed in 2005 when some provisions were replaced with the *Summary Offences Act 2005* (Qld).

[17] Nicolee Dixon, 'Reform of Vagrancy Laws in Queensland: *The Summary Offences Bill 2004* (Qld)' (Research Brief No 2005/06, Queensland Parliamentary Library, February 2005) 2.
[18] State Records of South Australia, GR5/2 Unit 159, South Australian Police Department Correspondence Files – Police Commissioner's Office, file no. 1541 of 1928, *Police Act Amendment Bill, 1928: Report*, cited in Andrew McLeod, 'On the origins of consorting laws' (2013) 37(1) *Melbourne University Law Review* 103.
[19] *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 1.
[20] Ibid s 4(1).

This Review notes that the Community Support and Services Committee tabled their report in relation to decriminalising public intoxication and begging offences, and health and social welfare-based responses on 31 October 2022. That report recommends that offences of begging, public intoxication, and public urination be repealed subject to appropriate community-based diversion services being in place.[21]

More recently, all Australian jurisdictions except the ACT have introduced modernised consorting schemes with the aim of preventing serious and organised crime by disrupting criminals' networks. An anti-association offence was introduced to the *Code* (s 60A) as a part of the 2013 suite of legislation, marking the modernisation of consorting provisions in Queensland.[22] It created a new offence for participants in a criminal organisation who knowingly gather together in a group of three or more persons. It carried a maximum penalty of 3 years imprisonment, 6 months of which had to be served wholly within a corrective services facility. The Taskforce identified a number of difficulties in proving the offence[23] and recommended the replacement of the provisions with a consorting offence modelled largely on the New South Wales provisions. The s 60A offence was replaced with the offence of habitually consorting in s 77B the *Code* by *SOCLAA*.

[21] Community Support and Services Committee, Parliament of Queensland, 'Towards a healthier, safer, more just and compassionate Queensland: decriminalising the offences affecting those most vulnerable' (Report No. 23, October 2022).
[22] *Criminal Code Act 1899* (Qld) ('*Criminal Code*').
[23] *Report on the Taskforce on Organised Crime Legislation* (n 3) 181.

WHAT IS THE OFFENCE OF CONSORTING?

The offence of habitually consorting is contained in s 77B the *Code*:

77B Habitually consorting with recognised offenders

1) A person commits a misdemeanour if—

   a) the person habitually consorts with at least 2 recognised offenders, whether together or separately; and

   b) at least 1 occasion on which the person consorts with each recognised offender mentioned in paragraph (a) happens after the person has been given an official warning for consorting in relation to the offender.

Maximum penalty—300 penalty units or 3 years imprisonment.

2) For subsection (1), a person does not ***habitually consort*** with a recognised offender unless the person consorts with the offender on at least 2 occasions.

3) This section does not apply to a child.

4) In this section—

   official warning, for consorting, see the *Police Powers and Responsibilities Act 2000*, section 53BAA.

An official warning for consorting ('OWFC') can be given pursuant to s 53BAC *PPRA*:

53BAC Police powers for giving official warning for consorting

1) This section applies if a police officer reasonably suspects a person has consorted, is consorting, or is likely to consort with 1 or more recognised offenders.

2) The police officer may stop the person and require the person to remain at the place where the person is stopped for the time reasonably necessary for the police officer to do any or all of the following—

   a) confirm or deny the police officer's suspicion, including, for example, by exercising a power under section 40 or 43B;

   b) give the person an official warning for consorting;

   c) if the official warning is given orally—confirm under subsection (5) the official warning.

   Note—

   Failure to comply with a requirement given under this subsection is an offence against section 791.

3) However, before giving an official warning under subsection (2)(b), the police officer must consider whether it is appropriate to give the warning having regard to the object of disrupting and preventing criminal activity by deterring

recognised offenders from establishing, maintaining or expanding a criminal network.

4) If an official warning for consorting is given in writing, the warning must be in the approved form.

5) If an official warning for consorting is given orally, the police officer must, within 72 hours after giving the warning orally, confirm the warning by giving it, in the approved form, to the person in the prescribed way.

6) Unless the contrary is proved—

    a) an approved form given by post is taken to have been received by the person to whom the form was addressed when the form would have been delivered in the ordinary course of post; and

    b) an approved form given by electronic communication is taken to have been received by the person to whom the form was sent on the day the form was sent to the unique electronic address nominated by the person to a police officer.

7) If practicable, the giving of an official warning under subsection (2)(b) must be electronically recorded.

8) To remove any doubt, it is declared that—

    a) an official warning for consorting may be given to a person in relation to a recognised offender before, during or after the person has consorted with the recognised offender; and

    b) a failure to comply with subsection (3) does not affect the validity of an official warning for consorting.

9) In this section—

    criminal activity means the commission of a relevant offence under the Criminal Code, section 77.

    prescribed way, for giving an approved form to a person, means—

    a) delivering the form to the person personally; or

    b) sending the form by electronic communication to the unique electronic address nominated by the person to a police officer; or

    c) sending the form by post or certified mail to the person at the last known or usual place of residence or business of the person or the last known or usual postal address of the person.

    recognised offender includes a person who a police officer reasonably suspects is a recognised offender.

Example of when a police officer might reasonably suspect a person is a recognised offender—

A police officer reasonably suspects a person has been convicted of an indictable offence. The police officer is unable to confirm the nature of the indictable offence, or whether the conviction is spent, due to the , the police officer reasonably suspects the person is a recognised offender.

WHAT DOES IT MEAN TO CONSORT?

Consorting has been subject to much judicial discussion:

> 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 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 decipherable 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 an obedience to an inclination, or impulse, to gravitate into the presence of, or, if accidently in such presence, to remain in a group with some other person or persons. The fundamental ingredient is companionship. The fact that people meet (*inter alia*) to carry on some trade or occupation is not inconsistent with a fraternising contemporary therewith amounting to consorting.[24]

Further, in *Johannsen v Dixon* (1979) 143 CLR 37, 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 … 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 associations with persons of the three classes, they being undesirable or discreditable persons.[25]

The meaning of "consort' is defined in s 77A the *Code*:

> **77A Meaning of *consort***
>
> (1) A person ***consorts*** with another person if the person associates with the other person in a way that involves seeking out, or accepting, the other person's company.
>
> (2) For subsection (1), the person's association with the other person need not have a purpose related to criminal activity.

[24] *Dias v O'Sullivan* (1949) SASR 195, 200-1.
[25] *Johannsen v Dixon* (1979) 143 CLR 376, 384.

(3) Also, for subsection (1), it does not matter whether the person's association with the other person happens in person or in another way, including, for example, electronically.

There has been considerable case law and public statements urging that in some cases the consorting may be innocent and, therefore, is not and should not be caught under the legislation.

Section 77C the *Code* provides a number of circumstances which may be considered reasonable, and for an offence under s 77B(1), must be disregarded. That burden of proof however, rests with the accused.

77C Particular acts of consorting to be disregarded

(1) In a proceeding against a person for an offence against section 77B(1), the following acts of consorting must be disregarded if the consorting was reasonable in the circumstances—

(a) consorting with a recognised offender who is a close family member of the person;

(b) consorting with a recognised offender while the person is—

(i) genuinely conducting a lawful business or genuinely engaging in lawful employment or a lawful occupation; or

(ii) genuinely receiving education or training at an educational institution; or

(iii) genuinely obtaining education or training at an educational institution for a dependent child of the person; or

(iv) receiving a health service; or

(v) obtaining a health service for a dependent child of the person; or

(vi) obtaining legal services; or

(vii) complying with a court order; or

(viii) being detained in lawful custody.

(2) Proof that the consorting was reasonable in the circumstances lies on the person.

(3) For subsection (1), it is not reasonable for a person to consort with a recognised offender if the purpose (or 1 of the purposes) of the consorting is related to criminal activity.

(4) In this section—

Australian Association of Social Workers means Australian Association of Social Workers Ltd ACN 008 576 010.

Australian Register of Counsellors and Psychotherapists means Australian Register of Counsellors and Psychotherapists Pty Ltd ACN 110 047 197.

child includes stepchild.

close family member, of a person—

(a) means—

(i) a spouse of the person; or

(ii) someone with whom the person shares parental responsibility for a child; or

(iii) a parent or step-parent of the person; or

(iv) a child of the person; or

(v) a grandparent or step-grandparent of the person; or

(vi) a grandchild or step-grandchild of the person; or

(vii) a brother, sister, stepbrother or stepsister of the person; or

(viii) an aunt or uncle of the person; or

(ix) a niece or nephew of the person; or

(x) a first cousin of the person; or

(xi) a brother-in-law, sister-in-law, parent-in-law, son-in-law or daughter-in-law of the person; and

(b) includes—

(i) for an Aboriginal person—a person who, under Aboriginal tradition, is regarded as a person mentioned in paragraph (a); and

(ii) for a Torres Strait Islander—a person who, under Island custom, is regarded as a person mentioned in paragraph (a).

dependent child, of a person, means a child of the person who is dependent on the person for support.

educational institution means—

(a) an approved education and care service under *the Education and Care Services National Law (Queensland)*; or

(b) a State educational institution or non-State school under the *Education (General Provisions) Act 2006*; or

(c) a registered higher education provider under the Tertiary *Education Quality and Standards Agency Act 2011 (Cwlth)*; or

(d) a registered training organisation under the National *Vocational Education and Training Regulator Act 2011 (Cwlth)*.

health service means a service for managing a person's physical or mental health, including drug and alcohol counselling, that is provided by—'

(a) a registered health practitioner or student under the Health Practitioner Regulation National Law (Queensland); or

(b) a counsellor or psychotherapist registered with the Australian Register of Counsellors and Psychotherapists; or

(c) a social worker registered with the Australian Association of Social Workers.

legal services means legal services within the meaning of the *Legal Profession Act 2007* that are provided by an Australian legal practitioner within the meaning of that Act.

The fact the burden of proof rests with the accused is a reverse onus, but such provisions are not unique to consorting, with similar provisions in legislation such as the *Drugs Misuse Act 1986* (Qld).

Consorting provisions have been the subject of various academic articles and research. Loughnan writes:

> Consorting is the offence of association with criminals. In broad terms, the offence functions to criminalise an individual who associates (for any reason, not for a criminal purpose) with another individual who is a criminal, and the degree of association is sufficient to be 'habitual'.[26]
>
> … the system of police warnings that must precede a charge of consorting in some jurisdictions 'has the practical effect that a person warned would find it difficult to say

[26] Arlie Loughnan, 'Consorting, then and now: Changing relations of responsibility' (2019) 45(2) *University of Western Australia Law Review* 8, 8.

that he or she did not know the persons with whom he or she was consorting thereafter were convicted offenders.'[27]

As this indicates, these warnings put an individual on notice about the status of her or his associates. In addition to aiding efficacy, and demanding extensive record keeping, these procedural provisions assist consorting laws to adhere to the enhanced rule of law demands of the current era. As explained by the Queensland Taskforce in advocating for a new consorting law in that state, utilising an offence based on the criminal convictions of the person with whom the individual is now associating is the appropriate way to avoid unfairness to individuals.[28]

Consorting provisions have also been considered by O'Sullivan and Lauchs in their article *A Spoiled Mixture: The excessive favouring of police discretion over clear rules by Queensland's consorting laws* (2018):[29]

Queensland's organised crime legislation grants police wide discretionary authority to issue consorting warnings which can criminalise associations. The Act does not require evidence that the association is connected to a criminal activity before the warning can be issued … [These laws] excessively favour discretion, creating a substantial risk that the disadvantages of discretion will eventuate and the advantages of rules will be undermined. Moreover, it is likely that vulnerable groups will be disproportionately affected by the laws. A clear rule requiring a nexus between the association and a criminal activity would mitigate these risks, while still facilitating police in preventing serious and organised crime……[30]

…..Queensland Parliament has devolved wide discretionary authority to police officers to decide whether people can associate with "recognised offenders". Under the *Serious and Organised Crime Legislation Amendment Act 2016* (Qld) (*SOCLA*), it is an offence … to "habitually consort" with two or more recognised offenders. The purported intention behind the offence is to prevent serious and organised crime by disrupting the criminals' networks. However, there is no need for a nexus between the association and a criminal activity before a police officer can issue a warning.[31]

The explicit exclusion of a need for a nexus between the association and a criminal activity means that it is the police exercise of discretion to issue a warning, and not the purpose of the association, that transforms an otherwise lawful association into a crime.[32]

[27] Ibid 32, quoting *Tajjour v New South Wales* (2014) 254 CLR 508.
[28] Ibid 32.
[29] O'Sullivan and Lauchs (n 14).
[30] Ibid 108.
[31] Ibid.
[32] Ibid 114.

At a minimum, this discretion could be restrained by a rule requiring a nexus between the prohibited association and a criminal activity. Such a rule would provide a more appropriate mixture of discretion and rules under the consorting laws.[33]

Although SOCLA states that before issuing an official warning for consorting, the officer must have "regard to the object of disrupting and preventing criminal activity", the Act effectively off-sets this limitation by stating that failing to comply with this requirement "does not affect the validity of an official warning for consorting." Accordingly, warnings that are not based on a reasonable suspicion that prohibiting the association would disrupt and prevent criminal activity would still be valid. As such, the police officer does not even have to believe that prohibiting the association would prevent a criminal activity. Bar a limited protected group and circumstances, the discretionary authority to decide which associations should be criminalised rests completely with the police officer.[34]

However, the ability of the court to rectify errors or abuses of discretion is substantially limited by the requirement that officers merely suspect consorting and not consorting for a criminal purpose. Associations for non-criminal purposes can be affected without the benefit of court review and rectification. The threshold set for the officer's suspicion to be reasonable is also very low, requiring only that the officer believes that the person is likely to associate with the recognised offender in the future. Thus, a person who has had no previous contact with the recognised offender could still be reasonably suspected of consorting. This low standard is compounded by SOCLA setting no criteria or factors that would be relevant to founding a reasonable suspicion. As such, a court has limited circumstances to review the officers' decisions.[35]

[33] Ibid 115.
[34] Ibid 116.
[35] Ibid 117.

THE CONSORTING WARNING NOTICE

Recurring themes in criticisms of the consorting provisions are:

1. the allegation of consorting does not require the association have a purpose related to criminal activity; and
2. concerns about the avenue for review.

In the article *Casting the net too wide: the disproportionate infringement of the right to freedom of association by Queensland's consorting laws* (2019), O'Sullivan makes the following comments:

> International human rights law requires restrictions on rights to be proportionate.[36]
>
> … several aspects of the consorting provisions raise concerns … they are highly restrictive (they apply to associations where persons meet for noncriminal purposes; they identify recognised offenders by reference to offences that may not be linked to serious organised crime; they limit the rights of persons with no criminal history and no demonstrable intention to commit a crime; they use a very low threshold, such that very many innocuous associations can be caught; and the offence for which they provide is subject to heavy punishments and long-term consequences) and less restrictive or 'softer measures' are available (for example, the law could instead require a connection between the prohibited association and criminal activity).[37]
>
> Australian courts have previously held that it is not necessary to establish a particular purpose for an association in order for the association to constitute habitual consorting … however … they did not consider whether…… [the laws] might breach international human rights.[38]
>
> The inclusion of exempted associations was ostensibly an attempt to rectify the otherwise wide scope of the consorting provisions. Indeed, the SOCLA Explanatory Notes claim that the impact on a person's right to freedom of association is 'justified' because 'there are prescribed defences which facilitate participation in ordinary civic life' … For example, outside of 'Aboriginal and Torres Strait Islander cultural norms of kinship', the protection for associating with family does 'not necessarily [extend] past first cousins' … Other family members, lifelong friends, former partners and colleagues outside of work are all associates with whom a person can be prohibited from associating, even where there is no suggestion that the person has committed or intends to commit a crime.[39]

[36] Carmel O'Sullivan, 'Casting the net too wide: the disproportionate infringement of the right to freedom of association by Queensland's consorting laws' (2019) 25(2) *Australian Journal of Human Rights* 263, 263.
[37] Ibid 269.
[38] Ibid.
[39] Ibid 270.

O'Sullivan noted submissions in relation to *SOCLA* urged the list of exempted persons be expanded, and that there be a general defence of 'reasonable excuse'.[40]

O'Sullivan further argues that Parliament could make consorting provisions less disproportionate by implementing:

> …. a requirement that police officers have a 'reasonable suspicion' that the association is connected to criminal activities for an official warning to be valid, which would provide a defence for 'reasonable excuse'. Perhaps most simply and effectively, it would require a connection between the association and a serious or organised criminal activity. While this could have the effect of restricting police officers to a greater degree and placing a higher burden on prosecutors, it would strike a better balance between the interests of public safety and individuals' rights.[41]

In their submissions to this Review, the QLS, LAQ, and Drs Goldsworthy and Brotto support the inclusion of a requirement of a reasonable suspicion that criminal activity or an intent to commit a crime be required before consorting provision powers be able to be used.

The QLS submission also seeks amendment to s 53BAC of the *PPRA* to include a requirement that prior to an OWFC being issued to a person, police must form a reasonable suspicion based on cogent evidence that criminal activity is likely to occur if an OWFC is not issued to the person.

Notice has been taken of all these submissions, however, as was said in the *Review of Victorian Criminal Organisation Laws – Stage 1*:[42]

> Accordingly, disruption has been recognised in academic literature and by law enforcement bodies as a valid technique to deter organised crime groups from offending. It is also a valid technique to disrupt offending before the community is harmed.[43]
>
> At the national level, disruption is also a widely accepted policy mechanism. It features regularly as an aim of national organised crime committees and taskforces, of which Victoria Police is a member. These include the:
>
> - Board of the ACIC

[40] Ibid.
[41] Ibid 273.
[42] Department of Justice and Community Safety, *Review of Victorian Criminal Organisation Laws Stage One* (Report, 30 June 2020).
[43] Ibid citing Martin Innes and James W. E. Sheptycki, 'From Detection to Disruption: Intelligence and the Changing Logic of Police Crime Control in the United Kingdom ' (2004) 14 *International Criminal Justice Review* 1.

- Australian Transnational, Serious and Organised Crime Committee
- Operation Morpheus (the national joint operation targeting OMCG involvement in criminal activity), and
- National Cybercrime Working Group.[44]

The Victorian Review came to the conclusion that preventing and disrupting organised crime is a valid policy objective that should be continuously and vigorously pursued.[45] Part 5 of the *Criminal Organisations Control Act 2012* (Vic) being considered by that Review provided that:

> The officer must reasonably believe that prohibiting the association would likely prevent an offence from being committed.

The conclusion of the Victorian Review was that the threshold proved cumbersome as:

> Before an unlawful association notice can be issued, the issuer must believe that an offence is likely to be prevented if the individuals are prevented from associating.[46] Victoria Police explained that the level of satisfaction its officers are required to have to meet this threshold is one of the primary hurdles to using the unlawful association provisions in the COCA. Victoria Police considers that even a strongly held suspicion is insufficient. The process is also open to review and challenge, and there is no protection for any criminal intelligence that might have been used to help form the belief. This also makes police reluctant to rely on criminal intelligence in forming the necessary state of satisfaction to issue a notice.[47]

This led to a recommendation that:

> Consideration be given to developing a more operationally practical and effective method of limiting associations between serious criminals and others likely to be involved in organised crime[48]

In light of the Victorian experience, this Review considers it would be unwise to lift the threshold.

[44] Department of Justice and Community Safety (n 42) 29-30.
[45] Ibid.
[46] *Criminal Organisations Control Act 2012* (Vic) s 124D(1)(b).
[47] Department of Justice and Community Safety (n 42) 35.
[48] Ibid 37.

WHO CAN RECEIVE A CONSORTING WARNING NOTICE?

To receive an OWFC, a police officer must reasonably suspect that a person has consorted, is consorting, or is likely to consort with one or more recognised offenders.[49] While an officer must consider whether it is appropriate to give the OWFC having regard to the object of disrupting and preventing criminal activity by deterring recognised offenders from establishing, maintaining or expanding a criminal network, there is no requirement that the recipient have any criminal history.[50]

OWFCs may be issued with respect to multiple recognised offenders on the same notice, without having to repeat the words of the warning offender by offender.[51] The QPS submission to this review confirms the current practice is to insert a number of individuals, identified by name and photograph, on an OWFC. Where it emerges a stated person is not, in fact, a recognised offender, the OWFC ceases to have effect only in relation to that stated person.[52]

QPS raised concerns in its submission regarding the service requirements for OWFCs:

- in writing immediately (s 53BAC(4));[53] or
- orally, and then within 72 hours, confirmed in writing by giving it to the person in the prescribed way (s 53BAC(5)).[54]
- QPS expressed a concern that an OWFC cannot be served electronically if being issued immediately pursuant to s 53BAC(4).[55]

In its submissions to this Review, the QLS noted the provisions have the capacity to criminalise persons who are otherwise law-abiding citizens. It says the regime allows for persons not captured by the definition of 'recognised offender' to be issued an OWFC. Further, it raises concern that an OWFC has the potential to prevent persons who are deemed recognised offenders from establishing pro-social relationships. The QLS reports instances of persons

[49] *Police, Police Powers and Responsibilities Act 2000* (Qld) s 53BAC(1) ('*PPRA*').
[50] Ibid s 53BAC(3).
[51] R v Barbaro; Ex parte Attorney-General (Qld) (2019) 3 QR 68.
[52] Ibid.
[53] *PPRA* (n 49).
[54] Ibid.
[55] Ibid.

owning and operating businesses being issued with OWFCs in relation to one another, and subsequently being charged with a s 77B offence.

RECOMMENDATION 1:

The legislation should be amended so that an official warning for consorting issued pursuant to s 53BAC(4) may be issued in 'the prescribed way' as already defined in s 53BAC(9).

EXPANDED POWERS IN THE CONSORTING PROVISIONS

There are a number of provisions in the *PPRA* which allow for expanded search powers if a person has consorted, is consorting, or is likely to consort with one or more recognised offenders.[56] Further, a person can be subject to additional obligations to provide their name and address or identifying particulars in those same circumstances.[57] Contravening such directions may result in an offence under ss 790 or 791 *PPRA*. As the QLS, ATSILS and LAQ note, a person need not have received an OWFC before such powers may apply. A person may unknowingly place themselves in a position where they are liable to be searched, have their vehicle searched, and be subject to additional obligations, potentially without being aware that a person in their company is a recognised offender.

Submissions from the QLS and ATSILS report circumstances whereby *PPRA* search powers have been relied upon to conduct such searches in situations where police have mistakenly identified a person in company with their client as a recognised offender or have asserted, they have previously or recently seen their client with such a person.

[56] Ibid ss 30(1)(i), 32(2)(b)).

[57] Ibid ss 41(o), 41A. As previously noted, the *Police Powers and Responsibilities and Other Legislation Amendment Act 2020,* s41(m) was omitted from s41 *Police Powers and Responsibilities Act 2000* (Qld), and s 41 was renumbered as s 41(m) to (o). This accounts for a discrepancy in the 'consorting provisions' as defined in s 736(5)(b) *Criminal Code 1899* (Qld), which refers to s 41(p) *Police Powers and Responsibilities Act 2000* (Qld).

Police may also direct a person leave a stated place for no longer than 24 hours if the officer has given a person an OWFC at that place and the officer reasonably suspects the person is consorting at that place with the person stated in the warning.[58]

In its submission to this Review, QPS notes that when police officers respond to large gatherings, it means that individuals within the group can only be directed to not consort with those who are recognised offenders rather than dispersing the entire group, particularly where some are recognised offenders and others are not. QPS also note a difficulty with the provision in that it is limited in its application to the place where the OWFC was given, not a location close by or in transit to the location.

> For example, a police officer is unable to issue a move on direction to warned persons outside of an organised crime event or on the way to an event (eg at a roadside operation to intercept vehicles police know from intelligence are travelling to an organised crime event). This means police officers must wait until the person re-enters the place, which creates both logistical challenges and safety concerns…… it also means that the direction cannot be issued as an alternative to commencing proceedings to prevent people from continuing, or attempting, to consort after being given a warning.

The QLS submits the offence contained in s 77B the *Code* is 'a discretionary police power disguised as a substantive offence'. To highlight this, the example was given where five defendants were charged with consorting in circumstances where they had been attending dinners, social gatherings, christenings and a family holiday with their young children and partners. No actual criminal conduct occurred on any of these occasions, except the contravention of the consorting notice. The QLS further suggests that in some circumstances, powers under the *PPRA* have been used punitively where, following the issuing of a consorting notice, that association is used as grounds to apply for search warrants and seize items like mobile phones, with no offending being detected or charges arising out of the search.

LAQ also points out that the legislation does not require a police officer to show a link between the association and a criminal activity, and that police can exercise their powers with minimal accountability. The concern echoed in a number of submissions is that there appears to be a low threshold required to trigger broad powers under the *PPRA*; an officer is only

[58] Ibid s 53BAE.

required to believe a person is likely to associate with the recognised offender in the future, leaving open situations whereby a search can occur in circumstances where a person is unaware that a person in their company may be a recognised offender.

The CCC advised it does not have experience through its investigative activities in the use of the 'habitual consorting' provisions, however does have responsibility to deal with complaints of corruption, which include police misconduct and corrupt conduct.[59] It conducted a search of matters received since 2017 on the allegation codes '*misuse of authority*' and '*inappropriate exercise of operational discretion*' and found no matters containing the word 'consort'. That is to say, the CCC does not have any complaints data which suggests any issues with the application of the consorting laws in Queensland; although the CCC acknowledged the data does have limitations.

QPS advise the consorting provision powers under the *PPRA* have been exercised as follows:

	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
s 30(1)(i)[60]		6	8	8	3	4
s 32(2)(b)[61]		4	7	7	4	6
s 41(o)	Information not held					
s 41A		18 occasions between 1 July 2017 to 30 June 2022				
s 43B	Information not readily available and requires a manual review of individual occurrences					
s 53BAC(2)	Information not held					
s 53BAE	4	54	45	38	23	34
s 60(3)(k)	Information not held					

Table 1. Exercise of *PPRA* powers in relation to consorting

[59] *Crime and Corruption Act 2001* (Qld) s 4.
[60] Calculated via search reason containing 'criminal organisation'.
[61] Calculated via search reason containing 'criminal organisation'.

Few people have been charged with offences pursuant to ss 790 or 791 *PPRA* after failing to comply with directions of an officer in relation to a consorting provision:

	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
s 790	0	0	0	0	2	0
s 791	0	0	1	2	0	0

Table 2: *PPRA* offences arising from consorting provisions

As can be seen from the data received from QPS, the number of search warrants executed under the consorting provisions are minimal. The Review holds no concerns that the powers are being overused or misused.

The Taskforce recommended that a consorting offence apply to persons convicted of offences in a schedule, only if and when all three persons involved in the consorting have convictions which have not expired or become spent.[62] Such a requirement is present in similar provisions in the Northern Territory, Tasmania, and the recently introduced legislation in Western Australia, which requires the 'notified person' as well as the stated person to have been found guilty of either a prescribed offence or indictable offence. As is noted later in this report, most persons issued an OWFC in Queensland are recognised offenders.

NSW, SA and Victoria do not require the person receiving the notice to be convicted of an offence, prescribed or not. This Review agrees with the Taskforce recommendation that OWFCs only be given to recognised offenders. Such an amendment would maintain the objectives of the Act to target serious and organised crime, while reducing the potential criminalisation of otherwise law-abiding persons.

RECOMMENDATION 2:

Section 53BAC *PPRA* should be amended to provide that official warnings for consorting should only be issued to persons who are 'recognised offenders'.

[62] *Report on the Taskforce on Organised Crime Legislation* (n 3) 196.

CONSORTING WARNING NOTICE STATISTICS

Data collection for taking identifying particulars and for issuing OWFCs is required under ss 52A and 52B of the *Police Powers and Responsibilities Regulation 2012* (Qld):

> **52A Taking identifying particulars for official warning for consorting—Act, s 679(1)**
>
> The following information about taking or photographing identifying particulars of a person under section 41A of the Act must be included in the register of enforcement acts—
>
> a) the name of the person in relation to whom the identifying particulars were taken or photographed;
>
> b))the reason the identifying particulars were taken or photographed;
>
> c) when the identifying particulars were taken or photographed;
>
> d) when the identifying particulars were destroyed;
>
> e) the name of the justice in whose presence the identifying particulars were destroyed;
>
> f) the apparent demographic category of the person.

> **52B Official warnings for consorting—**
>
> The following information about an official warning for consorting given under section 53BAC of the Act to a person must be included in the register of enforcement acts
>
> a) the name of the person given the warning;
>
> b) the reason the warning was given;
>
> c) when the warning was given;
>
> d) the location of the person when given the warning;
>
> e) when and how the police officer gave the person the approved form confirming the official warning;
>
> f) whether the giving of the official warning led to the person committing an offence against section 790 or 791 of the Act;
>
> g) whether the person was required to leave a place under section 53BAE of the Act;
>
> *h) **the apparent demographic category of the person**.*

This Review analysed the demographics of the 1,808 people issued with OWFCs to further understand the operation of the law. It is noted that restrictions put in place to slow the spread of coronavirus from March 2020 had an impact on trends in crime during this time.

For example, after reaching a peak of 953.9 offences per 100,000 persons in January 2020, the total recorded crime rate for Queensland dropped to 686.1 per 100,000 persons in April (22% lower than the expected rate), when the strictest Covid-19 measures were in place.[63] It is not unreasonable to expect there has been a similar impact on the data obtained by this Review.

According to QPS, between 2016 - 2022:

- there were 2,003 OWFCs issued during financial years 2016-17 through to 2021-22, to 1,808 unique individuals;
- the financial year with the highest number of warnings issued was 2017-18 with 640 OWFCs issued to 557 unique individuals;
- OWFCs have trended downwards since 2018-19, experiencing a small increase in the most recent financial year 2021-22 when 216 OWFCs were issued to 174 unique individuals.

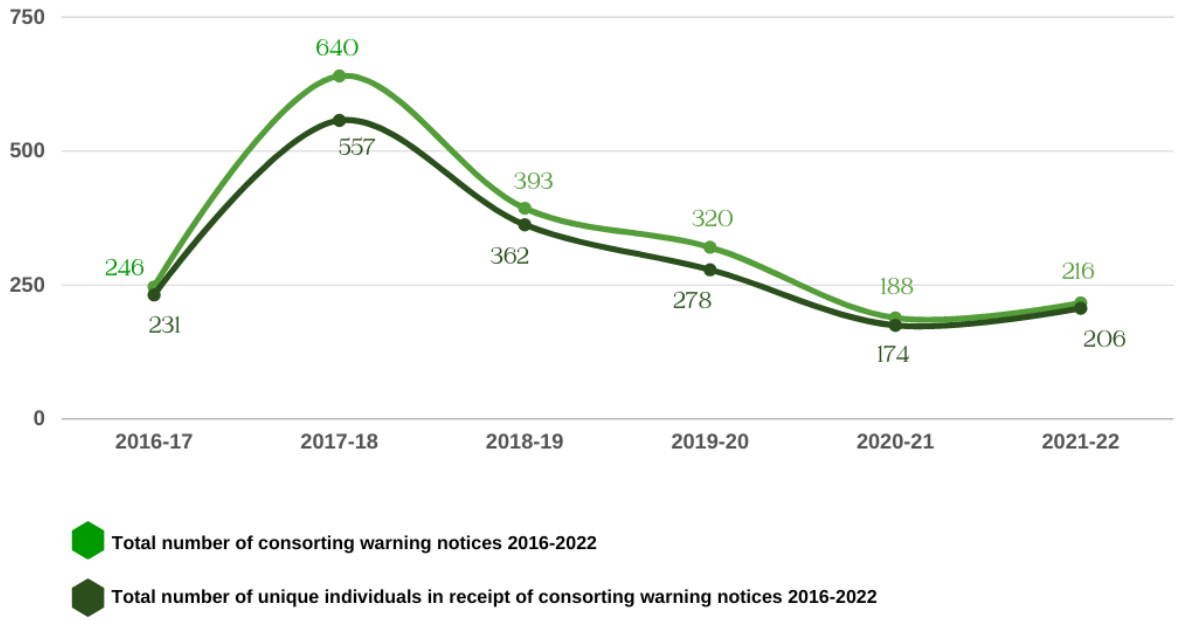

Figure 1: A comparison of the total number of consorting warning notices 2016-2022 and unique individuals in receipt of consorting warning notices 2016-2022

[63] Queensland Government Statistician's Office, *Covid-19 Impact on Crime, March to October 2020* (2 December 2021) 3.

Occurrence Districts

QPS divides Queensland into seven Regions (Figure 2). There are 15 Districts located within these Regions (Figure 3).

The QPS consorting warning data includes a record of the occurrence address, which is based on the address that has been recorded in QPS systems. The occurrence addresses are then categorised according to the District in which they occurred. Figure 3 displays the boundaries of each District contained in the consorting warning data.

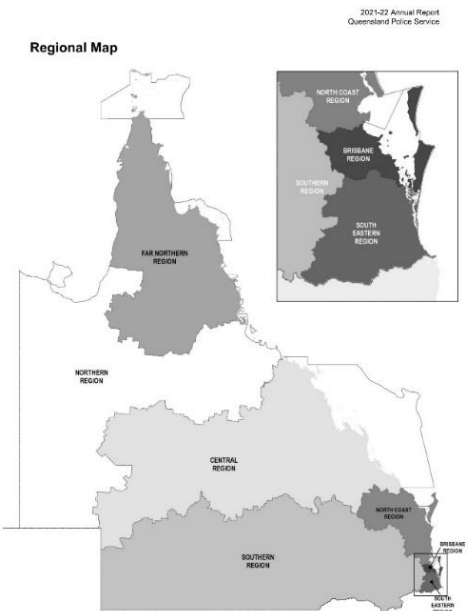

Figure 2: QPS Regions. Source: QPS 2021-22 Annual Report.

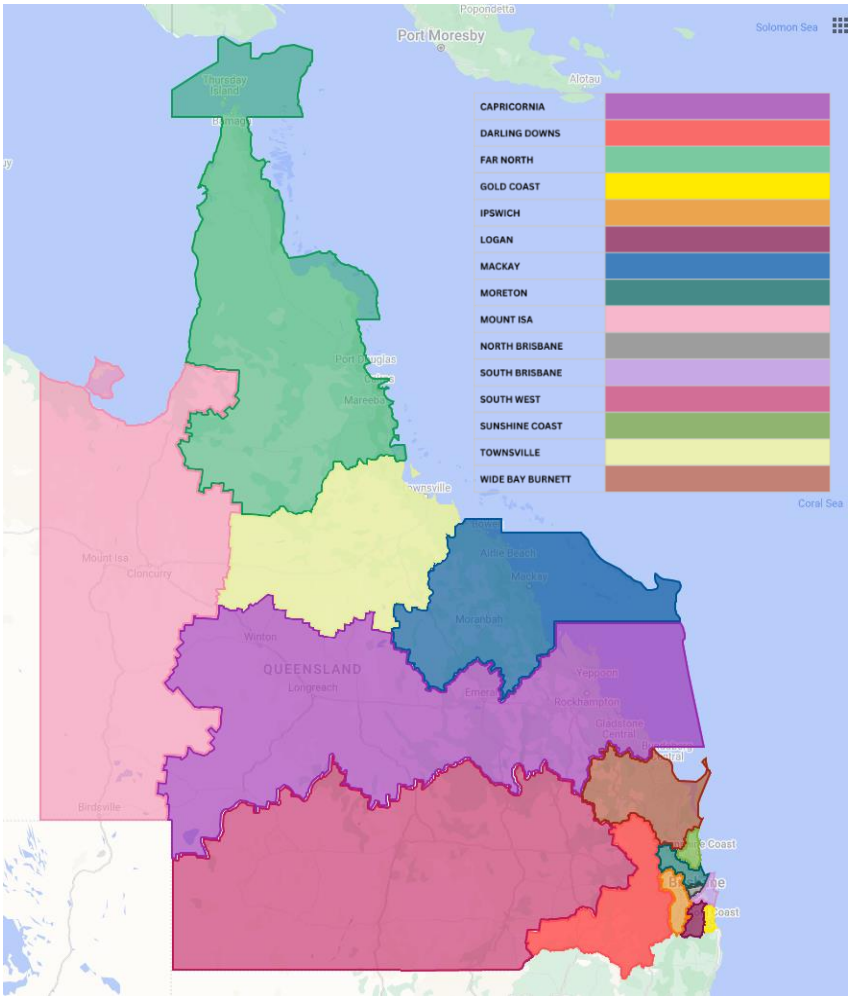

Figure 3: QPS District Map 2022
Data obtained from QPS open data portal 'Queensland Police Service District Boundaries'

It is generally accepted that crime occurs more often in more populated regions, with a large proportion of crime being recorded within dense urban populations.[64] This fact is borne out in Table 3 which shows that the QPS Regions with the largest populations, the Brisbane & South-eastern Regions, account for the highest number of OWFCs accounting for 24.16% and 26% of all OWFCs issued. Data obtained from the QPS (which provided the residential populations of each QPS District) allowed this Review to calculate the rate of OWFCs issued per 100,000 persons. This analysis (see Table 3) revealed that the District with the highest rate of OWFCs per 100,000 persons was the Central District with 59.8 per 100,000 persons compared with the mean rate of 37.95 per 100,000 persons. Therefore, despite accounting for only 12.92% of total OWFCs, the Central District, comparative to its population, experienced the highest rate of OWFCs across Queensland.

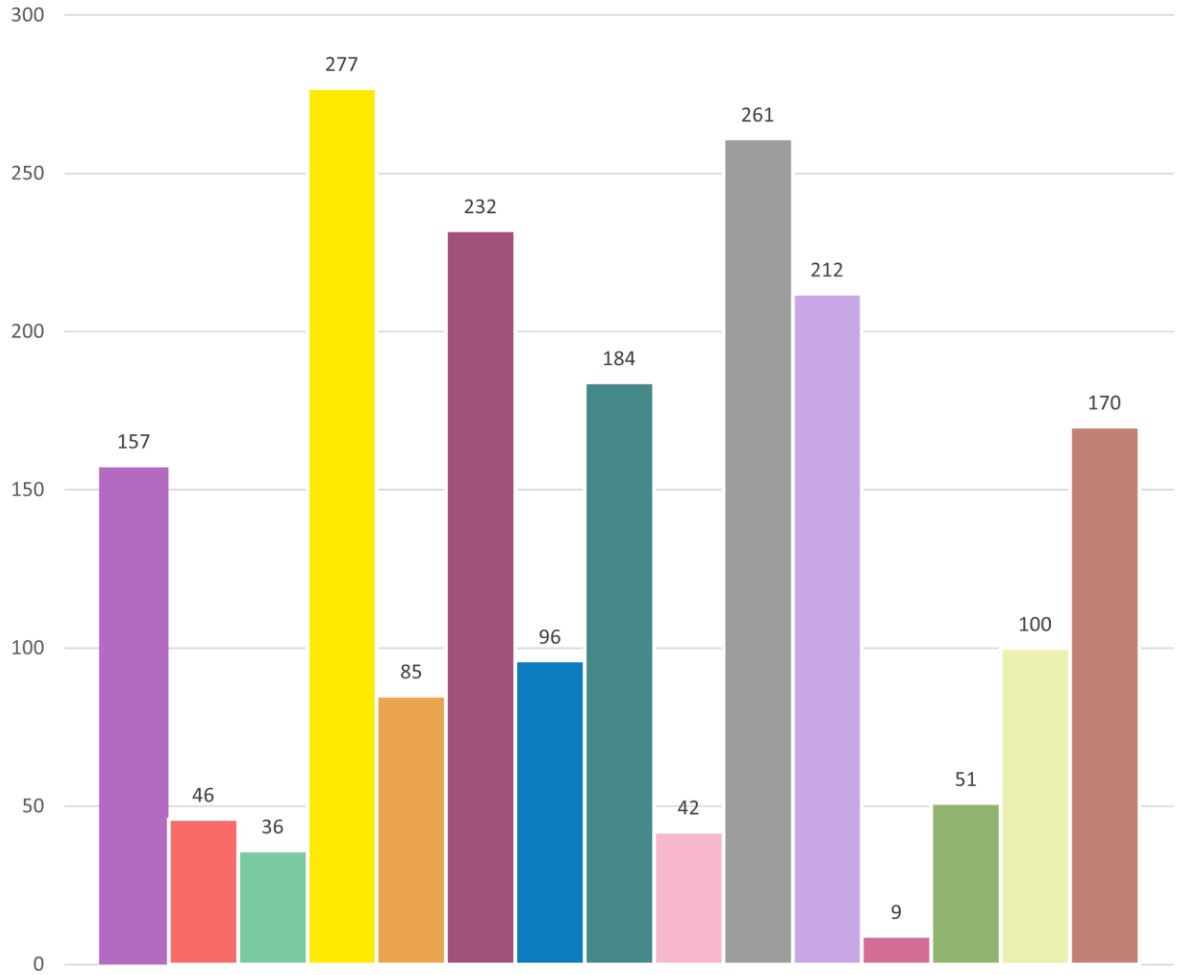

Figure 4: Number of OWFC issued in each QPS occurrence District

[64] Victoria Nagy and Alana Piper, 'Imprisonment of female urban and rural offenders in Victoria, 1860-1920' (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 100, 101.

QPS Region with police District	QPS Districts within each QPS Region	Number of OWFCs	Percentage of total OWFCs	Rate of OWFCs per 100,000 persons
Far Northern	Far North	36	1.84%	12.4 per 100,000
Northern	Townsville	142	7.25%	52.7 per 100,000
	Mount Isa			
Central	Mackay	253	12.92%	59.8 per 100,000
	Capricornia			
North Coast	Wide Bay Burnett	405	20.68%	36.6 per 100,000
	Sunshine Coast			
	Moreton			
Southern	Ipswich	140	7.15%	22.2 per 100,000
	Darling Downs			
	South West			
Brisbane	North Brisbane	473	24.16%	31.8 per 100,000
	South Brisbane			
South-Eastern	Logan	509	26%	50.2 per 100,000
	Gold Coast			
Total		1958*	100%	Mean of 37.95 per 100,000

Table 3: Number and percentage of OWFCs in each QPS Region
*This figure does not include 45 OWFCs where the District was either not recorded or recorded as 'Interstate'

Criminal Histories

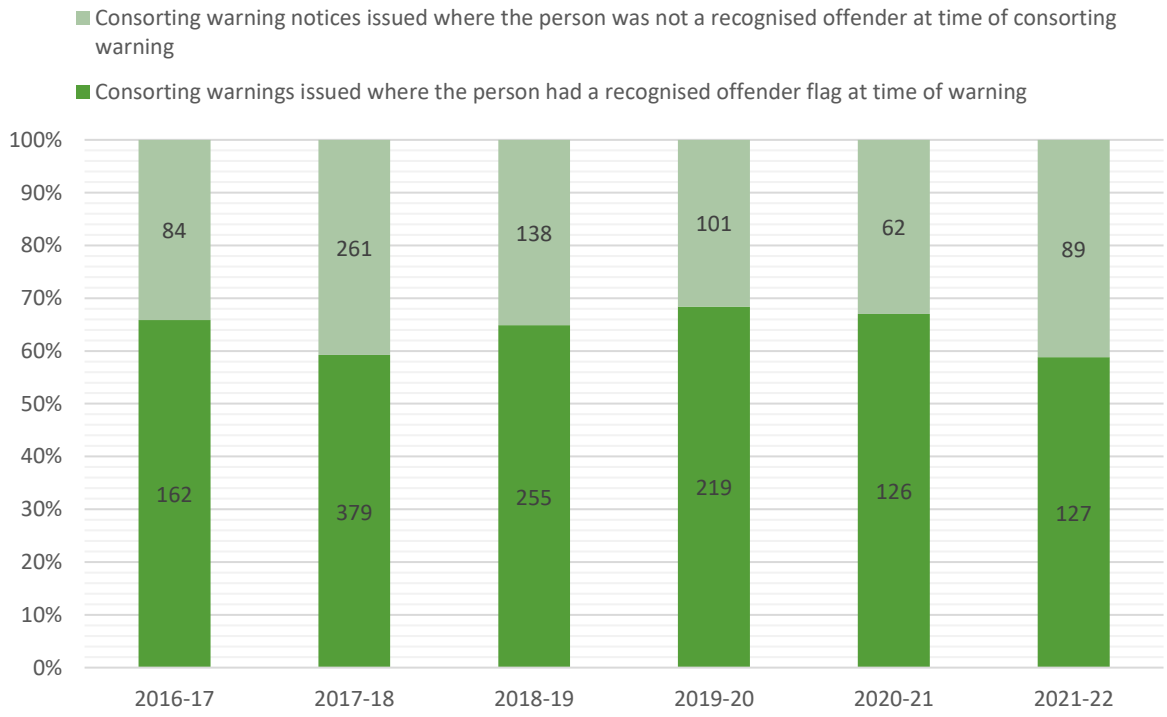

Figure 5: The number of recipients of a consorting warning notice who were not a recognised offender

OWFCs have primarily been issued to those who are recognised offenders. It is noted there has been a gradual increase in the last few years in relation to persons who are not recognised offenders being issued an OWFC. Those persons may have a criminal history, though some may not.

Considering the objectives of issuing an OWFC are to disrupt and prevent criminal activity by deterring recognised offenders from establishing, maintaining or expanding a criminal network, there is some concern these provisions are being used against those who are not necessarily involved in criminal activity, and cause them to be exposed to criminal consequences.

Age

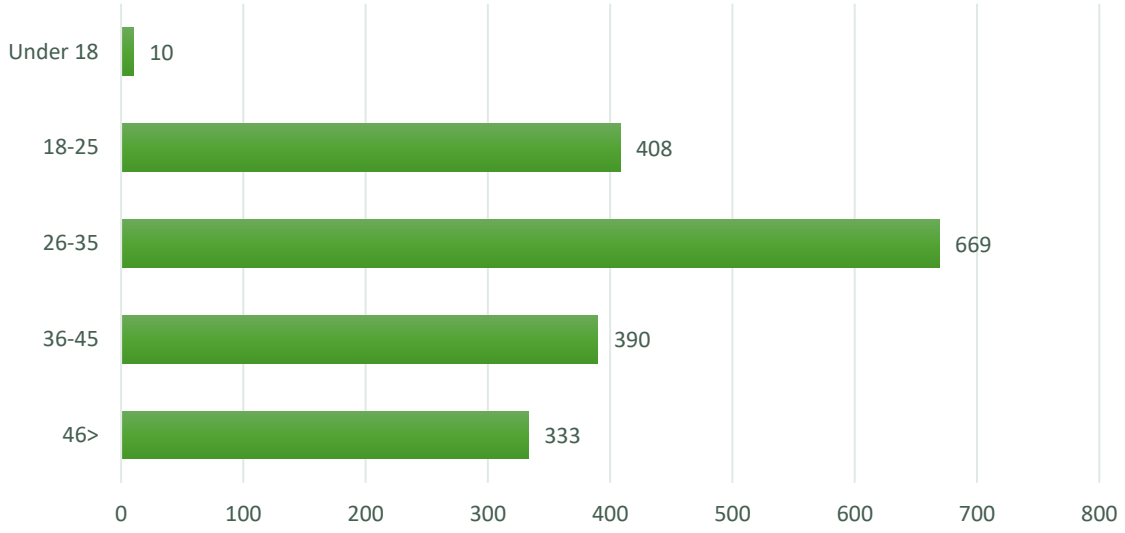

Figure 6: Number of unique individuals issued OWFCs July 2016 – June 2022 by age group

By making comparisons across age groups, this Review recognises the prevalence of OWFCs is negatively correlated with age, with the smallest number of OWFCs issued in the 46 and over age group. This data may include OWFCs issued and subsequently deemed invalid: most consequentially in relation to the age category of under 18 years. It is further noted the *Youth and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld) commenced on 12 February 2018, meaning young persons aged 17 were now included in the definition of a child, and could not receive an OWFC.[65] That is not to say there have not been

[65] *Youth and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld).

instances of OWFCs being improperly issued to a child – see for instance the PIM Annual Report 2021-22 noting such an instance which was due to officer error. As a result of that instance, QPS was reviewing the design and delivery of training material and methods.[66]

Gender

Age group (years)	Females	Males
Under 18	5	7
18-25	51	412
26-35	95	646
36-45	62	360
46>	20	343

Table 4: OWFCs by age and gender

There were two individuals where gender was unknown, and these individuals are not included in the above table.

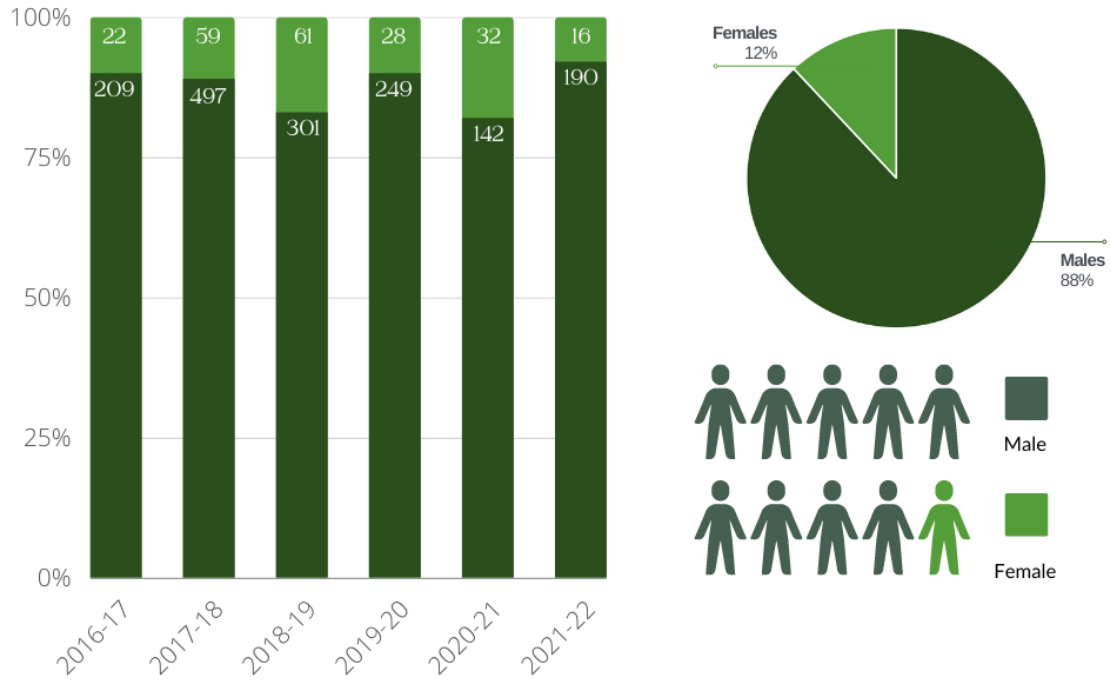

Figure 7: OWFCs by gender

[66] Public Interest Monitor, *Annual Report 2021 – 2022* (Report, October 2022) 14.

Eighty-eight per cent of people in receipt of OWFCs during the reporting period were male (1,588 males, 218 females, 2 unknown). The ratio of men and women subject to OWFCs is consistent with equivalent analysis in New South Wales, where around 92% of those subject to consorting laws were male.[67]

Indigenous Status

Age group (years)	Aboriginal and Torres Strait Islander males	Non-Indigenous males	Aboriginal and Torres Strait Islander females	Non-Indigenous females
Under 18	0	7	1	4
18-25	25	383	8	43
26-35	29	610	12	83
36-45	14	337	6	56
46>	10	292	2	17

Table 5: OWFCs by Indigenous status

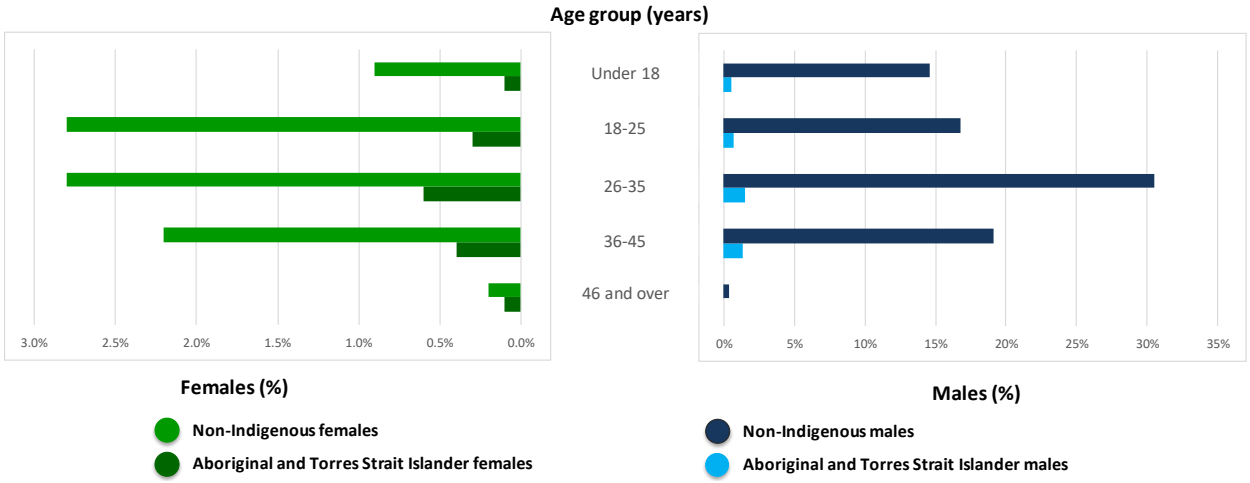

Figure 8: Consorting warning notices by Indigenous status and age

When offending rates are compared between Aboriginal and Torres Strait Islander and non-Indigenous persons, it is likely the offender rate in the Aboriginal and Torres Strait Islander population will be higher due to the larger population of young people in the Aboriginal and

[67] New South Wales Ombudsman, *The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900* (Report, April 2016) 38.

Torres Strait Islander population.[68] Differing age profiles must be considered when interpreting any data which compares Aboriginal and Torres Strait Islander and non-Indigenous populations, to avoid erroneous conclusions being drawn about variables which are correlated with age.

As Indigenous status is based on the status most commonly recorded in the system by police, identification is not always established. This has resulted in a proportion of unknown values for Indigenous status for individuals given OWFCs. As such, the above data excludes instances where Indigenous status was not determined by police. From the 2016-17 financial year through to the 2021-22 financial year, there were 64 OWFCs issued to individuals where Indigenous status was recorded as not stated.

Apparent Demographic*

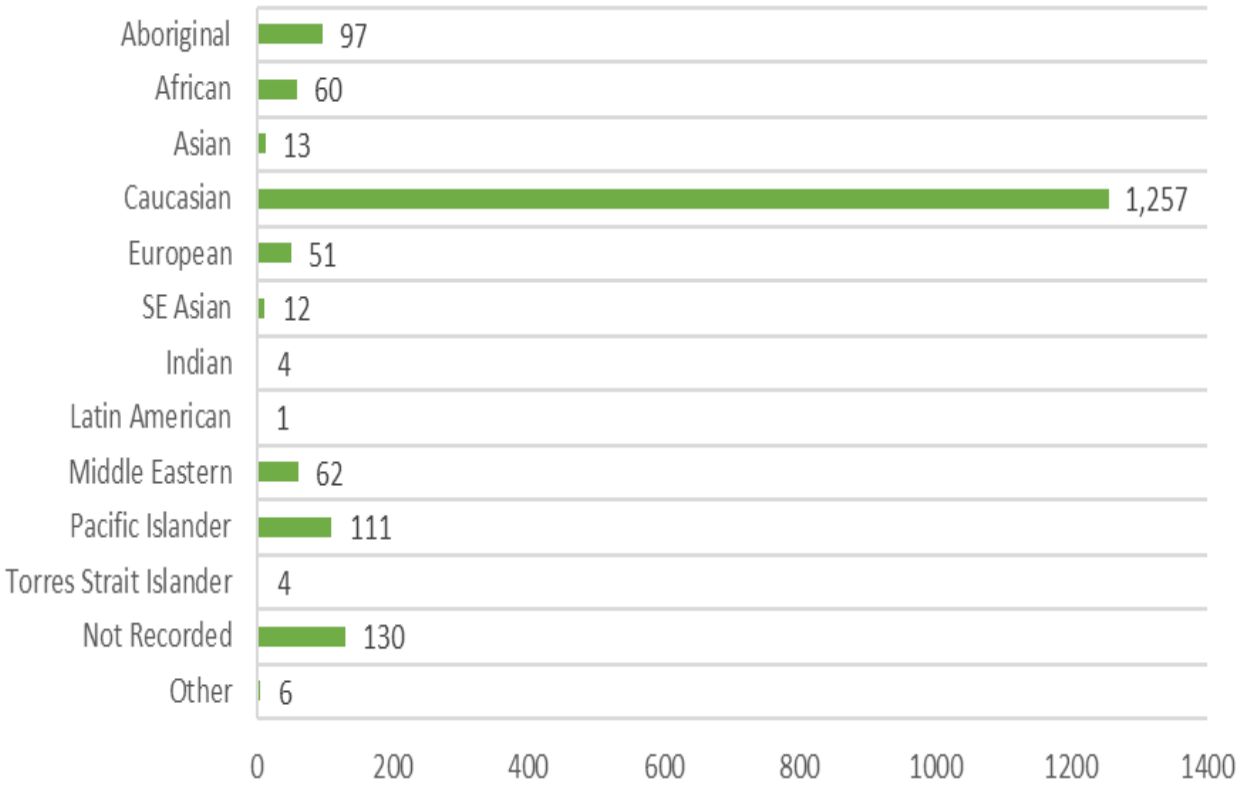

Figure 9: Total number of OWFCs issued by apparent demographic
*These figures reflect the perception of the officer in each instance, not how the person self-identified

[68] Australian Bureau of Statistics. *Recorded Crime - Offenders methodology 2020-21 financial year* (ABS Methodologies, 10 February 2022) <https://www.abs.gov.au/methodologies/recorded-crime-offenders-methodology/2020-21.>.

It is noted that s 52B(h) *Police Powers and Responsibilities Regulation 2012* (Qld) requires only the apparent demographic category of a person issued with an OWFC to be recorded, inevitably leading to issues in accurate data collection and limiting its use for statistical analysis. Further, the apparent demographic is not always consistently collected. The 2021-2022 PIM Report noted that there was a 'lack of uniformity in the recorded categories. In one instance there was contradictory demographic information in two separate records about an individual.'[69]

Interpreting the above data would suggest that most individuals in receipt of an OWFC are Caucasian. The remaining individuals are split across various racial classifications with the race of 130 individuals not being recorded. Considering ethnicity as a multi-dimensional concept based on a number of distinguishing characteristics using a self-perception approach allows for a practical and useful classification attuned to a concept of what constitutes ethnicity and cultural identity. Analysis of QPS data on race is limited as racial classification is based on a person's race most commonly recorded in the system and may differ from self-defined ethnicity.

Further issues arise when examining the racial classifications utilised by the QPS. For example, the term 'Caucasian' has received widespread academic criticism with Flanagin, Frey and Christiansen stating 'the term Caucasian had historically been used to indicate the term White … [it is] specific to people from the Caucasus region in Eurasia and thus should not be used except when referring to people from this region'.[70] Accordingly, the Australian Standard Classification of Cultural and Ethnic Groups (ASCCEG), endorsed by the Australian Bureau of Statistics as the statistical standard for classifying cultural and ethnic groups, provides for the following broad ethnic classifications, each of which contains between two and five narrower groups:

[69] Public Interest Monitor (n 66).
[70] Annette Flanagin, Tracy Frey and Stacy L. Christiansen, 'Updated Guidance on the Reporting of Race and Ethnicity in Medical and Science Journals' (2021) 326(7) *Journal of the American Medical Association* 621, 625.

CULTURAL AND ETHNIC GROUPS, 2019[71]			
1	OCEANIAN	6	NORTH-EAST ASIAN
2	NORTH-WEST EUROPEAN	7	SOUTHERN AND CENTRAL ASIAN
3	SOUTHERN AND EASTER EUROPEAN	8	PEOPLES OF THE AMERICAS
4	NORTH AFRICAN AND MIDDLE EASTERN	9	SUB-SAHARAN AFRICAN
5	SOUTH-EAST ASIAN		

The ABS promotes the use of the ASCCEG by statistical, administrative and service delivery agencies in order to improve the comparability and compatibility of data about ethnicity.

In consultation with QPS it was revealed that OWFCs have recently been increasingly used to disrupt emerging street gangs, which are now often divided on ethnic grounds. This is also noted in the 2021-22 QPS Annual Report, referencing the formation of Taskforce Uniform Knot in February 2022, and the service of 37 consorting notices on members of criminal street gangs.[72] It is difficult to draw reliable conclusions from the data due to the methodologies used by the QPS which group together heterogenous populations.

In any case, certain ethnicities have experienced a recent rise in the number of OWFCs issued by QPS. Figure 10 suggests that during the financial year spanning 2021-22, there was a substantial increase in the number of individuals identified as Middle Eastern and African being in receipt of OWFCs. Where throughout the reporting period those identified as African have typically represented less than 5% of all individuals issued with OWFCs, in the 2021-22 reporting period this demographic accounted for 18% of all OWFCs, a significant jump from previous years. Similar observations can be made with regard to the Middle Eastern demographic which has also experienced a sudden increase in the most recent reporting period.

[71] Australian Bureau of Statistics, *Australian Standard Classification of Cultural and Ethnic Groups* 18 December 2019 <https://www.abs.gov.au/statistics/classifications/australian-standard-classification-cultural-and-ethnic-groups-ascceg/latest-release>.
[72] The State of Queensland, Queensland Police Service, *Annual Report 2021-2022* (26 September 2022) 36.

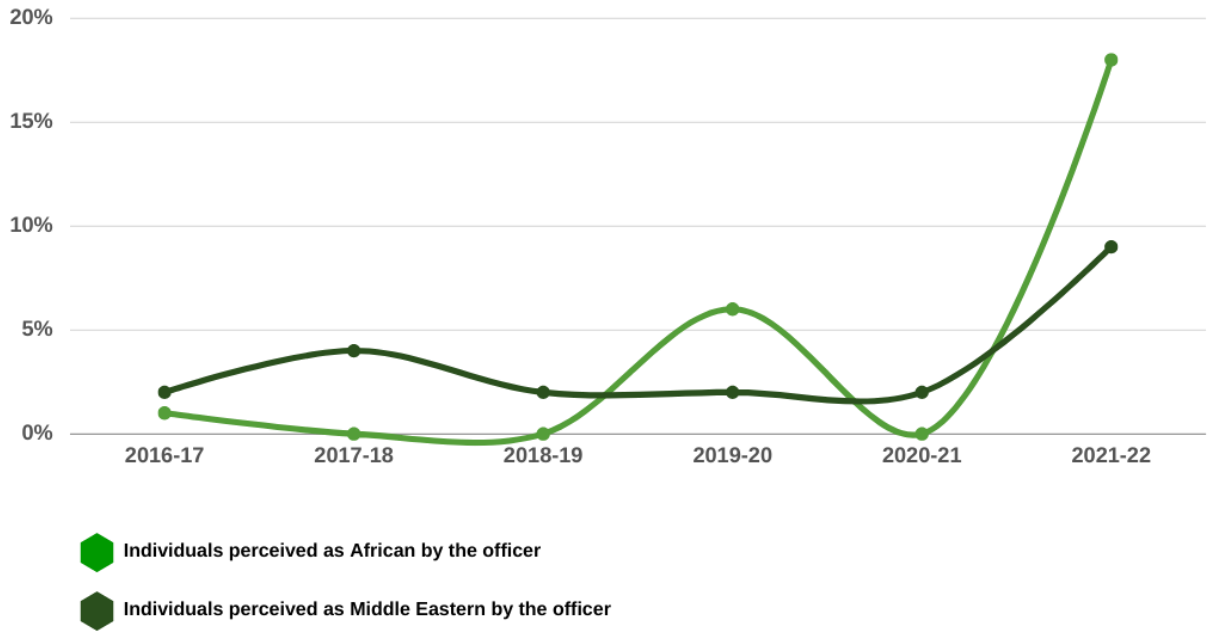

Figure 10: Representation of African and Middle Eastern demographics throughout the reporting period, as a percentage of total warnings issued

QPS confirmed its efforts to disrupt ethnic based gang violence, submitting to this Review:

> … in February 2022 Task Force Uniform Knot was commenced by the OCGG to investigate two ethnic based crime gangs committing highly publicised violent crimes. In addition to investigation and community engagement strategies, investigators utilised consorting provision to disrupt the activities of these groups with 38 consorting notices served on various individuals in the two gangs.

International literature on the criminalisation of immigrant minorities in Western countries has found that the visible difference of skin colour is linked closely with prejudice and heightened perceptions of criminality.[73] Australian researchers Benier, Wickes and Moran have linked this phenomenon to the 'black and criminal' associations with 'Africanness' in Australian society, which was rampant after the so-called 'Moomba riot' which occurred in Melbourne in 2016, leading to a racialized political and media campaign regarding the perceived problem of African gangs.[74] The generalised suspicion of African communities

[73] Emily M. Farris and Heather Silber Mohamed, 'Picturing immigration: how the media criminalizes immigrants' (2018) 6(4) *Politics, Groups & Identities* 814; Robert Adelman et al, 'Urban crime rates and the changing face of immigration: Evidence across four decades' (2017) 15(1) *Journal of Ethnicity in Criminal Justice* 52.
[74] Kathryn Benier, Rebecca Wickes and Claire Moran, ''African gangs' in Australia: Perceptions of race and crime in urban neighbourhoods' (2021) 54(2) *Journal of Criminology* 220.

within Australia and their alleged 'failure to integrate' has in the last decade led to a phenomenon of organised crime being inextricably linked with ethnicity.[75] In their submission to this Review, Dr Goldsworthy and Dr Brotto said:

> In recent years Australian governments have responded to the moral panic that has resulted from highly visible groups committing violent criminal acts in public. In political terms reacting strongly to such perceived challenges to crime control is a popular public platform for any government to extend its crime-fighting credentials.

Although in the above extract Dr Goldsworthy and Dr Brotto were referencing the punitive reactions to public displays of violence by OMCGs, the same phenomenon is now being reported by the media in relation to emerging street gangs. A recent Courier Mail article, reported on the 'the brazen behaviour of rival youth gangs terrorising South East Queensland posting photos and videos of stolen goods, illicit drugs and guns being fired from moving vehicles on social media'.[76] With the QPS reporting a decline in OMCG gang membership, the QPS is monitoring the rise in alternative gang membership including rival youth gangs in South East Queensland with ethnic associations.[77]

The 2021-22 QPS Annual Report states that this increase in street gang crime led to the establishment of Taskforce Uniform Knot, which aims to:

> … address unlawful activity by criminal street gangs including serious personal violence offences, property and weapons offences, serious fraud offences and public disturbances. The Taskforce is comprised of officers from Organised Crime Gangs Group, Southern and South Eastern Police Regions and the QPS First Nations and Multicultural Affairs Group. Taskforce Uniform Knot brings together key capabilities to tackle criminal street gangs in South East Queensland with a focus on prevention and disruption and diverting young people away from the criminal justice system.
>
> Since its establishment to 30 June 2022, the Taskforce has:
>
> - served 37 Consorting Notices with five further notices to be served

[75] Adrian Leiva and David Bright, '"The usual suspects": media representation of ethnicity in organised crime' (2015) 18(4) *Trends in Organized Crime* 311, 312.
[76] Samantha Scott, ' Youth gangs terrorising South East Queensland', The Courier Mail (online, 1 December 2022) <https://www.couriermail.com.au/truecrimeaustralia/police-courts-qld/youth-gangs-terrorising-south-east-queensland/news-story/6b3fad61ee2b1413debbe671320e4bef>
[77] Ibid.

- attended 105 family residences of known members to offer support and intervention to dissuade members from offending behaviours
- charged 30 offenders with 86 offences.

The Crime and Intelligence Command also developed the Risk Assessment of Violence in Network to support the Taskforce in identifying, triaging and prioritising the targeting of known criminal street gang members. This will assist with the effective allocation of resources to disrupt criminal street gang offending.[78]

Contrary to popular media and political portrayals of organised crime recently observed in relation to youth street gangs, Leiva and Bright, in their research between organised crime, ethnicity and media representations found:

> … contemporary Australian organised crime is not known to conform to traditional hierarchical and familial structures traditionally associated with the phenomenon. Instead, the data suggests that organised crime groups have developed a criminal network structure (i.e., highly flexible and mobile groups of known associates) and that shared ethnicity has become less of a barrier in creating criminal alliances …[79]

Drawing upon the Parliamentary Joint Committee on the Australian Crime Commission (2007) *Inquiry into the Future Impact of Serious and Organised Crime on Australian Society*, Leiva and Bright further said:

> [Organised crime networks] have no institutional identity, shared background, or identifiable leader. Individuals who operate within criminal networks are not known to share a common heritage, ethnicity or identity and are instead connected by 'powerful' individuals when the opportunity for monetary profits arise.[80]

Given that OWFCs are utilised with the intended purpose of disrupting criminal networks, the reported statistics bear relevance to the observations made by Leiva and Bright. Despite the QPS data showing an increase in OWFCs to ethnic minorities, Caucasians still represent the largest racial identity. The dynamic and complex nature of organised crime was reflected upon by the Taskforce:

> Organised crime is constantly evolving. It exists in a dynamic environment 'not exclusive to certain geographical areas, to singular ethnic groups or to particular social systems' …

[78] The State of Queensland, Queensland Police Service (n 72) 36.
[79] Leiva and Bright (n 75) 312.
[80] Ibid 313, discussing Parliamentary Joint Committee on the ACC, Inquiry into the Future Impact of Serious and Organised Crime on Australian Society (Report, September 2007).

> The nature of the modern-day crime landscape is such that those old-style traditional groups are no longer so prominent.[81]

It is important to bear this in mind when assessing the efficacy of the consorting provisions, particularly when they have the potential to unjustly or disproportionately target particular groups of people. This will be further discussed with respect to submissions received by this Review which recognised the potential impact of consorting provisions on minority communities.

THE COMPLEXITIES OF A 'RECOGNISED OFFENDER'

An OWFC remains in effect until the stated person stops being a recognised offender,[82] unless an oral OWFC has not been confirmed in writing within 72 hours or is given in relation to a stated person who is not a recognised offender.[83] In such cases, the OWFC stops having effect 72 hours and 24 hours respectively after the notice has been given.[84] The QPS Operational Procedural Manual states that in such circumstances officers should take reasonable steps to advise the person the OWFC is not valid, and update the occurrence and remove the relevant consorting warning flag.[85]

Whether a person is a recognised offender can be a complicated issue. Not all convictions will result in a designation as a recognised offender; a conviction must have been recorded in relation to a 'relevant offence'.[86]

A person ceases to be a recognised offender when their recorded convictions become spent. A conviction becomes spent if the rehabilitation period has expired. For an adult, that is typically 10 years from the date the conviction is recorded in relation to an offence dealt with in the District or Supreme Court, or 5 years for an offence dealt with in the Magistrates

[81] *Report on the Taskforce on Organised Crime Legislation* (n 3) 13.
[82] *PPRA* (n 49) s 53BAD(1).
[83] Ibid ss 53BAD(2)-(3).
[84] see *R v Barbaro; Ex parte Attorney-General (Qld)* (2019) 3 QR 68 which held that an official warning remains in effect if issued for more than one stated persons when one of those stated persons is not a recognised offender.
[85] The State of Queensland (Queensland Police Service), 'Chapter 2 – Investigative Process', *Queensland Police Service Operational Procedures Manual* (Issue 91, Effective 9 December 2022), 213.
[86] See *Criminal Code* (n 22).

Court.[87] If the conviction was recorded as a child, a period of 5 years applies regardless of jurisdiction.[88] However, if the Court made an order in relation to the conviction which has not been satisfied within that time, the conviction will not become spent until the date the order is satisfied.[89]

Further, a conviction will be revived if the person is convicted for an offence in Queensland or elsewhere that is not a simple or regulatory offence, meaning the rehabilitation period in relation to that conviction shall commence again on the date of the revival of that conviction.[90]

In practice, a recognised offender should have a 'Possible Recognised Offender' QPRIME flag, indicating they have a recorded conviction for a relevant offence.[91] The current QPS computer system records and flags persons who are possible recognised offenders, with an automated script run each 24 hour period and the records updated.[92] Before using powers in relation to consorting acts, an officer should ensure the recognised offender to whom a person has, is, or is likely to consort, meets the definition of a recognised offender; but this will not stop an OWFC from being issued. QPS systems are not capable of automatically determining when a person no longer becomes a recognised offender. A manual review of a person's criminal history may need to be conducted and may include the provision of legal advice in complex cases. [93] That is understandable given the complexities discussed. Therefore, the QPS Operational Procedures Manual directs that a workflow task to the Police Information Centre should be commenced to validate the recognised offender status.[94]

There are two types of warnings – pre-emptive warnings and retrospective warnings. Pre-emptive warnings are usually planned based on intelligence, and retrospective warnings are given after individuals have consorted. It is reported that pre-emptive warnings tend to have a smaller margin of error as they are a planned action which has been directed through a

[87] Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) s 3.
[88] Ibid.
[89] Ibid.
[90] Ibid s 11.
[91] The State of Queensland (Queensland Police Service) (n 85) 211.
[92] Queensland Police Service, Submission to Serious and Organised Crime Legislation Review (December 2022) 5.
[93] Ibid 6.
[94] The State of Queensland (Queensland Police Service) (n 85) 211.

workflow task to an administration official who checks the status of the relevant recognised offender which police suspect the person will consort. OWFCs given in the field are liable to a higher margin of error, and potentially used to target groups who are not intended to be targeted under the legislation. This was a matter raised in consultation with the PIM, and QPS have indicated retrospective warnings are liable to more issues than the pre-emptive warnings.

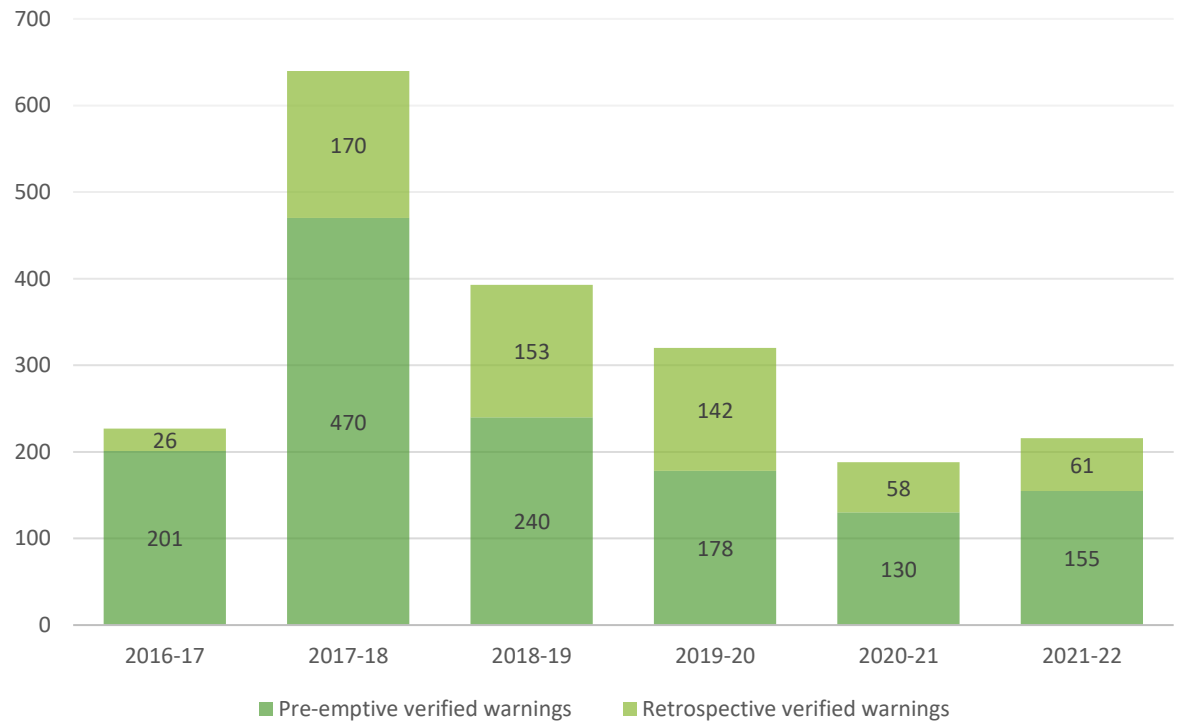

Figure 11: OWFC by issue type

Owing to privacy concerns, police will not reveal information in respect of an offence, or the timing of an offence. Once an OWFC has been issued, the system relies on associates asking recognised offenders for their criminal history, and for an accurate record of this to be conveyed. It seems particularly cumbersome for the associate of the recognised offender to obtain the information they need to comply with the law and ensure they do not habitually consort.

While the QPS Operational Procedures Manual[95] requires an officer to advise a person in certain circumstances an OWFC was invalid, there is no impetus or requirement that a person

[95] Ibid 213.

be advised as to when a recognised offender stated on a valid OWFC ceases to be a recognised offender. Officers are reminded they should not disclose to any person the details of any recognised offender's convictions unless otherwise authorised by law.[96]

A circumstance may reasonably arise whereby an OWFC may be issued one day and the recognised offender may cease to be so within days of that notice, but the associate will not be told and would have to rely upon the recognised offender being an accurate historian in relation to their conviction history, including understanding whether or not their convictions are spent or have been revived.

As a result, an OWFC in relation to a particular recognised offender may be in effect for potentially days, to 10 or more years. This may lead to an associate not interacting with an individual even when lawfully able to do so. This appears to be a disproportionate interference with the freedom of movement[97] and association[98] contained in the *HRA*, to which this Review must have regard.

The QLS supports an amendment to the definition of a recognised offender. LAQ advocates for a narrowing of the definition of a 'relevant offence'. Both the QLS and Dr Goldsworthy and Dr Brotto recommend post-conviction style schemes where, upon application to a court by the prosecution, a person can be declared a recognised offender.

However, as LAQ notes in its submission, legislative change to sentencing regimes adds increasing complexity to the already complex balancing task of sentencing.

A move to a post-conviction based scheme is not recommended by the Review, based on the outcomes discussed in relation to Control Orders under Part 9D *PSA,* in Part 3 of this report. Essentially there are already other types of control orders available at the time of sentence.

[96] Ibid 211.
[97] *HRA* (n 6) s 19.
[98] Ibid s 21.

RECOMMENDATION 3:

The definition of a 'recognised offender' should be simplified and legislation amended to provide that a recognised offender be a person who has been convicted of a relevant offence within the definition of s 77 the *Code* within the last 10 years.

AVENUE FOR REVIEW: *FORBES V WILMOT* [2022] QSC 168

Detective Senior Constable Wilmot issued an OWFC to the applicant. The applicant's lawyers wrote informing of an intention to judicially review the matter and asking for the correspondence to be treated as a formal request for a statement of reasons for the decision to issue the notice under s 32 of the *Judicial Review Act 1991* (Qld). The QPS Legal Division responded:

> The issuing of an official warning under section 53BAC of the Police Powers and Responsibilities Act 2000 is a decision relating to the administration of criminal justice. Accordingly, pursuant to section 31 and schedule 2 of the JRA, it is not a decision for which reasons need be given.

The applicant sought an order that the reasons be supplied.

Schedule 2 of the *Judicial Review Act 1991* (Qld) contains a list of decisions for which reasons need not be given. This includes:

> **1 Administration of criminal justice**
>
> Decisions relating to the administration of criminal justice, and, in particular—
>
> (a) decisions in relation to the investigation or prosecution of persons for offences against the law of the State, the Commonwealth, another State, a Territory or a foreign country; and
>
> (b) decisions in relation to the appointment of investigators or inspectors for the purposes of such investigations; and
>
> (c) decisions in relation to the issue of search warrants under a law of the State; and

(d) decisions under a law of the State requiring—

(i) the production of documents or things; or

(ii) the giving of information; or

(iii) the summoning of persons as witnesses.

His Honour Justice Callaghan in his judgement said:

> It can be seen that the issue of an official warning is an element of the offence created by that section. A decision to charge someone with that offence would be a decision relating to the administration of criminal justice. It does not, however, follow that the same must be said about the issuing of the warning. Until a further act of "consorting" occurs on "at least one occasion", the link to the administration of criminal justice is not established by mere reason of the fact that s 77B of the Criminal Code exists.
>
> Further, not every issue of a warning will result in a charge being laid. If a warning is heeded, there will be no need for any charges. In that way, s 53BAC of the *PPRA* enjoys a completely independent existence and performs a function that might remain unconnected with the offence that is created by a different statute. Nothing about the issue of the warning itself involves proceedings in any court. In fact, the very concept of a warning is calculated to regulate behaviour in such a way as to avoid the need for criminal justice to be administered at all.[99]

As to the question of whether judicial review was the appropriate vehicle, at paragraph [10] His Honour referred to the fact the legislation was reviewed by the Legal Affairs and Community Safety Committee of Parliament. The committee's report noted that on three occasions the *PPRA* itself provided no mechanism by which the issue of a warning might be reviewed.[100] At paragraph [10] His Honour said that it was observed by the committee that:

> There is no simple review mechanism provided in respect of these warnings, although presumably judicial review would still be available under the Judicial Review Act 1991.[101]

His Honour in referring to s 53BAC(3), said:

> subsection (3) was a clear statement of the Parliamentary intention as to the conditions precedent to the issue of a warning.

[99] *Forbes v Wilmot* [2022] QCA 168, [8] ('*Forbes*').
[100] Legal Affairs and Community Safety Committee, 55th Parliament, *Serious and Organised Crime Legislation Amendment Bill 2016* (Report No 42, November 2016) 66.
[101] *Forbes* (n 99) citing Legal Affairs and Community Safety Committee (n 100).

That is:

> before giving an official warning under subsection (2)(b), the police officer must consider whether it is appropriate to give the warning having regard to the object of disrupting and preventing criminal activity by deterring recognised offenders from establishing, maintaining or expanding a criminal network.[102]

His Honour further referred to subsection (8) which reads:

> (8) To remove any doubt, it is declared that—
>
> (a) an official warning for consorting may be given to a person in relation to a recognised offender before, during or after the person has consorted with the recognised offender; and
>
> (b) a failure to comply with subsection (3) does not affect the validity of an official warning for consorting.[103]

His Honour said at paragraph [14]:

> the inclusion of subsection (8) has the consequence that there is a limit to the extent that the bona fides of a police officer might be interrogated in the course of any trial for an offence against s 77B of the Criminal Code.[104]

At paragraph [15] His Honour said:

> Since there is no other provision for review, attention necessarily returns to the JRA. Unless it remains applicable, the decision to issue the warning remains unreviewable in any forum. The words in subsection (3) would ring hollow, and the intention of Parliament could be frustrated with impunity.[105]

At paragraph [16] he continued:

> In these circumstances, there is every reason to conclude that Parliament intended that the decision to issue a warning should be judicially reviewable. No sensible basis for any other conclusion has been identified. It is not, for example, open to contend that the requirement is disproportionately onerous. Of course, reasons for the decision will have to include more than mechanical recitation of the section.[106]

[102] *PPRA* (n 49) s 53BAC(3).
[103] *PPRA* (n 49) s 53BAC(8).
[104] *Forbes* (n 99) [14]
[105] Ibid [15].
[106] Ibid [16].

His Honour ordered that the respondent provide a statement of reasons.

It is understood that the decision has not been appealed. Consultations with the QPS suggest steps have been taken to address the issue, in that some considerable attention is being given to the notice and the nature of the reasons. Further, the 2021-22 PIM Annual Report notes that QPS have put in place procedures for the issue of statements of reasons where requested.[107]

If *Forbes*[108] is correct in both respects, that is, that the police are required to give reasons for an official notice, and that the official notices are subject to judicial review, then presumably, the reasons will require a consideration of the s 53BAC requirements.

QPS submits the judicial review process is costly when taking into account the appearance on the application and potential public interest immunity applications attempting to protect intelligence sources and intelligence gathering methods. It has suggested a provision allowing for an application to QCAT for a review of the decision to issue the notice in the first instance would be appropriate, with further provisions as discussed below regarding the protection of police intelligence and intelligence sources.

SUFFICIENCY OF REASONS AND THE PROTECTION OF CRIMINAL INTELLIGENCE

Forbes did not however, examine the question of the 'sufficiency of reasons' for the issuing of an OWFC.[109] During discussions with QPS, it was made clear that QPS is considering the sufficiency of reason and whether there is a better way to provide modified statements of reasons when requested. This is particularly important given the finding in the PIM Annual Report 2021-22 that reasons for OWFCs were not always recorded - being either absent or with insufficient detail.[110]

[107] Public Interest Monitor (n 66) 15.
[108] *Forbes* (n 99)
[109] Ibid.
[110] Public Interest Monitor (n 66) 15.

In its submission QPS noted that (in relation to the provision of a statement of reasons):

> … because of the complex nature of the information relied upon and sometimes large number of recognised offenders listed in a warning, it can be time consuming for police officers to prepare a statement of reasons. This means police officers could be deterred from issuing an official warning, or alternatively if issued, operational police officers are diverted from priority frontline duties and unable to respond to other matters.

Given the potential impact on a person in receipt of an OWFC, and that such reasons are mandated by s52B(b) *Police Powers and Responsibilities Regulation 2012* (Qld), this Review considers it remains appropriate that police be required to provide the reasons the OWFC was given.

QPS have raised concerns that in some cases the decision to issue a warning is based on criminal intelligence information; other times the way the police officer satisfied themselves the warning should be issued may be based on police methodologies, the release of which could potentially compromise ongoing or future investigations.

It was pointed out that under the *Weapons Act 1990* (Qld) (‘*Weapons Act’*) it is possible to provide an abridged version of the reasons and, if there is a need to use criminal intelligence, there is an arrangement under the *Weapons Act* to provide a specific mechanism for appeal which protects criminal intelligence.[111] There is, of course, a tension between giving sufficient reasons for an OWFC and the disclosure of criminal intelligence, methodology, or operational matters.

For a prosecution under s 77B the *Code*, the notice retains its validity whether or not a police officer reasonably suspects that the person has consorted, is consorting, or is likely to consort with one or more recognised offenders.[112] However, that may not be the case on an application for judicial review. On an application for judicial review, there may be an interrogation as to whether the police officer considered whether it was appropriate to give an OWFC, having regard to the object of disrupting and preventing criminal activity, by deterring recognised offenders from establishing, maintaining, or expanding a criminal

[111] *Weapons Act 1990* (Qld) 142A ('*Weapons Act*').
[112] *Criminal Code* (n 22) s77B.

network.[113] It may be that the police officer in considering what is appropriate, having regard to the object, may base his/her consideration partly on criminal intelligence.

The *Weapons Act* provides requires a person who wishes to possess a firearm to be licensed, and a license may only be issued to a person who is a fit and proper person to hold a license. An authorised officer may amend the conditions of a license on the authorised officer's own initiative, suspend a license, or revoke a license.

Under s 142 *Weapons Act* a person aggrieved by such decisions may apply to the Queensland Civil and Administrative Tribunal for a review of the decision. Section 142A of the *Weapons Act* provides confidentiality of criminal intelligence:

> **142A Confidentiality of criminal intelligence**
>
> 1) This section applies to—
>
> a) a Review, under the QCAT Act, of a relevant decision; or
>
> b) a Review, under the Judicial Review Act 1991, of a relevant decision; or
>
> c) an appeal, under the QCAT Act, in relation to a relevant decision.
>
> . . .
>
> 3) In this section—
>
> . . .
>
> ***relevant decision*** means any of the following decisions—
>
> a) a decision refusing an application for a licence or to renew a licence;
>
> b) a decision suspending or revoking a licence.

Therefore, a review under the *Judicial Review Act 1991* (Qld) to which s 142A *Weapons Act* applies, must be to a relevant decision, that is a decision in respect of a license for a firearm. The *Weapons Act* goes on to provide in s 142A(2):

> 2) The court or tribunal deciding the appeal or reviewing the decision—
>
> a) must ensure that it does not, in the reasons for its decision or otherwise, disclose the content of any criminal intelligence on which the decision is based; and
>
> b) in order to prevent the disclosure of the criminal intelligence must receive evidence and hear argument **in the absence of the public, the appellant**

[113] *PPRA* (n 49) s 53BAC(3).

or applicant for review and the appellant's or applicant's lawyer or representative; and

c) may, as it considers appropriate to protect the confidentiality of criminal intelligence, take evidence consisting of criminal intelligence by way of affidavit of a police officer of at least the rank of superintendent.

And further:

2A) If the court or tribunal considers information categorised as criminal intelligence by the commissioner has been incorrectly categorised as criminal intelligence, the commissioner may withdraw the information from consideration by the court or tribunal.

Criminal intelligence is defined under s 142A(3) as:

3) In this section—

criminal intelligence means criminal intelligence or other information of the kind mentioned in section 10B(1)(ca) or 10C(1) that could, if disclosed, reasonably be expected—

a) to prejudice the investigation of a contravention or possible contravention of this Act; or

b) to enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of this Act, to be ascertained; or

c) to endanger a person's life or physical safety; or

d) to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of this Act; or

e) to prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety.

The *Crime and Corruption Act 2001* (Qld) also has provisions to prevent the disclosure of criminal intelligence in matters where a person subject to an investigation by the Crime and Corruption Commission makes an application for injunctive relief on the grounds that the investigation is being conducted unfairly or the complaint or information on which an investigation is being, or is about to be conducted, does not warrant investigation.[114] Firstly

[114] *Crime and Corruption Act 2001* (Qld) s 332(1).

an application under this section must be held in closed court.[115] On the commission's application, the judge may hear submissions from the commission in relation to the investigation **in the absence of the person or their lawyer**.[116]

The *Review of the Victorian Criminal Organisation Laws – Stage One*, pointed out that the process for Review of consorting warnings:

> … is also open to review and challenge, and there is no protection for any criminal intelligence that might have been used to help form the belief. This also makes police reluctant to rely on criminal intelligence in forming the necessary state of satisfaction to issue a notice.[117]

RECOMMENDATION 4:

Legislation should be enacted for the protection of criminal intelligence which may arise on a judicial review as to whether sufficient reasons have been given for the official warning for consorting.

TIME LIMITATIONS FOR WARNING NOTICES

This Review is very grateful to the PIM, Mr David Adsett, for his consultation which involved disussions surrounding the lack of expiration date for an OWFC, and current policing practices and policies with respect to enforcement. Mr Adsett's report was tabled in Parliament on 8 December 2022, and this Review wishes to acknowledge that his information allowed for this Review to follow up on this issue in its consultations with the QPS.

[115] Ibid s 332(8).
[116] Ibid s 332(2).
[117] Department of Justice and Community Safety (n 42) 35.

The QPS recognise that there are significant difficulties for a person issued an OWFC to ascertain whether it is still extant:

- because of privacy provisions, the person issued the OWFC is not able to clarify with the QPS when the recognised offender ceases to be such;
- the person issued the OWFC is unable to direct any enquiries to the recognised offender themselves because the OWFC prohibits such contact; and
- sometimes, as in *Forbes,*[118] warnings are given for multiple people. Some of those people may cease to be recognised offenders at different times.

A two-year expiry on the OWFC would make it clear to the person issued the notice, that each warning expires in two years, or when the relevant conviction is spent, whichever comes first.

The QPS Operational Procedures Manual indicates that when creating a QPRIME consorting occurrence, one of the steps is to set an expiry for 12 months from the date of issue for the OWFC.[119] The QPS confirmed the implementation of a de facto 12-month 'limitation' period as a policy decision, arguing that the 12-month expiration was justified from a prosecutorial perspective. That is, if the consorting was more infrequent than twice in 12 months, it would likely not satisfy the definition of habitual consorting. This definition was derived from historical learnings about the terminology of 'habitual consorting' including judicial approaches in states such as NSW. Further, the QPS is very cognisant of the NSW Ombudsman Report[120] and accepts that there are sound policy reasons to justify a two-year expiration on OWFCs.

Therefore, QPS is supportive of a time limit for consorting notices, including from a human rights perspective. It has been suggested that there could be a provision allowing the QPS to renew the OWFC if the organised crime environment gave arise to appropriate criteria, that is, whether it is appropriate to give the warning having regard to the object of disrupting and preventing criminal activity by deterring recognised offenders from establishing, maintaining, or expanding a criminal network.

[118] Forbes (n 99).
[119] The State of Queensland (Queensland Police Service) (n 85) 213.
[120] New South Wales Ombudsman (n 67).

Imposing a time limit on the validity of a notice would not be unusual; a number of other Australian jurisdictions have imposed time limits for which a consorting notice remains in effect:

- Northern Territory requires warnings to be in writing, and must not exceed 12 months;[121]
- Victoria's unlawful association notices remain in effect for 3 years after issue, unless it is revoked earlier;[122]
- New South Wales introduced a statutory time limit in 2016, so that a warning is valid for 2 years;[123]
- Western Australia's recently introduced consorting legislation includes a provision that the consorting notice remains in effect for a period of 3 years, beginning on the day on which the notice is served unless revoked sooner;[124]
- Tasmania's official warnings specify that the convicted offender must not consort with another convicted offender named in the notice within 5 years after having been given an official warning;[125]
- South Australia's consorting notices last indefinitely, but do provide for an application for review of the notice to be made within 4 weeks of the service of the notice, to a Court.[126] A consorting prohibition notice may, however, be varied or revoked by a Court upon application,[127] or be revoked upon notification by the Commissioner in writing to the recipient;[128] Similarly to Queensland, South Australia has not reviewed their consorting laws since their introduction.

[121] *Summary Offence Act 1923* (NT) s 55A(1)(a).
[122] *Criminal Organisations Control Act 2012* (Vic) - the unlawful association offence was created in 2015. The unlawful association offence contained in *Criminal Organisation Control Act 2012* (Vic) s124A also specifies that they must not associate with an individual specified in that notice on 3 or more occasions within a 3 month period, or on 6 or more occasions within a 12 month period, and breaches of that are punishable by imprisonment for 3 years or 360 penalty units or both.
[123] *Crimes Act 1900 No 40* (NSW) s 93X; as New South Wales also permits consorting warning notices to be served on children between 14 and 17 years of age, those warning notices remain in effect for a reduced period of 6 months.
[124] *Criminal Law (Unlawful Consorting and Prohibited Insignia) Act 2021* (WA) s 13.
[125] *Police Offences Act 1935* (Tas) s 20C.
[126] *Summary Offences Act 1953* (SA) s 13 and Part 14A; see also South Australia, Parliamentary Debates, House of Assembly, 15 February 2012, 94.
[127] Ibid s 66E.
[128] Ibid s 66G.

The ACT has not introduced consorting legislation. A review was conducted by Drs Goldsworthy and Brotto in 2019 which did not recommend the enactment of consorting laws in the ACT.[129] However the ACT does have a post-conviction based non-association order which can be imposed if an intensive correction order, drug and alcohol treatment order, or a good behaviour order is made, and the period of the order must not be unreasonably disproportionate to the purpose for which the order is made.[130] The QLS is supportive of a conviction-based application process.

A significant advantage to introducing such a time restriction is that it provides the person issued the OWFC with a clear and definite time frame within which consorting with a particular person is prohibited. The QLS also supports OWFCs being subject to an expiry date. QPS have also indicated their support for the implementation of a time frame for which the OWFCs would be valid and would be a formalisation of an already existing policy.[131] This would be consistent with almost every other jurisdiction in Australia, consistent with the objects of the Act, and would only limit a person's rights preserved under the *HRA* to an extent that is reasonable and justifiable in all the circumstances.

RECOMMENDATION 5:

Section 53BAC *PPRA* should be amended to provide that official warning for consorting remains valid for a period of 2 years and expires thereafter.

[129] Terry Goldsworthy and Gaelle Brotto, 'Independent review of the effectiveness of ACT policing crime scene powers to target, disrupt, investigate and prosecute criminal gang members ' (Report, 6 December 2019).
[130] *Crimes (Sentencing Act) 2005* (ACT) ss 22 & 23.
[131] The State of Queensland (Queensland Police Service) (n 85).

THE OFFENCE OF HABITUALLY CONSORTING

The offence of habitually consorting is classed as a misdemeanour and is to be heard and decided summarily unless a defendant elects a trial by jury.[132] The Taskforce report had recommended that the s 77B offence should be an indictable offence, but include a restriction that the occasions of consorting following the issuing of a (prohibition) notice must occur within a twelve-month period.[133] The Taskforce noted that many other jurisdictions provide for a consorting offence to be tried summarily and, therefore, have varying time restrictions upon the commencement of criminal proceedings following a warning, ranging from 6 months to two years.[134] No such limitation on prosecution is currently legislated for in Queensland.

In its submission to this Review, the QLS reiterated the Taskforce recommendation that there be restrictions on the commencement of criminal proceedings:

> Such amendments would ensure that where rights contained in the *Human Rights Act 2019* (Qld) . . . . . are engaged and are limited by the consorting scheme, such limitations are reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom as required by section 13(1) of the *Human Rights Act 2019* (Qld).

The QPS Operational Procedures Manual[135] recommends that the instituting of charges for habitually consorting have the approval of a senior sergeant or higher, and the approving officer must ensure there is not more than 12 months from the first consorting offence to the last unless, amongst other things, exceptional circumstances exist. However, such policy decisions (or directives) are not legislatively based but form an exercise of prosecutorial discretion and cannot be relied upon by people charged with consorting as a part of any defence in a prosecution of consorting.[136]

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[132] *Criminal Code* (n 22) s 552B.
[133] Report on the Taskforce on Organised Crime Legislation (n 3) 197.
[134] Ibid 197. For example, *Criminal Procedure Act 1921* (SA) s 52(1) limits prosecutions to within 2 years of the date on which the offence is alleged to have been committed. However WA's new consorting offence is a crime (ie indictable) and has no limitation on prosecution – see *Criminal Law (Unlawful Consorting and Prohibited Insignia) Act 2021* (WA) s 17 and *Criminal Procedure Act 2004* (WA) s 21.
[135] The State of Queensland (Queensland Police Service) (n 85) 214.
[136] In NSW there are occurrences of prosecutions occurring where consorting incidents were 18 months apart – see New South Wales Ombudsman (n 67) 96.

This QPS policy position appears not only to have adopted the position of the Taskforce report, but also somewhat modelled on developments from New South Wales developments relating to being able to establish the association as 'habitual'.

The NSW developments

New South Wales consorting laws from 1979 to 2012 did not contain a definition of 'habitually'. Case-law developed such that in practice it was necessary to establish 7 or more occasions of associating, within 6 months, to satisfy the court it was 'habitual'. This was due to the offence's classification as a summary offence, therefore requiring the acts constituting the offence to have occurred within 6 months of the date of the charge. Following amendments in 2012 which changed the offence to an indictable offence and inserted a definition to include consorting with at least 2 convicted offenders on at least 2 occasions, New South Wales police made a policy decision that unless there were exceptional circumstances, the occasions of consorting must still fall within a 6 month period.

In the 2016 NSW Ombudsman Review of consorting provisions, NSW police did not support a time limit being imposed within which occasions of consorting must occur out of concern such a restriction would weaken the legislation and impact on its use. They noted criminal activity can be maintained over many years, and that larger investigations or covert operations where it might be strategically advantageous to 'hold off' on issuing warnings or charges until operations were concluded, could be affected.[137] The 2016 NSW Ombudsman Review did ultimately make recommendations that a statutory time limit be introduced via one or more of three approaches:[138] prescribe the length of time following the commission of the offence within which a prosecution must be brought; and/or prescribe the length of time a consorting warning is valid; and/or further defining 'habitually consorting'.

As a result, a time limit for which the consorting warning remains in effect was introduced.

The QPS approach to prosecuting a s 77B offence seems to be consistent with the purpose of issuing an OWFC: to disrupt and prevent criminal activity by deterring recognised offenders from establishing, maintaining or expanding a criminal network.[139] If there has been no consorting within a reasonable time of the issuing of an OWFC, the warning has served its purpose. Further, it is questionable that consorting outside of such a timeframe truly satisfies

[137] Ibid 96-97.
[138] Ibid 98 see Recommendation 9.
[139] *PPRA* (n 49) 53BAC(3).

the 'habitual' aspect of a consorting offence (despite being defined as 'on at least 2 occasions' in s 77B the *Code*).

CONSORTING PROSECUTION IN PRACTICE

This Review obtained data from the QPS and Queensland Courts, and transcripts of relevant proceedings, surrounding the prosecution of a consorting charge pursuant to s 77B the *Code*. Data was obtained from Court Services Queensland via the Queensland Wide Inter-linked Courts ('QWIC') database, which gathers information on persons charged including court appearances and outcomes.[140]

The Review has received data for defendants and charges for habitually consorting during the period 1 July 2016 to 30 June 2022. That data reveals there have been 41 such charges lodged in Magistrates Courts during that time.[141]

All defendants were recorded as being non-Indigenous.

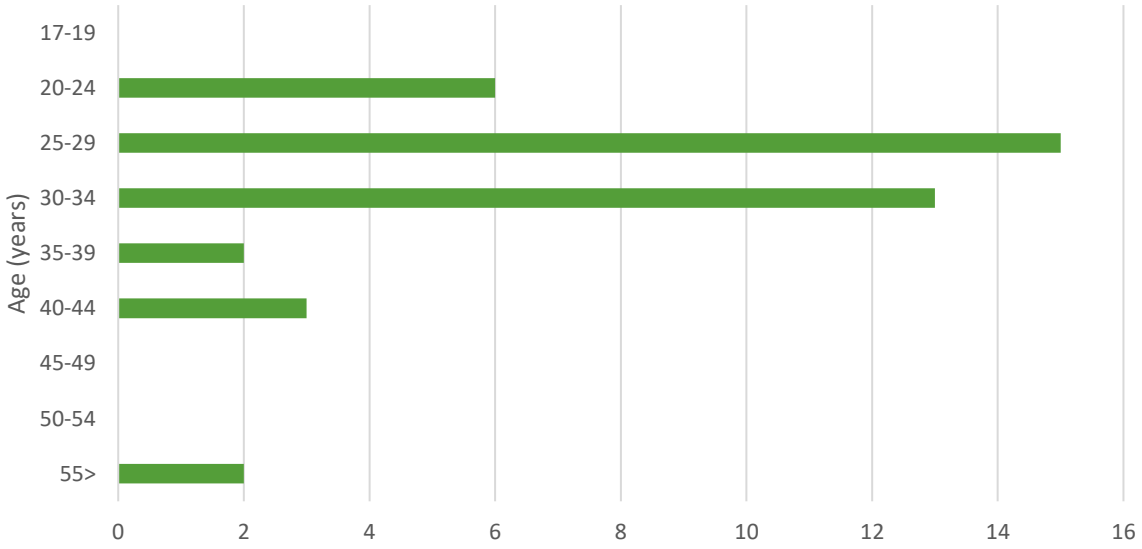

Figure 12: Habitually Consorting charges lodged July 2016 – June 2022 by age group

[140] The QWIC system is a 'live' operational system in which records are updated as the status of court matters change (for example, a defendant being resentenced as a result of a Court of Appeal decision) and/or input errors are detected and rectified. This constant updating and data verification may result in a slight variance of figures over time.

[141] As there is no unique identifier enabling the identification and subsequent reporting of unique defendants, defendants have been identified on the national Report on Government Services counting methodology, i.e. same surname, first name, date of birth and date the offence was registered within QWIC.

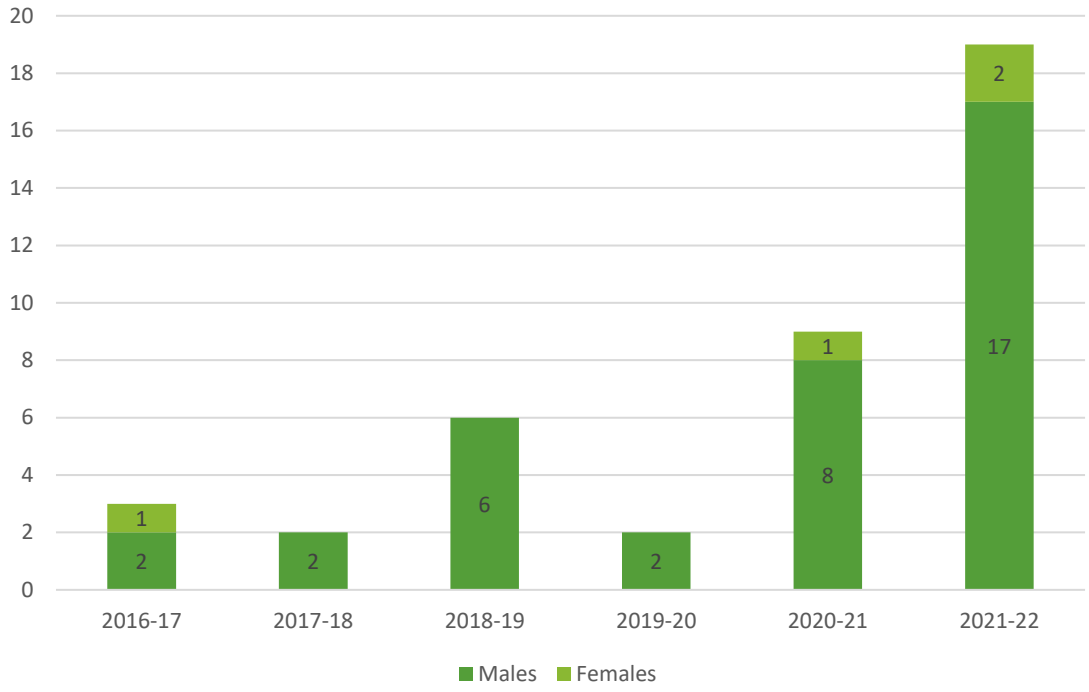

Figure 13: Habitually Consorting charges lodged July 2016 – June 2022 by gender

Of those charges lodged, 20 resulted in the courts imposing a sentence,[142] 10 matters were finalised by way of either being found not guilty or having charges discontinued, and the remaining were active matters.[143]

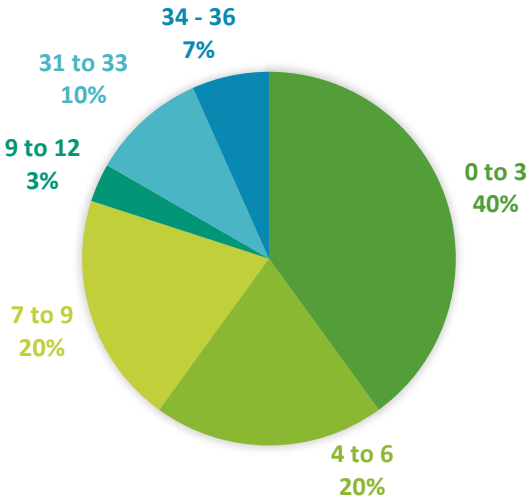

Figure 14: Months taken to finalise Habitually Consorting charges

[142] Data for convicted and not further punished was released as 'other non-custodial'.

[143] The QWIC system is a 'live' operational system in which records are updated as the status of court matters change (for example, a defendant being resentenced as a result of a Court of Appeal decision) and/or input errors are detected and rectified. This constant updating and data verification may result in a slight variance of figures over time.

80% of charges were finalised within 9 months.

The QLS and the BAQ note that in their members' experience, habitually consorting offences are not frequently prosecuted, and when they are the prosecution is not necessarily consistent, or always successful. The more common issues appear to be difficulties in proving the issue of a valid notice, or in proving the occasions of alleged consorting. The QPS Operational Procedures Manual notes that officers completing a full brief of evidence for a habitually consorting matter will require proof of a conviction/s to satisfy the recognised offender status of each person the defendant has consorted with – by obtaining a certified verdict and judgment record.[144]

The QLS notes differences in prosecutorial decisions in relation to particulars and prosecutorial differences as to what constitutes 'habitual'. In one circumstance a stated person was removed from the particulars of one defendant's charge, but not from another. This meant the same occasion was considered an act of consorting for one defendant, but not for another, despite circumstances being the same. The QLS also raised concerns of prosecutorial independence, citing one circumstance where an officer completed giving evidence, then proceeded to sit at the bar table to instruct the prosecutor throughout the trial. Complaints about such instances are better pursued through other avenues.

ATSILS have observed somewhat limited use of the consorting provisions against their clients outside of where those individuals are part of some form of organised criminal activity, but caution that such instances only come to the attention of legal representatives in circumstances where charges are laid as a result of a relevant police interaction. Given the indication that no habitually consorting charges involve Indigenous defendants, it is perhaps unsurprising that ATSILS have had limited dealings with the provisions.

[144] The State of Queensland (Queensland Police Service) (n 85) 214.

PUNISHMENT OF HABITUALLY CONSORTING

This Review obtained data from Queensland Courts and the QPS, as well as transcripts from a large portion of matters which resolved in the Magistrates Courts relating to the prosecution of habitually consorting.

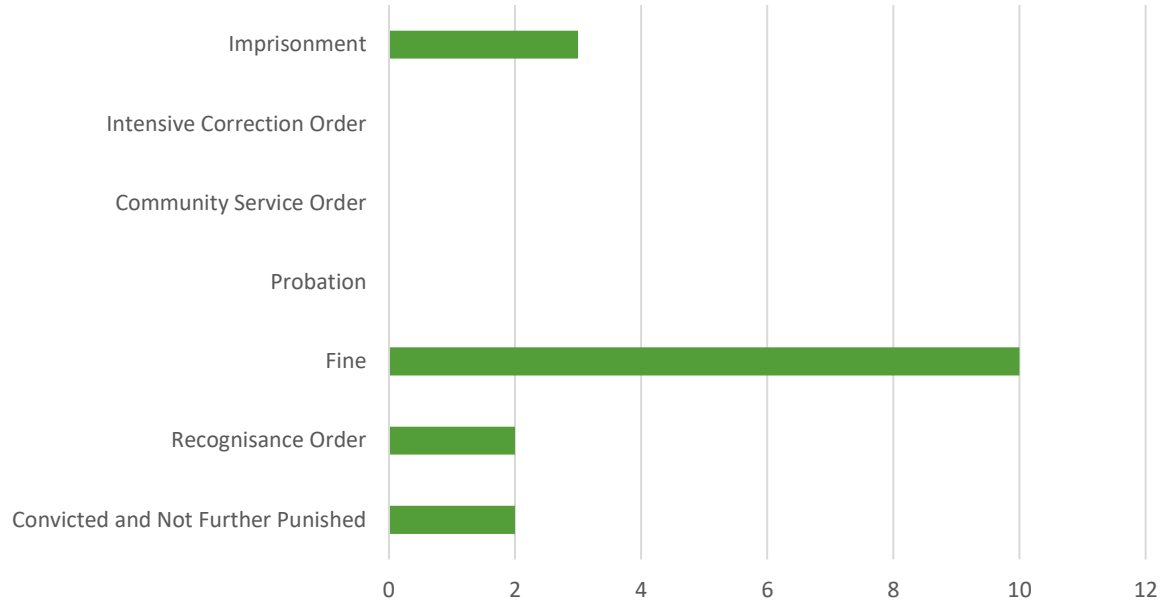

Figure 15: s77B charges finalised by sentence type: July 2016 – June 2022

This Review examined transcripts for more than half (12) of those proceedings. Of those:

- defendants were convicted and not further punished in circumstances where they had served a number of days in watchhouse custody, or where there were totality issues relating to already finalised proceedings;
- a recognisance was imposed in relation to a defendant who had no offending history in the last 20 years (and was therefore not a recognised offender himself);
- fines varying between $1000 and $1800 were imposed in circumstances where defendants were convicted of a consorting offence alone, or along with one other offence, and were being dealt with for breaching a previously imposed suspended sentence;

- imprisonment was imposed in circumstances where numerous other charges were also being dealt with, or where the defendant was serving other terms of imprisonment.

Circumstances which led to a charge of habitually consorting overwhelmingly related to social gatherings where multiple people were charged arising out of the same events, including dinners at restaurants and gatherings at hotels or other temporary accommodation, which resulted in multiple people being charged.

On one occasion the use of false names and a web-based call-diversion system was utilised to make phone calls to a number of long-time friends with whom the defendant had been issued an OWFC. However, it was submitted that given the calls were being recorded and monitored, and no other charge arose, those calls did not involve the discussion of criminal activity or other nefarious topics.

Defendants were mostly in their late 20s to mid-30's, had varying criminal histories, and often (but not always) had longstanding relationships with the persons contained in the OWFC.

DISPROPORTIONATE, ADVERSE, OR UNINTENDED CONSEQUENCES?

A number of submissions raised concerns the legislation lends itself to adversely and disproportionately affecting disadvantaged and vulnerable demographics, particularly those in remote locations or who experience homelessness. LAQ points out that people who experience disadvantage are often likely to associate with others who experience disadvantage and may be more likely as a result to fall within the broad category of what is a recognised offender.

The DCHDE notes that in 2020-21, 833 people assisted by a Specialist Homelessness Service in Queensland in their first support period were exiting a custodial arrangement (which includes adult correctional facilities, youth or juvenile justice detention centres, or immigration detention centres). People receiving support at congregate housing facilities (eg shelters) or centre-based support services (eg drop-in centres) may interact with, live with, or receive support alongside recognised offenders. Additionally, where a person is sleeping in a vehicle or couch surfing with friends, family or acquaintances, they are accessing a place to sleep off the streets. Shelter is their priority whether or not they are aware that a person they are sharing a space with is a recognised offender.

The DCHDE further notes that where a person is at risk of or experiencing, homelessness they may be disadvantaged in proving their association with a recognised offender was reasonable in the circumstances due to a lack of capacity to self-fund legal advice or advocacy, or to advocate on their own behalf where they have trauma histories involving contact with the QPS and/or the youth justice or corrections systems. The power for police to require identifying particulars under s 41A *PPRA* may also present a disadvantage for homeless people, given they may be unable to provide sufficient identification documents that include their current physical home address.

Further, DCHDE notes the exemption in s 77C the *Code* may hold unintended consequences where support services are not captured under s 77C(1), particularly given s 77C(2) provides the person bears the burden of proving that consorting was reasonable in the circumstances. People accessing support services do not necessarily have agency, choice or awareness about

other people accessing the same service with whom they may be required to share space with.

ATSILS raises concerns with the structure of s 77C, in that it has two limitations. Firstly, it only applies to that part of the *PPRA* and, it therefore does not restrict the breadth of powers of police to search people or vehicles; secondly, in a practical sense it creates confusion for an individual, who would need to be aware of this limitation on police powers, assert a relationship of relevance, and articulate a circumstance that may then render the otherwise prohibited consorting act as one that is in fact 'reasonable'. In its view, this framework is materially unworkable and impractical, especially considering the demographic of ATSILS' client base.

It was clear from this Review's consultation with the QPS that considerable attention has been given to the NSW Ombudsman Issues Paper regarding the consorting provisions.[145] That paper related to the first twelve months of the NSW consorting laws, and reviewed 1247 persons whom the police targeted for 'consorting'. Approximately 7% of these persons were children and young people, aged between 13-17. 40% of all persons subject to the consorting provisions in their first year of use were Indigenous, despite comprising only 2.5% of the general population.[146] A more recent examination of the New South Wales provisions by the Law Enforcement Conduct Commission [147] continued to raise concerns about the disproportionate application of consorting laws to Aboriginal and Torres Strait Islanders and to young people. This is in stark contrast to the data received by this Review, noting that 4.89% of all the people receiving OWFCs were Indigenous.

The consorting laws in Western Australia have also been subject to recent media criticism, alleging that the laws are 'being used to tear Indigenous youths, often in out-of-home care away from little connections they have with family'.[148] An article published in the National

[145] New South Wales Ombudsman, 'Consorting Issues Paper - Review of the use of the consorting provisions by the NSW Police Force - Division 7 Part 3A of the Crimes Act 1900 ' (Issues Paper, November 2013).
[146] Ibid 9.
[147] NSW Law Enforcement Conduct Commission, *Review of the operation of the amendments to the consorting law under Part 3A Division 7 of the Crimes Act 1900* (Discussion Paper, October 2021).
[148] Jess Whaler, 'Hardline anti-bikie laws tearing young indigenous cousins apart', *National Indigenous Times* (online, 21 October 2022) <https://nit.com.au/21-10-2022/4132/hardline-anti-bikie-laws-tearing-young-indigenous-cousins-apart>.

Indigenous Times in October 2022 says Indigenous legal experts are calling for the overhaul of consorting laws they say have disproportionately targeted young First Nations people for committing minor offences while hanging out with family.[149]

However, as the CCC notes, the Queensland legislation is relevantly different to that in NSW in relation to some vulnerable groups. The consorting provisions in Queensland expressly do not apply to young people and while the 'kinship defence' was introduced into NSW legislation, it has been part of Queensland's legislation since its inception. This may explain a different approach to these groups between the two jurisdictions.

The QPS told the Review it had 'learnt a lot' from the NSW Ombudsman's report.[150] The consultation emphasised the unique kinship between Indigenous peoples, was recognised. The Review was told 'we educate police that it is not applicable to Indigenous communities'. However, both the QLS and ATSILS report feedback from recordings and from taking instructions from clients indicates that enquiries as to whether there is a 'close family member' type relationship between the person and a recognised offender are minimal, if existent at all, and that on one occasion brothers were placed on each other's official warnings for consorting.

Both the QLS and ATSILS report viewing Body Worn Footage of interactions with police where racist and offensive remarks are made surrounding the use of consorting powers:[151]

"this bloke you're with is a grub…… the law makes us target people like him and anyone he's with"

"Where did you get this from? Murri kids? Must be stolen then."

Additionally, ATSILS submit it has heard anecdotes from its clients that police utilise these, and other, powers in a manner that is seen as harassment by its clients, in situations that may

[149] Ibid.
[150] New South Wales Ombudsman, *The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900* (n 67).
[151] This Review has not viewed these recordings.

not lead to charges, but which can still involve needless and embarrassing public police interactions including, in particular, being stopped, 'street checked' and searched.

In ATSILS view, while acknowledging the differences in the legislation between Qld and NSW, there is still sufficient scope within Queensland's legal framework for the provisions to be abused to the detriment of Aboriginal and Torres Strait Islander peoples and other similarly disadvantaged groups.

This Review notes the report recently provided by the *Commission of Inquiry into Queensland Police Service responses to domestic and family violence*.[152] That Commission found that racism is a significant problem within the QPS, and that cultural issues within the QPS that contribute to policing responses and the overrepresentation of First Nations peoples in the criminal justice system. That report made a number of recommendations to address those issues, noting that real change to those cultural issues require full and meaningful engagement with First Nations communities across Queensland.[153] ATSILS notes that it is indeed possible that, notwithstanding its limited exposure to issues in the implementation of consorting provisions, that abuse of powers may be occurring on the ground.

This Review has not received evidence of widespread misuse of consorting provisions by the QPS. However, given the findings of the *Commission of Inquiry into Queensland Police Service responses to domestic and family violence*, attitudes and interactions such as those identified in that report, and in submissions by the QLS and ATSILS, are likely to be present.[154] By implementing the recommendations of that Commission of Inquiry, it is likely the consorting provisions could be implemented in a way that does not disproportionately or adversely impact on vulnerable persons.

The submission from ATSILS seeks:

> A more robust framework within the PPRA which sets out how a likelihood of future consorting would be assessed by police officers in the field;

[152] Commission of Inquiry into Queensland Police Service, *A Call for Change: Commission of Inquiry into Queensland Police Service responses to domestic and family violence* (Report, 14 November 2022).
[153] Ibid 211.
[154] Ibid.

> Sufficient guidance in QPS policies/procedures to support the legislative framework relating to how a police officer in the field would assess the likelihood of future consorting;
>
> A positive legislative obligation on police officers seeking to use the consorting provisions to ask whether the subject individual identifies as an Aboriginal and/or Torres Strait Islander person, a positive legislative obligation on a police officer to then assess whether a close family member (including kinship relationship) exists between the two or more individuals that the police reasonably suspect are 'consorting'.

This Review notes that a similar obligation is set out in the QPS Operational Procedures Manual.[155] Further:

> A legislative framework on how a police officer would make this assessment in the field, for example, police should have an updated list of elders for the Aboriginal and Torres Strait Islander communities within their jurisdiction whom they could contact to determine this;
>
> Sufficient guidance for police officers in QPS's policies/procedures to support the legislative framework relating to the 'close family member' assessment (including kinship connection) process.

Once again, this Review notes that such policies and procedures are presently contained in the QPS Operational Procedures Manual.[156] And finally:

> Regular cultural awareness training conducted by the QPS for police officers with the aim of giving police officers in the field a better understanding of Aboriginal and Torres Strait Islander culture including the cultural norm of gathering and socialising in public spaces and the importance of kinship relationships.

This Review agrees with the submission but points out that the QPS indicate considerable effort is being put into education in this regard.

[155] The State of Queensland (Queensland Police Service) (n 85).
[156] Ibid.

COMPATIBILITY WITH THE *HUMAN RIGHTS ACT 2019* (QLD)

Elements of human rights were considered in *Tajjour v NSW* (2014) 254 CLR 508, where it was argued that the New South Wales consorting laws breached constitutionally implied freedoms of political communications, freedom of association, and was inconsistent with the international covenant on Civil and Political Rights.[157] The majority in the High Court found the anti-consorting provisions burdened the implied freedom of political communications or occasions for such communications, but that the provisions were appropriate and adapted to serve the legitimate end of the prevention of crime, and that the offence was limited to 'habitual'.

However, the High Court found the argument surrounding freedom of association was unnecessary to consider and could not be implied into the Constitution as a separate right to the implied freedom of communication on government or political matters and rejected the proposition that a treaty not incorporated into Commonwealth law could circumscribe the legislative power of State Parliaments.

The consorting provisions contain a reverse onus defence whereby certain acts of consorting will be disregarded if they are reasonable and occurred in the course of certain specified activities.[158] This limits the right to a fair hearing and the rights in relation to criminal hearings which includes the presumption of innocence until proved guilty. [159] At the time *SOCLAA* was passed, it was noted this constituted a potential infringement on the fundamental legislative principle that legislation have sufficient regard to the rights and liberties of individuals. The reversal of onus was justified on the basis the factual issues that must be proved do not relate to an essential element of the offence and relate to facts which the defendant is well-positioned to prove in the context of the offence. It was further noted it potentially impacts on an individual's then common-law right to freedom of association. That impact was justified on the basis the provision is narrow in its application in that it is largely limited to persons consorting with persons convicted of offences carrying a maximum penalty of 5 years imprisonment or more (which reflected the policy intention to target serious and/or

[157] *Tajjour v NSW* (2014) 254 CLR 508 ('*Tajjour*').
[158] *Criminal Code* (n 22) s 77B.
[159] *HRA* (n 6) ss 31-32.

organised criminals), and the prescribed defences facilitate participation in ordinary civic life (eg lawful employment, or with family members). As has been mentioned earlier in this report, the reversal of onus is not an unusual legal stratagem and is used in such acts as the *Drugs Misuse Act 1986* (Qld).[160]

The disclosure of another person's conviction for a criminal offence intrudes on that person's right to privacy.[161] At the time *SOCLAA* was passed, it was considered justified on the basis that convictions which have become 'spent' under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) are not relevant for the purpose of the offence in recognition of the principles of rehabilitation.

In its submission to this Review LAQ recognises there are already sufficient powers within legislation (for example in the *PPRA*), which are less restrictive options for allowing the investigation and prevention of criminal activity. It points to bail conditions preventing or restricting associations with co-accused offenders etc. It is LAQ's view that there is not a sufficiently demonstrated need for the consorting provisions to be retained.

Police powers to stop and detain persons to facilitate the issuance of an OWFC may breach a person's right to personal liberty,[162] privacy,[163] and a common law right to silence. When *SOCLAA* was passed, this was justified on the basis those interactions are required in order to appropriately administer the OWFC, and that *PPRA* safeguards ensure the interactions are recorded appropriately, information is properly destroyed, and that it only relates to those consorting with convicted offenders, and the PIM's oversight role.

It is very clear from the most recent PIM report that QPS and law enforcement officers of the QPS have complied with record keeping requirements, and that investigations into OWFCs were rigorously monitored and breaches were exposed and had been rectified.[164] The PIM did note the reason the warning was given was not always recorded, it was either absent entirely or insufficient detail was provided. This aspect has been judged as a matter for judicial

[160] *Drugs Misuse Act 1986* (Qld).
[161] *HRA* (n 6) s 25.
[162] Ibid s 29.
[163] Ibid s 25.
[164] Public Interest Monitor (n 66).

review and it is to be expected that steps would be taken following the PIM Annual Report to put in place procedures to avoid this deficiency. In addition, The PIM notes the QPS has detailed internal procedures relating to consorting, including the issuing of OWFCs.[165] There is also an online training module. The PIM reported that it had reviewed both of these resources and found them fit for purpose.[166]

It should be remembered that this is the only review required by the legislation, with s 736 of the *Code* only stipulating that ***a review*** is required '5 years after the commencement of the consorting provisions.'[167] Therefore, future review of the operation of the offence is not currently required by the legislation and oversight will only be required through the PIM's statutory duties, which are far more limited in nature then the current Review's purview.

While the consorting provisions infringe upon the human rights conveyed in the *HRA*, this Review is of the view that, with the recommended amendments, they do not unreasonably or unjustifiably infringe upon those rights when regard is had to their purpose of disrupting and preventing serious criminal activity, and the relative restricted application of those laws.

[165] Ibid 14.
[166] Ibid 15.
[167] *Criminal Code* (n 22) s 736(1).

DO THE CONSORTING PROVISIONS DISRUPT SERIOUS AND ORGANISED CRIME?

The QLS submits the consorting provisions have been ineffective in disrupting serious and organised crime: "[*R]arely is it the case that persons charged with a consorting offence pursuant to s77B of the Criminal Code are also charged with other serious offences typically associated with organised crime*." To its members' knowledge, there is no data to substantiate a significant reduction in organised crime as a consequence of the introduction of the consorting offence.

The QLS supports an amendment to the definition of a recognised offender. Its proposal is for a conviction-based scheme where, upon application to a court by the prosecution, a person can be declared a recognised offender. This submission overlooks the objects of the legislation and is impractical in the disruption of organised crime in a timely manner. As will be discussed in more detail in 'the disruption of criminal organisations by way of disincentivising involvement', 'empirical studies often find that crime rates appear more sensitive to changes in the probability of apprehension than to changes in the severity of punishment'.[168]

With the changing nature of OMCG membership being reported by QPS, coupled with the emergence of new street gangs, the QPS submits that OWFCs are a valuable tool that is used to disrupt organised crime within these criminal networks. The QPS submits:

> By pre-emptively and retrospectively warning people about their associations with recognised offenders and the legal consequences if they continue to do so, police officers have the ability to disrupt and dismantle criminal networks.

The efficacy of OWFCs was observed by the PIM in its 2021-2022 Annual Report, noting that:

> The fact that the issue of OWFC notices led to 16 individuals in 2021-22 being charged with consorting offences indicate some people issued with the notices disregard them. This figure may also indicate that the notices are, in most cases, effective, in that only a

[168] Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report (appendices), August 2019) Appendix J, 595.

small proportion of those served with a notice go on to commit the offence of habitually consorting.[169]

Since the commencement of the OWFC provisions to 30 June 2022, 2,003 OWFCs were issued, whilst only 33 people were charged with habitually consorting. This may indeed point to the efficacy of OWFCs as a preventative measure. As OWFC provisions were introduced to disrupt organised crime, particularly amongst OMCGs, the utility of OWFCs in this respect is borne out in the proportion of 2021-22 OWFCs where the recipient had a gang affiliation.

	Number	**%**
OWFC notices where recipient had street gang affiliation	26	13
OWFC notice where recipient had OMCG affiliation	87	43

Table 6: Proportion of 2021-22 OWFC where recipient had a gang affiliation. *Source: PIM Annual Report 2021-2022*

The PIM also notes the importance of considering the gang affiliation of the **recognised offender** in an OWFC, given that this could speak to the utility of OWFCs in preventing and disrupting gang recruitment activities.

	Number	**%**
OWFC notices where recognised offender had street gang affiliation	29	14
OWFC notice where recognised offender had OMCG affiliation	96	47

Table 7: Proportion of 2021-22 OWFC where at least one recognised offender named had a gang affiliation. *Source: PIM Annual Report 2021-2022*

[169] Public Interest Monitor (n 66) 18.

PART 2: *PEACE AND GOOD BEHAVIOUR ACT 1982* (QLD)

HISTORY OF THE *PEACE AND GOOD BEHAVIOUR ACT 1982* (QLD)

The *PGBA* was enacted as a means to prevent '[a] considerable variety of disturbances [that] occur in the community where actual or threatened violence is involved, such as domestic disturbances, disputes between neighbours, child abuse and the like.'[170] The provisions re-enacted in a modernised form provisions removed from the *Justices Act 1886* (Qld)[171] in 1964, with a purpose of providing 'a form of preventive justice by which a person threatening or causing actual violence or other such breaches of the peace to another through his behaviour or conduct may be dealt with by means of a readily accessible, speedy and inexpensive process'.[172]

In 2016 the *PGBA* was substantially amended by *SOCLAA*. It not only created a scheme of new public safety protections orders, but also set out new objectives for the Act: to protect the safety, welfare, and peace and good order of the community from risks presented by people engaging in anti-social, disorderly or criminal conduct. It was further clarified that it was not Parliament's intention the powers under the *PGBA* should be exercised in a way that diminishes the freedom of persons in the State to participate in advocacy, protest, dissent or industrial action.[173]

[170] Queensland, *Parliamentary Debates*, Legislative Assembly 14 September 1982, 841 (Sam Doumany, Minister for Justice and Attorney-General).
[171] *Justices Act 1886* (Qld) ss 198-199.
[172] Queensland, *Parliamentary Debates*, 14 September 1982 (n 170) 841.
[173] *Peace and Good Behaviour Act 1982* (Qld) s 4(4) ('*PGBA*'); Explanatory Memorandum, *SOCLA* Bill (n 13).

PUBLIC SAFETY ORDERS

The COA Review found that no public safety orders ('PSO') had been sought or issued under that Act, noting that police had expressed some scepticism of their utility in light of the complexity and delay associated with operating under some other parts of the Act.[174] Ultimately it recommended that the PSO provisions be maintained, with amendments.[175] Conversely, the Taskforce found it persuasive that with the possible exception of a variant of public safety orders in South Australia, such measures had not proved to be particularly useful, however recommended that should the recommendations of the COA Review be implemented, consideration be given to transferring the PSO's into the *PGBA*.

Part 3 *PGBA* deals with PSO's and transferred provisions from Part 4 *Criminal Organisation Act 2009* (Qld) with some amendments, including provision for police-issued orders. The combination of a police-issued system and court-issued system merged efficiency and accountability.

The object of Part 3 is to provide for PSO's of no more than 7 days to be made by a commissioned officer, or of no more than 6 months to be made by a court,[176] and the provisions expressly do not affect the *Peaceful Assembly Act 1992* (Qld).[177] A PSO may be made with respect individuals as well as a group of persons,[178] and a PSO 72 hours or longer may be appealed.[179]

POLICE-ISSUED

The insertion of police-issued PSO's was intended to cover situations where it may not be practical or effective for police to apply for a court-issued PSO. The Explanatory Notes to *SOCLAA* outlined the hopes that such avenues could have been utilised in the 'Ballroom Blitz' incident on the Gold Coast in 2006, by assisting police to separate and remove persons from

[174] *Review of the Criminal Organisation Act 2009* (n 4) 80.
[175] Ibid 218-220.
[176] *PGBA* (n 173) s 15.
[177] Ibid s 16.
[178] Ibid s 14.
[179] Ibid s 88.

the location once they became aware of the situation developing, and may have prevented the incident from occurring or reduced its severity.[180]

Part 3 Division 2 allows a commissioned officer (Inspector or above) to make a PSO for a person or group of persons (the respondent) if he/she is satisfied:

a) the presence of that respondent at premises or an event, or within an area, poses a risk to public safety or security; and
b) it is more appropriate to make an order under this division than applying to the court for an order of longer duration; and
c) making the order is appropriate in the circumstances.[181]

The commissioned officer must have regard to the matters contained in s 17(3) *PGBA*, including whether the degree of risk involved justifies the imposition of the conditions having regard to any legitimate reason the respondent has for being present. Conditions which may form part of the order are contained in ss 18 and 20, and the duration is determined according to s 23. Powers under Part 3 Division 2 are limited by s 19 unless authorised by a court. Personal service of a copy of the order may be dispensed with if a commissioned officer is satisfied a public safety order should become binding as a matter of urgency.[182]

COURT-ORDERED

Part 3 Division 3 *PGBA* governs court-ordered PSO's. A senior police officer may apply to the court for, or for an extension of, a PSO.[183] The respondent may file a response.[184] A court may only make or extend a PSO if it is satisfied:

a) the presence to the respondent at premises or an event, or within an area, poses a serious risk to public safety or security; and
b) making or extending the order is appropriate in the circumstances.[185]

In considering whether or not to make or extend the order, the court must have regard to:

[180] Explanatory Memorandum, SOCLA Bill (n 14) 16.
[181] *PGBA* (n 173) s 17(1).
[182] Ibid ss 21-22.
[183] Ibid s 25.
[184] Ibid s 26.
[185] Ibid s 27(1).

a) the respondent's criminal history and any previous behaviour of the respondent that posed a serious risk to public safety or security;

b) whether the respondent is or has been a participant in a criminal organisation or the subject of a control order;

c) whether the respondent associates or has associated with

   i. a participant in a criminal organisation; or (ii) a person who is the subject of a control order; or

   ii. a recognised offender; or

   iii. an associate of a recognised offender;

d) if advocacy, protest, dissent or industrial action is the likely reason for the respondent being present at the premises or even or within the area – the public interest in maintaining freedom to participate in those activities;

e) whether the degree of risk involved justifies the imposition of the conditions to be stated in the order, having regard, in particular, to any legitimate reason the respondent may have for being present at the premises or even or within the area;

f) the extent to which making or extending the order will reduce the risk to public safety or security or effective traffic management;

g) the extent to which making or extending the order will assist in achieving the objects of this Act; and

h) anything else relevant.[186]

The conditions of an order may be what the court considers necessary having regard to the grounds for making or extending the order,[187] and may prohibit the respondent from:

a) entering or remaining at stated premises;

b) attending or remaining at a stated event;

c) entering or remaining in a stated area;

d) doing a stated thing in a stated area.[188]

The order takes effect when made, if the respondent or a legal representative is present, or upon service in person or by public notice if personal service is not practicable or the respondent is a group of persons.[189] An order, or an order for extension, remains in force

[186] Ibid ss 27(2)-(3)
[187] Ibid s 28(1).
[188] Ibid s 28(2).
[189] Ibid s 29.

until revoked, or the date stated in the order which must not be more than 6 months after the order, or the extension is made.[190]

A PSO may be varied or revoked at any time upon application by a senior police officer.[191]

OFFENCE TO CONTRAVENE

Following the making of a PSO, police are empowered to enter, search and detain if they reasonably suspect a PSO has been, is being, or is about to be contravened.[192] Knowingly contravening a PSO is an offence punishable by 300 penalty units or 3 years imprisonment.[193]

PUBLIC SAFETY ORDERS IN PRACTICE

Data obtained from QPS advises that nine PSO's have been made by a commissioned officer since the transition to the *PGBA*, suggesting that the difficulties faced by police under the previous legislation has been alleviated. Those PSO's were made in the 2017-18 financial year.[194]

The police powers pursuant to s 31 *PGBA* to stop and detain a person or vehicle, to remove person, or take other steps reasonably considered necessary have not been exercised between 1 July 2017 and 30 June 2022.[195] Neither has any person be charged for contravening a PSO. No applications for a public safety order, or extension of, a public safety order, have been made under s 25 *PGBA* since it's insertion.

THE *HUMAN RIGHTS ACT 2019* (QLD) CONSIDERATIONS

PSO's undoubtedly have the capacity to limit some of the rights now enshrined in the *HRA*; In particular the freedom of movement,[196] freedom of peaceful assembly and freedom of

[190] Ibid ss 29(4)-(5).
[191] Ibid s 30.
[192] Ibid s 31.
[193] Ibid s 32.
[194] Public Interest Monitor, *Annual Report 2018 – 2019* (Report, October 2019).
[195] Data obtained from QPS.
[196] *HRA* (n 6) s 19.

association,[197] right to privacy and reputation,[198] the right to protection of families and children,[199] and the right to liberty and security of persons.[200] The QLS also submits that the right to recognition and equality before the law[201] is affected, along with the right to take part in public life.[202]

It was noted in *SOCLAA's* explanatory notes that the provisions relating to PSO's infringed on the legislative principles that legislation have sufficient regard to the rights and liberties of individuals[203] as it may restrict a person's right of freedom of movement and association (and by extension their capacity to communicate and associate for political purposes), and potential inconsistency with the principles of procedural fairness and natural justice [204] regarding police-issued orders.

Those potential breaches were justified on the basis a Magistrate could only make a PSO if he/she was satisfied of a *serious* risk to public safety or security and that the lack of notice to a respondent in relation to police-issued orders could be justified on the basis it provides police with a fast and effective method of protecting public safety in circumstances where it may not be practicable to prepare a court application. Short-term police orders cannot be made repetitively in a short period of time, and the PIM has oversight of such orders.[205] Further, in determining an application, the court is required to take into account the public interest in maintaining the freedom to participate in advocacy, protest, dissent or industrial action if that is the likely reason for the respondent being present,[206] as well as any legitimate reason they may have for being present,[207] and the extent to which the order will reduce the risk to public safety or security or effective traffic management.[208]

[197] Ibid s 22.
[198] Ibid s 25.
[199] Ibid s 26.
[200] Ibid s 29.
[201] Ibid s 15.
[202] Ibid s 23.
[203] *Legislative Standards Act 1992* (Qld) s 4(2)(a).
[204] Explanatory Memorandum, *SOCLA* Bill (n 13) 40.
[205] Ibid.
[206] *PPRA* (n 49) s 27(2)(d).
[207] Ibid s 27(2)(e).
[208] Ibid s 27(2)(f).

Those considerations remain relevant to considering whether the limitations on human rights are necessary, justifiable and proportionate.

DISCUSSION

The QLS and LAQ question the necessity of the provisions given the limited number of orders sought and the provisions' capacity to affect human rights. As the COA Review observed, a PSO provides police with the power to direct a person not to attend an event in the first place.[209]

Other provisions which provide police with similar powers include:

- taking reasonable steps to prevent a breach of the peace from happening or continuing to happen;[210]
- take steps considered reasonably necessary to prevent the commission, continuation, or repetition of an offence;[211]
- a senior police officer may authorise the use of out-of-control event powers if they reasonably believe an event may get out of control, including the direction to immediately leave and not return to a specified place for up to 24 hours;[212]
- police may issue a 'police banning notice' which can prohibit a person from entering licensed premises, being at public places in a safe night precinct, or attending a public event at which alcohol will be sold[213] if a person has behaved in a 'disorderly, offensive, threatening or violent way' at any time in the past at or near one of those places, and their presence in one of those places 'in the immediate future' would pose an unacceptable risk of causing violence, impacting on public safety or interfering with others' enjoyment of the place.[214]

[209] *Review of the Criminal Organisation Act 2009* (n 4) 220.
[210] *PPRA* (n 49) s 50.
[211] Ibid s 52.
[212] Ibid ss 53BE(1)(b), 53BG(2)(b).
[213] Ibid s 602B(1).
[214] Ibid ss 602A, 602C(3).

Such provisions primarily target alcohol-related and disorderly behaviour rather than criminal activity, and do not cover anticipated violence in public places such as airports or shopping centres.[215] As concluded in the COA Review, the removal of PSO's could mean that some anticipated violence could not be prevented using other tools.[216]

The QPS advised there is a complexity around using the PSO provisions for a group, as it focusses mostly on an individual. Where QPS had been looking to use a PSO for an OMCG, while it could be served on a group, it nevertheless had to state every person individually. Given these provisions will affect a person's human rights, such requirements are desirable.

QPS submit that the combination of powers under the *PGBA* effectively shut down the places being used as clubhouses. It is a somewhat more challenging environment, in that clubhouses are a thing of the past. That restricts much of the social element that makes membership of an OMCG an attractive option and impedes typical recruitment strategies.

[215] *Review of the Criminal Organisation Act 2009* (n 4) 220.
[216] Ibid.

RESTRICTED PREMISES ORDERS

Part 4 *PGBA* relates to the making of restricted premises orders ('RPO') and was modelled on *Restricted Premises Act 1943* (NSW) upon the recommendation of the Taskforce. It replaced s 60B the *Code* (known as the 'clubhouse offence') which had only been charged 5 times in 27 months with no convictions at the time of the Taskforce Review.

Under the previous provision, where the court had made a reputed criminal declaration anchored to a particular premises because 'reputed criminals' or associates of reputed criminals were known to go to the premises, it became an offence for the owner of the premises to have such a person there, or take part or assist in the control or management of the premises, unless they could prove they had taken all reasonable steps to stop that from occurring.

The amendments were designed to ensure individuals would be targeted on the basis of their 'disorderly activity' rather than merely on the basis of their association, provide for better judicial oversight over the declaration of premises, and provide for more open and accountable decision-making.

THE PROVISIONS

A senior police officer may apply to a court for a RPO for stated premises, other than a licenced premises[217] if he/she reasonably suspects that one or more disorderly activities have taken place at the premises and are likely to take place again.[218] An owner or occupier may respond to the application.[219]

Disorderly activity is defined to include:[220]

a) drunkenness, disorderly or indecent conduct, or entertainment of a demoralising character, at the premises; or

b) criminal activity at the premises that is likely to pose a risk to the safety of a member of the public; or

[217] *PGBA* (n 173) s 34.
[218] Ibid s 36(1)(a).
[219] Ibid s 35.
[220] Ibid s 33.

c) the unlawful supply of liquor or drugs from the premises; or

d) the unlawful possession at, or supply from, the premises f firearms or explosives; or

e) the presence of any of the following at the premises –

   i. recognised offenders;

   ii. associates of recognised offenders;

   iii. persons subject to a control order; or

f) the participation of any of the following in the control or management of the premises:

   i. recognised offenders;

   ii. associates of recognised offenders;

   iii. persons subject to a control order; or

A court may make a RPO if satisfied that disorderly activities have taken place and are likely to take place again, and the order is appropriate in the circumstances.[221] The court must have regard to:

a) the extent to which the premises are open to the public, or used by the public, whether on payment or otherwise;

b) the extent to which disorderly activities habitually take place at the premises;

c) the extent to which making the order will reduce the risk to public safety caused by disorderly activities taking place at the premises;

d) the extent to which making the order will assist in achieving the objects of this Act;

and anything else it considers relevant.[222]

A RPO must prohibit:[223]

a) disorderly activities taking place at the premises;

b) any of the following being at the premises –

   i. recognised offenders;

   ii. associates of recognised offenders;

   iii. persons subject to a control order; or

[221] Ibid s 36(1).
[222] Ibid s 36(2)-(3).
[223] Ibid s 37(2).

c) any of the following taking part in the management or control of the premises –

i. recognised offenders;

ii. associates of recognised offenders;

iii. persons subject to a control order.

The RPO takes effect when made if the respondent or a legal representative is present, or upon service in person or by public notice, and will remain in force until the order is revoked, or the day stated in the order (being at least 6 months but not more than 2 years).[224]

A RPO may be revoked or varied upon application by a senior police officer.[225]

Once a RPO is made, police are permitted to search the premises without a warrant from time to time as required[226] in relation to the search and seizure of prohibited items or things that may be evidence of a commission of an offence.

There are provisions relating to the return of prohibited items seized by police from a restricted premises, and the forfeiture of seized prohibited items. [227]

OFFENCE TO CONTRAVENE

Once a RPO is in place, the owners or occupiers of a restricted premises commit an offence if disorderly activity takes place at the restricted premises, and they know or ought reasonably to know that the disorderly activity has taken place, unless the owner or occupier proves they have taken all reasonable steps to prevent the contravention.[228] A conviction is punishable by 150 penalty units or 18 months imprisonment for a first offence, or 300 penalty units or 3 years imprisonment for each later offence.[229]

[224] Ibid s 38.
[225] Ibid s 39.
[226] Ibid s 49.
[227] Ibid ss 50-53.
[228] Ibid s 54.
[229] Ibid.

RESTRICTED PREMISES ORDERS IN PRACTICE

No RPO's have been applied for, made, revoked, or varied pursuant to ss 34, 36 and 43 *PGBA*. No charges for contravening a RPO have been laid, and powers pursuant to s 49 *PGBA* have not been exercised.

In order to affect a transition between the previous and new legislation, a list of premises was taken to be restricted premises for two years.[230] Statistics from QPS and Queensland Courts reveal there has been one application for an extension of a RPO, pursuant to s43 *PGBA*. That matter involved an application, as detailed in the PIM Annual Report 2018-19, to the Magistrates Court to extend an order beyond 2 years for a prescribed place. While the Magistrate was satisfied that one or more disorderly activities had taken place, she was not satisfied that disorderly activities habitually took place, or that they ever did.

Weapons and ammunition being found, shots fired at the building, and an act of arson were not disorderly activity (as it was then defined). While it might have been open to conclude that serious criminal activity was likely to occur, that was not the test at that time. Subsequent to that decision, the definition of 'disorderly activity'[231] was amended to insert "*(b) criminal activity at the premises that is likely to pose a risk to the safety of a member of the public*".[232] The relevant amendments were made 'in response to a Magistrates Court interpretation of the definition of disorderly activity as not including unspecified criminal activity.[233] Such amendment was appropriate in the circumstances in the opinion of this Review.

THE *HUMAN RIGHTS ACT 2019* (QLD) CONSIDERATIONS

As with PSO's, RPO's have the capacity to limit rights now enshrined in the *HRA*, including the freedom of movement,[234] freedom of peaceful assembly and freedom of association,[235]

[230] *Peace and Good Behaviour Regulation 2010* (Qld) s 11A.
[231] *PGBA* (n 173) s 33.
[232] *Justice and Other Legislation Amendment Act 2020* (Qld) s 158.
[233] Explanatory Memorandum, Justice and Other Legislation Amendment Bill 2019 (Qld) 2 ('Justice and Other Legislation Amendment Bill ').
[234] *HRA* (n 6) 19.
[235] Ibid s 22.

property rights,[236] right to privacy and reputation,[237] the right to protection of families and children,[238] and the right to liberty and security of persons.[239]

Are the limitations on those rights necessary, justifiable and proportionate? RPO's allow police to search premises without a warrant at any time during the operation of the order, and it is an offence for an owner or occupier to allow unlawful and/or disorderly behaviour to occur on declared premises. Such limitations on the right to freedom of movement, right to peaceful assembly and freedom of association, and property rights can be particularly onerous, especially in circumstances where the owner of a premises may be distanced from the occupier by way of a lease or rental agreement.

Such limitations may be justified when taking into account that such orders can only be made if a Court is satisfied that disorderly activities are occurring, and with the public safety imperative of disrupting the disorderly activities of persons convicted of serious offences.[240] An application must be made, and the owner or occupier may file a response to that application and have their position considered by a neutral decision-maker.[241] Further, applications can be made for the return of items, and such proceedings considered by this Review indicate the provisions are being applied appropriately.

DISCUSSION

Feedback from QPS has been that the standard required to satisfy a Court on an application pursuant to Part 3 is high. Powers pursuant to s 150(1)(e)[242] are often first used to apply for a search warrant on the basis that a senior police officer reasonably believes one or more disorderly activities have taken place, and are likely to have taken place again, so that he/she may find and seize prohibited items at the place. The QPS is also cognisant that once a warrant[243] has been executed, the police officer must then rely on intelligence to say that it

[236] Ibid s 24.
[237] Ibid s 25.
[238] Ibid s 26.
[239] Ibid s 29.
[240] Ibid s 36.
[241] Ibid s 31, ensuring natural justice occurs and providing a right to a fair hearing in accordance with this provision of the *HRA*.
[242] Also inserted into the *PPRA* (n 49) as a result of the *SOCLAA* (n 1).
[243] Pursuant to *PPRA* (n 49) s 150(1)(e).

would happen again, but the QPS is mindful of having to protect human sources or the methodology of any operations.

The QLS and LAQ question the necessity of the provisions given the limited number of orders sought and their capacity to affect human rights.

The lack of applications being made under the *PGBA* provisions might be explained by the QPS experience. The QPS have found in practice that the preliminary steps of obtaining and executing a search warrant is often sufficient for the person in charge of the premises to close it down and cease activity, such that the police officer has not had to proceed further to make an application for a premises to be declared restricted. This is reflective of the preventative intent of the legislation – there is little need to resort to applying for a RPO if the preliminary steps enabled by *SOCLAA* mean the premises is effectively shut down. However, that also means that officers are limited in proving the premises have been used on more than one occasion, which is necessary for an application for a RPO.

In addition, the changing face of OMCG's in particular, mean that the clubhouse is no longer the centrepiece of an organisation – instead favouring more temporary accommodation options. In its submission QPS notes that while this may make enforcement difficult, it is "evidence that the QPS has disrupted the ability to meet and recruit". Further, given the potential impact for the owner of the premises, if there is disorderly conduct in the future there is an element of liability for them, and they are unlikely to encourage the retention of individuals or organisations that would open up that liability.

The QPS also point to the utility of the provisions to criminal organisations as a whole, rather than just OMCG's. They can be used for other unlawful behaviours, for example in business such as pop-up karaoke bars run by criminal groups or entities which may be providing unlawful prostitution and supplying liquor without a licence. The QPS note the legislation is not limited to OMCG's and has had utility in disrupting criminal activity more widely, including emerging street gangs.

In its submission the QPS notes the property seized also acts as a financial impost on individual gang members, and gangs as a whole. In relation to items that have been seized utilising these provisions, the Review has been provided with material relating to a number of

applications for the return of items seized pursuant to s 150(1)(e) *PPRA*.[244] This material indicates that Respondents are exercising their rights pursuant to the legislation for the return of items not properly classed as prohibited items, and where there is dispute between the parties, there is full ventilation before the Magistrates Court.

[244] Ibid.

FORTIFICATION REMOVAL ORDERS

The COA Review suggested that fortification removal orders ('FRO') have been used rarely in Australia and traced the first legislative FRO's being enacted in Western Australia in 2002 as a reaction to a car bombing which killed a retired police officer and his friend in September 2001.[245] Queensland enacted the *Criminal Organisation Act 2009* (Qld) based on targeting organisations instead of individuals.

The COA Review found that no FRO's had been sought under that regime and put forward three options for consideration/amendment. *SOCLAA* combined two of those recommendations, being a court-ordered model and a variant of the police-issued model whereby a senior policy officer could apply to the Magistrates Court for a FRO,[246] resulting in Part 4 *PGBA*.[247]

A 'fortification' is 'any structure or device that, alone or as a system or part of a system, is designed to stop or hinder, or to provide any other form of step against, uninvited entry to the premises.[248]

POLICE-ISSUED

A commissioned officer may give a 'stop and desist notice' to an owner or occupier of a premises requiring them to stop and desist from installing fortifications, and will remain in force for 14 days.[249] Failure to comply with the notice is evidence of the grounds contained in s 60(1)(a) to obtain a FRO upon application to the court, unless the respondent can prove otherwise.[250]

[245] *Review of the Criminal Organisation Act 2009* (n 4) 135.
[246] Ibid 221-222.
[247] The third involved the expansion of police search powers.
[248] *PGBA* (n 173) s 56.
[249] Ibid s 76.
[250] Ibid s 77.

COURT-ORDERED

A senior police officer (ranked Sergeant or above) may apply to a court for a FRO[251] and the respondent may file a response.[252] The court may only make an order if it is satisfied:

a) the premises have a fortification; and

b) the fortified premises are either –

   i. being, have been or are likely to be, used for or in connection with serious criminal activity, or to conceal evidence of, or to keep proceeds of, serious criminal activity; or

   ii. owned or habitually occupied or used by a criminal organisation, participants in a criminal organisation, recognised offenders, or associates of recognised offenders; and

c) the extend or nature of the fortification is excessive for lawful use of that type of premises; and

d) making the order is appropriate in the circumstances.[253]

The court must also have regard to:

a) the extent to which the premises are open to the public, or used by the public, whether on payment or otherwise;

b) the extent to which making the order will reduce the risk to public safety caused by habitual use of the premises by people mentioned in subsection (1)(b);

c) the extent to which making the order will assist in achieving the objects of (the) Act.[254]

Powers to enforce an order by removing or modifying fortifications are contained in s 65 *PGBA*, and the procedure for entry to a fortified premises is contained in ss 66 and 67 *PGBA*.[255] Fortifications that have been removed may be forfeited to the state, which may recover any reasonable costs incurred in taking enforcement action.[256]

[251] Ibid s 58.
[252] Ibid s 59.
[253] Ibid s 60(1).
[254] Ibid s 60(2).
[255] Ibid ss 66-67.
[256] Ibid ss 71-72.

A FRO may be varied or revoked at any time upon application by a senior police officer.[257] Compensation is payable to an owner of a fortified premises who is someone other than a responsible person and whose property has been damaged by the removal of the fortification only if the court is satisfied it is just to make the order in the circumstances of the particular case.[258] The State may recover the amount paid pursuant to s 73 from any responsible person as a debt.[259]

CONTRAVENTIONS AND APPEALS

There is a right of appeal for a person aggrieved by a decision in relation to a FRO, however the lodgement of an appeal does not affect the operation of the order or prevent the taking of action to implement the order unless ordered by the court.[260]

It is an offence to hinder the removal or a modification of a fortification, or the enforcement action, and attracts a maximum penalty of 5 years imprisonment.[261]

FORTIFICATION REMOVAL ORDERS IN PRACTICE

Statistics obtained from QPS advise that no stop and desist notices have been issued pursuant to s 76 *PGBA* from 1 July 2017 to 30 June 2022, and that no FRO's have been issued; however Queensland is not isolated in that regard. The COA Review indicated that by 2015 only three attempts had been made to obtain a FRO in WA, 4 in South Australia, 2 in Victoria, and none in other jurisdictions including Queensland.

Further, the WA Corruption and Crime Commission notes no fortification warning notices were issued in 2020-21,[262] and previous Annual Reports confirm only 3 fortification warning notices had been issued since the provision's introduction in 2002. Previous Annual Reports also note that the Commission had only received one fortification warning notice since January 2011, and it has continually attributed the lack of applications to the fact that:

[257] Ibid s 63.
[258] Ibid s 73.
[259] Ibid s 74.
[260] Ibid ss 88, 90.
[261] Ibid s 75.
[262] Western Australia, Corruption and Crime Commission Annual Report 2020-21 (Report, 27 October 2021) 95.

- the definition of organised crime under the *Corruption, Crime and Misconduct Act 2003* (WA) is narrow and confusing; and
- only coercive examination, search, and anti-fortification powers need to be sought from the commission, and that fortification warning notices fail to discourage organised crime groups from re-fortifying premises previously dismantled and re-emphasised a Joint Standing Committee on the Corruption and Crime Commission report of 2014 recommendation to make amendments to the *Corruption, Crime and Misconduct Act 2003* (WA) to prevent re-fortification.[263]

In Queensland, no charges for hindering the removal or modification of a fortification have been laid, and no enforcement actions have been taken by QPS pursuant to s 65 *PGBA* during 1 July 2017 to 30 June 2022; nor was QPS aware of any enforcement actions taken by the Organised Crime Gangs Groups.

THE *HUMAN RIGHTS ACT 2019* (QLD) CONSIDERATIONS

FRO's and the associated powers limit human rights such as property rights[264] and right to privacy and reputation.[265] Limitations on individual freedoms and liberties should not be infringed without justification. Courts are often uniquely placed to determine whether such a justification exists. While stop and desist orders are not overseen by an independent decision-maker, they cease to have effect after 14 days. Their purpose is to prevent premises associated with criminal activity and criminal associates from becoming heavily fortified. Failure to comply with a stop and desist order is deemed to satisfy the requirement there be disorderly activity if an application for a FRO is made.

Data from QPS advises that there were no stop and desist notices issued between 1 July 2017 – 30 June 2022. This is reflective of the anecdotal evidence given in consultation with QPS that informal conversations with potential respondents, who take initiative to remove potential fortifications, as well as a practical approach to enforcement being taken by QPS, is effective.

[263] Western Australia, *Corruption and Crime Commission Annual Report 2018-19* (Report, 26 September 2019) 107.
[264] *HRA* (n 6) s 24.
[265] Ibid s 25.

The power to forcibly remove fortifications limits an individual's property rights, and right to privacy and reputation. Such a limitation may be justified on the basis that a court may only make such an order if the premises, owner, or occupier, are linked to criminal activity and the premises are fortified to an extent which is unlawful for a lawful use of those premises.

DISCUSSION

The statistics obtained by this Review may indicate these laws have rarely, if ever, been put in to use by law enforcement authorities, though there is some anecdotal evidence to suggest the provisions may still have utility.

In its submission to this Review, QPS advise that given criminal organisations are shifting to transient uses of short-term premises they do not own, they are often not able to install the conventional fortifications that the legislation was designed to combat. QPS notes that police officers can raise the prospect of seeking an order when requesting the person in charge of premises to remove fortifications voluntarily. While largely unused, QPS submits they remain an important deterrence function and remain necessary should criminal organisations return to using permanent addresses.

The DCHDE held concerns that there were potential adverse consequences for tenants residing in accommodation where they may have recommended and/or funded security camera installations for those experiencing stalking, sexual violence, or domestic and family violence. This is because security cameras can fall within the definition of a fortification. This concern equally applies to private residences, or indeed short-terms rental accommodations such as Airbnb's, where security systems and/or alarms, have been installed.

The use of the FRO provisions in those circumstances would likely be at odds with programs run by the QPS such as the Community Camera Alliance.[266] The Community Cameral Alliance is an initiative encouraging the registration of CCTV systems to prevent crime and make the community safer, noting that CCTV footage is regularly used to investigate and solve often serious crimes. Further, consultation with QPS indicates that use of these provisions involves

[266] Queensland Police Service, *Community Camera Alliance* (web page, 13 December 2022) <https://www.police.qld.gov.au/safety-and-preventing-crime/community-camera-alliance>.

significant consideration of the adverse consequences on people other than those involved in the criminal activity intended to be prevented by these provisions.

In any event, the material obtained by this Review does not suggest the legislation is being used outside of its intended purpose (if at all).

DISPROPORTIONATE, ADVERSE, OR UNINTENDED CONSEQUENCES?

Given the limited use of orders pursuant to these provisions, it is difficult to conclude whether the legislation is resulting in disproportionate, adverse, or unintended consequences. However the limited use of the provisions does not negate their deterrent effect.

If few or no orders have been sought, it can have no adverse or unintended consequence. While the advancement and promotion of home security systems means that more residences may fall within the definition of a fortified premises, it is clear the provisions are not being used without proper regard for their purpose.

IS THE *PEACE AND GOOD BEHAVIOUR ACT 1982* (QLD), OTHER THAN PART 2, MEETING THE OBJECTIVES OF THE ACT?

The main object of the *PGBA* is to protect the safety, welfare, security and peace and good order of the community from risks presented by people engaging in antisocial, disorderly or criminal conduct.[267] Other objects include:

a) disrupt and restrict the activities of criminals; and

b) deter criminals from establishing, maintaining or expanding a criminal network; and

c) ensure premises in which criminals habitually gather are unable to be used for antisocial, disorderly or criminal conduct; and

d) ensure premises habitually used by criminals, or connected with serious criminal activity, do not become excessively fortified; and

e) prevent intimidation of the public by criminals; and

f) protect the community's enjoyment of safe and secure neighbourhood environment and public spaces.[268]

The QPS submits that the issuing of search warrants under s 150(1)(e) *PPRA*:

> has acted as an important pre-emptive action which has provided ongoing disruption to criminal networks, negating the need for more arduous measures such as RPO's and FRO's. Although, the presence of these provisions acts as a secondary deterrent in itself.

The limited use of the provisions makes a conclusion on this question difficult to resolve. Anecdotal evidence suggests there is still some use to the RPO and PSO provisions, and that they have been used in furtherance of the *PGBA* objectives. This may mean that while individual use of these provisions is small, they form part of a multi-faceted approach to disrupting and restricting the activities of criminals.

It is difficult to establish empirically whether the provisions of the *PGBA*, other than Part 2, are meeting the objectives of the Act. However, material from the QPS indicates the provisions have been useful.

[267] *PGBA* (n 173) s 4(1).
[268] Ibid s 4(2).

REVIEW RECOMMENDATIONS REGARDING THE *PEACE AND GOOD BEHAVIOUR ACT 1982* (QLD) EXCLUDING PART 2

This Review is being asked to consider what amendments are necessary to improve the effectiveness of the provisions, whether aspects be repealed, and if amendments are recommended, what form should they take.

Organisations such as the QLS and LAQ question the need for the legislation. ATSILS did not support the wholesale repeal of these provisions, noting utility in having these orders as a means to fill gaps, legislative or otherwise, which may be important in certain contexts. If they were to be repealed or amended, ATSILS is concerned that consideration must be given as to what will replace them.

Despite the limited use of RPO's and PSO's, this Review does not consider it necessary for those provisions to be amended or repealed. While there have been few or next to no RPO's or PSO's issued since *SOCLAA's* commencement, associated *PPRA* powers have been utilised such that the provisions should be retained without amendment.

However, this Review recommends consideration be given to repealing the provisions relating to FRO's, to be replaced with an expanded search warrant power, as originally recommended by the COA Review. The COA Review advocated for, and preferred, the expansion of existing police search warrant powers rather than the introduction of a fortification removal order regime. It suggested the insertion of a power in s 157(1) *PPRA* so that with specific authorisation by a Supreme Court Judge, fortifications may be removed in the course of executing a search warrant. This is a step beyond a warrant that may authorise causing structural damage to a building such that walls, ceiling linings or floors of a building may be removed to search for warrant evidence or property.[269]

The FRO provisions have not been used. This is not a surprising outcome, given the COA Review found that similar provisions had rarely been utilised in Australia, including by

[269] *PPRA* (n 49) s 157(3).

Western Australia who has had such legislation in place now for 20 years with only three formal applications during that time.

Whist a search-warrant based system potentially may not have the same deterrent or preventative effect as a FRO, that is of less significance considering the changing face of organised crime, the disappearance of the traditional OMCG clubhouse in favour of more temporary, or online, coordination and socialisation, and the utilisation of other powers including the consorting provisions. Further, the removal of the FRO's and insertion of a subsection into the *PPRA* search warrant powers would provide judicial oversight of an infringement upon an individual's property and privacy rights, and present a less-restrictive impact only exercised with judicial oversight and independence.

The provisions do limit human rights contained in the *HRA*, however they are reasonable and demonstrably necessary given their purpose. The proposed amendments to the FRO and *PPRA* provisions reflect an additional safeguarding of an individual's human rights

RECOMMENDATION 6:

The Review recommends the RPO and PSO provisions remain without amendment.

The Review recommends the repeal of the FRO provisions in the *PGBA*, and replacement with expanded search warrant powers within s 157(1) *PPRA*.

DOES THE *PEACE AND GOOD BEHAVIOUR ACT 1982* (QLD) REMAIN THE MOST APPROPRIATE ACT FOR THE PROVISIONS RELEVANT TO THE REVIEW?

The insertion of these provisions into the *PGBA* was as a result of recommendations made by the COA Review and the Taskforce. The COA Review recommended PSO powers be transplanted to an Act like the *PGBA*, as that Act already allowed a person who has been threatened with assault or destruction of their property to make a complaint to a justice of the peace, who may in turn refer the matter to the Magistrate's Court. A Magistrate may then make an order that the person who made the threat is to 'keep the peace and be of good behaviour for such time, specified in the order, as the court thinks fit'. It was suggested it would be a natural complement to the scheme of that Act to include similar preventative orders upon application by police. However, the COA Review recommendation was that if the powers were to be amended to allow police the power to issue them within urgent timeframes, then it would logically be inserted into the *PPRA* similar to 'move on' powers.

The Taskforce recommended that RPO provisions would fit well within the *PGBA* – noting that the recommendations from the COA Review appeared intuitively complementary.

This Review considers the provisions appropriately remain within the *PGBA*. Should FRO's be retained as they are, they too should remain in the *PGBA*.

RECOMMENDATION 7:

The *PGBA* remains the most appropriate Act for these provisions, subject to the Review's recommendations regarding FRO's.

PART 3: PART 9D *PENALTIES AND SENTENCES ACT 1992* (QLD)

THE SERIOUS ORGANISED CRIME CIRCUMSTANCE OF AGGRAVATION

Recommendation 21 of the Taskforce report was to repeal the circumstance of aggravation that had been introduced by the 2013 suite of legislation, and replace it with a circumstance of aggravation contained within the new organised crime framework. This was a unanimous recommendation by the Taskforce members. That replacement was inserted into Part 9D *PSA* by *SOCLAA*.

This circumstance of aggravation applies to a prescribed list of serious offences,[270] often associated with organised criminal activity.

161Q Meaning of *serious organised crime circumstance of aggravation*

1) It is a circumstance of aggravation (a ***serious organised crime circumstance of aggravation***) for a prescribed offence of which an offender is convicted that, at the time the offence was committed, or at any time during the course of the commission of the offence, the offender—
    a) was a participant in a criminal organisation; and
    b) knew, or ought reasonably to have known, the offence was being committed—
        i. at the direction of a criminal organisation or a participant in a criminal organisation; or
        ii. in association with 1 or more persons who were, at the time the offence was committed, or at any time during the course of the commission of the offence, participants in a criminal organisation; or
        iii. for the benefit of a criminal organisation.
2) For subsection (1)(b), an offence is committed for the benefit of a criminal organisation if the organisation obtains a benefit, directly or indirectly, from the commission of the offence.
3) To remove any doubt, it is declared that a criminal organisation mentioned in subsection (1)(b) need not be the criminal organisation in which the offender was a participant.

[270] *Penalties and Sentences Act 1992* (Qld) Schedule 1C.

The consequence of conviction for a prescribed offence committed with the circumstance of aggravation is to enliven s 161R *PSA*, namely that the court must sentence the person to a term of imprisonment for the prescribed offence. The length of this "base component" is decided by the court having regard to the circumstances of the case, but not the "mandated" sentence or the control order which must be made.

However, if a sentence of life imprisonment is imposed as the base component *or* the offender is already serving a term of life imprisonment, the court must impose a sentence of imprisonment (***the mandatory component***) for the lesser of the following periods—

(i) 7 years;
(ii) the period of imprisonment provided for under the maximum penalty for the prescribed offence

The mandatory component must be served cumulatively with the base component,[271] and, if the offender is serving, or has been sentenced to serve, imprisonment for another offence, the mandatory component must be ordered to be served cumulatively with the imprisonment for the other offence.[272]

When deciding which prescribed offence to use for imposing the mandatory component, the court must choose the offence which will result in the offender serving the longest period of imprisonment. [273]

Section 161S *PSA* provides that if a person provides cooperation of significant use to a law enforcement agency about **an** offence, ss 13A or 13B *PSA* apply. It should be noted that the cooperation is not limited to the offence for which the offender is being sentenced, however, the cooperation must be of **significant use** to a law enforcement agency.[274]

[271] Ibid s 161R(3).
[272] Ibid s 161R(4).
[273] Ibid s 161R(7).
[274] *R v BDW; R v DAA* [2022] QCA 197 ('*R v BDW; R v DAA*').

AN ISSUE OF INTERPRETATION

The terms in s 161R are largely defined in ss 161N, 161O and 161P *PSA*. However, there have been single judge decisions in the Supreme Court which examine the proof necessary to enliven the circumstance of aggravation:

- *R v Stasiak and Turkyilmaz* (2019) 2 QR 533;
- *R v Hilton* (2020) 3 QR 260;
- *R v Hill* (2020) 5 QR 225; and
- *R v Hill (No 2)* (2020) 6 QR 1.

Some further discussion arose in the recently delivered decisions of the Court of Appeal in *R v BDW; R v DAA* [2022] QCA 197 and *R v Hermansson; R v Ali* [2022] QCA 243. Each of these cases involved an offence of trafficking in drugs where the circumstance of aggravation was alleged.

R v Stasiak and Turkyilmaz (2019) 2 QR 533

This matter involved a pre-trial hearing in which Bryan Stasiak applied for a ruling of no case to answer in respect of the circumstance of aggravation, with arguments focusing on whether the requisite association existed. The use of 'by their association' in s 161O(1) requires there exist an association between the persons who are alleged, for the purpose of the circumstance of aggravation, to be a part of a criminal organisation.

His Honour Henry J said:

> In the present case it is not suggested that this is a criminal organisation of more than three persons … So here we are dealing with the bare minimum requirement of three at the very best for the prosecution, namely Bryan Stasiak, Wieslaw Stasiak and Gokhan Turkyilmaz …[275]
>
> … I, of course, accept that evidence of association can be indirect, that is to say circumstantial, but there must be some evidence capable of sustaining the inference that there was association as between the three members of the group.[276]

[275] *R v Stasiak and Turkyilmaz* (2019) 2 QR 533, [29].
[276] Ibid [30].

At paragraph [33] his Honour said that 'taking the evidence at the best, they [Wieslaw Stasiak and Gokhan Turkyilmaz] appear to have been agents of Bryan Stasiak. There is an absence of evidence of association between them, direct or indirect.'[277] The application was successful. The circumstance of aggravation in respect of Turkyilmaz was withdrawn.

R v Hilton (2020) 3 QR 260

This was a pre-trial application for a stay of proceedings. The prosecution argued that Hilton was a distributor for a sophisticated network and operating so proximate to that network, that it would be open for a jury to conclude that his conduct in relation to that organisation would lead someone to consider him a participant in the organisation.[278]

That argument was rejected by Henry J, noting that Hilton's proximity was simply an incident of him being an important wholesale customer of the alleged criminal organisation that was shipping drugs to Cairns, to Hill.[279] His Honour held that while an organisation's customers may be vital to its survival, it does not make those customers participants in the organisation. Buying a product from an organisation is an activity external to the organisation. While selling on behalf of the organisation as a paid agent or employee would likely amount to participation in the organisation, in this case there was no evidence that Hilton's on-selling was controlled or directed by the organisation.

R v Hill (2020) 5 QR 225

The matter was further considered in *R v Hill* (2020) 5 QR 225. His Honour, Henry J outlined the prosecution case as follows:

> … the prosecution case is that there was one criminal organisation in play. That case is that the organisation consisted of four individuals: two based in Sydney, "the Sydney offenders", and two based in Cairns, "the Cairns offenders". It is alleged the Sydney offenders were involved in repeatedly sending large quantities of illicit drugs to Cairns by arrangement with the Cairns offenders and that the Cairns offenders were involved in

[277] Ibid [33].
[278] *R v Hilton* (2020) 3 QR 260, [48].
[279] Ibid [49]-[50].

repeatedly sending large quantities of cash back to Sydney in an arrangement with the Sydney offenders.[280]

His Honour concluded that this was not a case in which it could be said that the prosecution facts were simply incapable of sustaining the requisite conclusion of guilt. Rather, this case involved an assessment of how one categorises what was occurring between the Sydney and Cairns offenders.[281] The application was dismissed.

R v Hill (No 2) (2020) 6 QR 1

The matter came on for trial before a judge alone, where His Honour Applegarth J made the following relevant findings:

- the word "group" in s 106O should be given an ordinary meaning and is capable of applying to a group of associated criminals, arranged informally, and lacking the features of a legitimate business arrangement.[282]
- the word "group" 'must be read in the context of serious criminal activity and with regard to s 161O. Care is required to test the existence of an alleged "group" for the purposes of s 161O by reference to the features of non-criminal groups.'[283]
- the simple fact of a commercial relationship between the buyer and the seller, along with others constituting a group, but other features of their relationship and the relationship between their associates may lead to the conclusion that the three or more may constitute a group.[284]
- it is not necessarily the case that any three or more persons who are associated or related in some way, for example, in buying and selling illegal drugs to each other, will constitute a "group" in the context of s 161O.[285]
- the mere presence of a common interest or purpose together with diverging or conflicting interests, may not be sufficient to comprise three or more persons as a group.[286]

[280] *R v Hill* (2020) 5 QR 225, [14] ('*R v Hill*').
[281] Ibid [44].
[282] *R v Hill (No 2)* (2020) 6 QR 1, [92]-[93] ('*R v Hill (No 2)*').
[283] Ibid [94].
[284] Ibid [117].
[285] Ibid [119].
[286] Ibid [122].

- whilst any ongoing commercial relationship, built on trust, created over a period of time, and with mutual interest in its continuation, is likely to be a closer relationship than a one-off transaction between buyer and seller, that would not, however transform the relationship into something other then that of buyer and seller.[287]
- the mutual interest in avoiding police detection does not constitute criminals with a mutual interest in a transaction as a group.[288]
- it is possible for an individual to belong to more than one "criminal organisation" at any one time.[289]

His Honour came to the view that, while in this case there were sale transactions, the drugs were not sent from Sydney on consignment. The first Sydney offender did not determine the sale price used by the first Cairns offender who was not the first Sydney offender's agent, let alone a partner or joint venturer. The Cairn's customers were not the customers of the first Sydney offender or of a group.

His Honour was not satisfied the circumstance of aggravation had been proved to the required standard.

[287] Ibid [126].
[288] Ibid [128].
[289] Ibid [134].

MITIGATION OF THE MANDATORY COMPONENT: A QUESTION OF 'SIGNIFICANT USE'

R v BDW; R v DAA [2022] QCA 197

This judgment specifically considered whether the cooperation of each applicant was 'not of significant use in a proceeding about a major criminal offence' in order find that s 161S *PSA* applied to allow the mandatory component of the sentence to be mitigated.[290] The Court stated:

> As defined in s 161O, a "criminal organisation" is a group of three or more persons, whether arranged formally or informally:
>
> (a) who engage in, or have as their purpose (or one of their purposes) engaging in, serious criminal activity (defined in s 161N as conduct constituting an indictable offence for which the maximum penalty is at least 7 years imprisonment); and
>
> (b) who, by their association, represent an unacceptable risk to the safety, welfare or order of the community.[291]

Having examined, in particular, *Malvaso v The Queen* (1989) 168 CLR and *R v Thompson* (1994) 76 A Crim R 75, the Court said:

> [16] These cases provide some assistance in understanding what is meant by "significant use" – the relevant "use" being detection of crime, identification of offenders, prosecution and conviction of them. The qualifier "significant" signals that it is not anything that might be characterised as cooperation that will trigger the procedure under ss 13A or 13B; it is only where the court is satisfied that the cooperation will be of "significant use", in the detection of crime, identification of offenders and/or the prosecution and conviction of them, that the procedure will be available.[292]

Further, the Court said:

> [24] "Significant" is an ordinary, not a technical word. In context, the ordinary meaning of significant, as informed by the Oxford English Dictionary is "sufficiently great or important to be worthy of attention; noteworthy, consequential, influential". Likewise, the Macquarie Dictionary relevantly

[290] See for example *R v PBH* (2021) 7 QR 414 in which the Court of Appeal found there was no reasons to read the reference in *Penalties and Sentences Act 1992* (Qld) s 161S(4) as excluding *Penalties and Sentences Act 1992* (Qld) s 161S(3)(c).
[291] *R v BDW; R v DAA* (n 270) [6].
[292] Ibid [16].

defines “significant” as “important; of consequence”. Also in the Oxford English Dictionary, the word “use”, as it appears in this context (“of [significant] use”) refers to something being applied for a purpose; utilised or appropriated in order to achieve an end or purpose. It is important to give meaning to both words since, as the sentencing judge correctly held, the focus is not on how cooperative the offender has been; the question of “significant use” is a reference to the use of the evidence which has been provided.

[25] The ordinary meaning of the words used fits with the purpose of the provisions which, on the one hand, is to impose a strong deterrent penalty on those who would commit crime as part of a criminal organisation (s 161R) and, on the other, is to encourage such offenders to cooperate with law enforcement agencies in proceedings or investigations about major criminal offences by providing evidence which is of significant use in the detection of crime, identification of offenders, prosecution and conviction of them (s 161S; read with s 13A and s 13B).

[29] The requirement, in s 161S(2) and (3), that the court is satisfied the cooperation “will be of significant use in a proceeding about a major criminal offence”, is to ensure that offenders convicted of committing a prescribed offence with a serious organised crime circumstance of aggravation do not defeat the mandatory component of the sentence by offering cooperation that is not of significant use or that is manufactured or contrived solely to overcome the application of the mandatory component, which is the penalty that has been legislated to deter persons from committing prescribed offences as participants in criminal organisations. In that context, it is a potentially onerous requirement, and should not be assumed to be capable of satisfaction by any cooperation at all.[293]

The issue had not been explored in previous proceedings, such as *R v PBH* (2021) 7 QR 414, or other sentencing proceedings as it had been accepted that the cooperation was of ‘significant use’.[294]

[293] Ibid [24]-[25], [29].
[294] See for example McMurdo JA in *R v PBH* (2021) 7 QR 414 at [3]-[24].

OTHER JUDICIAL PRONOUNCEMENTS

There have been two cases concerning an appeal against the base sentence imposed: *R v Hermansson; R v Ali* [2022] QCA 243 and *R v Pain* [2022] QCA 233.

There have been a number of judicial pronouncements made during the course of sentencing that trafficking in drugs represents an unacceptable risk to the safety and welfare of the community. There have been no judicial announcements in respect of other prescribed offences, although offences of violence by their very nature would represent an unacceptable risk to the safety, welfare and order of the community. The phrase 'order of the community' is fairly wide and would, it seems, encompass most offences, not least the prescribed offences.

Despite the view of the previous inquiries, there have been no prosecutions for the offence of sharing child exploitation material with the circumstance of aggravation. It has been suggested by more than one contributor that such activity is generally linear, that is, between two people and does not provide evidence sustaining an inference that there was an association as between the three members of the group.[295]

Nor have there been any prosecutions for 'boiler-room' investment frauds. The ODPP contends that such activity ceased after high profile prosecution of such cases some years ago. Further, COVID-19 isolation is also speculated to be a contributing factor. It is yet to be seen whether this situation remains unchanged. It may be that the fluid nature of organised crime and advanced in technology have altered the 'boiler-room' template.

[295] *R v Stasiak and Turkyilmaz* (2019) 2 QR 533.

STATISTICS

This Review obtained data from the QPS and Queensland Courts in relation to charges attracting the circumstance of aggravation. Transcripts were also obtained in relation to select matters. The data obtained from Court Services Queensland is via the Queensland Wide Inter-linked Courts ('QWIC') database, which gathers information on persons charged including court appearances and outcomes.[296]

Substantive offences that have been charged with the circumstance of aggravation:

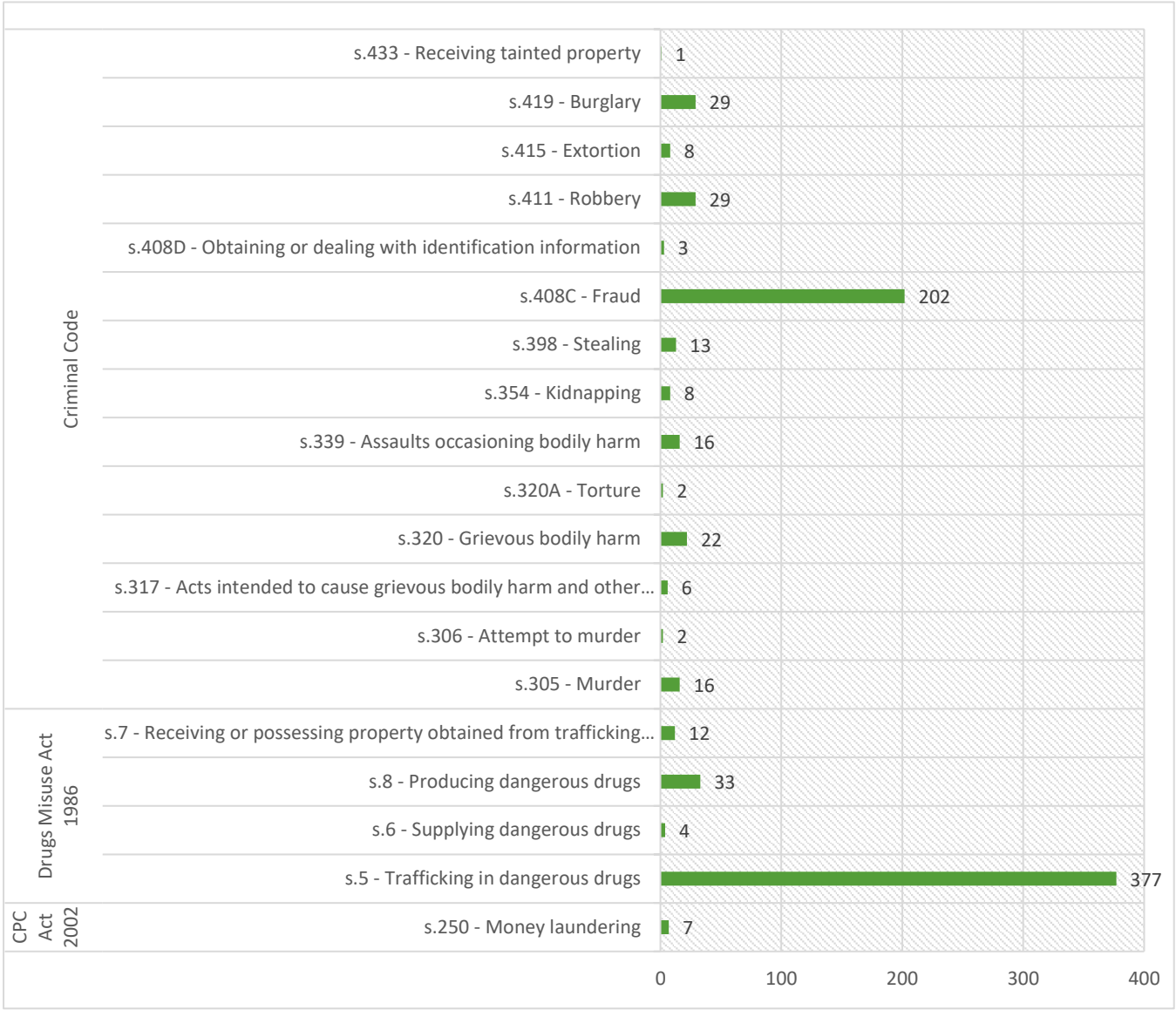

Figure 16: Number of charges lodged for each type of offence for the period 1 July 2016 to 30 June 2022, grouped by corresponding legislation

[296] The QWIC system is a 'live' operational system in which records are updated as the status of court matters change (for example, a defendant being resentenced as a result of a Court of Appeal decision) and/or input errors are detected and rectified. This constant updating and data verification may result in a slight variance of figures over time.

	2017-18	2018-19	2019-20	2020-21	2021-22
Number of charges lodged in the Magistrates Court with a serious organised crime circumstance of aggravation	64	101	101	288	78
Number of defendants[297] lodged in the Magistrates Court for a charge with a serious organised crime circumstance of aggravation	38	84	71	76	66

Table 8: Charges with the circumstance of aggravation lodged in the Magistrates Court compared to individuals charged

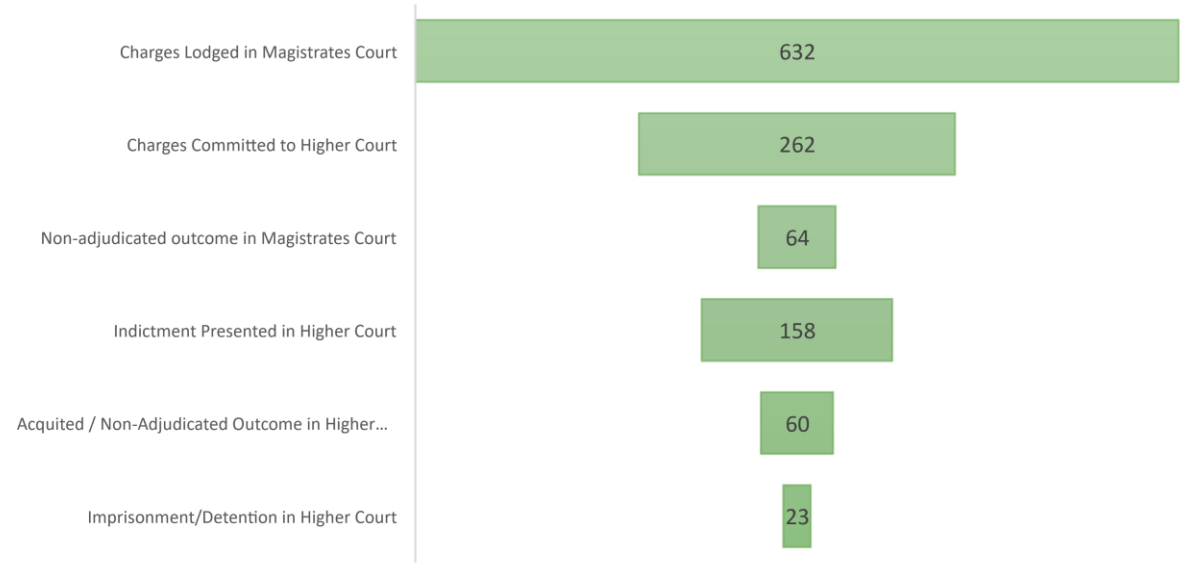

Figure 17: Charges with the circumstance of aggravation

The data indicates there are 77 charges without an outcome recorded (still active) throughout the Magistrates, District, and Supreme Court jurisdictions. Further, this data is reflective of the charges lodged, rather than individual defendants.

[297] As there is no unique identifier enabling the identification and subsequent reporting of unique defendants, defendants have been identified on the national Report on Government Services counting methodology, i.e. same surname, first name, date of birth and date the offence was registered within QWIC.

Court	Outcome	Number of charges finalised with the circumstance of aggravation alleged	Percentage of total charges finalised in Higher Court
Magistrates Court	Committed to Higher Courts	262	
District Court & Supreme Court	Acquitted/Non adjudicated Outcome	60	72.3%
	Imprisonment/Detention	23	27.7%

Table 9: Charges lodged in the Magistrates Court to be committed to higher courts and outcomes of charges finalised in the District and Supreme Courts

Court	Outcome	Number of charges finalised with the circumstance of aggravation alleged	Percentage of total charges finalised in the respective Court
Magistrates Court	Acquitted/Non adjudicated Outcome	64	19.6%
	Committed to Higher Courts	262	80.4%
District Court	Acquitted/Non adjudicated Outcome	34	87.18%
	Imprisonment/Detention	5	12.82%
Supreme Court	Acquitted/Non adjudicated Outcome	26	59.09%
	Imprisonment/Detention	18	40.91%

Table 10: Charges with the circumstance of aggravation

Of the 158 charges with a circumstance of aggravation indicted in the District and Supreme Court, 83 have been finalised.[298] That 72.3% of those matters resulted in an acquitted or non-adjudicated outcome may indicate the presence of significant prosecutorial negotiations.

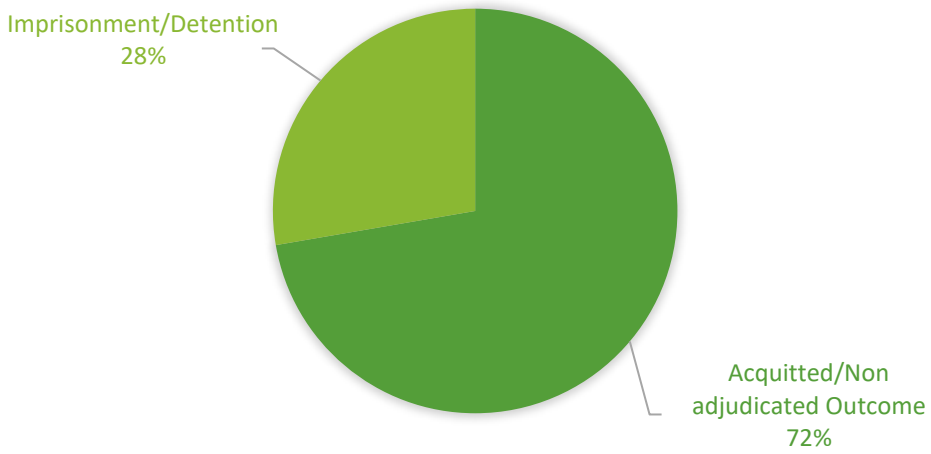

Figure 18: Disposal of charges in the District and Supreme Court by outcome type

Age

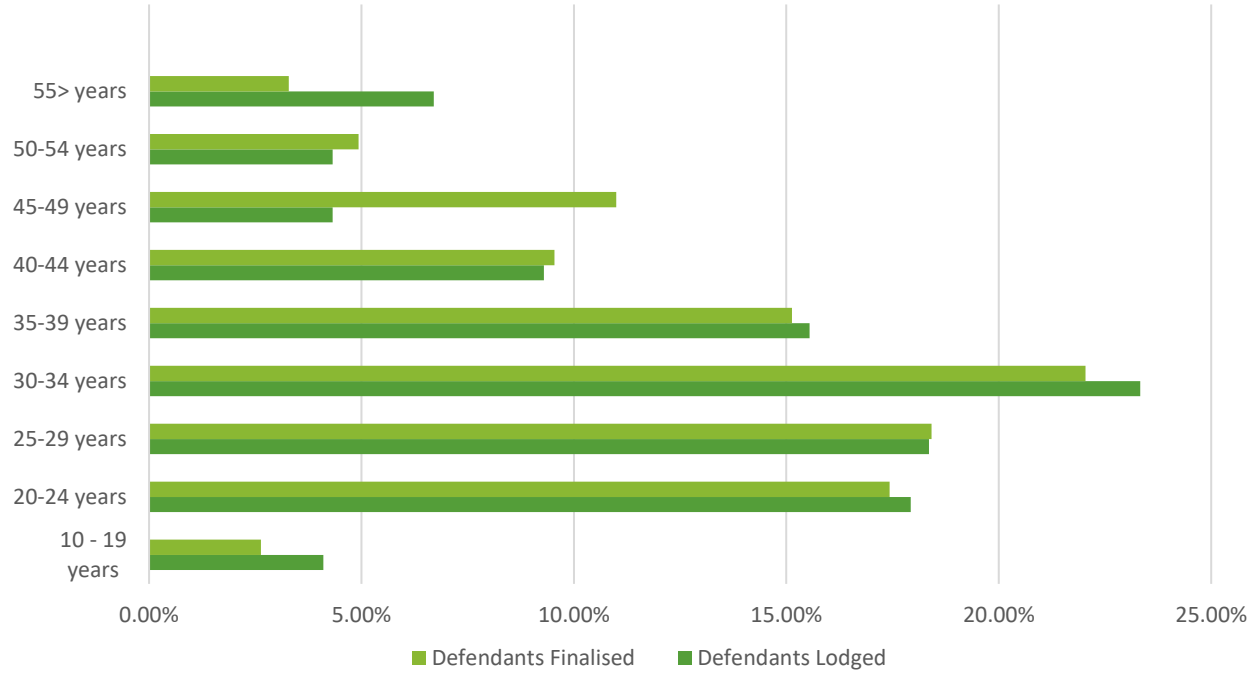

Figure 19: Ages of defendants lodged and finalised for charges with a circumstance of aggravation[299]

[298] As at 30 June 2022. It is noted that some matters may still be awaiting the presentation of indictments or be ongoing in the higher courts.

[299] Age is recorded as age at the time the defendant was lodged and finalised respectively, not when the offence occurred necessarily.

Approximately one-quarter (23.3%) of defendants who had charges finalised with the circumstance of aggravation were 30-34 years old. The data shows a decline in the number of individuals who have had charges lodged and finalised from 35-39 upwards, with those over 55 accounting for 6.7% of defendants lodged and 3.29% of defendants finalised.

Gender

Men	**382**
Women	81
Total	463

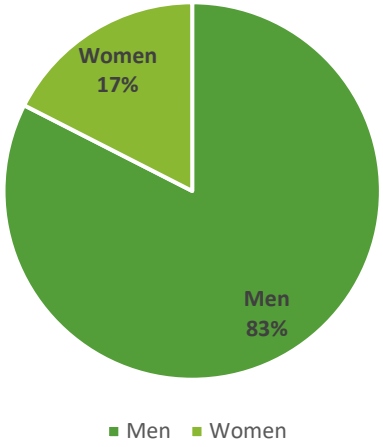

Figure 20: Defendants lodged: charge with a serious organised crime circumstance of aggravation by Gender

The overwhelming majority of individuals in this sample were men (82.5%: see Figure 20). This is consistent with international studies such as Francis et al. 2013[300] which found amongst a sample of organised crime offenders from the UK, upwards of 90% of offenders were male. Similarly, the Australian Institute of Criminology found in the Fuller, Morgan and Brown study[301], that 92% of offenders in the sample were male and 6% were female, with the gender of 2% of offenders being unknown.

[300] Brian Francis et al, 'Understanding Criminal Careers in Organised Crime' (Research Report No 74, The Home Office UK, October 2013).
[301] Georgina Fuller, Anthony Morgan and Rick Brown, 'Criminal histories of Australian organised crime offenders' (Trends & issues in crime and criminal justice No 567, Australian Institute of Criminology, January 2019).

Indigenous Status

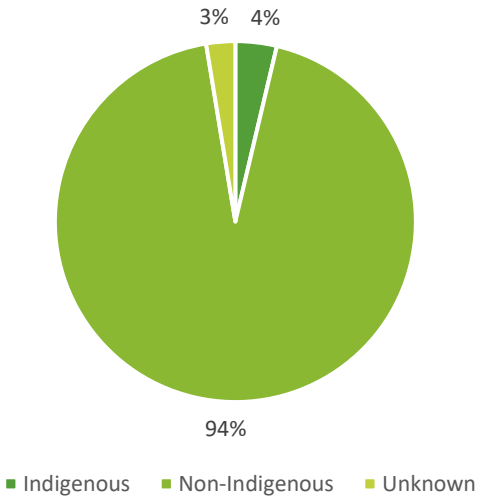

Figure 21: Indigenous status of defendants lodged for a charge with a circumstance of aggravation

CONTROL ORDERS

A control order may be imposed by a court pursuant to Part 9D, Division 3 *PPRA* when sentencing a defendant for a prescribed offence, or where the court is satisfied the defendant was a participant in a criminal organisation. A court may impose any conditions considered reasonably necessary to protect the public by preventing, restricting or disrupting involvement in serious criminal activity.

MANDATORY CONTROL ORDERS

A consequence of conviction for an offence aggravated by the circumstance of aggravation is that, pursuant to s 161R *PSA,* a mandatory control order **must** be made.

This Review is only aware of two such orders having been issued since the provision's insertion into the *PSA* up until 31 October 2022 – one in the District Court involving an offence of malicious act with intent,[302] and one in the Supreme Court involving trafficking in dangerous drugs.[303]

QPS consultation revealed scepticism as to the efficacy of a mandatory control order, particularly when the order does not come into effect until after the defendant is released from custody. In the matters where a mandatory control order was made, the sentences have ranged between 13 and 20 years inclusive of the mandatory component. The QPS submit and the CCC agree that it may be difficult or even impossible to predict what orders imposed at sentencing would address a potential risk so long into the future upon the offender's eventual release from prison. Both the QPS and the CCC point out that the circumstances in which such an order would be made are ones in which the offender may also face a substantial further period under supervision upon release on parole, independently of any control order made.

Victoria considered a similar issue in relation to its laws targeting organised crime. The report from that Review found that 'preventing and disrupting organised crime through declaration

[302] *R v Pain* [2022] QCA 233.
[303] Another two matters overlooked the imposition of a mandatory control order at first instance.

and control orders [was] no longer a valid policy mechanism' and that the scheme was 'fundamentally ill-suited to the contemporary nature of organised crime'.[304]

The submission by LAQ in respect of control orders is that LAQ does not support the imposition of mandatory control orders, stating that 'the court should be permitted to make these restrictive orders in the full exercise of its discretion, having regard to all relevant features of the case.'

The COA Review stated:

> Any assessment of the control order regime will be imperfect in light of the absence of any substantial experience of its operation — not just in Queensland, but anywhere in Australia. Only one valid control order has been issued in respect of organised crime, that being in South Australia. That experience, as discussed elsewhere in this report, was profoundly discouraging of any belief in the utility of control orders as presently framed.[305]
>
> … In 2012 the Independent National Security Legislation Monitor concluded that 'control orders in their present form are not effective, not appropriate and not necessary'.[306]

DISCRETIONARY CONTROL ORDERS

These apply at the court's discretion, upon application by the prosecutor or on the court's own initiative for:

- a person convicted of any indictable offence, where the court is satisfied that the offender was a 'participant in a criminal organisation' at the time of the offence (although the offender's participation in a criminal organisation need not be related to the indictable offence for which the offender is being sentenced); [307] or
- a person convicted of habitually consorting with a recognised offender;[308] and

[304] Department of Justice and Community Safety (n 42).
[305] *Review of the Criminal Organisation Act 2009* (n 4) 76.
[306] Ibid citing Bret Walker SC, *Independent National Security Legislation Monitor: Declassified Annual Report* (20 December 2012) 4.
[307] *Penalties and Sentences Act 1992* (Qld) s 161W.
[308] Ibid s 161X.

- the court is satisfied, on the balance of probabilities, that it is reasonably necessary to protect the public by preventing, restricting or disrupting involvement by the person in criminal activity.[309]

A control order for an offender must state the date the order takes effect, but if the offender is to immediately serve a term of imprisonment in a corrective services facility or is in custody in a corrective services facility for another offence, the day the offender is released from custody is the day the control order comes into effect.

The offender's participation in a criminal organisation need not be related to the indictable offence for which the offender is being sentenced. The section applies whether the offender is convicted of the indictable offence summarily or on indictment. The order can also be made in respect of a court sentencing an offender for an offence against s 77B the *Code* (habitually consorting) and the court considers the order is necessary to protect the public by preventing, restricting, or disrupting the offender's involvement in serious criminal activity.

The ODPP advised:

> I can confirm that for each sentencing proceeding, no control order was sought on the discretionary basis identified within Section 161V(2) of the Act, and indeed no submissions were made by the prosecution directed to that provision during the proceeding. This is perhaps understandable where the defendant having placed themselves at risk with the relevant criminal organisation was an unlikely candidate to re-engage with serious criminal activity, and other aspects of the sentencing, such as parole, guarded against such re-engagement.

The fact the discretionary control orders have not been used, may reflect LAQ's submission:

> Legislative change to sentencing regimes adds increasing complexity to the already complex balancing task of sentencing. LAQ does not support additional amendments which could further complicate this task, and/or which would operate to further fetter any discretion in the sentencing Court.

During discussions with the QPS, it was reported that in at least one instance the QPS had attempted to use the prospect of a discretionary control order in order to give consideration to withdrawing the circumstance of aggravation and/or to garner significant cooperation. It was unsuccessful. The QPS report it is also possible to use the discretionary control order to

[309] Ibid as per s 161Y an order may also be made if an offender is convicted for contravening a control order.

obtain an early plea of guilty. The ODPP have advised that in any of the matters involving sentencing of individuals where the circumstance of aggravation has applied, a number of individuals had cooperated with the authorities and relied on the provisions in s 13A *PSA*.

In blunt terms therefore, the legislation allowing for discretionary control orders has not been utilised since the *PSA* was amended to include it.

Discretionary control orders pursuant to ss 161W, 161X and 161Y require 'the court must consider the order reasonably necessary to protect the public by preventing, restricting, or disrupting the offender's involvement in serious criminal activity.'[310] As the CCC notes, where the offender's conduct is considered to be sufficient to give rise to a sufficient risk to public safety as to warrant the making of a control order, it may sensibly be expected that a sentencing court would seek to fashion a sentence to address these risks in any event. The CCC also submitted that equally, before a conviction, but once an offender is charged, one would hope that bail conditions would address risks to public safety, and if such risks could not be satisfactorily addressed, then bail would be refused.

There are many sorts of control orders already in legislation. These include:

- probation orders
- community service orders
- intensive correction orders
- orders of suspended imprisonment
- orders where the court may make a treatment order
- parole orders
- orders made under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004*.

Further, the QPS notes in its submission that the time elapsed since commencing proceedings and a consorting matter being finalised impacts on the ability to justify an application for a control order. The QPS advocates for an intelligence-based scheme involving an application to an issuing authority, to assist in disrupting organised crime.

[310] Ibid ss 161W, 161X, 161Y.

The *Review of Victorian Criminal Organisation Laws - Stage One*[311] said:

> Following extensive research, and after examining the operational data provided by Victoria Police, the Review Panel is not satisfied that declarations and control orders remain a valid mechanism to achieve the COCA's policy objectives.
>
> The declaration and control order scheme aims to unsettle groups, individuals and relationships. In theory this is sound policy, but this form of disruption is inherently challenging to implement in practice.
>
> Despite attempts to make the COCA more usable by successive legislative amendments, Victoria Police has not applied for a declaration or control order.
>
> The evidence considered by the Review Panel about the implementation of other similar schemes across Australia and internationally further demonstrates that declarations and control orders are not practical means for law enforcement agencies seeking to combat organised crime.

That Review pointed out that there were challenges in obtaining the intelligence to support the applications for declarations and control orders. It is understood Stage 2 of the report has been provided to the Victorian Government, but not yet released.[312]

As highlighted in this report, organised crime groups are meeting on a less frequent basis and members may not meet in person, enhancements in technology have impacted the ability of law enforcement to gather intelligence, club houses are no longer used as much as was once so, and the use of technology such as encrypted communications is growing as a tool in this area. Consideration has to be given to what happens if the control order is granted and then breached. The police need to monitor the person to ensure any breaches are detected and prosecuted, and the above comments serve as reasons as to why it is harder for law enforcement to monitor control orders.

This Review queries the basis for maintaining the policy in the absence of any utilisation since the inception. As the *Review of Victorian Criminal Organisation Laws - Stage One* noted:

> Preventing individuals associating with serious criminals to disrupt organised crime may be a valid policy mechanism. However, the current scheme in Victoria has not been used

[311] Department of Justice and Community Safety (n 42) 30.
[312] Craig Dunlop, 'Victoria Police repeatedly pushed government to fix anti-bikie laws' *the Courier Mail* (online, 30 June 2022) <https://www.couriermail.com.au/news/victoria/victoria-police-repeatedly-pushed-government-to-fix-antibikie-laws/news-story/327df876d96bae6c25f0c8d974f7b901>.

and therefore cannot be seen as currently achieving the COCA's policy objectives. Further consideration should be given to developing a more operationally practical and effective scheme.[313]

Should the provisions remain, LAQ submit that consideration be given to the PIM reporting statistics regarding Part 9D control orders. In its view, this would assist in the assessment of the efficacy of the orders, as well as invite scrutiny of the police powers in relation to them and submit that any information gathering would need to be compliant with the individual's right to privacy. This Review considers that to do so would mirror the reporting requirements the PIM has for control orders issued under the *Criminal Code Act 1995* (Cth) relating to Queensland residents or issued by courts in Queensland.[314]

RECOMMENDATION 8:

The provisions relating to mandatory and discretionary control orders be repealed.

In the alternative, the PIM's functions should be expanded to capture part 9D control orders, so that the PIM is required to include in its annual report, the number of control orders confirmed, declared void, revoked, or varied during the year and provide oversight of Part 9D control orders generally.

[313] Department of Justice and Community Safety (n 42) 33.
[314] *Criminal Code Act 1995* (Cth) Division 104.

IS PART 9D *PENALTIES AND SENTENCES ACT 1992* (QLD) ACHIEVING ITS OBJECTS?

ENCOURAGING COOPERATION

Consultations with the ODPP indicate clearly that the charging of the circumstance of aggravation with its requirement for a cumulative seven-year imprisonment on the base sentence, has provoked considerable cooperation. Perhaps more importantly it has prompted indications of an early plea of guilty in cases which might otherwise have consumed a great deal of court time and the considerable expense involved in the prosecution of complex matters. It should be noted that the cooperation need not be in relation to the charged offence but in serious offences more generally. [315]

As was noted in *R v BDW; R v DAA* [2022] QCA 197:

> [10] It was expressly part of the intention underpinning the new serious organised crime circumstance of aggravation, with its targeted sentencing regime, to "encourage these particular offenders to cooperate with law enforcement agencies in proceedings or investigations about major criminal offences".[316]

The CCC submission picks up on the circumstance of aggravation as providing some impetus for cooperation. The CCC points out that as a first step, the decision whether to charge the circumstance of aggravation rests with the investigator who is engaged with the suspect. The offender who cooperates at the earlier stage may avoid a charge which includes the circumstance of aggravation. Similarly, negotiations over charges to which an offender will plead guilty involve an exercise of discretion on the part of the prosecutor. The prosecutor, therefore, may consider accepting a guilty plea without the circumstance of aggravation in recognition of an offender's cooperation or of the utilitarian value of securing a plea.

The QPS supports the use of the circumstance of aggravation as successfully leading to information being obtained and used in prosecutions which may not have been available through other means.

[315] Explanatory Memorandum, *SOCLA* Bill (n 13) 120.
[316] *R v BDW; R v DAA* (n 274) [10].

The CCC note that there have been no persons charged with the circumstance of aggravation arising out of a CCC-led investigation. A review of the QSIS data suggested that the provisions of Part 9D *PSA* have provided some incentive to those charged, to co-operate. Further, it postulates that it can be assumed there are other matters where the availability of a circumstance of aggravation under Part 9D *PSA* may encourage cooperation in other ways. It is inherently difficult to ascertain whether such a provision has served to disincentivise involvement in criminal organisations. The CCC advises it is supportive of further research in this area.

The QLS submission stated:

> Consideration should be given to legislative amendment to ensure the provisions are compatible with the rights enshrined in the Human Rights Act. For example, s 15(3) of the Human Rights Act provides that every person is equal before the law. Under the circumstance of aggravation, a person is not equal before the law because the same act is subject to higher punishment for those deemed to be 'participants in a criminal organisation'.

However, it was pointed out in *R v JAA* [2019] 3 Qd R 242:

> …. the elements for the serious organized crime circumstance of aggravation require additional elements to be proven.[317]

The Explanatory Notes to the Bill which became *SOCLAA* argue that:

> The penalty regime is high but is justified to punish and signal the community's disapproval of serious and organised crime; and to be a disincentive to involvement in criminal organisations. The penalty regime also aims to disband criminal organisations by encouraging participants to break the 'code of silence' often associated with organised crime and to significantly cooperate with law enforcement agencies. The circumstance of aggravation, which targets only a confined cohort of serious offenders, reflects that participation in these groups presents an unacceptable risk to the safety, welfare or order of the community.[318]

[317] *R v JAA* [2019] 3 Qd R 242 [100].
[318] Explanatory Memorandum, *SOCLA* Bill (n 13) 38.

In any event, the QLS submission appears to overlook the point of the legislation, which was described in *R v BDW; R v DAA* [2022] QCA 197 as:

> … a "targeted sentencing regime" specific to offenders who commit particular offences with the "serious organised crime" circumstance of aggravation.[319]

The QLS also submits that as:

> cooperation is the only mitigating factor, which may give rise to false information being provided to police and does not allow courts to take into account a wide range of other factors which may be relevant and would ordinarily give rise to a lesser sentence.

The force of this submission is mitigated by the observation in *R v BDW; R v DAA* [2022] QCA 197 at [20]:

> …. under the procedure in s 13B, there is a requirement that a person representing the law enforcement agency (with whom the offender has cooperated) must have sworn an affidavit, which is to be handed up to the court, which must "state the nature, extent and usefulness of the cooperation given to the law enforcement agency by the offender" (ss 13B(4) and (5)). That requirement is not replicated in s 161S; although there would be no reason why such evidence could not be tendered, if it was available.[320]

THE DISRUPTION OF CRIMINAL ORGANISATIONS BY WAY OF DISINCENTIVISING INVOLVMENT

'Disincentivise' has been defined as meaning a factor which discourages a particular action. The term deterrence is defined as the action of discouraging an action or event by instilling doubt or fear of consequences. The word *disincentivise* has not been used, as far as the Review has been able to determine, in any academic articles or sentencing reports that are available. For that reason, this Review has treated the word *disincentivise* as synonymous with *deter*.

[319] *R v BDW; R v DAA* (n 274) [5].
[320] Ibid [20].

Deterrence is but one purpose for which a sentence may be imposed. No one purpose is the main or dominant purpose for sentencing, and the weight apportioned to any particular consideration depends upon the particular case. Indeed:

> [T]he purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.[321]

This is not a topic which can be addressed without an examination of the reasons for offending. These reasons have been set out in a number of academic articles and research papers. Without going to individual reports, some reasons can be identified in relation to drug trafficking. The cases would indicate that there is usually a normalization of drug use and mixing with drug users. Greed is also a factor in drug trafficking matters. Other factors leading to offending include alcohol and mental impairment, generational offending and generational disfunction, gang affiliation relating to the question of identity, drug addiction, territorial disputes and building reputation. In addition, there are the overconfident risk-takers.

Pogarsky proposes that potential offenders should be assigned to three different populations:[322]

> Acute conformists, who comply with the law for reasons other then the threat of sanction, the incorrigible who cannot be dissuaded regardless of the sanction, and the deterrable who occupy a middle ground and who are 'neither strongly committed to crime nor unwaveringly conformist'.[323]

The incorrigible would likely include the 'one-percenters'. The term 'one-percenter' was coined when the American Motorcycle Association was said to make a statement in response to the 1947 Hollister Riot in Hollister, California, that turned violent. The American Motorcycle Association stated that '99% of the motorcycling public are law-abiding; there are 1% who are

[321] *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476.
[322] Greg Pogarsky, 'Identifying "deterrable" offenders: Implications for research on deterrence' (2002) 19(3) *Justice Quarterly* 431, 431.
[323] Ibid 432, citing Daniel Nagin and Raymond Paternoster, 'Enduring Individual Differences and Rational Choice Theories of Crime' (1993) 27(3) *Law and Society Review* 467, 471.

not'. Not long after the comment was made, the clubs of the time stated they were the other one percent.[324]

The difficulties in laws specifically targeting these 'one-percenters' were expounded in McNamara and Quilter's article '*The 'Bikie Effect' and other forms of demonisation: The origins and effects of Hyper-Criminalisation':*[325]

> … the danger posed by 'bikies' have been used as a central justification for significant expansions of the parameters of the criminal law and police powers across the country. These discursive practices have muted resistance and encouraged popular endorsement or acquiescence in relation to extraordinary measures. [326]
>
> Two problematic effects may arise. First, often, the resulting laws are not limited in their operation to the bikies or other 'demons' who were instrumental in their rhetorical justification. They apply to all members of the community and may have effects that extend substantially beyond the evil at which they were ostensibly directed. The result is over-criminalisation. Secondly, in some instances, the drafting of 'draconian' new criminal laws is so influenced by the desire to maximise the appearance that the problem has been solved (and solved with strength), rather than to meaningfully augment existing laws – that 'success' is chimeric, because there is little or no place for the new offence in the day-to-day operations of police and prosecutors. The result, ultimately, is community dissatisfaction and a further erosion of public confidence in the criminal law and the criminal justice system.[327]

For example, the CCC submits it is debateable whether the 2013 amendments served to meaningfully reduce the criminality connected with OMCG associations (noting office bearers who 'resigned' to avoid the consequences of the scheme generally continued to undertake their roles in practice, acting as de facto secretaries, presidents or sergeants-at-arms).

Deterrence can also be achieved through incapacitation; denying the offender the opportunity to commit those crimes that would have been committed had the offender been

[324] National Alliance of Gang Investigators' Associations, *Quick guide to gangs* (National Gang Intelligence Center – Federal Bureau of Investigation, 2009).
[325] Luke McNamara and Julia Quilter, 'The 'bikie effect' and other forms of demonisation: The origins and effects of hyper-criminalisation' (2016) 34(2) *Law in Context* 5, 7.
[326] Ibid.
[327] Ibid 7-8.

free in the community.[328] Much has been written about whether increased levels of punishment have any effect on the prevalence of crime.

Writing for the Sentencing Advisory Council of Victoria, Donald Richie notes that highly publicised events, such as terrorist attacks, are often incorrectly judged as being more likely to occur than under-reported but very common events:[329]

> While deterrence is enshrined in common law and in Victorian sentencing legislation, there remains judicial scepticism about the effectiveness of deterrence and in particular the effectiveness of imprisonment to act as a deterrent.[330] In the South Australian case of *R v Dube,*[331] it was acknowledged by King CJ that,
>
> > there is no proven correlation between the level of punishment and the incidence of crime and that there is no clear evidence that increased levels of punishment have any effect upon the prevalence of crime.[332]
>
> . . .
>
> Similarly, in the case of *Pavlic v The Queen*,[333] Green CJ stated:
>
> > there is no justification for the view that there exists a direct linear relationship between the incidence of a particular crime and the severity of the sentences which are imposed in respect of it such that the imposition of heavier sentences … will automatically result in a decrease in the incidence of that crime.[334]

In 2012 the New South Wales Bureau of Crime Statistics and Research released a study into the effectiveness of the criminal justice system in controlling crime. The study examined the effect of changes in the probability of arrest, imprisonment, and the length of the average prison term on trends in property and violent crime in NSW between 1996 and 2008.[335] It found that a 10 per cent increase in the risk of arrest for violent crime produces a 0.297 per

[328] Donald Ritchie for the Sentencing Advisory Council, *Does Imprisonment Deter? A Review of the Evidence* (Report, 2011) 13.
[329] Ibid 16.
[330] Ibid 5.
[331] *R v Dube* (1987) 46 SASR 118 ('*Dube*').
[332] Ibid 120.
[333] *Pavlic v The Queen* (1995) 83 A Crim R 13.
[334] Ibid 16.
[335] Wai-Yin Wan et al, 'The effect of arrest and imprisonment on crime' (2012)(158) *NSW Bureau of Crime Statistics and Research - Contemporary Issues in Crime and Justice* 1.

cent reduction in violent crime.[336] A 10 per cent increase in the risk of imprisonment produces a 0.170 per cent reduction in violent crime.[337] Those differences, while not statistically significant, indicated that increasing arrest rates is likely to have the largest impact, and that increasing actual custody does not appear to impact on the crime rate after accounting for increases in arrest and the likelihood of imprisonment.[338]

This conclusion follows a number of previous studies surrounding the relationship between sentence severity and deterrence,[339] which conclude that the findings imply that increases in punishment levels do not routinely reduce crime through deterrence mechanisms.[340] That is the deterrence effect does not increase or decrease by a substantial degree – because the perception of risk upon which deterrence depends does not change according to punishment levels.[341]

> … despite offenders knowing that there may be a severe penalty for committing a particular offence, they may overestimate their own ability to complete the offence successfully, without being apprehended, compared to others.[342]
>
> … Implicit in the ability to weigh up the cost of a crime is the assumption that a potential offender has knowledge of the actual punishment.[343]
>
> The research suggests that imprisonment has a negative but generally insignificant effect upon the crime rate, representing a small positive deterrent effect … [and] increases in the severity of punishment … have no corresponding increased deterrent effect.[344]

As the Queensland Productivity Commission notes, a doubling of a sentence length may still provide additional deterrence effect, however the reduction in the likelihood of the offender committing the crime is not diminished by the same margin.[345]

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[336] Ibid 13.
[337] Ibid 16.
[338] Ibid 17.
[339] Donald Ritchie for the Sentencing Advisory Council (n 328); Wai-Yin Wan et al (n 335) 14-15.
[340] Ibid citing Gary Kleck et al, 'The Missing Link in General Deterrence Research' (2005) 43(3) *Criminology* 623, 653.
[341] Ibid.
[342] Donald Ritchie for the Sentencing Advisory Council (n 328) 9.
[343] Ibid 14.
[344] Ibid 17.
[345] Queensland Productivity Commission (n 168) 600 citing Steven N. Durlauf and Daniel S. Nagin, 'Imprisonment and crime: Can both be reduced?' (2011) 10(1) *Criminology & Public Policy* 13.

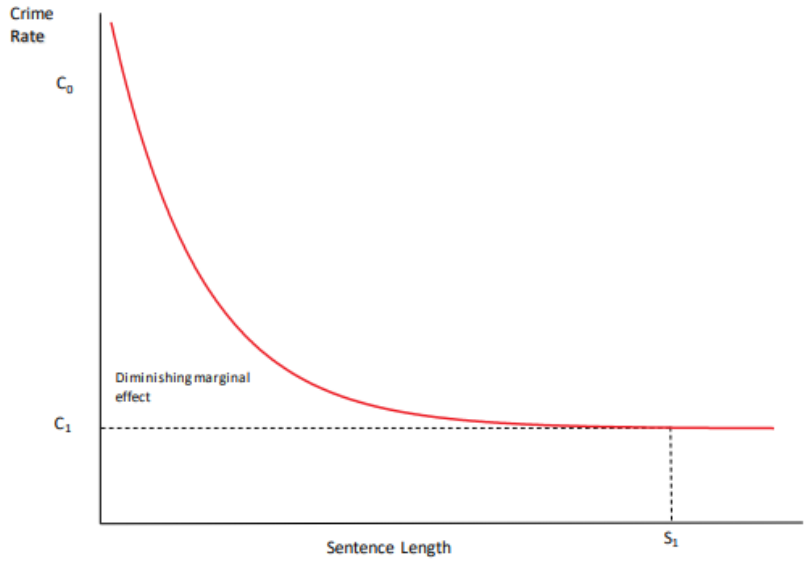

Figure 22: A diminishing effect on crime reduction as sentence lengths increase: Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report (appendices), August 2019) 600 citing Steven N. Durlauf and Daniel S. Nagin, 'Imprisonment and crime: Can both be reduced?' (2011) 10(1) *Criminology & Public Policy* 13.

The certainty of apprehension deters to a greater extent that the severity of punishment.[346]

> Increasing arrest rates is likely to have the largest impact, followed by increasing the likelihood of receiving a prison sentence. Increasing the length of stay in prison beyond current levels does not appear to impact on the crime rate after accounting for increases in arrest and imprisonment likelihood. Policy makers should focus more attention on strategies that increase the risk of arrest and less on strategies that increase the severity of punishment.[347]

The Queensland Productivity Commission also notes potential criminals are more strongly influenced by the immediate threat of arrest than the threat of a future punishment:[348]

> Studies also show that for any given probability of arrest once an individual receives a penalty, further or harsher penalties do not cause further deterrence.[349]

While those involved in serious organised crime are unlikely to carefully pore over Supreme Court decisions to consider what sentence they may face before embarking on their criminal activity, an informal risk calculation may include the likelihood of a lengthy prison sentence,

[346] Donald Ritchie for the Sentencing Advisory Council (n 328) 16.
[347] Wai-Yin Wan et al (n 335) 1.
[348] Queensland Productivity Commission (n 168) 85.
[349] Ibid citing; Francesco Drago, Roberto Galbiati and Pietro Vertova, 'Prison Conditions and Recidivism' (2011) 13(1) *American Law and Economics Review* 103; Giovanni Mastrobuoni and David A. Rivers, 'Criminal Discount Factors and Deterrence' (Discussion Paper No 9769, Institute of Labor Economics (IZA), February 2016).

as well as how likely that is to manifest. The CCC points out that similarly, a legislative scheme which encourages those within a criminal organisation to cooperate against their co-offenders – especially those further up the 'food chain' – increases the risk to those in the upper echelons.

The CCC acknowledged there are other legislative provisions also addressing organised crime activities, including the criminal proceeds confiscation regime, which is targeting at removing the financial benefit derived from organised crime. It published a paper in May 2022 examining the impact of proceeds of crime action on offending trajectories.[350] While the CCC identified some deficiencies which impair the effectiveness of the recovery of proceeds of crime and the ability to successfully prosecute money laundering offences, the CCC is engaged with the Department of Justice and Attorney-General as to how these can be addressed. The CCC pointed out that there is a wide range of legislation targeting organised crime, and that a holistic approach is necessary to effectively deal with the risks posed by such activity.

The QPS noted that since the legislation commenced to 30 June 2022, it had referred 106 matters to the CCC's Proceeds of Crime unit for consideration of criminal proceeds confiscation action. As a result, 67 restraining orders have been obtained for property worth over $20.614 million.

[350] Crime and Corruption Commission, *The impact of proceeds of crime action on offending trajectories* (Research Report, May 2022).

A MORE EFFECTIVE PART 9D *PENALTIES AND SENTENCES ACT 1992* (QLD)?

The BAQ recommended consideration as to whether the provisions should be amended to make clear that the circumstance of aggravation requires proof of conduct that is separate and in addition to the conduct constituting the substantive offence – to make clear that the matters alleged as the circumstance of aggravation must be more than what is comprised within the simpliciter offence. For example, sales to a network of drug buyers should not, without more, amount to participation in a criminal organisation. Likewise an offence charged as a conspiracy or joint enterprise should not have a circumstance of aggravation attached merely to engage the mandatory sentencing provisions. While that might be open as a matter within prosecutorial discretion, the purposes of *SOCLAA* do not suggest such a result was intended nor does the court data suggest that the prosecutorial discretion is being exercised in any untoward way. This Review is of the opinion the fact an offence is charged with a circumstance of aggravation is sufficient to make it clear that what is required to be proved is more than the simpliciter offence.

Some stakeholders have expressed concerns regarding the application of these provisions to family units. However, where it is proven such individuals and family units are involved in serious criminal activity, Parliament has decided appropriate consequences should attach:

> The new definition of 'criminal organisation' is intended to be sufficiently broad enough to capture both traditional and hierarchically structured criminal groups; as well as shapeshifting, opportunistically formed and flexible criminal groups. This enhancement acknowledges that while OMCGs have traditionally favoured hierarchical and highly visible models of organisation, other crime groups are now frequently informally arranged and adaptable in their structure (as emphasised under all three Reports – the Commission, COA Review and Taskforce). In framing the new definitions, the Bill takes into account the recent decision of the Honourable Justice Peter Lyons in R v Hannan, Hannan, Gills, Murrell & Hannan [2016] QSC 161; to ensure the scenario illustrated by that case is captured by the definition.[351]

As the title of that case suggests, it involved a group including family members.

[351] Explanatory Memorandum *SOCLA* Bill (n 13) 19.

THE *HUMAN RIGHTS ACT 2019* (QLD) CONSIDERATIONS

ATSILS acknowledges that laws which address serious and organised crimes are important and that Queensland has come a long way since the enactment of the now repealed *Vicious Lawless Association Disestablishment Act 2013* (Qld). What remains important is striking the correct balance between upholding these fundamental human rights and imposing laws which limit those rights in a manner that is proportionate to the risk to community safety.

Conviction for a circumstance of aggravation exposes a defendant to a mandatory 7-year period of imprisonment, irrespective of the sentence imposed for the substantive offence, unless they have provided cooperation of significance. This may limit a person's right to equality before the law.[352] At the time *SOCLAA* was passed, the impact on persons rights and liberties was justified on the basis it targets a confined cohort of serious offenders who present an unacceptable risk to the safety, welfare, or order of the community. A person is only liable to this punishment if proved beyond reasonable doubt they were a participant in a criminal organisation and committed the offence at the direction of, in association with, or for the benefit of, a criminal organisation, or was a participant in a criminal organisation. Further, the consent of the ODPP is required in order to present an indictment containing the circumstance of aggravation.

Attention should be given to the executive summary prepared by the Queensland Sentencing Advisory Council's publication '*The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld)*': [353]

> The Council identified several ways in which the scheme constrains sentencing practices for serious violent offences, including by creating unnecessary complexity, unintended consequences and anomalies in the sentencing process.
>
> The Council found that the mandatory operation of the scheme may be contributing to inconsistent sentencing outcomes — in particular between offences attracting a 10-year sentence and those falling just below this threshold. When sentencing co-offenders, the split mandatory/discretionary nature of the scheme can make it more difficult to apply the principle of parity.

[352] *HRA* (n 6) s 15.
[353] Queensland Sentencing Advisory Council, *The '80 per cent rule': the Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld)* (Final Report, 9 June 2022) xvii.

The Council found that the scheme has a 'distorting effect' on sentencing. This is because it restricts courts in recognising an offender's plea of guilty and other relevant mitigating factors through the setting of an earlier parole eligibility date, thereby exerting downward pressure on head sentences to ensure the imposition of a sentence that is 'just in all the circumstances'.

The scheme was also widely criticised during this review as adding an unnecessary layer of complexity to sentencing, including when dealing with multiple offences committed over different time periods or involving different complainants where only some of the offences may be subject to the SVO scheme.

The Council found that the arbitrary nature of the 10-year mark at which the making of a declaration becomes mandatory and the high level at which the non-parole period is set under the scheme creates unnecessary complexity and leads to unintended consequences.

That report further notes: [354]

The Council was asked to consider the compatibility of the current scheme to the rights contained within the Human Rights Act 2019 ('HRA'). The Council was primarily concerned with compatibility issues that might arise from the SVO scheme's mandatory operation.

The Council views the mandatory component of the SVO scheme as giving rise to human rights concerns as it constrains sentencing and can lead to inconsistencies between sentences that attract an SVO declaration and those that do not.

It thereby interferes with the court's capacity to maintain parity and consistency. As courts are restricted in their ability to recognise relevant mitigating factors in setting the non-parole period — such as a plea of guilty or cooperation with law enforcement — it limits the ability of a court to consider individual circumstances when setting the head sentence.

The Council acknowledges that the scheme's compatibility with rights of victims and survivors of crime needs to be considered, in particular the rights to be protected from torture and cruel, inhuman or degrading punishment, the right to life, and the right to security of person. In the Council's assessment of human rights, it balanced the rights of both victims and offenders.

The Council is of the view that the SVO scheme may limit rights protected under the Human Rights Act and that there are less restrictive and reasonably available ways to achieve the purposes of the SVO scheme.

[354] Ibid xviii.

The purpose of this mandatory penalty is to punish and signal community disapproval of serious and organised crime. It was also intended to be a disincentive to involvement in criminal organisations and to disband them by encouraging participants to break the 'code of silence' often associated with organised crime and to significantly cooperate with law enforcement agencies. While this may impact on a person's right to privacy and reputation, when considering the purpose is to encourage cooperation and to disrupt criminal activity, such infringements may be reasonable and justified. [355]

Control orders may restrict a person's movements, day-to-day activities, types of employment, associations (even for political purposes) and affects rights such as personal liberty, privacy, work and free association. Discretionary control orders can only be imposed if the court is satisfied such conditions are reasonably necessary to protect the public by preventing, restricting or disrupting a person's involvement in serious criminal activity. It is restricted to a prescribed cohort of offenders, and is a conviction-based regime and forms part of the penalty imposed. Whether mandatory or discretionary, the court retains complete discretion as to the conditions of a control order. These measures promote a person's rights in criminal proceedings and to a fair trial.[356]

Control orders confer a right of entry to premises without warrant, which also infringes upon a person right to privacy and reputation.[357] That may be justified on the basis that those subject to a control order have been proven guilty of an offence, and are considered serious offenders whose behaviours must be controlled in the community in order to ensure community safety and the safety of police officers.

This Review has examined the implementation of the circumstance of aggravation and is of the opinion it is achieving the objective of encouraging cooperation, but it may limit rights protected under the *HRA*. However, in light of the body of literature which examines the effect of increased imprisonment and deterrence, this Review cannot conclude that these provisions are disincentivising participation in criminal organisations.

[355] *HRA* (n 6) s 25.
[356] Ibid ss 31-32.
[357] Ibid s 25.

The utility of mandatory and discretionary control orders is questionable, and this Review considers that in the balancing of the matters set out in s 13 *HRA*, such limitations are not reasonable and justified. Their purpose can often be served by other, less restrictive and reasonably available measures.

CONCLUSIONS

This is a legislative Review of some of the provisions introduced by *SOCLAA* as a result of three very large reviews into organised crime commissioned by the Queensland Government. The main focus of this Review is the consorting provisions within the *Code* and *PPRA,* along with select provisions in the *PGBA.* In addition to the legislatively mandated provisions, this Review has further been tasked to review the circumstance of aggravation contained in Part 9D *PSA.*

This Review has drawn upon data obtained from the QPS and Court Services Queensland, transcripts of relevant proceedings, and targeted consultations with the QPS and the ODPP. Submissions were also invited from a number of stakeholders, and a number of similar inter-state inquiry reports, media articles, and academic works have been drawn upon throughout this process. Further, this Review has had regard to the *HRA*, which imposes obligations to consider human rights in all decision-making and action, only to be limited in certain circumstances and after careful consideration.

Although consorting laws have been met with strident criticism in some quarters, similar legislation exists in all states and territories except the ACT. The idea of disrupting organised crime by the use of such laws has been widely adopted and accepted. A review of the consorting laws demonstrates that the laws provide expansive powers to police. While there is academic criticism that there is a lack of empirical data to show that the powers work as a preventative, feedback provided by the QPS indicates the usefulness of the provisions.

The data received by this Review does not indicate the consorting provisions are being implemented in a way that results in disproportionate or unintended consequences, and particular demographic trends can be explained by way of changes also being experienced in the wider community context. Further, statistics show that the OWFCs have been used in a limited number of cases, which would translate to a very small percentage of the population.

There is no convincing evidence that any particular demographic has been disproportionately or adversely affected by the legislation.

It is now clear there is an avenue for review under the *Judicial Review Act 1991* (Qld). It is apparent from the most recent PIM Annual Report that oversight is rigorously and continuously exerted by the PIM. It is also to be hoped that an expiry time for the notices together with legislating for the notice to be given to the recognised offender will further ameliorate any unintended consequences of the notices.

The proposition that some of the orders available have not been used extensively and in some cases rarely, does not mean that those laws should be repealed. Such a proposition overlooks the fact that there are many laws on the statute books which are not used often or even routinely. Nevertheless, those laws are available for use if necessary. The *PGBA* provisions have been rarely used, however this alone does not necessarily provide an impetus to do away with the provisions entirely. Feedback from the QPS indicates some of those provisions have been of use, and the preliminary actions being taken are seemingly enough to avoid applying for formal orders.

FROs, however, have rarely been issued in any Australian jurisdiction, which may not be a surprise given the shift towards the use of short-term premises not owned by the criminal organisation. Therefore, the ability to install the fortifications anticipated by these provisions is hampered. This Review is of the view a search-warrant based system provides independent judicial oversight of a limitation upon a person's property and privacy rights, and that the FRO provisions be repealed in favour of an expansion of existing search warrant powers.

In relation to the circumstance of aggravation, it is difficult to say such laws provide a disincentivisation for offenders, but it is clear the legislation has led to significant cooperation with law enforcement agencies, prosecuting authorities, and the court. While there has been a limited number of matters where the circumstance of aggravation has reached a conclusion, those matters have involved very serious drug trafficking, and serious violence in a public setting.

Mandatory and discretionary orders are more problematical. Discretionary orders have not been used since their inception, which is almost certainly due to the fact prosecution bodies and the courts have many forms of control orders already at their disposal in the sentencing of offenders. Mandatory control orders have been imposed twice and overlooked at first

instance in two other matters. This Review doubts the continued validity of control orders as a policy mechanism, and upon balancing the matters set out in s13 *HRA*, the limitations on human rights imposed by control orders pursuant to Part 9D *PSA* are not reasonable and justified, as their purpose can often be served by other, less restrictive and reasonably available measures.

RECOMMENDATION 9:

A further review of these provisions should be undertaken 5 years after the commencement of any amendments implemented as a result of this Review.

REVIEW RECOMMENDATIONS

CONSORTING PROVISIONS:

RECOMMENDATION 1:

The legislation should be amended so that an official warning for consorting issued pursuant to s 53BAC(4) may be issued in 'the prescribed way' as already defined in s 53BAC(9).

RECOMMENDATION 2:

Section 53BAC *PPRA* should be amended to provide that official warnings for consorting should only be issued to persons who are 'recognised offenders'.

RECOMMENDATION 3:

The definition of a 'recognised offender' should be simplified and legislation amended to provide that a recognised offender be a person who has been convicted of a relevant offence within the definition of s 77 the *Code* within the last 10 years.

RECOMMENDATION 4:

Legislation should be enacted for the protection of criminal intelligence which may arise on a judicial review as to whether sufficient reasons have been given for the official warning for consorting.

RECOMMENDATION 5:

Section 53BAC *PPRA* should be amended to provide that official warning for consorting remains valid for a period of 2 years and expires thereafter.

PEACE AND GOOD BEHAVIOUR ACT 1982 (QLD)

RECOMMENDATION 6:

The Review recommends the RPO and PSO provisions remain without amendment.

The Review recommends the repeal of the FRO provisions in the *PGBA*, and replacement with expanded search warrant powers within s 157(1) *PPRA*.

RECOMMENDATION 7:

The *PGBA* remains the most appropriate Act for these provisions, subject to the Review's recommendations regarding FRO's.

CIRCUMSTANCE OF AGGRAVATION

RECOMMENDATION 8:

The provisions relating to mandatory and discretionary control orders be repealed.

In the alternative, the PIM's functions should be expanded to capture part 9D control orders, so that the PIM is required to include in its annual report, the number of control orders confirmed, declared void, revoked, or varied during the year and provide oversight of Part 9D control orders generally.

GENERALLY

RECOMMENDATION 9:

A further review of these provisions should be undertaken 5 years after the commencement of any amendments implemented as a result of this Review.