

# The Shopfront

## YOUTH LEGAL CENTRE

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### Consorting

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#### 1 The offence of consorting

In NSW it is an offence to “habitually consort with convicted offenders” (section 93X of the *Crimes Act* (NSW)).

You may be guilty of this offence if:

- you are aged 14 or over (*before 28 February 2019, you could be charged if you were under 14*); and
- you “consort” with at least two other people (not necessarily at the same time); and
- those people are “convicted offenders”; and
- you “habitually consort” with each of them, which means on at least two occasions; and
- at least one of those occasions is after the police have given you an official warning; and
- you are unable to prove that the “consorting” was for one of the purposes listed in section 93Y and was reasonable in the circumstances.

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#### 2 What is consorting?

There is no clear definition of “**consorting**” in the *Crimes Act*, although section 93W says that it includes electronic and other forms of communication.

The courts have interpreted “consorting” to mean “associating” or “keeping company” with someone. It usually means intentionally seeking out someone’s company, not running into someone on the street or having a casual chat.

Consorting can still be an offence even if you have no criminal purpose.

“**Habitually**” usually means “regularly”, “constantly” or “usually”. There is no clear definition of “habitually” in the *Crimes Act*, except that section 93X says that a person does not habitually consort with someone unless they consort with them on at least two occasions.

*Forster v Director of Public Prosecutions* [2017] NSWSC 458 was a case decided by the NSW Supreme Court in 2017. Mr Forster had three casual conversations on the street with three different men who he knew. He then went out for a drink with all three of them. Together, these meetings were alleged to be “habitual consorting”.

Mr Forster was found guilty in Local Court and was sentenced to 12 months’ imprisonment. He appealed to the Supreme Court, which overturned the conviction. Justice McCallum said that the essence of consorting is “the intentional seeking of something in the nature of companionship”, not mere conversation. In this case, the casual chats that Mr Forster had with others in the street did not amount to consorting.

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### 3 Who is a convicted offender?

A “**convicted offender**” is a person who has been convicted of an indictable offence (other than a consorting offence) (*Crimes Act s93W*).

This also includes an offence committed outside NSW that would be an indictable offence if committed in NSW.

#### 3.1 What is an indictable offence?

An **indictable offence** is a more serious type of criminal offence which may be heard in a superior court (i.e. the District or Supreme Court). However, many indictable offences are not very serious and may also be dealt with in the Local or Children’s Court.

Examples of indictable offences include stealing, robbery, destroying or damaging property, assault, drug supply, murder, manslaughter and dangerous driving occasioning death or grievous bodily harm.

Indictable offences **do not include summary offences** such as offensive language or conduct, trespassing, possession or self-administration of a prohibited drug, goods in custody, breaching an apprehended violence order, and most traffic offences.

#### 3.2 What does convicted really mean?

There is some uncertainty about what “convicted” actually means. It may mean either:

- being found guilty of an offence; or
- having a conviction formally recorded against you.

It is possible to be guilty of an offence but not to have a conviction recorded against you, for example:

- A child under 16 dealt with by the Children’s Court cannot have a conviction recorded against them. For young people aged 16 or over, the Children’s Court can decide whether or not to record a conviction.
- A young person who is dealt with by warning, caution or conference under the *Young Offenders Act* does not have a conviction recorded against them.
- An adult who is dealt with under section 10 of the *Crimes (Sentencing Procedure) Act* does not have a conviction recorded against them.

It is also not clear whether a “convicted offender” includes a person with **spent convictions**. Recorded convictions for some types of offences can become spent after a crime-free period (3 years for Children’s Court convictions and 10 years for other convictions). This means they are basically wiped off your criminal record for most purposes.

For the purpose of the consorting law, we would argue that “convicted offender” means a person who has had a conviction formally recorded against them and whose conviction is not spent. As far as we know, this has not been tested in court yet.

For more information about convictions, see our fact sheet on *Convictions and Criminal Records*.

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## 4 Official warnings from the police

The police may give you an “official warning”, telling you that:

- a person is a convicted offender; and
- habitually consorting with a convicted offender is an offence.

The warning does not have to be written down. It may be given verbally.

Police may give a warning at any time. It doesn't matter whether or not you have already been (or they suspect you have been) consorting with any convicted offenders.

Warnings given before 28 February 2019 never expire – so you could still be charged with consorting even if the official warning was given a few years ago.

Official warnings given on or after 28 February 2019 will expire after a period of time:

- 6 months, if the warning was given when you were under 18; or
- 2 years, if the warning was given when you were aged 18 or over.

You may be guilty of consorting if you consort with at least two convicted offenders on at least two occasions, as long as:

- the police have given you a warning about each person; and
- the warning is still in force; and
- you consort with each of those people at least once after receiving the warning.

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## 5 Types of consorting that are allowed

Not all communications with convicted offenders will make you guilty of consorting. The following forms of consorting will *not* make you guilty, if you can satisfy a court that the consorting was reasonable in the circumstances (*Crimes Act* section 93Y):

- a) consorting with family members (this includes extended family and kinship relationships for people of Aboriginal and Torres Strait Islander background);
- b) consorting that occurs in the course of lawful employment or the lawful operation of a business;
- c) consorting that occurs in the course of training or education;
- d) consorting that occurs when providing a health or welfare service (this includes a wide range of services) (*"welfare" has been added from 28 February 2019*);
- e) consorting that occurs when providing legal advice;
- f) consorting that occurs in lawful custody or in the course of complying with a court order;
- g) consorting that occurs in the course of complying with parole or a similar order (*added from 28 February 2019*); or
- h) consorting that occurs in the course of providing transitional, crisis or emergency accommodation (*added from 28 February 2019*).

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## 6 Penalties for consorting

If you are guilty of consorting, you may face a prison sentence of up to 3 years, or a fine of up to \$16,500, or both. These are the maximum penalties, which would rarely be imposed.

Consorting is an indictable offence, which means it can be dealt with by the District Court. However, it may be and usually would be dealt with summarily, which means it is finalised in the Local Court or Children's Court.

The maximum period of imprisonment or detention the Local or Children's Court can impose for any one offence is 2 years. The maximum fine that can be imposed is \$11,000 in the Local Court and \$1,100 in the Children's Court.

Other sentencing options such as good behaviour bonds, community correction orders, etc., also apply.

If you are under 18, an offence of consorting may be dealt with by a police caution or youth justice conference under the *Young Offenders Act*.

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## 7 Review of consorting laws

Many people have criticised the consorting law because it is unfair and allows police to target young, homeless and disadvantaged people.

The NSW Ombudsman reviewed the consorting law from 2012-2016. The final report is at <https://www.ombo.nsw.gov.au/news-and-publications/publications/reports/legislative-reviews/the-consorting-law-report-on-the-operation-of-part-3a,-division-7-of-the-crimes-act-1900-april-2016>.

Some amendments were made to the consorting law on 28 February 2019. They have been incorporated into this fact sheet.

### **The Shopfront Youth Legal Centre Updated March 2019**

The Shopfront Youth Legal Centre  
356 Victoria Street  
Darlinghurst NSW 2010  
Tel: 02 9322 4808  
Fax: 02 9331 3287  
[www.theshopfront.org](http://www.theshopfront.org)  
[shopfront@theshopfront.org](mailto:shopfront@theshopfront.org)

*The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills, in association with Mission Australia and The Salvation Army.*

*This document was last updated in March 2019 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.*

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## Consorting case study

Charlie (aged 18), Harry (aged 13) and Mary-Jane (aged 17) play together in a mixed football competition.

They are waiting for a lift home after training when two police officers approach them and say “Hey you three, do you know you could be guilty of consorting if we catch you hanging around with each other again?”.

The police tell each of them that the other two are convicted offenders, and warn them all that it is an offence to consort with convicted offenders.

While the police are still there, Mary-Jane’s phone rings and she answers it. It’s her cousin Crystal (aged 24), apologising that she is running a bit late to pick up Mary-Jane and her friends.

One of the police officers takes the phone from Mary-Jane, speaks briefly to Crystal and then hangs up. He turns to Mary-Jane and says “and I’m giving you a warning about that Crystal as well. She is also a convicted offender and remember, consorting with convicted offenders is an offence”.

Charlie recently went to the Local Court and received a fine for possessing cocaine.

Harry is on a bond for shoplifting, imposed by the Children’s Court just after he turned 13.

Mary-Jane has had two police cautions for possessing cannabis.

Crystal was found guilty of robbery in company when she was 17. The Children’s Court put her on probation and recorded a conviction. She has not been in trouble since.

If they all keep hanging around together, can any of them be guilty of consorting?