NSW Ombudsman

Review of the *Justice Legislation Amendment (Non-association and Place Restriction) Act 2001*

December 2006

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December 2006

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The Hon. Tony Kelly MLC
Minister for Justice
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Dear Messrs Debus and Kelly

Under section 5(1) of the *Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001* (the Act) I have been required to keep under scrutiny the operation of the amendments made by this Act.

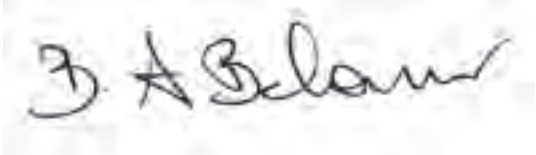
The Act also provides that as soon as practicable following the two year review period I am to furnish the Attorney General and the Minster for Justice and Juvenile Justice with a report about the activities we have undertaken to monitor the implementation and operation of the Act.

I am pleased to provide you with the final report of our review. In addition to reporting on our monitoring activities in relation to the relevant legislative provisions I have made a number of recommendations, some identifying potential legislative and procedural changes, for your consideration. This is consistent with section 5 of the Act.

I note the key agencies involved in the implementation of the legislation under review, including NSW Police, the Attorney General's Department, the Department of Corrective Services and the Department of Juvenile Justice were provided with a draft of the report. Their comments have been considered in finalising my findings and recommendations.

I draw your attention to Section 5(4) of the Act which requires you both to lay a copy of this report before both Houses of Parliament as soon as practicable after receiving it. You may consider it appropriate to co-ordinate regarding the tabling of the report.

Yours sincerely



Bruce Barbour
Ombudsman

Foreword

In October 2001 the *Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001* (the Act) was introduced into Parliament as one of a package of new laws designed to target gang-related crime.

The Act amends various laws relating to sentencing, bail and sentence administration. It aims to break up gangs through the use of orders and conditions that prohibit an offender or charged person from associating with specified persons or attending specified places or areas.

Schedule 1 of the Act made amendments relating to sentencing procedure, permitting courts to impose non-association and place restriction orders on persons who are sentenced for offences with a maximum penalty of six months imprisonment or more.

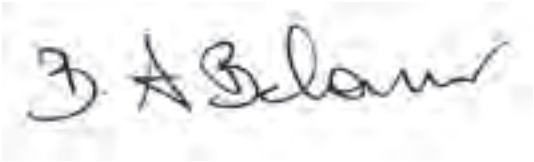
Schedule 2 of the Act made amendments to the *Bail Act 1978* to enable non-association and place restriction conditions to be imposed on the grant of bail. Courts and police had previously been able to impose these type of bail conditions.

Schedule 2 of the Act also made amendments to laws relating to sentence administration enabling non-association and place restriction conditions to be imposed on the grant of leave, parole and home detention. The Department of Corrective Services, the State Parole Authority and the Department of Juvenile Justice had previously been able to impose these type of conditions.

The NSW Parliament determined that the Act be reviewed by my Office for the first two years of its operation. We aimed to monitor whether the Act was being applied fairly and effectively. Our scrutiny of the Act has revealed that the non-association and place restriction orders have been used infrequently during the review period and that there has been no increase in the use of bail, parole, home detention or leave conditions restricting associations and attendance at places.

This report discusses the reasons why there has been such low use of the Act and identifies a number of legislative and procedural issues for consideration by Parliament and relevant agencies should the Act remain in operation. The report contains a number of recommendations. In particular, I recommend that Parliament consider whether aspects of the legislation should continue, given that it is clearly not meeting its objectives.

I trust this report will provide valuable assistance to those assessing the benefits and determining the future use of non-association and place restriction orders and conditions in New South Wales.



Bruce Barbour
Ombudsman

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Executive Summary

Background to this report

The *Justice Legislation Amendment (Non-association and Place Restriction) Act 2001* ('the Act') was introduced as one part of a package targeting gang-related crime. The Act amends various laws relating to sentencing, bail and sentence administration (parole, leave and home detention). The main objective of the Act is to prohibit an offender's or alleged offender's association with persons and places that may increase the likelihood of further offending.

The Act required the Ombudsman to keep under scrutiny the operation of the amendments for the first two years after commencement — from July 2002 to July 2004. This report outlines the activities undertaken as part of the review and details our findings and recommendations.

During our review we conducted various research activities including:

- analysis of records kept by police, courts and other relevant agencies on the use of the non-association and place restriction provisions
- reviewing transcripts and court papers of matters where non-association and place restriction orders were imposed
- obtaining information from and consulting with all agencies who have responsibilities under the Act including NSW Police, Local Courts, Department of Juvenile Justice, Department of Corrective Services, State Parole Authority, Bureau of Crime Statistics and Research and the Judicial Commission of NSW
- consulting with a range of community groups
- surveys of custody managers, local court judges and police prosecutors on their use of and views on the new laws.

Key provisions of the Act

The Act amends existing sentencing, bail and sentence administration laws (parole, leave and home detention) by establishing specific orders and conditions which prohibit an offender or alleged offender from associating with specified persons and attending specified places.

'Associate with' is defined as being in the company of or communicating with by any means (including post, facsimile, telephone and email).

Sentencing Orders

The Act amends the *Crimes (Sentencing Procedure) Act 1999* and the *Children (Criminal Proceedings) Act 1987* to enable a court to impose a non-association order or place restriction order on an adult or juvenile offender who is being sentenced for an offence which carries a penalty of six months or more imprisonment. This amendment is the most significant change brought about by the Act. The orders provide courts with an additional sentencing option, and the amendments provide for a new offence for breach of the orders.

The court must be satisfied that it is reasonably necessary to make the order to ensure that the offender does not commit any further such offences. An order lasts for up to 12 months.

Orders may not prevent association between the offender and a member of their close family. In addition, orders may not be imposed on the offender to restrict them attending their residence, or the residence of close family, or the offender's place of work, educational institution or place of worship.

If an offender breaches an order without reasonable excuse, they can be fined up to 10 penalty units or imprisoned for six months or both.

The Act makes it an offence to publish or broadcast the identity of a person (other than the offender) who is named in a non-association order.

Courts had previously been able to impose non-association and place restriction type conditions at sentencing through good behaviour bonds or suspended sentences. However, unlike orders under the Act, a breach of a good behaviour bond or a suspended sentence is not of itself an offence and there are no provisions which make it an offence to publish the identity of a non-offender named in such conditions.

Bail Conditions

The Act amends the *Bail Act 1978* to enable the conditions of bail to specifically include non-association and place restriction provisions. Courts and police had previously been able to impose these type of bail conditions. As with orders, the Act makes it an offence to publish or broadcast the identity of a person (other than the alleged offender) who is named in a non-association bail condition.

Sentence administration

The Act amends the *Crimes (Sentencing Procedure) Act 1999*, the *Crimes (Administration of Sentences) Act 1999* and the *Children (Detention Centres) Act 1987* to enable the conditions of home detention, leave and parole orders to include specific non-association and place restriction provisions. The relevant authorities had previously been able to impose these type of conditions.

Non-association and place restriction orders imposed at sentencing

The objective of the non-association and place restriction orders imposed at sentencing was to target gangs, break down criminal associations, promote the rehabilitation of offenders and assist in preventing crime. Our research reveals that the legislation presently does not meet these objectives.

The orders have been infrequently used — only 20 times in the two year period of the review. When used, they have not been imposed for serious organised criminal gang activity. Only five of the 20 orders imposed relate to criminal activity involving two or more persons and there were no charges for breach of the orders in the review period.

Factors contributing to the low use include that courts continue to use alternative means available for imposing non-association and place restriction conditions at sentencing, and a lack of knowledge of the Act by local court judges, police prosecutors and others.

Legislative restrictions and safeguards in respect of non-association have attracted critics from both sides of the fence — being too broad or narrow as regards family or kinship matters (especially for Aboriginal persons) and not allowing for certain 'conditional' associations such as association at school. This has likely impacted on the very limited use of the orders. In light of this we have recommended consideration for greater flexibility in non-association orders.

There is also a need for increased flexibility for place restriction orders. We have recommended more flexible tailoring of orders be allowed, so that courts can permit an offender to visit a place at specified times, or in specified circumstances (such as in the company of a parent or guardian). We have also recommended consideration of orders which limit access to those places which cannot presently be included in an order — for example attendance at a school but only during school hours.

Non association and place restriction conditions imposed at bail

The Act codified existing bail powers for non-association and place restriction conditions. It was intended that express legislative recognition of non-association and place restriction bail conditions would require police officers and courts to specifically consider the appropriateness of such conditions, thereby promoting their further use.

However, there has been no appreciable increase in the use of non-association or place restriction conditions during the two year review period and no identified increase in the use of these provisions for gang type activity.

Our research has also revealed that the provisions as they relate to bail are misunderstood by courts and police. There has been general uncertainty as to whether conditions were being imposed under general bail powers or the new laws. Advice received from Senior Counsel has now clarified the position — the specific provisions have replaced the general powers to impose non-association and place restriction conditions.

A number of problems with non-association and place restriction bail conditions were identified during our review. For example:

- sometimes the conditions were inexact or confusing, leading to the potential for inadvertent breaches by alleged offenders
- sometimes the conditions were imposed for minor offences where this is not appropriate.

A common theme from those we consulted was the desirability of guidelines for these bail conditions.

The *Bail act 1978* already sets out comprehensive considerations regarding the imposition of bail conditions. These considerations would need to be properly taken account of in the development of any guidelines. The guidelines would also need to be made flexible to allow individual circumstances to be taken into account in determinations.

We have also found that the restrictions as to non-association with 'close family' provided for in sentencing orders may not be appropriate for bail, where conditions are often imposed for the protection of victims or witnesses. These issues would need to be considered in the development of any guidelines for the imposition of non-association and place restriction bail conditions.

Little has been achieved by the bail amendments. There appears to be few advantages to police or courts and the criminal justice outcomes sought, that is, an increase in the use of these types of provisions and an increase in use for gang type offences in particular, have not been achieved. The new provisions also have the clear potential to be less flexible and more complex than the previous general powers.

However, the Act, does:

- provide guidance as to the nature of non-association and place restriction conditions, reducing the possibility of uncertainty
- provide guidance on when a condition will not be breached
- provide a clear definition of 'associate with'
- provide protection for persons, other than the accused person, named in a condition.

On balance, and given misunderstandings and less than comprehensive implementation, we do not at this time recommend repealing the new bail laws. We have recommended that careful consideration be given to the development of a set of guidelines which set out appropriate matters to be considered when imposing non-association and place restriction conditions at bail. We have also recommended ongoing monitoring of the use of these new laws.

Non association and place restriction conditions imposed at sentence administration

The objective of the legislation in relation to sentence administration was to encourage the use of non-association and place restriction conditions for leave, parole and home detention.

Our research reveals that the legislation at present does not meet these objectives. Minimal work has been undertaken by the Department of Corrective Services, the State Parole Authority and the Department of Juvenile Justice, who are responsible for sentence administration, to implement the new provisions and thereby promote their further use.

The main reason for this is because the new laws provide no additional power to impose non-association or place restriction conditions. However, for reasons similar to those concerning new bail laws, we have not recommended the new sentence administration laws be repealed. We have recommended consideration of guidelines, increased training and ongoing monitoring of the use of these conditions.

Impact on young and Aboriginal people

Non-association and place restriction orders and conditions are imposed on Aboriginal and young persons at a rate disproportionate to their representation in the general population. This is explained in part by the disproportionate offending rates of young and Aboriginal persons. Another factor appears likely to be that these groups include disadvantaged young and Aboriginal people who commonly associate with their peers in public spaces, often because they have nowhere else to go. The fact that these vulnerable groups may be further exposed to the criminal justice system as a result of the orders is a matter of concern.

We have recommended close monitoring of the Act to assess the ongoing impact of orders and conditions on young and Aboriginal persons.

Conclusion

Our scrutiny of the Act has revealed that the non-association and place restriction orders have been used infrequently during the review period. In addition, there is no evidence of an increase in the use of non-association and place restrictions conditions for bail or sentence administration.

We recommend that Parliament consider whether aspects of the legislation should continue at all, given that it is clearly not meeting its objectives of targeting and breaking up gangs.

If the legislation is to continue we have identified a number of legislative and procedural changes which, if adopted, should improve the operation of the new laws. We have also identified key issues that should be kept under scrutiny into the future to ensure the Act operates fairly and effectively.

Summary of Recommendations

	Recommendation	Page number
1	That Parliament consider this report in reviewing the ongoing need for the non-association and place restriction orders, as an option to target gang activity.	80
2	If the non-association and place restriction orders remain: a) Parliament give consideration to amending s100A of the *Crimes (Sentencing Procedure) Act 1999* to address the apparent need for flexibility in the legislation when imposing non-association orders and place restriction orders at sentencing. Such consideration should take account of the following issues: i. the need to accommodate kinship ties which extend beyond the immediate family in any definition of close family ii. in exceptional circumstances, allowing orders to be applied to close family where a court is satisfied of an ongoing pattern of criminal behaviour within the close family of an offender iii. the need to expand the list of places which may not be included in a place restriction order to accommodate health, welfare and related services iv. in exceptional circumstances, allowing orders to be applied to places that otherwise may not be included in a place restriction order, where a court is satisfied of an ongoing pattern of criminal behaviour (in which the offender is involved) occurring at that place v. the need to clearly express in the legislation that exceptions are permitted when deemed appropriate by the court. b) The Attorney General continue to monitor the Act to ensure the proper, fair and effective use of the non-association and place restriction orders imposed at sentencing. c) The Attorney General make enhancements to the Local Court computer system to ensure that statistical reports can be generated containing information on variations, revocations or appeals against non-association and place restriction orders to enable the resulting data to be included in any further monitoring of the legislation undertaken by the Attorney General. d) The Attorney General make arrangements for the: i. non-association and place restriction conditions imposed at parole to be recorded accurately on the available court computer systems to enable future monitoring of the provisions ii. details of the non-association and place restriction conditions imposed at parole to be electronically transferred to COPS iii. data recording requirements for court imposed non-association and place restriction provisions at parole to be considered in the design and implementation of the 'Courtlink' project. e) The Department of Corrective Services provide additional training and information to probation and parole officers and any other relevant personnel within the department about non-association and place restriction orders available at sentencing. f) The Judicial Commission of NSW provide additional training and information to judicial officers about non-association and place restriction orders available at sentencing.	81

	Recommendation	Page number
2 *Cont'd*	g) The NSW Police provide additional training and information to police prosecutors about non-association and place restriction orders available at sentencing. h) The Department of Juvenile Justice provides additional training and information to relevant juvenile justice officers about non-association and place restriction orders available at sentencing. i) The Department of Juvenile Justice include non-association and place restriction orders imposed at sentencing as an 'outcome category' on its system to enable the resulting data to be included in any further monitoring of the legislation undertaken by the Attorney General.	81
3	That Parliament consider this report in reviewing the ongoing need for a specific provision in the *Bail Act 1978* to permit the grant of bail subject to non-association and place restriction conditions.	97
4	If the Act is to continue, the: a) Attorney General, in conjunction with NSW Police and appropriate representatives of other interested groups such as Legal Aid, community legal centres, victims' representatives, the Director of Public Prosecutions and Aboriginal and youth legal centres and community organisations, give consideration to the development of a set of formalised guidelines which set out appropriate matters to be considered when imposing non-association and place restriction conditions at bail. Such consideration should take account of the following: i. those qualifications contained in s100A of the *Crimes (Sentencing Procedure) Act 1999* ii. those restrictions on imposing bail conditions already detailed in s37 of the *Bail act 1978* iii. the apparent need for flexibility when imposing non-association conditions at bail iv. circumstances where bail conditions may be imposed for the protection of victims or witnesses v. the need for police and courts to impose specific, clear and appropriate non-association and place restriction conditions at bail in accordance with the Act vi. the suitability of imposing non-association and place restrictions when granting bail for minor offences vii. the impact of the conditions on Aboriginal and young persons.	97
5	If the Act is to continue that: a) NSW Police provide a briefing to police prosecutors and those police who have responsibility for imposing bail, outlining the agreed legal interpretation regarding the interactions of the powers under s36 and s36B and the application of s36C of the *Bail Act 1978* and the relevant implications. b) NSW Police advise officers (including police supervisors who review COPS events) of the correct way to record non-association and place restriction conditions imposed at bail on COPS.	98
6	If the Act is to continue, the: a) Attorney General consider the advice regarding the interactions of the powers under s36 and s36B of the *Bail Act 1978* and the application of s36C and the findings and observations in this report in relation to adopted practice, and provide advice to those courts who have responsibility for imposing bail as appropriate.	98

	Recommendation	Page number
6 *Cont'd*	b) Attorney General make arrangements for: i. the pending review of the Bail Regulation to consider an amendment to the 'Bail Undertaking' forms used for documenting bail conditions imposed at court and by police so that the relevant provisions of the *Bail Act 1978* are clearly and simply referred to when magistrates and other officers are recording their decisions in relation to any non-association and place restriction conditions imposed ii. all non-association and place restriction conditions imposed at bail, including reference to the relevant *Bail Act 1978* provisions, be recorded accurately on the available court computer systems iii. details of the non-association and place restriction conditions imposed in accordance with the Act and recorded on the courts computer systems to be electronically transferred to COPS iv. data recording requirements for non-association and place restriction provisions imposed at bail to be included in the design and implementation of the 'Courtlink' project. c) Attorney General continue to monitor the Act to ensure the proper, fair and effective use of non-association and place restriction conditions imposed at bail by courts.	98
7	That the Attorney General consider the observations and findings in relation to the use of conditional bail for the protection of victims and witnesses contained in this report when considering any further amendments to Part 15A (Apprehended Violence) of the *Crimes Act 1900* to ensure that victims of domestic and personal violence are provided with effective and immediate relief.	98
8	That Parliament consider this report in reviewing the ongoing need for specific provisions enabling non-association and place restriction conditions to be attached to leave, parole and home detention.	103
9	If the Act is to continue, the Attorney General, in conjunction with the Department of Corrective Services and Department of Juvenile Justice and relevant representatives of other interested groups give consideration as to whether it would be appropriate to develop a set of formalised guidelines, comparable to those recommended in the bail context, which set out applicable matters to be considered when imposing non-association and place restriction conditions when issuing leave, parole and home detention.	103
10	If the Act is to continue that: a) NSW Department of Corrective Services: i. incorporate specific information regarding the non-association and place restriction provisions introduced by the Act into their forms, policies and procedures, and education and training materials relating to parole, leave and home detention ii. enhance its client information systems to enable data on non-association and place restriction conditions imposed when granting leave, parole and home detention to be recorded and evaluated iii. monitor and evaluate the non-association and place restriction conditions imposed on leave, home detention and parole to ensure the fair, proper and effective use of the conditions. b) NSW Department of Juvenile Justice: i. incorporate specific information regarding the non-association and place restrictions provisions introduced by the Act into their forms, policies and procedures, and education and training materials relating to leave	103

	Recommendation	Page number
10 *Cont'd*	ii. enhance its client information systems to enable data on non-association and place restriction conditions imposed when granting leave to be recorded and evaluated iii. monitor and evaluate the non-association and place restriction conditions imposed when granting leave to ensure the fair, proper and effective use of the conditions.	103
11	If the Act is to continue that: a) The Attorney General give particular consideration to further monitoring of the Act to assess: i. the impact of orders and conditions on young and Aboriginal persons ii. the appropriateness of orders imposed and the prosecution of any breaches of the orders to assess whether any punishment imposed is proportionate to the original offence iii. any evidence that an inability to pay a fine imposed for breach of an order is resulting in adverse consequences for recipients. b) NSW Police keep under scrutiny the policing of: i. non-association and place restriction orders imposed at sentencing through the systems proposed for examining legal treatment process in the NSW Police *Aboriginal Strategic Direction 2003–2006*. ii. non-association and place restriction conditions imposed at bail and specifically record, monitor and evaluate data relating to the use of the conditions including data relating to breaches through the systems proposed for examining legal treatment process in the NSW Police *Aboriginal Strategic Direction 2003–2006*. c) NSW Police consider the relevant Aboriginal Justice Advisory Council recommendations in light of police practice relating to the imposition of non-association and place restriction conditions at bail.	112
12	The Attorney General consider the findings of this report in any review of the *Bail Act 1978*, especially in respect of any consideration of the *Bail Act 1978* as it effects young and Aboriginal persons.	112
13	NSW Police should ensure that information regarding any non-association and place restrictions orders imposed upon persons at sentencing be recorded on the COPS system in an manner that allows rapid warning of their existence to officers in the field.	117

Chapter 1. Introduction

1.1. Outline

The *Justice Legislation Amendment (Non-association and Place Restriction) Act 2001* ('the Act') was introduced as part of a series of legislation amending existing sentencing, bail and sentence administration laws with the intention of targeting gang-related crime. The Act was aimed at breaking up gangs by establishing specific orders and conditions which prohibited an offender from: associating with specified persons; and attending specified places. The main objective of the Act is to prohibit an offender's association with persons and places that may increase the likelihood of their re-offending.[1]

Schedule 1 of the Act makes amendments to the *Crimes (Sentencing Procedure) Act 1999*, the *Criminal Appeal Act 1912* and the *Children (Criminal Proceedings) Act 1987* to enable non-association and place restriction orders to be imposed on persons who are sentenced for offences carrying a maximum penalty of six months imprisonment or more.

Schedule 2 of the Act makes amendments to the *Bail Act 1978* to enable non-association and place restriction conditions to be imposed on the grant of bail.

Schedule 2 also amends the *Crimes (Administration of Sentences) Act 1999* to enable non-association and place restriction conditions to be imposed on the grant of leave, the grant of parole and home detention and also makes amendments to the *Children (Detention Centres) Act 1987* to enable non-association and place restriction conditions to be imposed on juveniles on the grant of leave from a detention centre.

The provisions relating to bail and sentence administration commenced on 13 May 2002 and those relating to sentencing orders commenced on 22 July 2002.

1.2. Our role

The Act provides that for two years from the 22 July 2002, the Ombudsman is to keep under scrutiny the operation of the amendments made by the Act.[2] The Ombudsman must, as soon as practicable after the review period expires, prepare a report for each of the Ministers administering the statutory provisions affected by these amendments, as to the operation and effect of those amendments during the review period.[3]

Mr Stewart MP, the Parliamentary Secretary Assisting the Minister for Police and Utilities, commented on the Ombudsman's review in the second reading speech as follows:

> *The Government realises the importance of the independent monitoring and review of the legislation. Clause 5 of the Bill requires the Ombudsman to monitor the Act for two years and to report on its operation.*[4]

This report documents our findings resulting from the scrutiny of the operation of the new provisions.

The report includes recommendations to be considered by Parliament about amendments that might appropriately be made to the Act, and recommendations for a range of other Government agencies to consider. Ministers who receive the report must table a copy before both houses of Parliament as soon as practicable after receiving the report.[5]

1.3. Structure of this report

This report contains 12 chapters, which focus on the following areas:

- Chapter 2 — methodology used to scrutinise the implementation of the legislation
- Chapter 3 — background to the introduction of the Act
- Chapter 4 — key provisions and related laws which existed prior to the introduction of the Act
- Chapter 5 — similar powers in Australia and other jurisdictions
- Chapter 6 — how the Act has been implemented by the authorities who have responsibility for administering the Act
- Chapter 7 — use of the provisions of the Act during the review period
- Chapter 8, 9, 10, 11, 12 — issues identified through our scrutiny of the Act

Endnotes

1 Mr Stewart MP, New South Wales Parliamentary Debates (NSWPD), Legislative Assembly, Second Reading Speech, 26 October 2001, p. 18104.
2 s5(1), *Justice Legislation Amendment (Non-association and Place Restriction) Act 2001*.
3 s5(3), *Justice Legislation Amendment (Non-association and Place Restriction) Act 2001*.
4 NSWPD, Legislative Assembly, 26 October 2001, p. 18104.
5 s5(4), *Justice Legislation Amendment (Non-association and Place Restriction) Act 2001*.

Chapter 2. Methodology

This chapter briefly outlines the research activities we undertook for our review.

A multi-faceted research strategy was developed to review the operation of the Act. The aim was to obtain information from a range of sources and perspectives about the way the various aspects of the legislation relating to sentencing, bail and sentence administration were being implemented in NSW.

2.1. Submissions

In 2003, we released a discussion paper, which was distributed widely to various interested parties including:

- NSW Police
- NSW Local Courts
- NSW Department of Corrective Services
- NSW Department of Juvenile Justice
- NSW Director of Public Prosecutions
- youth and Aboriginal legal services
- community legal centres
- legal practitioners
- academics
- other relevant government departments.

The discussion paper described the new provisions, and their use to date, and canvassed various issues arising from their implementation. The paper included 21 questions for consideration.[6] We received 19 submissions; see Appendix A.

2.2. Court proceedings

Information on the use of non-association and place restriction orders was obtained from NSW Local Courts and the NSW Bureau of Crime Statistics and Research (BOCSAR). We reviewed the transcripts and court papers of all proceedings where it was identified that a court had imposed a non-association and place restriction order, including the examination of 20 matters where orders had been imposed on offenders in accordance with s17A of the *Crimes (Sentencing Procedure) Act 1999*.

2.3. Observation of the Implementation Working Party

We were invited to observe the 'Non Association-Implementation Working Party' prior to the commencement of the Act. The Working Party was facilitated by the Attorney General's Department and met several times in early 2002. It comprised representatives of relevant government agencies and certain non-government agencies and primarily focussed on issues that impacted on the practical implementation of the Act. Observation of this Working Party provided us with valuable information about procedural issues relating to the early implementation of the Act, and other useful background material.

2.4. Information supplied by agencies with responsibilities under the Act

Section 5 of the Act authorises the Ombudsman to require and obtain information from NSW public authorities about the use of the Act.

We wrote to all government agencies who had responsibilities under the Act including NSW Police, NSW Local Courts, Department of Juvenile Justice (DJJ), Department of Corrective Services (DCS) and BOCSAR setting out the information we required under s5(2) of the Act.[7]

Each of these agencies provided a range of data and information to assist our review including records on the use of the provisions, access to relevant files and databases, details of policy and procedural changes, education and training materials and particulars of information technology enhancements.

In addition, these agencies were invited to provide a submission in response to the discussion paper.

The NSW Police 'Gangs Crime Squad' within the State Crime Command provided a submission in response to specific issues raised.[8]

The data provided by NSW Police is outlined in more detail below at 2.7.

2.5. Interviews with relevant departmental officers, operational police, magistrates and other interested parties

We conducted meetings and interviews with personnel from all government agencies which have responsibilities under the Act including representatives of the NSW Police, NSW Local Courts, DJJ, DCS and BOCSAR.

We interviewed police prosecutors and senior police from Cabramatta, Kings Cross, Newcastle and St Mary's local area commands (LACs) who had direct experience of the operation of the legislation. The NSW Police Corporate Sponsor for the legislation and the NSW Police State Crime Command, which includes the 'Gang Crimes Squad', were also consulted as to their view of the effectiveness of the new provisions.

We also interviewed magistrates from regional areas of NSW, representatives from Aboriginal legal services, Many Rivers Legal Service, Shopfront Youth Legal Services and Marrickville Legal Centre.

2.6. Surveys of custody managers, magistrates and police prosecutors

2.6.1. NSW Police custody managers

In February and March 2003 we conducted a telephone survey of NSW Police custody managers in 34 LACs across NSW.[9] A structured questionnaire with specific questions was used during the interview. There was also an opportunity for a general discussion with the custody managers, where any other relevant issues could be raised. The survey specifically focused on custody managers because of their operational responsibilities in imposing conditions when granting police bail. The survey included questions about the officers' awareness of the new provisions, their experience in the use of the provisions, their recording practices, the education and training offered to them regarding the provisions and any operational strategies put in place to assist in the implementation of the Act.

2.6.2. Magistrates

In June 2005 we arranged for the Chief Magistrate to distribute a survey about the legislation to all NSW magistrates in Local and Children's Courts. The survey was distributed by email. Magistrates were surveyed because of their responsibilities in imposing orders and conditions when sentencing, issuing parole orders and granting bail. The survey included questions designed to establish whether magistrates had used the provisions, whether they had been given any training regarding the provisions, what information or material they had been exposed to regarding the provisions, their recording practices and what they saw as concerns, problems or issues with the legislation.

2.6.3. Police prosecutors

In July 2005 we also arranged through NSW Police Legal Services for the distribution of an email survey to all NSW police prosecutors. Police prosecutors were chosen because of their responsibilities in seeking bail conditions and sentencing orders at court. The survey included questions designed to establish prosecutors' involvement in any matters where a non-association or place restriction order or conditions had been imposed on an offender as part of sentencing or on alleged offenders when imposing bail at court. The survey also included questions related to education and training received by police prosecutors on the legislation, their recording practices and what they saw as concerns, problems or issues with the legislation.

2.7. COPS information

Information from NSW Police's Computerised Operational Policing System (COPS) database was used to monitor the use of the Act in relation to bail imposed by NSW Police and also to obtain background details of persons who had had sentencing orders imposed upon them.

The COPS database provides a structure for police to record event details such as date, location, offence, LAC, offender details and relevant facts. COPS also contains a 'narrative' field which allows officers to describe an event in their own words and to record important features of the incident which may not fit under other category headings.

Arrangements were made with NSW Police to provide the Ombudsman with a range of data on police bail. This included the provision of data on the following:

- the total number of police bails for the review period (May 2002 to May 2004) and a breakdown of that total including the total number of unconditional bails and total number of conditional bails imposed for the period

- total number of persons bail refused for the review period
- parallel data for a comparison period (May 2000 to May 2002).

More specific bail data was also provided by NSW Police including the following:

- a 'charge enquiry list' detailing all matters where conditional bail had been imposed for all NSW charging stations for specific days within the review period (May 2002 to May 2004)
- parallel data for a comparison period (May 2000 to May 2002).

The data provided for the review period also indicated where a 'Create non-association condition' and 'Create place restriction condition' screen was used and details of the information recorded. This allowed us to ascertain the extent to which police were recording non-association and place restriction conditions in the appropriate screens created for the new provisions.

In addition to the information provided by NSW Police, we also examined the COPS database to obtain details of incidents such as court outcomes, facts about offences, any breaches of orders or bail conditions, re-offending rates and 'event narratives' composed by operational police who dealt with particular incidents.

2.8. Other sources

A range of other information was also examined, including Parliamentary debates and media reports, relevant literature and comparable legislation in other jurisdictions.

The limited use of the provisions during the review period meant there was little input from members of the public on the implementation of the legislation.

2.9. Research limitations

There were several limitations in the data and information that was available for us to examine which are outlined below:

2.9.1. Data from NSW Local Courts and BOCSAR

The NSW Local Courts and BOCSAR provided us with data relating to matters where non-association and place restriction orders were imposed by courts at sentencing during the review period. There were several limitations identified with the data provided.

2.9.1.1. Sentencing data provided does not include Department of Juvenile Justice statistics

NSW Local Courts and BOCSAR currently record details of finalised cases on two computer systems, the General Local Courts (GLC) computer system and the non-GLC courts computer system.

Approximately 85% of the total workload of all NSW Local Courts is managed on the GLC computer system. All other local courts in NSW are linked to the non-GLC computer system.

The data provided by NSW Local Courts was from the GLC computer system and relates to both juveniles and adults. The data provided from BOCSAR was from both GLC and non-GLC courts but only relates to adults not juveniles.

Data on matters involving juveniles heard in non-GLC courts is collected by DJJ on the NSW Children's Court Information System (CCIS). However when we contacted DJJ to obtain data on non-association and place restriction orders imposed at sentencing recorded in the review period, the department advised that they did not have the orders listed as an 'outcome category' and therefore could not provide the data requested.

This meant that there was no data captured on non-association and place restriction orders imposed at sentencing on juveniles in non-GLC courts. For this reason we do not have a full set of data on all matters where non-association and place restriction orders were imposed in the review period.[10]

2.9.1.2. Lack of data on non-association and place restriction conditions imposed at bail by courts

NSW Local Courts advised that there were no amendments made to court forms to accommodate the recording of details regarding the use of the new non-association and place restriction provisions relating to bail. Hence the bail conditions imposed by the court in the review period make no distinction as to which section of the legislation has been used to impose the conditions. This means that there is no reliable data on the use of the new bail provisions in NSW courts in the review period.[11]

2.9.1.3. Lack of data on non-association and place restriction conditions imposed by court on parole

NSW Local Courts advised that there were no amendments made to relevant policies, procedures, forms or systems in order to apply the legislation in relation to parole. As a result, statistical reports containing information on conditions imposed by courts on parole cannot be generated from the current system. If conditions were imposed they would have been documented manually on the individual files. This means that there is no reliable data on the use of the new provisions relating to parole in NSW courts in the review period.[12]

2.9.2. Data relating to non-association and place restriction conditions imposed at bail by NSW Police

We asked NSW Police to provide us with COPS data relating to matters where non-association and place restriction conditions were imposed by police at bail during the review period (May 2002 to May 2004) and in a comparison period (May 2000 to May 2002). A quantity of data was supplied and in a small number of matters (less than 1%) the 'bail text' section of the data, which describes what type of condition was imposed, was left blank. Therefore for these matters the type of condition imposed could not be determined.

2.9.3. Limitation of COPS

In relation to data regarding bail imposed by police we relied on numbers and events sourced from the COPS database. Despite its advantages as a central record of a large volume of police data, COPS does have some limitations as a source of information about police activity. Those limitations stem from the technical design of the system, its vulnerability to human error, as well as the effectiveness of police recording procedures. Information in COPS is entered by a broad range of police officers and the data and narratives entered varies in terms of reliability and accuracy. The advantages and disadvantages of COPS as a research tool have previously been comprehensively discussed in our review of the *Crimes Legislation (Police and Public Safety) Act 1998*.[13] NSW Police is currently conducting a review of the COPS system.

We obtained demographic data about people subject to police imposed bail from COPS including age distribution and Aboriginal status.[14] We were unable to obtain information about whether a person is from a non-English speaking background as there is no consistent recording of information about ethnicity.

2.10. Consultation on final report

A draft copy of this report was provided to NSW Police, the Attorney General's Department, DJJ and DCS for comment. The purpose of this consultation was to give agencies an opportunity to comment on the accuracy of the material presented, and on the findings and recommendations.

The agencies' comments where relevant have been incorporated in the report, especially in sections immediately following our recommendations.

It should be noted that the Director General of the Attorney General's Department, Laurie Glanfield provided general comments in response to our draft report on behalf of his department and the Attorney. While not addressing the specific recommendations, Mr Glanfield commented:

> *Clearly a great deal of effort has been put into the review and it will provide a valuable basis for further considering the operation of the legislation. The recommendations made in the draft report appear to comprehensively and constructively address relevant issues and there are no particular matters I would draw your attention to in relation to their general tenor.*[15]

Endnotes

6 NSW Ombudsman, *The Justice Legislation Amendment (Non-association and Place Restriction) Act 2001: Discussion Paper*, Sydney, December 2003.
7 s5(2) of the Act states that the Ombudsman may require any public authority to provide information concerning the authority's participation in the operation of the statutory provisions affected by the amendments brought about by the Act.
8 Letter from NSW Police Gangs Squad, State Crime Command, 7 December 2005.
9 There are 80 LACs located across NSW. Our survey of 34 LACs covered 43% of all LACs.
10 See 8.3.5 for further discussion and recommendations relating to this issue.
11 See 6.1.5 and 9.2.1 for further discussion and recommendations relating to this issue.
12 See 6.1.4 and 8.4 for further discussion and recommendations relating to these matters.
13 NSW Ombudsman, *Policing Public Safety: Report under s6 of the Crimes Legislation Amendment (Police and Public Safety) Act, 1999*, pp. 89–94.
14 In this report Aboriginal refers to Aboriginal and Torres Strait Islander peoples.
15 Letter from the Attorney General's Department of NSW, 28 August 2006.

Chapter 3. Background

This chapter outlines the background to the introduction of the Act, the objectives of the legislation and notes some of the issues relevant to the review.

3.1. Part of an anti-gang package

Prior to the introduction of the Act, events and media attention[16] in NSW had heightened the focus on youth gangs and ethnic youth gangs in particular.[17] Concern over this gang activity led to the Government's introduction of a package of legislative measures[18] designed to combat gang-related crime in NSW including:

- *Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001*.[19] This Act imposed a maximum sentence of life imprisonment for gang rapists.
- *Police Powers (Vehicles) Amendment Act 2001*.[20] This Act gave police additional powers to stop vehicles reasonably suspected of having been used in connection with an indictable offence and to ask all persons in the vehicle to provide information about their identities.
- *Crimes Amendment (Gang and Vehicle Related Offences) Act 2001*.[21] This Act introduced higher penalties for the commission of certain gang-related offences in company. This Act also reformed kidnapping laws and created new offences for car-jacking, threatening potential witnesses to prevent them from giving evidence, recruiting a child to commit a serious indictable offence and organised criminal involvement in car rebirthing.
- *Motor Trade Legislation Amendment Act 2001*.[22] This Act created offences targeted at gangs and other criminals who engage in organised motor vehicle theft.

Whilst these Acts were designed to have a particular impact on gangs, all the provisions contained within the legislation are of general application to all people, whether they offend 'in company' or not.

The Premier said of the package:

> *This means that courts can now order gang members not to associate with other gang members or even go to their so-called 'turf'. With these new laws the Government is establishing the legislative framework that police need to target gangs and organised crime. Now there are new evidence-based powers for police: powers to stop and search vehicles, to seek identification from both driver and passenger, to move on gangs, to search for and confiscate knives, and to break through the fortified doors of drug houses and arrest those inside. The Government has introduced new offences of threatening to intimidate witnesses, recruiting children to commit crimes and car rebirthing.*[23]

The Opposition supported the legislation. During the Parliamentary debate on the Justice Legislation Amendment (Non-Association and Place Restriction) Bill, Mr C Hartcher MP, Shadow Attorney General, stated:

> *This legislation is long overdue. It is clear that much crime is related to gang activity and much juvenile crime is caused by gang activity and peer pressure. Young people on their own will not commit offences that they frequently commit in company. Society needs to prevent the coming together of people with criminal intent or people who are idle, because it may lead to criminal conduct.*[24]

None of the gang-related legislation included a definition of 'gangs'.

3.2. Introduction of the legislation

The Justice Legislation Amendment (Non-Association and Place Restriction) Bill ('the Bill') was read for the first and the second time to the Legislative Assembly on 26 October 2001. The Bill was passed through its remaining stages on 9 November 2001.

The Bill was introduced and first read in the Legislative Council on 13 November 2001 and read for a second time and debated on 14 November and 27 November 2001. In Committee an amendment was moved to insert a requirement that a copy of the Ombudsman's report be laid before both houses of Parliament as soon as practicable after the report is received (Clause 5).[25] The amendment was approved on 5 December 2001. The Act was assented to on 11 December 2001.

The provisions relating to bail and sentence administration commenced on 13 May 2002 and those relating to sentencing orders commenced on 22 July 2002.

3.3. Objectives of the legislation

3.3.1. General

The Long Title of the Act as described in the legislation is as follows:

> *An Act to amend various Acts relating to sentencing, bail and sentence administration to reduce certain kinds of criminal activity; and for other purposes.*

Mr Stewart MP in his second reading speech described the legislation as the 'cornerstone of the Government's comprehensive anti-gang package' when it was introduced in September 2001.[26] He further commented that the Bill complemented the other gang-related legislative reforms 'in that it targets the elements that are central to gang activity' and outlined the main objective of the legislation as follows:

> *Breaking down an offender's association with persons and places that increase the likelihood of their re-offending*[27]

Mr Stewart MP further stated that the legislation:

> *will target gangs, break down criminal associations, promote the rehabilitation of offenders, and assist in preventing crime.*[28]

3.3.2. Specific comments related to sentencing

In relation to sentencing orders, Mr Stewart MP made the following comments in his second reading speech:

- non-association orders may be used to prevent a gang member from associating with other gang members. Place restriction orders target turf and, by extension, can also target gang associations
- the aim of such orders is to prevent crime and to assist the rehabilitation of the offender by severing their ties with people or places that make them more likely to engage in criminal activity
- the orders can be imposed by the court where it believes they are reasonably necessary to ensure the offender does not commit further offences
- the orders may be made in addition to but not instead of, other sentencing options and thus give the courts increased flexibility in sentencing.[29]

The Act introduced an offence for the breach of the orders.[30] The rationale for the creation of an offence was provided as follows:

> *A breach of these orders needs to be taken seriously if they are to successfully deter offenders from inappropriate associations or access to places. New Zealand legislation on which the bill is partially modelled recognised that a breach of such an order should itself be a minor criminal offence. This bill takes the same approach. Proposed section 100E of the Crimes (Sentencing Procedure) Act creates a criminal offence where an order is contravened without reasonable excuse.*[31]

3.3.3. Specific comments related to bail

In relation to the new provisions relating to bail Mr Stewart MP made the following comments:

- the Bill amends relevant legislation to specifically recognise that non-association and place-restriction conditions may be attached to bail
- express legislative recognition of non-association and place restriction conditions will require bodies with bail responsibilities to specifically consider the appropriateness of such conditions, thereby promoting their further use.[32]

3.3.4. Specific comments related to sentence administration

With regard to the new provisions relating to sentence administration Mr Stewart MP made the following comments:

- the Bill amends relevant legislation to specifically recognise that non-association and place-restriction conditions may be attached to unescorted leave from custody, conditions of home detention and parole
- express legislative recognition of non-association and place restriction conditions will require bodies with parole and leave management responsibilities to specifically consider the appropriateness of such conditions, thereby promoting their further use

- the Bill will encourage the Department of Corrective Services and the Department of Juvenile Justice to consider the appropriateness of attaching non-association and place restriction conditions to leave, parole and home detention.[33]

3.4. Parliamentary debate

The main concern about the Bill expressed during the Parliamentary debates was that it had potential for a disproportionate detrimental impact on particular groups in the community, especially young and Aboriginal people.[34] Other concerns expressed included:

- that it did not address the under resourcing and poor management of NSW Police[35]
- that it did not address the root causes of crime in society, namely poverty and economic and social stress[36]
- that breach of the orders/conditions will result in imprisonment of offenders and increase the gaol population.[37]

3.5. Definition of a gang

The term 'gang' is not defined in the second reading speech for the legislation nor is it defined in the Act. And while this legislation is part of an 'anti-gang package' and one of the Acts in the package contains the word gang in its title,[38] the term has not been defined in any of the legislation introduced. Indeed the word gang is not defined in any criminal legislation in Australia.

However, in his second reading speech introducing the Bill, Mr Stewart MP, did refer to some 'common characteristics' of youth gangs that have been identified in the North American context:

> *The 1995 United States of America Federal Bureau of Justice Youth Gang Survey recognised that gangs generally have a number of common characteristics, two of the most important being ongoing criminal association in a group, and identification with a particular territory or turf.*[39]

In a briefing paper to Parliament, R Lozusic noted that in Australia there is no agreement 'about the key aspects of gang-related behaviour, identification of gang members and the formation and disintegration of gangs'.[40]

Lozusic observed that the term gang is used in Australia in a 'variety of ways by the media, law enforcement, politicians and members of the community' and commented that:

> *The word generally refers to a group of people acting or going about together for a common usually criminal purpose.*[41]

Lozusic further commented 'there is a spectrum of criminal activity perpetrated by groups of people and a range of gangs operating along that spectrum, from street gangs committing petty crime, to well structured and entrenched organised crime groups'.[42]

Several other definitions of gangs have been developed in the Australian context[43] including the following:

- A group which sees itself as a gang, and is perceived by others as a gang, primarily because of its illegal activities, constitutes the minimum baseline definition of a gang.[44]
- Several people who regularly act together in an illegal or threatening manner. A gang has some form of ongoing organisation.[45]

The then Premier, The Hon. R Carr MP, referred to the 'definition of a gang' issue when responding to a question relating to the Crimes Amendment (Aggravated Sexual Assault in Company) Bill. [46] This Bill was introduced in response to concerns regarding the sentencing of gang rapists. The Bill proposed the insertion of a new offence into the *Crimes Act 1900* titled 'Aggravated sexual assault in company' which carried a maximum penalty of life imprisonment for gang rapists.[47] In reference to a question of what constituted a gang for the purposes of the legislation, the Premier commented:

> *The Government has been asked how it intends to define a gang. The Government will be using the existing Crimes Act definition of 'in company', that is two or more people. By focusing on the 'in company' definition, the legislation does not need to develop criteria for gang membership. This overcomes issues concerning the constitution of a gang, what makes a gang.*[48]

While there is no definition of what constitutes a gang for this particular legislation nor for the remainder of the 'anti-gang package', 'criminal activity in a group' appears to be the basic common characteristic of the definitions of a gang applied in the Australian context. Thus at the bare minimum it may include a 'group' made up of two or more people.

At the time of the completion of this report the *Crimes Legislation Amendment (Gangs) Act 2006* was passed by Parliament in September 2006.[49] The Act defines 'criminal group' as a group of three or more people who have as their objective or one of their objectives:

a) obtaining material benefits from conduct that constitutes a serious indictable offence, or

b) obtaining material benefits from conduct engaged in outside New South Wales (including outside Australia) that, if it occurred in New South Wales, would constitute a serious indictable offence, or

c) committing serious violence offences, or

d) engaging in conduct outside New South Wales (including outside Australia) that, if it occurred in New South Wales, would constitute a serious violence offence.

The legislation is largely targeted at 'organised criminal groups and impromptu groups of violent individuals or mobs'.

For the purposes of this report we refer to a 'gang type offence' as an offence where there is evidence of criminal activity involving two or more people. It should be acknowledged, however, that this minimal concept of a gang was by and large not the type of gang activity which Parliament intended to target through this legislation.

3.6. Information about membership and activities of gangs

Lozusic has emphasised that in the Australian context no matter how gangs are described they are invariably 'fairly transient, with members coming and going'.[50]

The Australian Institute of Criminology has also noted that membership of gangs in Australia is difficult to determine commenting:

> *There is very little empirical material in Australia that would tell us how many gangs exist, who is in them and what they do.*[51]

With the formation in police departments of specific gang strike forces or squads, and increased focus on gang related criminal activity from research bodies such as BOCSAR, it appears that in the future we may have improved data on gang activities in Australia. Increased focus on gang activity from these agencies will enable more comprehensive assessment of the existence and extent of gangs and the details of gang membership.

Endnotes

16 In 2001, gang-related offences attracted much media and political attention. This is evidenced in the following articles: C Miranda, 'Crackdown on city gangs: Police search 100 for weapons', *The Daily Telegraph*, 26/02/01; D Goodsir and L Kennedy, 'Police Revolt by backing rebel on gang wars', *Sydney Morning Herald*, 6/3/01; N Mercer, 'Police chief hits out at ethnic gang violence', *Sydney Morning Herald*, 12/3/01; L Doherty, 'Premier steps into ethnic crime row', *Sydney Morning Herald*, 14/3/01; F Walker, 'Ganglands: where school students fear the trip home', *The Sun-Herald*, 8/04/01; F Walker, 'Schoolboys vow to dob in Triad leaders', *The Sun-Herald*,15/04/01; L Doherty, M Brown and L Kennedy, 'Drug gangs recruiting teens for past two years', *Sydney Morning Herald*, 2/05/01; L Doherty and L Kennedy, 'Running riot; officer warns of emerging teen gangs', *Sydney Morning Herald*, 10/05/01; A Mitchell, 'Drugs capital thrived as police 'turned a blind eye', *The Sun-Herald*, 17/06/09; 'Former member tells of his life in a gang', *The Daily Telegraph*, 8/08/01; B McDougall, K Lawrence, R Morris and C Miranda, 'Special Investigation: Gangland: The crisis Sydney's community leaders are too timid to confront', *The Daily Telegraph*, 6/08/01; R Wainwright, 'We import gangsters, says Premier', *Sydney Morning Herald*, 7/08/01; 'Anti-gang school plan', *Sydney Morning Herald*, 7/08/01 ; M Sun, 'Scared witnesses say we're losing the fight', *The Sun-Herald*, 7/08/01; R Morris, 'Statistical check into ethnic link with crime', *The Sun-Herald*, 7/08/01; A Mitchell, 'Libs push life terms for gang rapists', *The Sun-Herald*, 12/08/01; 'Gang rape law first up', *Daily Telegraph*, 3/09/01; R Morris, 'Gang Tackle', *The Daily Telegraph*, 5/09/01. See also R Johns, 'Sentencing Law: A Review of Developments in 1998–2001', NSW Parliamentary Briefing Paper 2/2002, p. 10.

17 F Manning in the 'Dealing with Street gangs: Proposed Legislative Changes' Briefing Paper No. 26/96, NSW Parliamentary Library Research Service noted that It has been 'alleged that media reports of gang activity have the effect of distorting its actual prevalence. It has been speculated that the reasons for the media devoting such prominence to gang activity is that such stories are highly visual, they play on peoples fears, and they appeal to bases of race, age and social class'.

18 The anti-gang package was announced by Premier Carr on 4 September 2001.

19 The *Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001* was assented to on the 21 September 2001 and commenced on 1 October 2001.

20 *Police Powers (Vehicles) Amendment Act 2001* was assented to on 25 October 2001 and commenced on 1 January 2002.

21 The *Crimes Amendment (Gang and Vehicle Related Offences) Act 2001* was assented to on 21 December 2001 and commenced on 14 December 2001.

22 The *Motor Trade Legislation Amendment Act 2001* was assented to on 28 November 2001 and commenced in full on 22 July 2002.

23 NSWPD, Legislative Assembly, 29 November 2001, p. 9239.

24 NSWPD, Legislative Assembly, 9 November 2001, p. 18330.

25 The amendment was moved by The Hon. R Jones, MLC.

26 NSWPD, Legislative Assembly, 26 October 2001, p. 18104.

27 NSWPD, Legislative Assembly, 26 October 2001, p. 18104.

28 NSWPD, Legislative Assembly, 26 October 2001, p. 18107.

[29] NSWPD, Legislative Assembly, 26 October 2001, pp. 18104–18105.
[30] s100E(1), *Crimes (Sentencing Procedure) Act 1999*.
[31] Mr Stewart MP, NSWPD, Legislative Assembly, Second Reading Speech, 26 October 2001, p. 18105.
[32] NSWPD, Legislative Assembly, 26 October 2001, p. 18106.
[33] NSWPD, Legislative Assembly, 26 October 2001, pp. 18106 –18107.
[34] I Cohen MLC, NSWPD, Legislative Council, November 2001, pp. 18856 –18857.
[35] The Hon. G Pearce MLC, NSWPD, Legislative Council, 14 November 2001, p. 18555.
[36] The Hon. Dr A Chesterfield-Evans MLC, NSWPD, Legislative Council, 27 November 2001, p. 18863.
[37] The Hon. J Ryan MLC, NSWPD, Legislative Council, 27 November 2001, p. 18862.
[38] The *Crimes Amendment (Gang and Vehicle Related Offences) Act 2001*.
[39] NSWPD, Legislative Assembly, 26 October 2001, p. 18104.
[40] R Lozusic, *Gangs in NSW*, NSW Parliamentary Briefing Paper 16/2002, 30/12/2002, p. 3.
[41] R Lozusic, *Gangs in NSW*, NSW Parliamentary Briefing Paper 16/2002, 30/12/2002, p. 3.
[42] R Lozusic, *Gangs in NSW*, NSW Parliamentary Briefing Paper 16/2002, 30/12/2002, p. 3.
[43] R Lozusic, *Gangs in NSW*, NSW Parliamentary Briefing Paper 16/2002, 30/12/2002, p. 21.
[44] R White, Understanding Youth Gangs, *Trends and Issues in Crime and Criminal Justice No. 237*, Australian Institute of Criminology, August 2002, p. 1.
[45] Pulse Consultants (1994) *Street Gangs: Study for the NSW Police Service*. Sydney, p. 1 as quoted by the Legislative Council Standing Committee on Social Issues, A Report into Youth Violence in New South Wales, 1995, p. 52.
[46] Introduced in 2001 as part of the Government's 'anti-gang package'.
[47] The legislation inserted s61JA into the *Crimes Act 1900*. The elements of the offence are sexual assault in the company of another person or persons, when any one or more of the circumstances — of violence, threatened violence or deprivation of liberty — are in place.
[48] The Hon. R Carr MP, Premier, Ministerial Statement on Law and Order in Parliament, Legislative Assembly, 4 September 2001, p. 16298.
[49] The *Crimes Legislation Amendment (Gangs) Act 2006* was assented to on 28 September 2006.
[50] R Lozusic, Gangs in NSW, NSW Parliamentary Briefing Paper 16/2002, 30/12/2002, p. 3.
[51] A Graycar, Director of the Australian Institute of Criminology, in the preface to the research paper by R White, 'Understanding Youth Gangs', *Trends and Issues in Crime and Criminal Justice No. 237*, Australian Institute of Criminology, August 2002, p. 1.

Chapter 4. Statutory framework

This chapter provides a brief synopsis of the key provisions of the Act relating to sentencing, bail and sentence administration, and outlines the related laws which existed prior to the new provisions being introduced.

4.1. Key provisions of the *Justice Legislation Amendment (Non-association and Place Restriction) Act 2001*

Regardless of when applied, orders or conditions are described in the Act as follows:

- A non-association order or condition prohibits the offender from associating with a specified person for a specified term.[52]
- A place restriction order or condition prohibits the offender from frequenting or visiting a specified place or district for a specified term.

Circumstances where these orders or conditions can be applied include at sentencing and when imposing conditions for parole, bail, leave and home detention.

4.1.1. Sentencing

4.1.1.1. *Crimes (Sentencing Procedure) Act 1999*

An amendment by the Act to the *Crimes (Sentencing Procedure) Act 1999*[53] inserts s17A, which enables a court to impose a non-association order or place restriction order[54] on an offender whom it is sentencing for an offence that carries a penalty of imprisonment for six months or more. The court must be satisfied that it is reasonably necessary to make the order to ensure that the offender does not commit any further such offences.[55]

This amendment is the most significant change brought about by the Act. The orders provide courts with an additional sentencing option, and the amendments provide for a new offence for the breach of the orders.

Section 17A(5) provides that an order must not exceed 12 months.

Section 25(1)(e) provides that an order is not to be imposed in the absence of the offender.

Part 8A of the *Crimes (Sentencing Procedure) Act 1999* was inserted by the amending Act. Part 8A sets out in some detail the non-association and place restriction regime.

Section 100A(1) provides that a non-association order may not include any members of the offender's close family — the offender's partner, immediate family, guardian or carer.

Section 100A(2) provides that a place restriction order must not specify places or districts which include the offender's place of residence or the place of residence of any of the offender's close family; any place of work at which the offender is regularly employed; any educational institution at which the offender is enrolled; or, any place of worship at which the offender regularly attends.

Section 100B requires the court to explain to an offender on whom it has imposed an order the offender's obligations under the order and the consequences that may follow if the offender fails to comply with the order.

Section 100C states that an order commences at the time it was made by the court.

Section 100D suspends the operation of orders while the offender is in custody, although suspension does not postpone the date on which the order ends.

Section 100E creates a new offence of contravention of the order. An offender must not, without reasonable excuse, contravene an order. The maximum penalty is 10 penalty units (currently $1100) or imprisonment for six months, or both. Reasonable excuses include if the offender did so in compliance with an order of a court; or having associated with the specified person unintentionally, the offender immediately terminated the association.

Section 100F allows a court to vary or revoke an offender's existing order when sentencing the offender for a new offence.

Section 100G allows an offender to apply to a Local Court, with the court's leave, to vary or revoke their order. Leave may be granted for such an application only if the court is satisfied that, having regard to changes in the applicant's

circumstances since the order was made or last varied, it is in the interests of justice that leave be granted.[56] The Commissioner of Police may appear and be heard in any proceedings on the application.

Section 100H makes it an offence punishable by fine to publish or broadcast, except in very limited circumstances, the fact that a named person (other than the offender) is specified in a non-association order, or any information calculated to identify any such person.

4.1.1.2. *Children (Criminal Proceedings) Act 1987*

The Act also amends the *Children (Criminal Proceedings) Act 1987* which means that non-association and place restriction orders may be imposed on juvenile offenders.[57] The provisions of part 8A of the Crimes (Sentencing Procedure) Act also apply for juveniles.[58]

4.1.1.3. *Criminal Appeal Act 1912*

The Act also makes a consequential amendment to the definition of sentence in the *Criminal Appeal Act 1912*, thereby permitting a person convicted of an offence to appeal to the court, with leave, against a non-association or place restriction order imposed as part of a sentence.[59]

4.1.1.4. Related laws which existed prior to the amendments

The Court had previously been able to impose non-association and place restriction type conditions at sentencing through good behaviour bonds[60] or suspended sentences.[61] However, unlike orders under the Act, a breach of a good behaviour bond or a suspended sentence is not in itself an offence[62] and there are no provisions which made it an offence to publish the identity of a non-offender named in such conditions.

4.1.2. Parole

4.1.2.1. *Crimes (Sentencing Procedure) Act 1999*

When sentencing an offender, a court may specify a minimum (or non-parole) and maximum term of imprisonment. Parole refers to the discharge of a prisoner from custody after the expiration of the minimum term of the sentence, provided the prisoner agrees to abide by certain conditions.

A court may only impose parole conditions if the sentence of imprisonment is for a term of 3 years or less and includes a non-parole period. In such cases, the *Crimes (Sentencing Procedure) Act 1999* prescribes that the court must make an order directing the release of the offender on parole at the end of the non-parole period.[63] The Parole jurisdiction operates within both the Children's and Adult criminal jurisdiction.

A court may impose such conditions as it considers appropriate on any parole order made by it.[64] An amendment by the Act to the *Crimes (Sentencing Procedure) Act 1999* inserts s51A which allows the court to attach non-association and/or place restriction conditions as part of a parole order.

The Act also makes it an offence to publish or broadcast information as to the identity of any person with whom an offender is prohibited from associating pursuant to parole conditions.[65]

4.1.2.2. *Crimes (Administration of Sentences) Act 1999*

For sentences of imprisonment of adults for periods greater than 3 years, the State Parole Authority[66] is responsible for making the parole order and may impose conditions as it sees fit. The Senior Children's Magistrate has responsibility for parole of juveniles sentenced to a period in custody greater than three years.

An amendment by the Act to the *Crimes (Administration of Sentences) Act 1999* inserts s128A which enables the conditions of a parole order imposed by the State Parole Authority or the Children's Court to include non-association and place restriction provisions.

4.1.2.3. Related laws which existed prior to the amendments

The Court had previously been able to impose non-association and place restriction type conditions at parole.[67] However, unlike conditions under the Act, the existing provisions do not make it an offence to publish the identity of a non-offender named in such conditions.

The State Parole Authority had previously been able to impose non-association and place restriction type conditions at parole.[68] Existing legislation made it an offence to disclose information as to the identity of any person with whom an offender is prohibited from associating pursuant to conditions imposed under this provision.[69]

4.1.3. Bail

Bail is defined in the *Bail Act 1978* as 'authorisation to be at liberty under this Act, instead of in custody'[70].

Bail becomes an issue when a person is charged by the police with a criminal offence. Bail legislation has been developed with reference to the presumption of innocence which is a fundamental rule of law. Under the *Bail Act 1978*, the availability of bail is divided into categories:

- a general entitlement to bail when a person is charged in respect of minor offences[71]
- a presumption against bail when a person is charged with serious drug offences involving commercial quantities[72]
- a presumption in favour of bail for persons charged with other crimes except where the presumption has specifically been removed such as for murder, manslaughter, serious sexual and drug offences, armed robbery, firearm offences, domestic violence, riot or civil disturbance offences and for certain categories of repeat offender.[73]

After the accused has been charged, an authorised officer shall 'as soon as reasonably practicable' determine whether or not bail should be granted, or arrange for the person to be brought before a court. An authorised police officer may grant bail to an accused person at a police station.[74] Police deal with approximately 50% of applications for bail in NSW. The remainder are dealt with by NSW courts.

In determining whether or not to grant bail for an offence which does not carry an entitlement to bail, four criteria are considered:

1. probability of whether or not the accused person will appear in Court
2. the interests of the accused person
3. the protection of the victim and their close relatives and any other person considered to be in need of protection
4. the protection and welfare of the community.[75]

Bail may be granted unconditionally or subject to written conditions. Conditions that may be imposed are stipulated in the *Bail Act 1978*.[76] Conditions are for the purpose of promoting effective law enforcement or for the protection and welfare of any especially affected person (for example the victim, close relatives etc.) or the community; or reducing the likelihood of future offences being committed by promoting the rehabilitation of an accused person.[77]

Conditions may not be imposed that are more onerous for the accused person than is required by the nature of the offence or for the protection and welfare of any specially affected person or by the circumstances of the accused person.[78]

The Act amends the *Bail Act 1978* to insert s36B which enables bail conditions to be imposed which prohibit or restrict a person from associating with a specified person or visiting a specified place or district.

The Act also inserts s36C which makes it an offence to publish or broadcast information as to the identity of any person with whom an offender is prohibited from associating pursuant to bail conditions imposed under this provision.

An authorised officer or court is to explain to any person entering into a bail agreement the obligations that arise under the agreement and the consequences that may follow if the agreement is breached.[79]

4.1.3.1. Related laws which existed prior to the amendments

The Court and police had previously been able to impose non-association and place restriction type conditions at bail through the *Bail Act 1978*.[80]

However, unlike conditions imposed under the Act, there were no provisions which made it an offence to publish the identity of a non-offender named in such conditions.

4.1.4. Leave

4.1.4.1. *Crimes (Administration of Sentences) Act 1999*

The *Crimes (Administration of Sentences) Act 1999* enables the issue of local leave permits allowing inmates to be absent from a correctional centre on such conditions and for such periods as specified in the permit and for such purpose as the Commissioner considers appropriate.[81] The purposes for which a local leave permit may be issued include enabling an inmate to do the following:

- to be interviewed by a law enforcement agency in connection with the commission of an offence in a correctional centre to assist in the administration of justice
- to attend a funeral service or a burial of a member of the inmate's family

- to attend an occasion of special significance to the inmate's family
- to visit a member of an inmate's immediate family who is suffering serious illness or disability
- to apply for work or attend an interview with an employer or prospective employer
- to attend an education or training course
- to engage in employment specified in the permit
- for weekend leave
- to reside at a transitional centre
- to attend tuition or perform work in connection with a course of education or training
- in the case of a female who is the mother of a young child or young children, to serve her sentence in an appropriate environment.

The regulations enable the Commissioner to set standard and additional conditions.[82]

An amendment by the Act to the *Crimes (Administration of Sentences) Act 1999* inserts s26A which enables the conditions of a local leave permit to specifically include non-association and place restriction provisions.

4.1.4.2. *Children (Detention Centres) Act 1987*

Section 24 of the *Children (Detention Centres) Act 1987* enables a person subject to control to be granted leave to be absent from a detention centre for the following purposes:

- to attend the funeral of a close relative
- to visit a close relative who is seriously ill
- to apply for employment or be interviewed in relation to an application for employment
- to engage in employment of a kind specified in the order
- to apply for enrolment in a course of education or vocational training or be interviewed in relation to an application for enrolment in a course
- to attend a course of education or vocational training at a place specified
- for any other purpose that the Director-General considers to be directly associated with the welfare or rehabilitation of the person concerned.

An order under s24 may be made subject to such conditions as the Director-General specifies in the order.[83]

An amendment by the Act to the *Children (Detention Centres) Act 1987* inserts s24A which enables the conditions of leave for juveniles at detention centres to include non-association and place restriction provisions.

4.1.4.3. Related laws which existed prior to the amendments

The Department of Corrective Services (DCS) had previously been able to impose non-association and place restriction type conditions when granting a leave permit to an inmate.[84] Existing legislation made it an offence to disclose information as to the identity of any person with whom an offender is prohibited from associating pursuant to conditions imposed under these provisions.[85]

The Department of Juvenile Justice had previously been able to impose non-association and place restriction type conditions when granting leave to a detainee.[86] Existing legislation made it an offence to disclose information as to the identity of any person with whom an offender is prohibited from associating pursuant to conditions imposed under this provision.[87]

4.1.5. Home Detention

4.1.5.1. *Crimes (Administration of Sentences) Act 1999*

The *Crimes (Administration of Sentences) Act 1999* states that if the State Parole Authority revokes a periodic detention order it may make an order directing that the remainder of the sentence to which the periodic detention order relates (if that remainder is 18 months or less) is to be served by way of home detention.[88]

Home detention was introduced as an alternative way of serving a term of imprisonment of up to 18 months. Offenders subject to home detention are required to remain within their residences unless undertaking approved activities. Probation and Parole officers monitor an offender's compliance with home detention conditions on a 24 hour basis, using electronic means.

An amendment by the Act to the *Crimes (Administration of Sentences) Act 1999* inserts s165A which enables the conditions of home detention imposed by the State Parole Authority to include specific non-association and place restriction provisions. The breach of any condition imposed through this provision is to be treated in the same manner as the breach of any other condition attaching to such an order.

4.1.5.2. Related laws which existed prior to the amendments

The State Parole Authority had previously been able to impose non-association and place restriction type conditions when imposing a home detention order.[89]

Existing legislation made it an offence to disclose information as to the identity of any person with whom an offender is prohibited from associating pursuant to conditions imposed under this provision.[90]

Endnotes

[52] s3(1), *Crimes (Sentencing Procedure) Act 1999* — 'Associate with' is defined as being in the company of or communicating with by any means (including post, facsimile, telephone and email).

[53] Amendments to the *Crimes (Sentencing Procedure) Act 1999* inserted a new division 4A into Part 2 and a new Part 8A.

[54] There are two kinds of non-association orders: one that prohibits the offender from being in the same company as one or more specified persons; the other that prohibits the offender from all forms of association with one or more specified persons (s17A(3), *Crimes (Sentencing Procedure) Act 1999)*. There is one kind of place restriction order: it prohibits the offender from frequenting or visiting a specified place or district (s17A(2)(b), *Crimes (Sentencing Procedure) Act 1999).*

[55] s17A(2), *Crimes (Sentencing Procedure) Act 1999*.

[56] s100G(3), *Crimes (Sentencing Procedure) Act 1999.*

[57] s33D, *Children (Criminal Proceedings) Act 1987*.

[58] s33D of the *Children (Criminal Proceedings) Act 1987* adopts Part 8A of the *Crimes (Sentencing Procedure) Act 1999* in relation to such orders.

[59] s2(1)(c), *Criminal Appeal Act 1912.*

[60] s95, Part 8 *Crimes (Sentencing Procedure) Act 1999.*

[61] s12, *Crimes (Sentencing Procedure) Act 1999*.

[62] s98, *Crimes (Sentencing Procedure) Act 1999*.

[63] s50, *Crimes (Sentencing Procedure) Act 1999.*

[64] s51(1), *Crimes (Sentencing Procedure) Act 1999.*

[65] s51B, *Crimes (Sentencing Procedure) Act 1999.*

[66] Prior to October 2005 the State Parole Authority was known as the NSW Parole Board.

[67] s51(1), *Crimes (Sentencing Procedure) Act 1999*.

[68] s128(1), *Crimes (Administration of Sentences) Act 1999*.

[69] s257, *Crimes (Administration of Sentences) Act 1999*.

[70] s4(1)c, *Bail Act 1978.*

[71] s8(1), *Bail Act 1978.*

[72] s8A, *Bail Act 1978.*

[73] s9, 9A, 9B, 8D*, Bail Act 1978.*

[74] An authorised police officer is an officer with the rank of sergeant or higher. 'Authorised officer' is the term used throughout the *Bail Act* to refer to such a police officer.

[75] s32, *Bail Act 1978.*

[76] Most relevantly s36(2)(a) provides that bail may be granted subject to the condition that the accused person enter into an agreement to observe specified requirements as to his or her conduct while at liberty on bail.

[77] s36, 36A, 36B, *Bail Act 1978.*

[78] s37, *Bail Act 1978.*

[79] s39B, *Bail Act 1978.*

[80] s36(2)(a), *Bail Act 1978* which states that 'the accused person enter into an agreement to observe specified requirements as to his or her conduct while at liberty on bail, other than financial requirements'.

[81] s26, *Crimes (Administration of Sentences) Act 1999.*

[82] Clause 169 of the *Crimes (Administration of Sentences) Regulation 2001* stipulates an application under s26 for a local leave permit is to be made in the form approved by the Commissioner. The regulations stipulate that an inmate who is the subject of a local leave permit must not contravene any condition to which the order or permit is subject. Failure by an inmate to comply with the requirements of this clause is a correctional centre offence.

[83] DJJ advise that for cases involving serious children's indictable offences (as defined in s3 of the *Children (Criminal Proceedings) Act 1987)*, applications for leave are initially considered by the Serious Young Offenders Review Panel (SYORP). Through this process, SYORP considers risk factor characteristics, including any gang related offending issues, along with other significant factors affecting leave eligibility. As a result on some occasions a non-association and/or place restriction type condition is recommended by SYORP and forwarded to the Director-General for consideration prior to the offender being approved for any leave. NSW Department of Juvenile Justice submission, 4 March 2004.

[84] s26(1), *Crimes (Administration of Sentences) Act 1999.*

[85] s257, *Crimes (Administration of Sentences) Act 1999* and s37D of the *Children (Detention Centres) Act 1987*.

[86] s24(1B), *Children (Detention Centres) Act 1987.*

[87] s37D, *Children (Detention Centres) Act 1987*.
[88] s165, *Crimes (Administration of Sentences) Act 1999*.
[89] s165(2), *Crimes (Administration of Sentences) Act 1999.*
[90] s257, *Crimes (Administration of Sentences) Act 1999.*

Chapter 5. Comparable legislation

This chapter provides a brief examination of comparable legislation and policy in Australia and some other jurisdictions.

5.1. United States

The United States has municipal (city), state and federal laws specifically created to target gang-related crime. Over 70% of all states have introduced such legislation.[91]

Cities impose penalties which have some similarities to non-association and place restriction orders through the use of gang congregation ordinances and gang and public nuisance injunctions. These injunctions are court orders intended to prohibit the members from engaging in a broad spectrum of criminal and nuisance behaviour within specific neighbourhoods.[92] These tools can restrict gang members from entering certain public parks, congregating in groups, being out after a certain time in a specified area or possessing a mobile phone.

However, unlike non-association and place restriction orders established by the Act which are imposed on individuals following a conviction for an offence, these injunctions enjoin a particular gang as a public nuisance. Generally the City Attorney seeks an injunction on behalf of the public against the activities of particular named gang members on the grounds that the gang members are a public nuisance. Prosecutors use police reports and court records to prove a person's gang membership and history.

The use of gang injunctions in the United States raises questions about the conflict between the rights of the individual, and the rights of society in accordance with its Constitution. Critics of the use of gang injunctions state that such measures remove from suspected gang members their constitutional freedoms such as the right to associate. However, those in support of them argue that communities are entitled to protection from risks to their safety and peace.[93]

The City of San Jose, California, brought a civil public nuisance suit against 38 gang members, in which the defendants were prevented from 'standing, sitting, walking, driving, gathering or appearing in public view with any other defendant'.[94] Breaching these conditions could result in the offenders being imprisoned for up to six months and/or fined $1,000.

In April 1995, the California Court of Appeal found that the injunction was unconstitutionally vague because it did not clearly define the banned activities. These shortcomings, argued the Court, could lead to arbitrary and discriminatory law enforcement.[95] The Court of Appeal's ruling was later reversed in the Californian Supreme Court which held that the anti-gang injunction was neither vague nor overbroad because its terms were reasonably clear in the context of the particular gang targeted. The court also held that the anti-gang injunction did not violate the free association rights of the particular gang members because there was no cognisable First Amendment right to free association implicated by membership in a criminal street gang. Justice Jane Rogers of the Supreme Court concluded:

> *To hold that the liberty of the peaceful, industrious residents of Rocksprings must be forfeited to preserve the illusion of freedom for those whose ill conduct is deleterious to the community as a whole is to ignore half the political promise of the Constitution and the whole of its sense.*[96]

Thus in California, anti-gang injunctions have become an established law enforcement tool.[97]

Also, the *California Street Terrorism Enforcement and Protection (STEP) Act 1988* (California Penal Code § 186.22) contains a notification process used to inform persons that they can be prosecuted under STEP.[98] Police and prosecutors gather evidence that a targeted gang fits the STEP Act's definition. This information is presented to the court, resulting in a judicial order. Gang members are then notified in writing that they are known members of such a group. Following such notice, the Act can then be applied to these members, enhancing penalties for subsequent offences because of the commission of crimes while involved in a gang.[99] The legislation defines 'criminal street gang'[100] and 'pattern of criminal gang activity'.[101]

At a federal level the *Racketeer Influenced and Corrupt Organisation Act (RICO)* and related conspiracy statutes provide for extended penalties for criminal acts performed as part of an ongoing criminal organisation.[102] This legislation enables persons financially injured by a pattern of criminal activity to seek redress through the state or federal courts.[103]

5.2. United Kingdom

The *Crime and Disorder Act 1998* introduced Acceptable Behaviour Contracts (ABCs), Anti-Social Behaviour Orders (ASBOs) and dispersal orders to curb anti-social behaviour. There are some similarities between these provisions and the measures that can be imposed under the Act.[104]

ABCs are voluntary written agreements usually between juveniles and young adults who have been involved in anti-social behaviour and agencies whose role it is to prevent such behaviour. The contracts normally last for six months and specify anti-social acts which the person agrees to stop. ABCs have no statutory basis, and are often used before more serious action is taken such as ASBOs. Provisions in ABCs target the offender's behaviour, and can include terms such as not congregating in groups, physically harassing people and damaging cars.[105]

A Home Office report evaluating the impact of ABCs concluded that young people were less likely to come to the attention of the authorities once they had been given a contract and those who continued with anti-social behaviour and criminal offending were doing so at a reduced rate. Overall 57% of contracts were not breached and 19% breached only once in a six month period. However, police and social housing landlords could not always be aware if contracts had been breached and there were some concerns that contracts were not enforced.[106]

ASBOs prohibit anti-social acts that the offender has been involved in. The banned behaviour may include acts that are not illegal, such as associating with certain named people, or conduct which is illegal, like shoplifting or assault. Although ASBOs are civil orders, breaching them is a criminal offence and can result in imprisonment for up to five years. The Home Office reported that 42% of ASBOs are breached, which compares favourably with other non-custodial youth justice interventions.[107]

Local people are often used to collect evidence to support ASBO applications and to enforce breaches. Controversially, the terms of orders and the identity of the people subject to them may be publicised to enable local people to pass information relating to breaches to the police for investigation.

Concerns have been raised that ASBOs, if not carefully researched and written, may include inappropriate terms, like preventing a person from entering an area where their doctor is based. However, the Home Office does not consider that inappropriate ASBO conditions are a major problem in practice. It reports that where inappropriate terms have been made, it is relatively straightforward to have the terms amended by the court. However, the Home Office recommends further research in this area to ascertain the extent of inappropriate ASBOs and the reasons underpinning these problems.[108]

Dispersal orders also allow police and community support officers to disperse groups committing certain anti-social acts such as harassment, from a designated area and exclude the offenders from the area for up to 24 hours.

5.3. New Zealand

The non-association and place restriction orders introduced through the Act were to some extent modelled on similar legislation introduced in New Zealand in the 1980's, which is contained in the *Criminal Justice Act 1985*. In his second reading speech for the Act, Mr Stewart MP stated that the Government had considered the New Zealand legislation:

> *That Act provided for non-association orders to be made at sentencing. The Bill before the House builds on the successful New Zealand Model, making a number of improvements to better suit the needs of New South Wales. In addition, it also makes provision for the introduction of place restriction orders.*[109]

The *Criminal Justice Act 1985* was amended by the *Criminal Justice Amendment Act 1989* which inserted a new Part 2 into the legislation relating to non-association orders.

The Act contains many of the features of the non-association orders contained within the New Zealand legislation and like the Act was introduced to tackle gang crime in New Zealand. The New Zealand legislation differs from the Act in the following key ways:

- it does not provide for the imposition of place restriction orders (the Act provides for both non-association and place restriction orders)
- it applies to any offence punishable by imprisonment (s28A) (the Act stipulates that the section applies to any offence that is punishable by imprisonment for six months or more)
- it states that the court shall not make a non-association order if the offender has any kind of full-time custodial sentence imposed at the same time (s28A(3) (the Act does not do this)
- it states that the order may prohibit the offender from associating with any person or persons of any class specified in the order (s28A)(4)(b) (the Act does not refer to a 'class of persons')
- it states that a breach of an order renders an offender liable to imprisonment for three months or a fine of a $1000 (s28F) (the Act stipulates a maximum penalty of $1000 or imprisonment for six months or both).

The court must be satisfied that the making of the order is reasonably necessary to ensure that the offender does not commit further offences punishable by imprisonment.[110]

It is understood that non-association orders have been used very sparingly in New Zealand.

The *Parole Act 2002* in New Zealand also allows special conditions including non-association and place restriction orders to be made against offenders to 'reduce the risk of re-offending, facilitate or promote the rehabilitation and reintegration of the offender, or provide for the concerns of the victims of the offender' when released from prison.

5.4. Canada

Bill C-95, passed in 1997,[111] makes it an indictable offence for a person to associate with or contribute to the activities of a criminal organisation, knowing that members of the organisation have been involved in certain indictable offences.[112] The Bill also allows sentences of up to 14 years imprisonment for anyone involved in an indictable offence connected to a criminal association.

5.5. Australia

5.5.1. Sentencing

Queensland and Victoria are the only other jurisdictions in Australia, where non-association and place restriction type orders exist. Offenders in Queensland can be restricted from associating with certain people and visiting certain places through 'non-contact orders' under the *Penalties and Sentences (Non-contact Orders) Amendment Act 2001*.

However, there are important differences between non-contact orders in Queensland, and the non-association and place restriction orders in NSW.

Non-contact orders in Queensland may be made for offences against 'the person' and may prohibit the offender from contacting the victim, or someone who was with the victim (the victim's associate) when the offence was committed, for a specified period.[113] In addition, under a non-contact order the offender may be banned from visiting a particular place for a stated time.

The emphasis in Queensland is to protect the victim and the victim's associates where there is 'an unacceptable risk' that the offender's behaviour would injure the victim and/or his or her associate physically or emotionally, or damage the victim's property.[114]

In Victoria the *Sentencing Act 1991* details the circumstances where a Drug Treatment Order may be made by the Drug Court and details the program conditions which may be attached to a drug treatment order. Section 18ZG states the program conditions may include that an offender:

(e) must not associate with specified persons

(f) must reside at a specified place for a specified period.

5.5.2. Bail

The provisions introduced in NSW in relation to bail appear to reflect a trend in Australia in recent years of enacting statutes that expressly state the conditions that may be imposed on persons released on bail. Similar examples include the *Bail Amendment (Confiscation of Passports) Act 2002* (NSW), which expressly provides for the confiscation of passports and the *Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002* (NSW) which expressly provides for participation in diversionary and intervention programs as a condition of bail.

5.5.2.1. NSW — Cabramatta Anti-Drug Strategy

A number of measures introduced as part of the Cabramatta Anti-Drug Strategy designed to tackle the drug trade in Cabramatta had some bearing on and similarities to the Act.

Drug Bail Scheme

The success of the Cabramatta Drug Bail Scheme was considered in the development of the Act. In his second reading speech, Mr Stewart MP stated that:

> *The Carr Government has developed this Bill having regard to the success of the police drug bail scheme being trialled in Cabramatta.*[115]

The Police Drug Bail Scheme was introduced as part of the Cabramatta Anti-Drug Strategy along with other measures designed to tackle the drug trade in Cabramatta. Under the scheme police may impose a mandatory bail condition on non-resident drug users, banning them from returning to the Cabramatta area unless they have a legitimate reason to do so.[116]

Between 1 July 2001 and 20 March 2002, 393 offenders who were charged with minor offences were bailed on the condition that they not return to Cabramatta.[117]

Drug move-on powers

The *Drug Premises Act 2001* amended s28F of the *Summary Offences Act 1988* (now located in Part 14 of the *Law Enforcement (Powers and Responsibilities) Act 2002*) to confer on police a new power to issue 'move-on' directions to people in public places whom they have reasonable grounds to believe are there for the purpose of buying or selling prohibited drugs. The scheme in relation to move-ons and the consequences of a failure to comply with a direction is as follows:

- before giving a move-on direction, police must inform the person of the reason for the direction and warn the person that failure to comply may be an offence
- if the person fails to comply with the direction, police may again give the direction and, if a direction is given, must again warn the person that failure to comply is an offence
- it is an offence for a person to fail to comply with the second direction 'without reasonable excuse'. However, a person is not guilty of an offence unless it is established that, after the second direction was given, the person persisted to engage in the relevant conduct
- the maximum penalty for any offence is two penalty units ($220).

In Cabramatta LAC, a practice of issuing seven-day move-on directions was employed as part of a strategy to deal with the street-level drug trade in the area.[118] The directions commonly stipulated that the person not return, for a period of seven days, within a one, two or three kilometre radius of Cabramatta Railway Station. Other seven-day directions were more limited in their operation, and prohibited a person from returning to a particular shopping plaza, or from several blocks in a residential area, for seven days.[119]

The Ombudsman considered the use of these powers in his review of the *Drug Premises Act 2001*.[120] Concerns expressed regarding the use of these seven day directions included: that they could reduce a person's access to public health services; they were sometimes issued to people who lived in the area from which they were moved-on; and there was a lack of clarity as to where the precise boundaries of the restricted area were.[121]

Over time police moved away from issuing these seven-day directions in response to community concerns about the use of the directions, and legal uncertainty about their validity.[122]

Our review found that there was evidence to suggest that the drug trade in Cabramatta was displaced to surrounding areas as a result of the use of the directions and other strategies. This had a demonstrable impact on local public health services, including reduced access to, and demand for, health services in Cabramatta by drug users.[123]

The review also found that some people charged for breaching 'seven-day' directions, had place restriction type bail conditions imposed. The duration of these conditions — essentially place restriction conditions under s36 of the *Bail Act 1978* — lasted until the 'breach of direction' charge was heard in court.[124]

5.5.2.2. Other Australian jurisdictions

Bail conditions may be imposed to control the behaviour of defendants in all Australian states and territories. Some jurisdictions clearly define the types of restrictions available when setting bail, while others are broader.

Apart from NSW there appears to be no jurisdictions in Australia which have specific provisions relating to non-association and place restriction in their bail legislation. In Western Australia, however, the *Bail Act 1982*, specifically states that a child may be prohibited from associating with a specified person or visiting a specified place. Part D s2(1a) states:

> *a judicial officer shall on a grant of bail to a child defendant, consider whether it is desirable…to impose a condition as to…*
>
> *e) any period in each day during which the child is to remain at a particular place;*
>
> *f) any person with whom the child is not to associate or communicate;*
>
> *g) any place that the child is not to frequent;*
>
> *h) the attendance by the child at a school or other educational institution;*

5.5.3. Parole

Parole is a feature of the criminal justice system in every Australian state or territory. Most jurisdictions include a combination of standard conditions and additional conditions, which may be imposed at the discretion of the court or the State Parole Authority.

Apart from NSW there appears to be no jurisdictions in Australia which have specific parole provisions relating to non-association or place restriction. The Australian Capital Territory in 2006, however introduced the Crimes (Sentence Administration) Regulation 2006 which provides examples of directions that could be given to an offender which include directions relating to non-association and place restriction. Clause 4 (i) of the legislation states:

> *The offender must comply with any direction given to the offender by the chief executive. Examples for par (i) — directions about any of the following:*
>
> - *Associating with particular people*
> - *Visiting any place, including a particular suburb*
> - *Obtaining, being available for or keeping employment*
> - *attending or taking part in an approved activity or program.*
>
> *Note: An example is part of the regulation, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see legislation Act, s126 and s132).*

5.5.4. Comparison to consorting laws in NSW

There are some similarities between the provisions introduced by the Act and existing consorting laws in NSW. Steel in his 2003 critique of consorting laws in NSW asserted that the non-association orders that may be imposed at sentencing in some ways 'constitute a modern form of consorting laws' in NSW. A major difference lay in the fact that the Act 'contains safeguards on the use of the power'.[125]

The crime of consorting was first introduced into NSW in the *Vagrancy Act 1835*. It made it an offence to be found in a house in company with reputed thieves or persons who had no lawful means of support, where the person could not satisfy a magistrate that they were in the house 'upon some lawful occasion'. In 1929 the *Vagrancy (Amendment) Act 1929* added a new offence of 'habitually consorting' with reputed criminals or prostitutes. The law was amended by the *Summary Offences Act 1970* which expanded the list of those persons who it was an offence to habitually consort with to include 'reputed drug offenders'.

In 1979 the Wran Government sought to restrain the scope of the offence by amending the wording of the offence to prohibit habitual consorting with persons convicted of an indictable offence. The offence is now s546A of the *Crimes Act 1900*. In order to commit the offence it must be proved:

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

It is understood that the provisions have been used sparingly with statistical records for the period 1995–2000 recording four convictions and only one resulting in a custodial sentence.

In comparing the offence of consorting to the non-association provisions, Steel noted that the Act:

> *makes it an offence to associate with named persons or in designated places without reasonable excuse and in this way resembles consorting. However, it differs in that it is only an offence to do so if such association occurs in violation of a court order. Such an order can only be made following conviction of an offence.*

Thus with the non-association orders introduced by the Act the restriction on the freedom to associate can only be imposed on a person who has been convicted of an offence, whereas under the consorting offence, an otherwise innocent person can be charged. Steel also noted that the non-association orders 'must specify each person with whom the offender may not associate, and the court must be satisfied that the offender is aware of who those people are'.

Steel went on to comment that the availability of orders in the Act 'would appear to remove any residual argument for the continuation of consorting as an offence'.[126]

Endnotes

91 W Thomas Russell, 'Do Gang Injunctions Work?' *Long Beach Press-Telegram*, November 15, 2003.

92 'Behaviour' has included using drugs or alcohol; possessing firearms; fighting in public; possessing spray cans; intimidation; possession of instruments for stealing; using gang specific gestures; clothes and symbols; and making loud noise.

93 W Reed and S Decker, *Responding to Gangs: Evaluation and Research,* U.S. Department of Justice, Washington, July 2002.

94 *People vs. Acuna,* Santa Clara Superior Court, California, 1993; C Coles and G Kelling, *Is the rigorous enforcement of anti-nuisance laws a good idea?,* Insight, 2/06/97, sourced from the Manhattan Institute for Policy Research website www.manhattan-institute.org, December 2005.

95 *People ex rel. Gallo v. Acuna,* California Court of Appeal, 1995.

96 *People ex rel. Gallo v. Acuna,* 929 P.2d 596, Claifornia Supreme Court, 1997.

[97] G S Walston, 'Injunctions Restricting Gang Activities Reduce Gang Violence' in W Dudley & L Gerdes (Editors), *Gangs: Opposing Viewpoints Series*, Greenhaven Press, Detroit, 2005. One study has indicated that Los Angeles County, alone had 150,000 gang members in 1992. Another study has indicated that gang members outnumbered police officers at a ration of six to one in Los Angeles County.

[98] The *California Street Terrorism Enforcement and Protection (S.T.E.P.) Act,* California Penal Code Section 186.21.

[99] Information from the National Criminal Justice Reference Service website, US Department of Justice; www.ncjrs.org.

[100] s186.22 (e)(f) of the *California Street Terrorism Enforcement and Protection (STEP) Act* defines 'criminal street gang' as any ongoing organisation, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. S186.22(e)(i) states that in order to secure a conviction, or sustain a juvenile petition, it is not necessary for the prosecution to prove that the person devotes all, or a substantial part of his or her time or efforts to the criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang. Active participation in the criminal street gang is all that is required.

[101] STEP defines 'pattern of criminal gang activity' as the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of a prescribed list of offences, provided at least one of these offences occurred after the effective date of the legislation and the last of those offences occurred within three years after a prior offence, and the offences were committed on separate occasions, or by two or more persons.

[102] The *Racketeer Influenced and Corrupt Organizations Act* (RICO) is a United States federal law. RICO was enacted by section 901(a) of the *Organised Crime Control Act of 1970*, Pub. L. No. 91–42, 84 Stat. 922, 15 October 1970.

[103] Information from the Federal Bureau of Investigation website www.fbi.gov, Racketeer Influenced and Corrupt Organizations (RICO).

[104] *A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts*, Home Office Communication Directorate, Home Office, London, United Kingdom, March 2003.

[105] *A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts*, Home Office Communication Directorate, Home Office, London, United Kingdom, March 2003.

[106] K Bullock and B Jones, *Acceptable behaviour contracts addressing antisocial behaviour in the London Borough of Islington*, Home Office Online Report 02/04, Home Office Research, Development and Statistics Directorate, 2004. This report describes the impact of a scheme, based in the London Borough of Islington, designed to reduce antisocial behaviour using Acceptable Behaviour Contracts (ABCs) and also examines the subsequent use of ABCs in England and Wales. The research shows that ABCs have proved a popular way of addressing antisocial behaviour and that, in Islington, ABCs can reduce the amount of antisocial behaviour committed by young people for the duration of their contract. The evaluation in Islington found that children on ABCs were less likely to engage in antisocial behaviour, less likely to be stopped or arrested by the police and were less likely to commit criminal acts.

[107] S Campbell, *A Review of Anti-social Behaviour Orders*, Home Office Research Study 236, Home Office Research, Development and Statistics Directorate, January 2002.

[108] S Campbell, *A Review of Anti-social Behaviour Orders*, Home Office Research Study 236, Home Office Research, Development and Statistics Directorate, January 2002.

[109] NSWPD, Legislative Assembly, 26 October 2001, p. 18104.

[110] s28A of the *Criminal Justice Act 1985.*

[111] Chapter 23 (Bill C-95) — An Act to amend the Canadian Criminal Code (criminal organizations) and to amend other Acts in consequence. Assented to in April 1997.

[112] 'Criminal organization' means any group, association or other body consisting of five or more persons, whether formally or informally organised:

(a) having as one of its primary activities the commission of an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, and

(b) any or all of the members of which engage in or have, within the preceding five years, engaged in the commission of a series of such offences.

[113] s43B(4) of the *Penalties and Sentences (Non-contact Orders) Amendment Act 2001* defines a 'personal offence' as an indictable offence committed against the person of someone.

[114] s43B(4) of the *Penalties and Sentences (Non-contact Orders) Amendment Act 2001*.

[115] NSWPD, Legislative Assembly, 26 October 2001, p. 18106.

[116] R Johns, *Bail Law and Practice: Recent Developments*, Briefing Paper No. 15/2002, NSW Parliamentary Library Research Service, p. 29. If the offender is a resident of Cabramatta and the police have reasonable grounds to believe that treating an offender's drug problem will stop the person re-offending, then police refer the drug users to health assessment and treatment services as a condition of bail.

[117] R Johns, *Bail Law and Practice: Recent Developments*, Briefing Paper No. 15/2002, NSW Parliamentary Library Research Service, p. 3.

[118] The provision does not stipulate the nature of the directions police can issue, other than that the direction must be reasonable in the circumstances for the purposes set out in the Act: to stop the purchase or supply of a prohibited drug in a public place.

[119] NSW Ombudsman, final report on the *Review of the Police Powers (Drug Premises) Act 2001*, January 2005, p. 206.

[120] s21 of the *Police Powers (Drug Premises) Act 2001* required that the NSW Ombudsman review the operation of the legislation for two years from the date of commencement (July 2001 — July 2003), and to report to the Minister for Police at the conclusion of that period.

[121] NSW Ombudsman, *Review of the Police Powers (Drug Premises) Act 2001*, January 2005, p. 207.

[122] NSW Ombudsman, *Review of the Police Powers (Drug Premises) Act 2001*, January 2005, pp. 207–208.

[123] NSW Ombudsman, *Review of the Police Powers (Drug Premises) Act 2001,* January 2005, pp. 209–210.

[124] NSW Ombudsman, *Review of the Police Powers (Drug Premises) Act 2001*, January 2005, pp. 221–222.

[125] A Steel, 'Consorting in NSW Wales: Substantive offence or police powers?', *UNSW Law Journal,* Vol. 26(3), 2003, pp. 567–602.

[126] A Steel, 'Consorting in NSW Wales: Substantive offence or police powers?', *UNSW Law Journal*, Vol. 26(3), 2003, p. 600.

Chapter 6. Implementation of the Act

This Chapter details the steps taken by the relevant authorities to implement the Act.

6.1. NSW Attorney General's Department

The principal business of the NSW Attorney General's Department (AGD) is the administration of effective systems for resolving civil disputes and legal matters including the administration of Local Courts. Local Courts in NSW have jurisdiction to deal with the vast majority of criminal, summary and juvenile prosecutions.

The AGD is responsible for administering the *Crimes (Sentencing Procedure) Act 1999*, the *Children (Criminal Proceedings) Act 1987* and the *Bail Act 1978*, and had certain responsibilities in implementing the non-association and place restrictions provisions introduced by the Act.

In order to implement the provisions AGD was required to make a number of policy and procedural changes and technical enhancements.

6.1.1. Implementation Working Party

The AGD prepared for the implementation of the Act by convening the 'Non Association-Implementation Working Party' prior to the commencement of the Act. The committee met several times between April and June 2002. It comprised specialist officers from within the department and representatives from other relevant government and certain non-government agencies. The Committee primarily focussed on issues that impacted on the practical implementation of the Act.

6.1.2. Computer systems

Systems changes were required to be made to both the General Local Courts (GLC) computer system and the non-GLC systems in order to implement the legislation. Approximately 85% of the total workload of all NSW Local Courts is managed on the GLC computer system. All other local courts in NSW are linked to the non-GLC computer system.

6.1.3. Non-association and place restriction orders imposed at sentencing

The following policy and procedural changes and technical enhancements were made by NSW Local Courts in order to implement the legislation with regard to sentencing:

- Three new court forms were developed including:
  - Non-association and Place Restriction Order
  - Application to Vary or Revoke Non-Association/Place Restriction Order
  - Variation/Revocation of a Non-Association/Place Restriction Order.
- The GLC system was enhanced to make the new forms available on the system and to enable electronic transfer of details of orders and appeals to the NSW Police Criminal Histories Branch in order to ensure that police are aware of whether there is an enforceable non-association and place restriction order against an offender.
- The non-GLC court system was enhanced to make the new forms available and instructions were issued to non-GLC courts to forward details of original sentencing orders, appeals, variations and revocations to the NSW Police Criminal Histories Branch by facsimile.
- The Clerk of the Court (or his/her delegate) in GLC and non-GLC court locations was directed to:
  - provide the offender with a copy of the order
  - ensure the order is signed by the offender
  - explain the terms of the order and the consequences of breaching the order to the offender
  - co-sign the order
  - ensure one copy of the order is placed on the court file and one accompanies any warrant of commitment provided to Corrective Services or to Probation and Parole.
- Directions were provided to court officers in relation to applications to vary or revoke orders
- Directions were provided to court officers to record the full detail of the orders on the respective systems.[127]

6.1.4. Conditions of parole as to non-association and place restriction

Prior to the amendments made by the Act a court could impose such conditions as it considered appropriate on any parole order made by it.[128] The provisions introduced by the Act formalise the making of non-association and/or place restriction conditions as part of a parole order. The Director of Local Courts advised that there were no changes made to any relevant policies, procedures, forms or systems in order to apply the legislation in relation to parole. None of the publications circulated by the court referred to the new provisions relating to parole.

6.1.5. Conditions of bail as to non-association and place restriction

Courts have been able to impose non-association and place restriction type conditions prior to amendments made by the Act.[129] The 2002 *Local Court Bulletin* noted that while it was open for the Court 'to make conditions of this type under the current provisions, the amendments formalise these arrangements and are intended to encourage their use in appropriate circumstances'.[130]

Bail conditions imposed at court are documented in the 'Bail Undertaking' Form 5 or 5A in accordance with the *Bail Act 1978* regulations.[131] No amendments were made to these forms to explicitly incorporate the provisions introduced by the Act. The 2002 *Local Court Bulletin* directed that any non-association or place restriction conditions imposed should be included manually 'in the undertaking in the section allowing for further conditions to be included.'[132]

Arrangements for these conditions to be recorded on the GLC system and transferred to COPS were not completed. A 'skeleton system' was developed by NSW Police which would have enabled bail conditions to be transferred from GLC to COPS however this system was never fully developed or implemented.[133] Courts continue to manually provide police with advice regarding any conditions imposed.

6.1.6. Publications and Training

NSW Local Courts produce regular publications for communicating news and relevant administrative information to court officers and other employees. These include the *Local Courts Bulletin* and the *GLC Bulletin* which provide officers with information and developments on new technology and legislation, policies and procedures.

Articles concerning the Act published in these Bulletins included:

- 'Non Association and Place Restriction Orders' — *Local Courts Bulletin* 2002/0065
- 'Non Association and Place Restriction Orders' — *Local Courts Bulletin* 2002/0096
- 'Non Association and Place Restriction Orders (NAPR) — Instructions' *GLC Bulletin* 10/2002
- 'Non Association and Place Restriction Orders (NAPR) — Instructions' *GLC Bulletin* 12/2002
- 'Non Association and Place Restriction Orders (NAPR) — Instructions' *GLC Bulletin* 14a/2002.

The above publications contained details of the policy and procedural changes and technical enhancements that were made following the introduction of the Act.

These were the only sources of information provided to court staff regarding the Act. Court staff were not provided with any additional training regarding the Act.

6.1.7. General

The Act requires the court to explain to any person on whom it has imposed an order or who has entered into a bail agreement, the obligations that arise under that order or agreement and the consequences that may follow if the agreement or order is breached.[134]

To assist officers to undertake this task the office of the Local Courts and Sheriff advise that the Local Courts Policy and Procedure Guidelines are provided to all staff as a guide to the operations of a court registry. This is a general document that applies to the range of tasks undertaken by Local Court staff. Reference is made throughout the guide to the importance of explaining orders to defendants. It emphasises that the court must ensure that all reasonable steps are taken to explain to the offender in language that the offender can readily understand the offender's obligations under a particular order and the consequences that may follow if the offender fails to comply with those obligations. These policies and procedure guidelines do not contain specific information regarding the Act.[135]

6.2. NSW Police

NSW Police provides police services to the state, including services to prevent and detect crime and essential services in emergencies.

Although the Attorney General formally administers the *Bail Act 1978* and the legislation relating to sentencing, given that some of the powers and functions are conferred on police officers, NSW Police had certain responsibilities in implementing the provisions in the Act relating to bail and sentencing.

NSW Police participated in the 'Non Association-Implementation Working Party' which met prior to the commencement of the Act.

6.2.1. Conditions of bail as to non-association and place restriction

As with Courts, police were able to impose non-association and place restriction type conditions at bail prior to the commencement of the Act. The July 2002 *Police Weekly* article on the Act commented that the new provisions would enable police to 'explicitly consider the appropriateness of such conditions when considering the granting of bail'.[136]

Bail conditions imposed by police are documented on police bail forms 1, 1A, 2, 5 and 8. No amendments were made to the bail forms to explicitly incorporate the provisions introduced by the Act. Instead police were directed to 'manually alter the existing relevant forms' when applying the new provisions.[137]

Enhancements to the COPS system, however, were made to incorporate the amendments. Two additional 'create bail condition' screens were introduced, namely 'Create non-association condition' and 'Create place restriction condition'. These screens were developed to enable officers to enter details of the new bail conditions directly into COPS.

6.2.2. Sentencing

When a court imposes a non-association or place restriction order it is required to advise NSW Police of the details of the order to ensure they are aware that there is an enforceable non-association and place restriction order against an offender.

It is the responsibility of NSW Police, along with other agencies, to identify and act on any breaches of these orders. NSW Police are also entitled to appear and be heard in the Local Court on any application by an offender to vary or revoke a non-association or place restriction order made by a sentencing court.[138]

In order to inform officers of their responsibilities under the Act in relation to these orders details of these amendments were included in *Policing Issues and Practice Journal* and *Police Weekly* articles.[139]

6.2.3. Publications

NSW Police produce regular publications for communicating news and relevant administrative information to police officers and other employees. These include the *Police Weekly*, *Policing Issues and Practice Journal* and *Online Newsletter* for COPS and ICOPS which provide officers with information and developments on new technology and legislation, policies and procedures.

Articles concerning the Act published in these publications included:

- 'Commencement of the Justice Legislation Amendment (Non Association and Place Restriction) Act 2001' *Police Weekly*, Vol 14, No 28, 22 July 2002, p13.
- 'Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001' *Policing Issues and Practice Journal*, July 2002, pp 8–15.
- 'Amendments to the *Bail Act 1978*' *Tips and tricks: Online Newsletter for COPS and ICOPS*, Issue 38, July 2002.
- 'COPS: Tips and Tricks', *Police Weekly*, Vol 14 No 32, 19 August 2002, p7.
- 'Court and Legal Services — New Law' *Police Weekly*, Vol 14, No 32, 19 August 2002.

The July 2002 Policing Issues and *Practice Journal* article was also disseminated through the Laws News Intranet site.

A state-wide memorandum was circulated on 4 July 2002 regarding the Act.

Details of the amendments to the *Bail Act 1978* were made available on the *Intranet at Law — Law Now* site on the NSW Police Intranet.

6.2.4. Training

In 2002 NSW Police produced an education package regarding the *Bail Act 1978*, which was available for all Education and Development Officers to implement within their respective commands. That package included advice to police regarding the application of the new provisions under the Act.

For the purposes of the review we observed a NSW Police training session in June 2003 which focussed on recent amendments to the *Bail Act 1978*. The session was held at St Mary's LAC and conducted for general duties police. The session contained a short presentation on the new non-association and place restriction provisions introduced by the Act.

Police prosecutors were educated on changes in the legislation on 4 July and 22 July 2002.

We also specifically requested advice from the NSW Police Gangs Squad in October 2005 regarding the following:

- whether any training regarding the legislation was conducted for the squad
- whether the squad includes information regarding the legislation in any Squad presentations on gang-related strategies and tactics given to LACs or other relevant areas of NSW Police
- whether the squad includes information regarding the legislation in the 'Gangs' knowledge map located on the NSW Police Intranet.

The Gangs Squad advised that no training of the squad on the legislation had taken place to date, however the matter would be included as a topic in future training days and appropriate information would be disseminated through the *Law News Circular*. The Squad also commented that it planned to specifically highlight the legislation in squad presentations and update the Knowledge Map with information on the Act.[140]

6.3. NSW Department of Corrective Services

The NSW Department of Corrective Services (DCS) manages adult offenders under the jurisdiction of NSW Courts.[141] DCS provides a range of services including correctional centre custody of remand and sentenced inmates, periodic detention, home detention, parole, pre-sentence advice to courts, community service orders and other forms of community offender supervision. The State Parole Authority is a statutory body whose primary responsibilities are to consider at the appropriate time those inmates cases for which the Courts have specified a sentence with a non-parole period which together exceed 3 years. The authority also reviews parole orders, home detention, and periodic detention orders where revocation may be necessary.

DCS and the State Parole Authority is responsible for administering the *Crimes (Administration of Sentences) Act 1999* and had certain responsibilities in implementing the non-association and place restrictions provisions introduced by the Act. In particular, the provisions relating to parole, home detention and local leave permits.

DCS was represented on the 'Non Association-Implementation Working Party'.

DCS records information about inmates on the Offender Integrated Management System (OIMS) which is a state-wide computer system.

6.3.1. Conditions of parole as to non-association and place restriction

The State Parole Authority had previously been able to impose non-association and place restriction type conditions at parole.[142] Prior to the Act the State Parole Authority's 'Standard Conditions' for parole included the following:

> 7. *The offender is not to associate with any person or persons specified by the Probation and Parole Officer.*
> 8. *The offender is not to enter or visit any place or district designated by the Probation and Parole Officer.*[143]

Attached to all 'Standard Conditions' is the 'Additional Conditions' document which provides for the following:

> *34. The offender must not associate with [specified person].*
>
> *35. The offender must not enter, frequent or visit [specified place or district] or environs.*[144]

The State Parole Authority has advised that since the introduction of the Act there has been no change made to the policies and procedures related to the imposing of conditions at parole. The 'Standard Conditions' and 'Additional Conditions' form have not been changed in response to the introduction of the Act and there is minimal reference to the new non-association and place restriction provisions in any of the department's documentation related to parole.

The department gave preliminary consideration to enhancing the OIMS to enable the recording of non-association and place restriction conditions imposed as a condition of parole imposed by the State Parole Authority. These enhancements, however, were not put into operation during the review period.

Information regarding the amendments made by the Act relating to parole were placed in the Probation and Parole: Policies and Procedures Manual as follows:

> *Section 128A of the Crimes (Sentencing Procedure) Act recognise that the Parole Board may impose similar conditions on Parole Orders.*[145]

6.3.2. Conditions of home detention as to non-association and place restriction

The State Parole Authority had previously been able to impose non-association and place restriction type conditions when imposing a home detention order.[146]

The State Parole Authority has advised that since the introduction of the Act there has been no change made to the policies and procedures related to the imposing of conditions of home detention. The 'Standard Conditions' form has not been changed in response to the introduction of the Act and there is no reference to the new non-association and place restriction provision in any of the department's documentation related to home detention.[147]

There was also no change made during the review period to the OIMS to enable non-association and place restriction conditions imposed when ordering home detention to be recorded.

Information regarding the amendments made by the Act relating to home detention was placed in the Probation and Parole: Policies and Procedures Manual as follows:

> *Section 165A of the Crimes (Sentencing Procedure) Act recognise that the Parole Board may impose similar conditions on Home Detention Orders, including those resulting from the revocation of periodic detention orders.*[148]

Notification of the amendments was circulated to all judicial members of the State Parole Authority.

The State Parole Authority also advised that it is are currently awaiting legislative action that will introduce uniformity in the 'standard conditions' on all State Parole Authority orders and that all 'additional conditions' attached to standard conditions will include the following new conditions:

- the offender must not associate with [specified person]
- the offender must not enter, frequent or visit (specified place or district) or environs.[149]

Effectively DCS and the State Parole Authority has made minimal adjustments to their practices or procedures following the introduction of the Act.

6.3.3. Conditions of local leave permits as to non-association and place restriction

The amendment to the *Crimes (Administration of Sentences) Act 1999* specifically recognises non-association and place restriction provisions.[150] The *Corrective Services Bulletin* of 31 October 2002 commented:

> *The Justice Legislation Amendment (Non-association and Place Restriction) Act 2001 was introduced as part of the Government's package of 'anti-gang' laws and initiatives…The above legislation inserts a new section 26A into the Crimes (Administration of Sentences) Act 1999…The new section clarifies and reinforces the Commissioner of Corrective Services existing power under section 26(1) to include a condition 'prohibiting or restricting an inmate from associating with a specified person, and/or a condition prohibiting an inmate from frequenting or visiting a specified place or district'.*[151]

The Commissioner of Corrective Services had previously been able to impose non-association and place restriction type conditions when granting a local leave permit.[152]

The October 2002 *Corrective Services Bulletin* directed that 'Officers involved in issuing external leave permits must … ensure that the local leave permit contains any non-association or place restriction conditions'. The article commented that all existing forms and documents relating to external leave and local leave permits were to be amended.[153]

Work release forms provided by DCS include references to section 26A of the *Crimes (Administration of Sentences) Act 1999 and a Section 26 Local Leave Permit form has been developed*. The *Work Release Program Standards of Conduct* states participants:

> *Must not knowingly contravene non-association and/or place restriction orders as per Section 26A of the Act.*

In addition, the State Parole Authority Standard Conditions applicable to all external leave programs include the following conditions:

- The offender is not to associate with any person or persons specified by the Probation and Parole Service Officer.
- The offender is not to frequent or visit any place or district designated by the Probation and Parole Service Officer.[154]

6.3.4. Sentencing

For those inmates subject to court imposed non-association and place restriction orders at sentencing, arrangements were made by DCS to enable details of those orders to be recorded on the OIMS. Arrangements were made for the following details to be recorded on the 'court order non association and placement screen' of the OIMS:

- court that originated the order
- date of the court event
- existence of a non-association and/or place restriction conditions.

Details of the actual conditions imposed were not to be recorded on the system but detailed manually on the inmate's file.

The above arrangements were made to ensure departmental officers had comprehensive information available to them when making decisions and arrangements regarding parole and other matters.

In order to inform officers of their responsibilities under the Act in relation to these orders details of these amendments were included in the *Corrective Services Bulletin* and the *Probation and Parole: Policies and Procedures Manual*.[155]

6.3.5. Publications

DCS regularly produces the *Corrective Services Bulletin* to communicate news and relevant administrative information to employees including information and developments on new technology and legislation, policies and procedures. Articles concerning the Act published in the *Bulletin* include 'Procedural matters: Non-association and Place Restriction Orders', *Corrective Services Bulletin*, 31 October 2002, p11.

Information regarding the legislation was also placed in the *Probation and Parole: Policies and Procedures Manual*.[156]

6.3.6. Training

Information relating to non-association and place restriction provisions is included in the Probation and Parole primary training course. This appears to be the only training that has been conducted within DCS regarding the legislation.

6.4. NSW Department of Juvenile Justice

The main responsibilities of the NSW Department of Juvenile Justice (DJJ) are to supervise juvenile offenders when mandated to do so by an order of the court and administer youth justice conferences.

DJJ is responsible for administering the *Children (Detention Centres) Act 1987* and had certain responsibilities in implementing the non-association and place restrictions provisions relating to leave introduced by the Act.

DJJ was represented on the 'Non Association-Implementation Working Party'.

6.4.1. Conditions of leave as to non-association and place restriction

Prior to the amendments, DJJ had previously been able to impose non-association and place restriction type conditions when granting leave to a detainee.[157] Section 24 of the *Children (Detention Centres) Act 1987* enables a person subject to control to be granted leave to be absent from a detention centre.

DJJ has advised that since the introduction of the Act there has been no change made to the policies and procedures related to the imposing of conditions at leave. No change has been made to the 'Order for Leave' forms and there is no reference to the new non-association and place restriction provision in any of the department's documentation or training conducted related to leave.

There was also no change made during the review period to the Client Information Data System (CIDS) to enable leave conditions imposed to be recorded. CIDS is a state-wide computer system that records information about supervised offenders.[158]

6.5. NSW Bureau of Crime Statistics and Research

The NSW Bureau of Crime Statistics and Research (BOCSAR) is a statistical and research agency within the NSW Attorney General's Department which collates and publishes crime and court statistics and conducts research into criminal justice issues.

BOCSAR is responsible for collecting data on non-association and place restriction orders imposed at NSW Local Courts.

To facilitate the data collection relating to the legislation BOCSAR issued a Memorandum informing non-GLC courts of the changes to the collection of statistics and created new penalty codes.[159] BOCSAR also updated its Local Court Statistical Instruction Manual with instructions relating to the new orders.

6.6. Judicial Commission of NSW

The principal functions of the Judicial Commission of NSW under the *Judicial Officers Act 1986* are to organise and supervise an appropriate scheme for the continuing education and training of judicial officers, assist the courts to achieve consistency in imposing sentences and examine complaints against judicial officers.

The Commission had certain responsibilities to inform and train judicial officers regarding the amendments introduced by the Act.

The Commission was represented on the 'Non Association-Implementation Working Party'.

The Commission has advised that the following information was distributed to judicial officers following the introduction of the Act:

- a 'Special note on commencement' of the legislation was placed on the Judicial Information Research System (JIRS) in the section titled 'Sentencing Information: Principles and Practice'
- a copy of the Act was placed in the 'Legislation' section on JIRS
- an announcement of the commencement of legislation was placed in the *Judicial Officers' Bulletin*, June 2002, Volume 14, No.5 and August 2002 Volume 14, No.7
- information on the use of non-association or place restrictions was included in the Children's Court, General Orders and Bail chapters of the Local Courts Bench Book supplied to all magistrates in NSW
- information on the use of non-association or place restrictions was included in the Children's Court Resource Book, which is supplied to all magistrates sitting in the Children's Court.

The Commission further advised that the following training was conducted for judicial officers following the introduction of the Act:

- sessions on sentencing in the Children's Court were held at the Magistrates Metropolitan and Regional Seminars in 2003 and 2004. This included a discussion about sentencing alternatives, including the use of non-association and place restriction orders.
- a session on the amendments introduced by the Act was included in the Children's Court Conference on 31 March 2004.[160]

On reviewing the above information it was identified that, apart from placing the legislation on JIRS, there appears to have been minimal information provided to the judiciary regarding the changes to the *Bail Act 1978* and changes to the *Crimes (Sentencing Procedure) Act 1999* in relation to parole.

It is also noted that it was determined at the 'Non Association-Implementation Working Party' that an article on the legislation should be written for inclusion in the *Judicial Officers Bulletin*. However it is apparent that this did not occur.

Endnotes

[127] Discussions with Local Court representatives. Letter from NSW Local Courts confirmed information, 4 August 2005.
[128] s51(1), *Crimes (Sentencing Procedure) Act 1999.*
[129] s36(2)(a), *Bail Act 1978* states that 'the accused person enter into an agreement to observe specified requirements as to his or her conduct while at liberty on bail, other than financial requirements'.
[130] 'Non Association and Place Restriction Orders' — *Local Courts Bulletin 2002/0065*.
[131] Clause 13, *Bail Act 1978 Regulation*.
[132] 'Non Association and Place Restriction Orders' — *Local Courts Bulletin* 2002/0065.
[133] The Director of Local Courts advised that 'a skeleton system was developed by the Police Department which would have enabled bail conditions to be transferred from GLC to COPS however this system was never fully developed or implemented. The reasons for this are not known to this office.' Letter from NSW Local Courts, 4 August 2005.
[134] s39B, *Bail Act 1978.*
[135] Letter from NSW Local Courts, 4 August 2005.
[136] 'Commencement of the *Justice Legislation Amendment (Non Association and Place Restriction) Act 2001*', *Police Weekly*, Vol. 14, No. 28, 22 July 2002, p. 13.
[137] The July 2002 *Police Weekly* article directed that 'until the bail forms are amended, police should manually alter the existing relevant forms'. 'Commencement of the Justice Legislation Amendment (Non Association and Place Restriction) Act 2001', *Police Weekly*, Vol. 14, No. 28, 22 July 2002, p. 13.
[138] s100G (5)(b) of the *Crimes (Sentencing Procedure) Act 1999* states that if leave to make an application for variation or revocation of a non-association order is granted the commissioner of Police is entitled to appear and be heard in any proceedings on the application.
[139] 'Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001', *Policing Issues and Practice Journal*, July 2002, pp. 8–15 and 'Court and Legal Services — New Law', *Police Weekly*, Vol. 14, No. 32, 19 August 2002.
[140] Letter from NSW Police Gangs Squad, State Crime Command, 7 December 2005.
[141] However it should be noted that since December 2004, the Kariong Juvenile Correctional Centre in New South Wales has operated under the authority of NSW Department of Corrective Services. The population at Kariong Juvenile Correctional Centre may include adult persons as well as juveniles.
[142] s51(1), *Crimes (Sentencing Procedure) Act 1999.*
[143] *Standard Conditions for Parole* provided by the NSW State Parole Authority, March 2005.
[144] *Additional Conditions for Parole* provided by the NSW State Parole Authority, March 2005.
[145] 2.3.2, *Probation and Parole: Policies and Procedures Manual,* NSW Department of Corrective Services.

[146] s165(2), *Crimes (Administration of Sentences) Act 1999.*
[147] Letter from Department of Corrective Services, 19 September 2005.
[148] 2.3.2, *Probation and Parole: Policies and Procedures Manual,* NSW Department of Corrective Services.
[149] Letter from Department of Corrective Services, 19 September 2005.
[150] s26A, *Crimes (Administration of Sentences) Act 1999.*
[151] 'Non-association and Place Restriction Order', Procedural Matters, *Corrective Services Bulletin*, 31 October 2002, p. 11.
[152] s26 of the *Crimes (Administration of Sentences) Act 1999* states that the conditions to which a local leave permit is subject must include such conditions as are required by the regulations and that the Commissioner may at any time vary or omit, substitute or add conditions of a local leave permit or revoke a local leave permit.
[153] Non-association and Place Restriction Order', Procedural Matters, *Corrective Services Bulletin*, 31 October 2002, p. 11.
[154] Letter from Department of Corrective Services, 14 September 2006.
[155] Non-association and Place Restriction Order', Procedural Matters, *Corrective Services Bulletin*, 31 October 2002; p. 11; 2.3, *Probation and Parole: Policies and Procedures Manual,* NSW Department of Corrective Services.
[156] 2.3, *Probation and Parole: Policies and Procedures Manual,* NSW Department of Corrective Services.
[157] s24(1B), *Children (Detention Centres) Act 1987.*
[158] Discussion with DJJ representatives July 2005.
[159] *BCSR Memorandum* No. 14, 9 July 2002.
[160] Letter from NSW Judicial Commission, 28 September 2005.

Chapter 7. Operation of the Act

This chapter details the use of the provisions during the review period.

7.1. Non-association and place restriction orders imposed at sentencing

7.1.1. *Crimes (Sentencing Procedure) Act 1999* and the *Children (Criminal Proceedings) Act 1987*

7.1.1.1. Non-association and place restriction orders imposed

The Act enables a court to impose a non-association order or place restriction order on an adult or juvenile offender sentenced for an offence that carries a penalty of imprisonment for six months or more.[161]

Information obtained from NSW Local Courts and BOCSAR indicates that for the review period 22 July 2002 to 22 July 2004, there were 20 non-association and place restriction orders imposed by the courts.[162] These orders were imposed at eight local courts, with one local court, Raymond Terrace, being responsible for 11 of the orders.[163] Thirteen of the orders were imposed by the same magistrate.[164]

Only two of the orders were imposed at a court located in the metropolitan area.

Sixteen of the orders prohibited an offender from visiting a specified place or district, whilst the remaining four prohibited an offender from associating with a specified person or persons. Of the four non-association orders, three were limited non-association orders which prohibited the offender from being in company with a specified person, whilst one was an unlimited non-association order which prohibited the offender from being in company with a specified person and from communicating with that person by any means.[165]

Just over half of the orders were made for a period of 12 months, whilst the remainder were for six months.

Table 1 shows the specific details of each of the 20 non-association and place restriction (NAPR) orders imposed by the courts between 22 July 2002 – 22 July 2004.

7.1.1.2. Characteristics of offenders subject to non-association and place restriction orders

Table 1 details the characteristics of offenders subject to non-association and place restriction orders. Some general observations can be made about the characteristics of offenders subject to these orders:

- 19 of the 20 non-association and place restriction orders were imposed on male offenders.
- 5 of the offenders were juveniles.
- 5 were recorded as being Aboriginal.

7.1.1.3. Offences for which non-association and place restriction orders were issued

Table 1 details the types of offences committed, which resulted in a non-association or place restriction order being imposed by the court.

Nineteen of the 20 offenders who had orders imposed on them were convicted of offences that attracted penalties of six months imprisonment or more. Seventeen of the offenders had previous criminal histories.

However one offender (Case no.14) was convicted of minor offences that did not attract a penalty of more than three months imprisonment. The order imposed in this matter appears to have been in contravention of the Act. Section 17A(1), *Crimes (Sentencing Procedure) Act 1999* states that the section applies to any offence that is punishable by imprisonment for six months or more only, whether or not the offence is also punishable by fine. The details of the matter are as follows:

> *A male offender, 20 years old, at the time of the offence was at a hotel in the town of Medowie, north of Newcastle. Police arrived at the hotel in response to a fight that had occurred outside the premises. While the police and hotel manager were speaking, the manager identified the offender who was intoxicated as a patron that had previously been banned from the hotel. The police instructed the offender to leave the hotel, and he finally did. When the police left the hotel they witnessed the offender trying to re-enter the hotel. When they again instructed him to leave he became disgruntled, was abusive, and resisted arrest from police. He was arrested and charged. The manager of the hotel advised the police that she was fearful of the offender and felt unable to exert her authority to remove him from the premises although he had been banned. The manager requested the police give consideration to placing conditions on the offender that he not contact the hotel and not attend the hotel including the carpark and confines. The offender was convicted of failure to quit premises and behave in an offensive manner and ordered to enter a bond for 12 months and fined. The court also imposed a place restriction order on the offender prohibiting him from visiting or frequenting the hotel for six months.*[166]

Table 1: Details of NAPR orders imposed between 22 July 2002 and 22 July 2004

No.	Gender	Age (yrs)*	Aboriginal Status	Date of Order	Offence	Act	Maximum Penalty	Sentence	Type of Order	Length of Order (mths)	Court
1	Male	17	Aboriginal	11/09/2002	Take & drive conveyance w/o consent of owner	Section 154A (1)(A) *Crimes Act 1900*	5 yrs imprisonment	1 mth (12mths non parole) Control Order: s33(1)(g) *Children (Criminal Proceedings) Act 1987*	Place restriction: must not enter or be within 5 kilometres of Bonalbo	12	Casino
					B&E bldg commit serious ind off (steal) value <= $15000 (x5)	Section 112 (1) *Crimes Act 1900*	14 yrs imprisonment	Supervised parole: *Children's (Detention Centres) Regulation 1995*, Regulation 52E			
					Steal motor car/ motor vehicle	Section 154AA(1) *Crimes Act 1900*	10 yrs imprisonment				
					Threaten violence to cause fear	Section 11A(1) *Summary Offences Act 1988*	10 penalty units or 6 mths imprisonment				
					Larceny	Section 117 *Crimes Act 1900*	5 yrs imprisonment				
					Plus driving offences						
2	Male	17	No	14/05/2003	Common assault	Section 61 *Crimes Act 1900*	2 yrs imprisonment	Probation: s33(1)(c) *Children (Criminal Proceedings) Act 1987*	Place restriction: city of Cessnock	12	Cessnock

Table 1: Details of NAPR orders imposed between 22 July 2002 and 22 July 2004

No.	Gender	Age (yrs)*	Aboriginal Status	Date of Order	Offence	Act	Maximum Penalty	Sentence	Type of Order	Length of Order (mths)	Court
3	Male	13	No	3/10/2002	Shoplifting value <=$2000	Section 117 *Crimes Act 1900*	5 yrs imprisonment	6 mths bond: s33 (1)(b)C *Children (Criminal Proceedings) Act 1987*	Place restriction: not to go inside retail store at Bonnyrigg, unless accompanied by brother or mother	6	Lidcombe
4	Male	23	No	2/09/2002	Common Assault	Section 61 *Crimes Act 1900*	2 yrs imprisonment	12 mth bond: s10 (1) *Crimes (Sentencing Procedure) Act 1999*	Non-association: prohibited from being in the company of the specified person	12	Raymond Terrace
5	Male	31	Aboriginal	18/11/2002	Fail to quit premises when refused entry by licensee	Section 103(3) *Liquor Act 1982*	50 penalty units	Sentenced to the rising of the court, fine: s15 *Crimes (Sentencing Procedure) Act 1999*	Place restriction: prohibited from frequenting/ visiting licensed premises/ hotel, Raymond Terrace	12	Raymond Terrace
					Common assault	Section 61 *Crimes Act 1900*	2 yrs imprisonment				

Table 1: Details of NAPR orders imposed between 22 July 2002 and 22 July 2004

No.	Gender	Age (yrs)*	Aboriginal Status	Date of Order	Offence	Act	Maximum Penalty	Sentence	Type of Order	Length of Order (mths)	Court
6	Male	29	No	24/01/2003	Maliciously destroy or damage property <=$2000 (x2)	Section 195(A) *Crimes Act 1900*	5 yrs imprisonment	3 mths imprisonment: s5 *Crimes (Sentencing Procedure) Act 1999* 3 yr bond: s9 *Crimes (Sentencing Procedure) Act 1999*	Place restriction: prohibited from frequenting/ visiting Kearsley	12	Raymond Terrace
					Contravene AVO	Section 562I(1) *Crimes Act 1900*	50 penalty units or 2 yrs imprisonment				
					Common Assault	Section 61 *Crimes Act 1900*	2 yrs imprisonment				
7	Female	25	Aboriginal	21/02/2003	Shoplifting (x2)	Section 117 *Crimes Act 1900*	5 yrs imprisonment	2 yr bond: s9 *Crimes (Sentencing Procedure) Act 1999*	Place restriction: prohibited from frequenting/ visiting retail stores, Hunter Street Mall, Newcastle	12	Raymond Terrace

Table 1: Details of NAPR orders imposed between 22 July 2002 and 22 July 2004

No.	Gender	Age (yrs)*	Aboriginal Status	Date of Order	Offence	Act	Maximum Penalty	Sentence	Type of Order	Length of Order (mths)	Court
8	Male	22	Aboriginal	26/05/2003	Affray	Section 93C(1) *Crimes Act 1900*	10 yrs imprisonment	2 yr bond: s9 *Crimes (Sentencing Procedure) Act 1999*	Place restriction: prohibited from frequenting/ visiting a Service Station at Karuah	6	Raymond Terrace
9	Male	32	No	5/05/2003	Assault Occasioning Actual Bodily Harm	Section 59(1) *Crimes Act 1900*	5 yrs imprisonment	2 yr bond: s9 *Crimes (Sentencing Procedure) Act 1999*	Place restriction: prohibited from frequenting/ visiting an Indoor Sports Centre at Medowie	6	Raymond Terrace
10	Male	29	No	10/03/2003	Stalk/Intimidate with intent to cause fear physical/ mental	Section 562AB(1) *Crimes Act 1900*	5 yrs imprisonment or a fine of 50 penalty units, or both.	12mth bond: s9 *Crimes (Sentencing Procedure) Act 1999*	Place restriction: prohibited from frequenting/ visiting licensed premises/ hotel, Glen Innes	12	Raymond Terrace

Table 1: Details of NAPR orders imposed between 22 July 2002 and 22 July 2004

No.	Gender	Age (yrs)*	Aboriginal Status	Date of Order	Offence	Act	Maximum Penalty	Sentence	Type of Order	Length of Order (mths)	Court
11	Male	41	No	22/04/2003	Common Assault	Section 61 *Crimes Act 1900*	2 yrs imprisonment	$300 fine: s5 *Crimes (Sentencing Procedure) Act 1999*	Place restriction: prohibited from frequenting/ visiting licensed premises/ hotel, Nelson Bay	6	Raymond Terrace
12	Male	15	Aboriginal	11/02/2003	Shoplifting < = $2000	Section 117 *Crimes Act 1900*	5 yrs imprisonment	Bond: s33(1)(b) *Children (Criminal Proceedings) Act 1987*	Non-association: prohibited from being in the company of the specified persons	12	Tamworth
13	Male	21	No	27/04/04	Affray	Section 93C(1) *Crimes Act 1900*	10 yrs imprisonment	3 mth periodic detention: s6 *Crimes (Sentencing Procedure) Act 1999*	Limited non-association: prohibited from being in the company of specified persons	6	Raymond Terrace
14	Male	21	No	15/03/04	Fail to quit premises — person previously refused	Section 103(3) *Liquor Act 1982*	50 penalty units	12 mth bond and fine ($300): s9, s14 *Crimes (Sentencing Procedure) Act 1999*	Place restriction: prohibited from frequenting/ visiting licensed premises/ hotel, Medowie	6	Raymond Terrace
					Behave in an offensive manner in/near a public place/school	Section 4 Summary *Offences Act 1988*	6 penalty units or imprisonment for 3 mths				

Table 1: Details of NAPR orders imposed between 22 July 2002 and 22 July 2004

No.	Gender	Age (yrs)*	Aboriginal Status	Date of Order	Offence	Act	Maximum Penalty	Sentence	Type of Order	Length of Order (mths)	Court
15	Male	34	No	9/06/04	Contravene apprehended domestic violence order	Section 562 *Crimes Act 1900*	50 penalty units or 2 yrs imprisonment	9mths imprisonment (suspended sentence): s12 *Crimes (Sentencing Procedure) Act 1999*	Place restriction: prohibited from frequenting/ visiting City of Cessnock	12	Cessnock
16	Male	34	No	20/07/04	Contravene apprehended violence order	Section 562 *Crimes Act 1900*	50 penalty units or 2 yrs imprisonment	6 mths imprisonment (suspended sentence): s12 *Crimes (Sentencing Procedure) Act 1999*	Place restriction: prohibited from frequenting/ visiting an area bounded in Brisbane Waters	6	Gosford
17	Male	15	No	14/07/04	Robbery in company	Section 97 *Crimes Act 1900*	20 yrs imprisonment	70 hrs of community service and fine ($300): s33(1)(f), s33(1)(c) *Children Criminal Proceedings) Act 1987.*	Unlimited non-association: prohibited from being in the company and communicating with specified persons	6	Lidcombe

Table 1: Details of NAPR orders imposed between 22 July 2002 and 22 July 2004

No.	Gender	Age (yrs)*	Aboriginal Status	Date of Order	Offence	Act	Maximum Penalty	Sentence	Type of Order	Length of Order (mths)	Court
18	Male	20	No	30/06/04	Supply prohibited drug (cannabis)	Section 25 (1) *Drug Misuse and Trafficking Act 1985*	2000 penalty units or 10 yrs imprisonment, or both If dealt with summarily: 100 penalty units or imprisonment for 2 yrs, or both	12mths imprisonment (suspended sentence): s12 *Crimes (Sentencing Procedure) Act 1999*	Place restriction: prohibited from frequenting/ visiting township of Nimbin	12	Lismore
19	Male	20	No	15/06/04	Maliciously destroy or damage property < = $2000	Section 195 *Crimes Act 1900*	5 yrs imprisonment	CSO (75 hours) & 2 yr Bond: s8, s9 Crimes (Sentencing Procedure) Act 1999	Place restriction: prohibited from frequenting/ visiting a Caravan Park, Heatherbrae	12	Raymond Terrace
20	Male	43	No	24/06/04	Contravene apprehended violence order	Section 562 *Crimes Act 1900*	50 penalty units or 2 yrs imprisonment	Bond: (s9) (12 mth) *Crimes (Sentencing Procedure) Act 1999*	Place restriction: prohibited from frequenting/ visiting within 50 metres of a residential address in Coonabarabran	6	Coonabara-bran

Source: NSW Local Courts data and court papers and BOCSAR data, July 2002–July 2004
*** The age of the NAPR recipients detailed in Table 1 refers to their age at the time of being charged by police**

7.1.1.4. Places from which offenders were prohibited from frequenting

Below is a summary of the places offenders were prohibited from frequenting in the 16 matters where place restriction orders were imposed:

- townships (6)
- licensed premises/hotels (4)
- retail stores (2)
- service station (1)
- sports centre (1)
- caravan park (1)
- within 50 metres of a residential address (1).

In a number of the matters where place restrictions orders were imposed the offenders had committed offences in licensed premises whilst intoxicated. The details of one of those matters is set out below:

> *An Aboriginal male offender, aged 31 at time of sentencing, was convicted of assault. The offender had entered the main bar area of a hotel in Raymond Terrace in a heavily intoxicated state. The victim, the licensee of the hotel, refused to serve the offender and requested him to leave. The defendant then struck the victim in the chest and arm and left the premises. Shortly after he was arrested and taken into custody. The offender was convicted for assault and sentenced to the rising of the court and fined.*[167] *The court also imposed a place restriction order on the offender prohibiting him from frequenting or visiting the hotel for 12 months. The magistrate commented that 'it is probably in your interests as well as in the interest of the licensee whom you assaulted [that you not return to the hotel]'.* [168]

In a number of matters where place restriction orders were imposed the offenders were prohibited from frequenting or visiting particular retail stores arising from shoplifting convictions. The details of one of these matters is set out below:

> *An Aboriginal female offender, aged 25, was caught shoplifting at two women's fashion retail stores located in Newcastle. The magistrate noted that the offender stole to fund a cannabis addiction. The offender was convicted of shoplifting and sentenced to enter a bond for two years. The court also imposed a place restriction order that prohibited the offender from visiting or frequenting the retail stores for 12 months.*[169]

In one matter the place restriction order imposed on a male juvenile included the exception that the offender not attend the retail store at Bonnyrigg unless accompanied by his brother or mother.[170]

7.1.1.5. Persons from which offenders were prohibited from associating

There were four matters where non-association orders were imposed. In three of those matters offenders were prohibited from associating with co-offenders. In the other matter the offender was prohibited from associating with the two juveniles who were in his company just prior to the offence being committed.

It appears that in all the matters where non-association orders were imposed, no co-offenders or persons accompanying the offender had orders imposed on them. There is some evidence that this may be because the particular offenders who had orders imposed on them were perceived by the court to be more vulnerable than their cohorts.

In one such matter it was noted by the magistrate that the offender was the less aggressive member of the offending group:

> *A male offender, aged 23 at the time of offence, was involved, along with a co-offender, in a physical assault upon two victims. Both offenders were intoxicated at the time. The court noted that the co-offender's assault on the victims was more serious than the offender's assault. The court found the offender guilty of the offence but did not record a conviction and discharged the offender upon entering a 12 month good behaviour bond. The court also imposed a non-association order prohibiting the offender from associating with the co-offender for 12 months. The police prosecutor commented that 'it is in the defendant's interest that a [non-association] order be made….as opposed to leaving it up to perhaps a person who is not strong enough to make those decisions.' The magistrate commented 'it's probably a good idea if you don't get together'.*[171]

In another matter where a juvenile offender committed a robbery in company with five other juvenile males the offender's solicitor commented that the co-accused 'were older and had more criminal history than he did at that stage and certainly now as well' and that it was 'one of those offences of immaturity' (see 7.1.1.6 below for more details).[172]

In another matter an Aboriginal juvenile offender's mother addressed the court and asked for a non-association order commenting that 'I'd rather he not associate with those boys. He's too easily influenced'.[173]

However, in one matter it appears that the court may have attempted to separate the 'main' offender from his co-offenders by imposing a non-association order on the offender. The matter involved five young males committing an

offence of affray. The court noted that the offender who had the order imposed upon him had a considerable criminal history and was the 'prime mover' behind the offence (see 7.1.1.6 below for more details).[174]

7.1.1.6. Orders imposed where the offences appeared to be 'gang type' offences

As discussed in Chapter 3 in the absence of an established definition of a gang in the Australian context, we refer to a 'gang type' offence as an offence where there is evidence of criminal activity involving two or more people.

Applying this definition to those 20 matters where non-association and place restriction orders were imposed in the review period we can determine that five (5) of the matters could be classified as matters which involved 'gang type' offences.

Two of these matters involved juveniles in small groups committing shoplifting offences and another matter involved two young males assaulting a group. One matter involved six juvenile males committing an offence of robbery in company. The details of this matter are set out below:

> *A juvenile male aged 15 years was in the company of five other juvenile males when committing the offence of robbery in company. The offenders and co-offenders approached the victim on a train in a metropolitan area and demanded money. The offender acted as a 'stand over man' with four other offenders while the remaining offender robbed the victim of money from his wallet and mobile phone. The offenders were identified from footage from the State Rail CCTV. The offender's lawyer in court stated that the offender no longer had 'a need to associate' with the co-offenders stating 'He knew them mostly through school, Year 9, he left them in early Year 10 and certainly because he's now full time employed he has no real need or opportunity to be associating with some of those other co-accused some of whom were older and had more criminal histories than he did at that stage and certainly now as well.' The offender was sentenced to 70 hours of community service, fined and ordered to pay compensation to the victim. A non-association order was also imposed which prohibited him from being in the company of the five co-offenders for a period of 12 months.*[175]

The fifth matter involved five young males committing an offence of affray:

> *A 21 year old intoxicated male was in the company of four other males in a car when they became disgruntled with another driver. They started to harass the other driver, who then stopped. The five offenders then threw beer bottles at the victim, one striking him in the head, and others causing damage to the victim's vehicle. The victim proceeded to the nearest police station where he reported the matter. This occurred in Nelson Bay, NSW. The five offenders were apprehended and charged with affray. The offender in question was identified by the court as the 'principal offender' and had a considerable record. He was sentenced to three months of periodic detention and ordered to pay compensation to the victim. A non-association order was also imposed which prohibited him from being in the company of the four co-offenders for a period of six months.*[176]

7.1.1.7. Sentences received by those subject to non-association and place restriction orders

Sentences imposed on those who were subject to non-association and place restriction orders include the following:

- imprisonment (2)
- periodic detention (1)
- community service orders (2)
- suspended sentences (3) [177]
- good behaviour bonds (7) [178]
- fines (4)
- rising of the court (1)
- probation (1).[179]

7.1.1.8. Raymond Terrace and Casino courts

The fact that 13 (65%) of the orders were imposed by the same magistrate at two local courts, Raymond Terrace and Casino, merits comment. It appears there may have been a number of factors which have influenced this occurrence.

It was reported in the *Newcastle Herald* in 2001 that 'juvenile group activity' in the Raymond Terrace area acted as a prompt for the introduction of the legislation. The paper reported the following on Saturday, 31 March 2001:

> *A Raymond Terrace couple terrorised by groups of youths half their age have prompted a NSW Opposition push for tough new 'anti-gang' laws….The NSW Opposition is using the Dipper's terrible predicament as evidence of the need for tough new anti-gang laws to allow police to break up the 'pack mentality of juvenile louts'. The Coalition is formulating a policy that will be followed by legislation in Parliament. Opposition legal spokesman*

Chris Hartcher said it was obvious police could not control juvenile gangs. Police should have the power to take offenders before a magistrate and get an order prohibiting individuals from coming together or associating if they are known to create trouble when in each other's company. Mr Hartcher said 'if they continued to get together they would face some form of disciplinary program or sanction'.[180]

The comments from the member for Port Stephens, Mr J Bartlett MP, when the Act was introduced into the Legislative Assembly in 2001 provides further evidence of a perceived problem in the Raymond Terrace area. The Port Stephens electorate includes Raymond Terrace. Mr Bartlett commented that the legislation 'goes a long way towards addressing the concerns that have been expressed' by the Raymond Terrace Chamber of Commerce and other committees and persons in the area.[181]

For the purposes of the review, this Office interviewed the magistrate who imposed the 13 orders at Raymond Terrace and Casino courts. At the time of the interview in early 2003, she had imposed three orders.

In response to a question as to why she used the orders she replied that: 'They were all made on the application of the police prosecutor…I am fortunate that I have such an astute police prosecutor.' She further commented that 'I knew of them [the orders] but you are constantly being told of new things and it does take a little bit of time to start using them and become accustomed to them'.[182]

She said that 'the prosecutors are also relying on the advice from police. I think it might be a country thing and the police are saying I don't want these people hanging around together'.[183]

She also commented that when dealing with gangs she believed you should 'try and separate off the vulnerable ones, those who are easily influenced, who can be persuaded by peer group pressure and get them away from the influence of people who are going to do what they want to do anyway.' [184]

The same police prosecutor was present in 11 of the 13 matters where this magistrate imposed the orders. In December 2005 we interviewed this police prosecutor for the purposes of the review. He was of the view that the orders had been effective in reducing crime in the area, and that the place restriction orders prohibiting offenders from visiting licensed premises and shopping centres had been particularly useful in reducing criminal activity in and around those locations. Prior to requesting such an order it was his usual practice to consult with the licensee or other relevant person to discuss the utility of imposing such an order.[185]

In relation to the impact of the orders on gang related activity in the area the police prosecutor commented that those offenders who had orders imposed upon them as a result of his submissions were often loosely involved with a group who consumed alcohol together. He commented that these groups did not have the 'cohesive nature of a gang'.[186]

The police prosecutor believes that these orders were particularly suited for use in regional areas where the police were more familiar with the offenders, the persons named and the locations connected with the orders.

7.1.1.9. Consideration by the court of issues related to association with close family

The scope of non-association orders is qualified by provisions that prevent a non-association order from imposing certain restrictions on the people an offender may associate with (that is members of the offender's close family).[187]

A study of the transcripts and court papers of the four matters where non-association orders were imposed reveals that none of the people the offenders were prohibited from associating with were members of the offender's close or extended family. In all cases they were associates or co-offenders.

7.1.1.10. Consideration by the court of issues related to restricting access to specified places

The scope of place restriction orders is qualified by provisions that prevent the court from imposing certain restrictions on the places or districts that the offender may frequent or visit (that is the offender's residence, or the residence of his or her close family, or the offender's place of work, educational institution or place of worship).[188]

A study of the transcripts and courts papers of the 16 matters where place restriction orders were imposed in the review period revealed the following:

- one offender was prohibited from frequenting or visiting a township where, prior to sentencing, the offender had resided
- one offender was prohibited from frequenting or visiting a township where, prior to sentencing, the offender had resided and where his parents still lived
- one offender was prohibited from frequenting or visiting a township where his former partner resided who was pregnant with his baby
- one offender was prohibited from frequenting or visiting a township which he had to travel through in order to visit his mother and sister.

In the first matter the offender was prohibited from being within five kilometres of the township from which the offender formerly resided. It was noted in court that the offender himself had decided that he wished to reside elsewhere. The details of the matter are set out below:

> *A young Aboriginal male, aged 17, was sentenced in the Children's Court for a number of matters including a number of break and enters, malicious damage, common assaults, unlicensed driving and take and drive conveyance. At the time of sentence the offender had been in custody for some six weeks. All offences had occurred in a country town in northern NSW. In sentencing the offender the magistrate referred to the pre-sentence report which documented that the offender was 'a likeable young man with an outgoing personality' who was very remorseful and keen to live elsewhere. The offender's lawyers commented in court that the offender had got 'mixed up with the wrong people'. The magistrate commented that the defendant needed to get away 'from the peer group that he was mixing with' and his lawyer advised the court that the offender had 'expressed a strong desire to go and live with his mum in Sydney'. The magistrate clarified 'He doesn't want to go back there. I take it' to which his lawyer advised 'that's correct'. The magistrate imposed a control order for 12 months with a one month non-parole period and imposed a place restriction order for 12 months prohibiting the offender from entering or being within 5 kilometres of the town.*[189]

In the second matter the offender was prohibited from frequenting the township where his former girlfriend lived which also happened to be the township where he had resided with his parents:

> *A male offender who was 29 at the time of sentencing, was convicted of a series of offences. The offender had been diagnosed with a mental illness, and admitted to having a problem with binge drinking. The offender resided in his parent's residence which was located in the same street that the victim lived in Cessnock, NSW. The offender and victim had an intermittent relationship for five months prior to the offence. The victim had an apprehended violence order placed on the offender. On the night of the offence the offender was at the victim's house and became irate and violent. The offender was asked to leave the residence, and did so, only to later return and find himself locked out. The offender then proceeded to kick in the back door. The victim locked herself in a room, and called 000. The offender was given a 3 month custodial sentence for assault, malicious damage and contravening the apprehended violence order. The court also imposed a place restriction order which prohibited the offender from visiting or frequenting the town for a period of 12 months. The offender advised the court that he had made arrangements to live with his sister in another area of the state.* [190]

The prosecutor in the above matter indicated to the magistrate that he had some concerns that by imposing a place restriction order 'we're setting him up to fail if he comes and visits his parents'. The magistrate replied by indicating that she believed she had little option as she did not want to 'keep him locked up forever'.

In the third matter the court gave consideration to the impact of a place restriction order on a male offender who was prohibited from visiting the township where his former partner resided who was pregnant with his baby:

> *A male offender, aged 35 at the time of the offence, had previously had an AVO placed against him after a complaint of assault on a former partner. The offender called the house of his former partner and made multiple threats to her and her family resulting in a breach of the AVO. The offence had occurred in Cessnock. At the time of the offence the victim was six months pregnant. The offender was said to be the father of the child. The offender was arrested and charged with contravening an apprehended violence order and given a suspended sentence for nine months on condition that he enter a bond for the same period and accept supervision of probation and parole. The current AVO was adjusted to protect everyone in the victim's household. In addition to the AVO the court also imposed a place restriction order on the offender prohibiting him from visiting or frequenting the town for a period of 12 months. The prosecutor noted that the order was pursuant to s 17A of the Crime (Sentencing Procedure) Act as 'there is no close family member in that this is an estranged relationship, not defacto'. The magistrate expressed some concern that once the child was born then a 'close family member' would presumably be in residence in the town and the order would be 'ultra vires of the legislation'.*[191] *The prosecutor indicated that a variation could then be sought if the child was born and this posed a problem.*[192]

Our inquiries with the relevant courts and the prosecutor involved in the matter revealed that the offender did not seek any variation or revocation of the order.

In the fourth matter the 21 year old offender was found by an undercover operative to be supplying cannabis in Nimbin, NSW. At the time of sentencing the offender had moved from the town to make a 'fresh start'. The offender was given a suspended sentence and the court imposed a place restriction order prohibiting the offender from visiting or frequenting the township for 12 months. The order included an exception that the offender was allowed to drive through the township for the sole purpose of visiting his mother and sister who lived just outside the township.[193]

7.1.1.11. Explanation of non-association and place restriction orders to offenders

The Act directs that the court is required to explain to an offender on whom it has imposed an order, the obligations that arise under the order and the consequences that may follow if he or she breaches the order.[194]

In practice this means that after the offender has been sentenced they are required to attend the administration desk of the court and the Clerk of the Court is required to provide the offender with a copy of the order, ensure the order is signed and explain to the offender their obligations in relation to the order. Each order issued contains the following statement, which is to be signed by the offender and counter signed by the Clerk of the Court:

> *My obligations under the order have been explained to me and I understand the consequences that may follow if I fail to comply with those obligations.*

In addition to the above statement the following information is detailed at the base of each order under the heading 'Important Notes' (see also Appendix 1):

1. If you breach this order without a reasonable excuse you will be guilty of an offence. The maximum penalty for breaching this order is $1100 fine and six months imprisonment.
2. It is a reasonable excuse for a breach of the order if the breach occurred in compliance with an order of a court or, having unintentionally associated with a specified person you immediately terminate the association.
3. If your circumstances change you may apply to a Local Court to vary or revoke this order.
4. Communication with a person includes by post, facsimile, telephone or email.

Copies of the orders imposed were supplied by the courts to this Office and in each matter it was noted that the order had been signed by both the offender and the Clerk of the Court.

The Director of Local Courts advised that court staff are required to adhere to the Local Courts Policy and Procedure Guidelines which direct court staff to explain orders to defendants. The guidelines emphasise that the court must ensure that all reasonable steps are taken to explain to the offender in language that the offender can readily understand the offender's obligations under the order and the consequences that may follow if the offender fails to comply with those obligations.

In one matter in the review period where a place restriction order had been imposed on a juvenile offender it was evident from the court papers that the offender was dissatisfied with the order once it had been explained to him by the Clerk of the Court.

The 17 year old had been prohibited from frequenting the township where he previously lived and where many of his friends/associates remained. The NSW Department of Juvenile Justice (DJJ) report on the matter indicated that one of the main reasons the offender's family had moved from the township was to ensure the offender 'remained trouble free. His parents stated that when he is not in Cessnock he does not represent a supervision problem'. Further details of the matter are set out below:

> *A juvenile male, aged 17 at the time of sentencing, was before the court for assaulting another juvenile by hitting him in the ribs. This occurred in the town of Cessnock. The offender admitted guilt, had a long criminal history, and was currently on an 18-month bond. A Juvenile Justice Department report which was referred to in court stated that the defendant 'appears to be at greater risk of offending when he returns to the negative influences of the town'. The Children's Court ordered that the defendant be returned to probation for a period of 12 months upon the conditions that he be of good behaviour and adhere to a place restriction order not to enter the town for 12 months.*[195]

The Clerk of the Court documented the following on the bottom of the court copy of the place restriction order in this matter:

> *The defendant was explained the order and consequences of not complying. The defendant at first refused to sign the notice, he wanted to go into custody. He eventually signed it by putting a cross and told the court staff that he was going to not comply with the restriction order and be present in Cessnock.*

7.1.1.12. Commencement of orders

An order commences at the time it was made by the court[196] and is suspended if the offender is taken into custody. The suspension of an offender's order does not operate to postpone the date on which the order comes to an end.[197]

In three matters where orders were imposed the order was suspended due to the offender having been taken into custody.

In the first matter an Aboriginal male juvenile had been given a control order for 12 months with a one month non-parole period and had a 12 month place restriction order imposed on him. Thus in effect the place restriction order only operated for an 11 month period.[198]

In the second matter a 29 year old male was given a three month custodial sentence and had a 12 month place restriction order imposed on him. So in effect the place restriction order only operated for a nine-month period.[199]

In the third matter a 21 year old male offender was sentenced to three months periodic detention and had a six-month non-association order imposed on him. So in effect the place restriction order only operated for the period in which the offender was not in periodic detention.[200]

7.1.1.13. Contravention of non-association and place restriction orders

If an offender contravenes their order without reasonable excuse they are liable to up to 10 penalty units ($1100) or imprisonment for six months or both.[201]

Information obtained from NSW Local Courts and BOCSAR indicates that no proceedings were commenced for the breach of non-association and place restriction orders.

7.1.1.14. Variation or revocation of non-association and place restriction orders

A court may vary or revoke an offender's existing order when sentencing the offender for a new offence.[202]

An offender may apply to a Local Court to vary or revoke their order.[203]

NSW Local Courts has advised that statistical reports containing information on variations and revocations of orders cannot be generated under the current system so there is no information available on the use of the provisions relating to variations and revocations.

7.1.1.15. Certain information not to be published or broadcast

The Act also makes it an offence to publish or broadcast the fact that a named person (other than the offender) is specified in a non-association order or any information calculated to identify any such person.[204]

Information obtained from NSW Local Courts and BOCSAR indicates that there have been no prosecutions of such offences during the review period.

7.1.1.16. *Criminal Appeal Act 1912*

The Act also makes a consequential amendment to the definition of sentence in the *Criminal Appeal Act 1912*[205] allowing for appeals to be made against the imposition of non-association and place restriction orders.

NSW Local Courts has advised that reports containing information on appeals against orders cannot be generated under the current system so there is no information available on the use of the provisions relating to any appeals of the orders.

7.2. Conditions of parole as to non-association and place restriction

7.2.1. *Crimes (Sentencing Procedure) Act 1999*

The Act amends the Crimes (Sentencing Procedure) Act to enable the court to impose non-association and place restriction conditions as part of a parole order.[206]

The Director of NSW Local Courts has advised that statistical reports containing information on such conditions imposed at parole cannot be generated under the current system.

If conditions were imposed they would have been documented manually on the individual files.

Based on the information available it is not possible to determine the impact the new provisions have had on the non-association and place restriction conditions imposed on parole determined at court.

7.3. Conditions of court imposed bail as to non-association and place restriction

As outlined previously, magistrates may grant bail to a person appearing before them who is accused of an offence, or who is appealing to a higher court.

The Act amends the *Bail Act 1978* to create a specific provision (s36B) relating to bail conditions which prohibit or restrict a person from associating with a specified person or visiting a specified place or district.[207]

The court had previously been able to impose non-association and place restriction type conditions at bail through s36(2)(a) of the *Bail Act 1978*.[208]

Bail conditions imposed at court are documented in the 'Bail Undertaking' Form 5 or 5A in accordance with the *Bail Act 1978* Regulations.[209]

NSW Local Courts has advised that no amendments were made to these forms to explicitly incorporate the provisions introduced by the Act nor were there any arrangements made for these conditions to be entered differently on the computer system. Any non-association or place restriction conditions imposed since the Act were documented manually in the section, which allows for further conditions to be included.

It is the task of the magistrates to document what provisions have been referred to when imposing non-association and place restriction conditions at bail. For the purposes of the review, magistrates and police prosecutors were surveyed as to their use of the new legislation in relation to bail. A number of magistrates were also interviewed in person for the review.

It is quite clear from the responses received from magistrates that many frequently impose non-association and place restriction provisions when granting bail. However, it is clear that many magistrates have continued to use the 'old' provision (s36(2)(a)) to impose such conditions and in any case, often do not detail which provision has been referred to when documenting the conditions imposed. As one magistrate commented:

> *I regularly impose non-association and place restriction conditions. I have never specified that they are imposed under s36B rather than under s36(2)(a). The current forms in use in Local Courts do not make provision for a distinction and I have never considered it necessary to make such a distinction.*

Another magistrate advised that 'whether out of habit or otherwise I [continue to use] s36(2)(a)'. The magistrate went on to comment:

> *My preference has no deeply held philosophical reasons attached to it. I feel more comfortable doing what is familiar….Because there are two sources of power to impose these conditions, personally, I don't think that people really address which is being used and it is more a matter of form rather than substance as to which is applied….For me they are not recorded differently and the court forms are not well adapted so that they are recorded differently.*

A police prosecutor commented:

> *I have asked for 36B and the magistrate granted it under 36(2)(a) — when raised, the magistrate replied 'that it does the same thing'.*

So the current court forms do not distinguish between the legislative basis for conditions which are imposed on alleged offenders, and magistrates appear to not make the distinction when they document their decisions. This means that when conditions are entered onto the computer system by court officers there is no distinction made as to what section has been used to impose the conditions.

As a result, on the information available it is not possible to determine the impact the new provisions have had on the non-association and place restriction conditions imposed when granting bail at court.[210]

7.4. Conditions of police imposed bail as to non-association and place restriction

An authorised police officer may grant bail to an accused person at a police station.[211] Police deal with approximately 50% of applications for bail in NSW.

The Act amends the *Bail Act 1978* to create a specific provision (s36B) relating to bail conditions which prohibit or restrict a person from associating with a specified person or visiting a specified place or district.[212]

Police had previously been able to impose non-association and place restriction type conditions at bail through s36(2)(a) of the *Bail Act 1978*.[213]

Police are required to enter all conditions imposed on COPS. Enhancements to COPS were made to incorporate the amendments to the *Bail Act 1978*. Two additional 'create bail condition' screens were introduced, namely 'Create non-association condition' and 'Create place restriction condition'. These screens were developed to enable officers to enter details of the new bail conditions directly into COPS.

7.4.1. COPS bail data obtained

In order to determine how NSW Police has used the new provisions in the review period, arrangements were made for NSW Police to provide us with a range of COPS data about police bail. This included the provision of general data on the following:

- the total number of charge records for the review period (May 2002 to May 2004)
- a breakdown of that total including the total number of charges where unconditional and conditional bails were imposed for the period and the total number of persons bail refused for the review period
- comparative data for the period May 2000 to May 2002.

More specific bail data was also provided by NSW Police including the following:

- a 'charge enquiry list' detailing all matters where conditional bail had been imposed for all NSW charging stations for the specific days within the review period (May 2002 to May 2004)
- comparative data for the period May 2000 to May 2002.

The data provided for the review period indicated where a 'Create non-association condition' and 'Create place restriction condition' screen was used and details of the information recorded.

It should be noted that the 'Create non-association condition' and 'Create place restriction condition' screens that were developed to enable police officers to enter details of the new non-association and place restriction bail conditions directly into COPS were not operational until July 2002.[214] The provisions relating to bail commenced on 13 May 2002. Thus the screens were not available to record information regarding the new bail conditions imposed until just under two months into the review period. Consequently the non-association and place restriction screen data was not recorded for the whole review period but for the period August 2002 – May 2004 only.

In addition to the information provided by NSW Police, we also made our own inquiries of the COPS database to obtain details of incidents such as background details about offences, any breaches of orders or bail conditions, re-offending rates and 'event narratives' composed by operational police who dealt with particular incidents and court outcomes.

7.4.2. Examination of a sample period

There were approximately 56, 545 charge records created in the review period, which contained conditional bails.

As it was impracticable for us to comprehensively assess all these records we examined a sample of data in order to determine police use of the new provisions.

Scrutiny of a sample of data involved the examination of COPS bail data for all NSW charging stations for 12 days (the last Friday of every second month) across the review.[215] These sample days will be referred to as the 'review sample period'.

The number of conditional bails imposed in the review sample period was 662.

Scrutinising a sample of data enabled us to:

- examine in detail the bail conditions imposed by police
- identify all the non-association and place restriction type conditions that had been imposed
- obtain demographic data including gender, age distribution and Aboriginal status
- assess the location, offence, breach and other details related to the imposition of these conditions.

Our sample analysis involved examination of those conditions recorded in the non-association and place restriction screens and all the additional COPS bail data for the review sample period.

7.4.2.1. Police use of the non-association and place restriction screens in the review sample period

In undertaking our sample analysis we first identified those matters in the review sample period where the police had used the 'Create non-association condition' and 'Create place restriction condition' screens in COPS and examined the information recorded. Examination of this data allowed us to ascertain the extent to which police were recording non-association and place restriction conditions in the appropriate screens created for the new provisions.

Table 3 shows the non-association and place restriction conditions recorded in the 'Create non-association condition' and 'Create place restriction condition' screens that were developed to enable police officers to enter details of their use of the new provisions directly into COPS.

Table 3: Conditions recorded in the COPS NAPR screens by NSW Police in the review sample period

	Type of condition			
	Non-association	**Place Restriction**	**Non-association and place restriction**	**Total NAPR**
Number recorded in NAPR screens by NSW Police	10	59	1	70

Source: NSW Police COPS data, May 2002 – May 2004

There were 10 non-association conditions recorded by police in the non-association screens in the review sample period. This accounted for 2% of all conditional bails imposed.

There were 59 place restriction conditions recorded by police in the place restriction screens in the review sample period which accounted for 9% of all conditional bails imposed. There was also one case where the individual received both a non-association and place restriction bail condition for the same charge.

Thus there were 70 non-association and place restriction conditions in total recorded on the screens, which accounted for 11% of all conditional bails imposed.

In relation to those conditions recorded by NSW Police the following matters were identified:

- In one matter a place restriction was listed but there was no place restriction detailed in the screen. The restriction was that the person was 'not to consume alcohol'. This event was therefore not included in the total number of place restriction screens used by the police in the sample period.
- There were five matters where the place restriction conditions imposed did not satisfy the requirements of the Act, as they did not specify the place or district where the alleged offender must not frequent or visit. These matters were also not included in the total number of place restriction screens used by police in the sample period (see 7.4.2.9 for more details).
- Eleven place restrictions were imposed which appeared to be exclusively imposed for the protection of a victim or witness of a crime.

7.4.2.2. Additional non-association and place restriction conditions identified in the sample period

In undertaking our sample analysis we also examined all of the additional conditional COPS bail data provided for the review sample period to determine when a place restriction or non-association condition had been imposed but had not been entered into a non-association or place restriction screen.

We examined these additional conditions as surveys of police revealed that since the introduction of the Act some police officers were uncertain as to whether they should impose non-association and/or place restriction conditions under s36(2)(a) or s36B of the *Bail Act 1978*.[216] Therefore whilst non-association and place restriction conditions were being used as a condition of a person's bail, they were not necessarily being imposed under the new provisions and the new screens were not necessarily being used to record them.

In distinguishing these additional conditions we included only those non-association and place restriction conditions that satisfied the requirements of the Act.

Table 4 shows the additional non-association and place restriction conditions identified in the COPS bail data provided for the review sample period.

Table 4: Additional NAPR conditions identified by the Ombudsman in the review sample period

	Type of condition			
	Non-association	**Place Restriction**	**Non-association and place restriction**	**Total NAPR**
Number of additional conditions identified by Ombudsman	19	201	4	224

Source: NSW Police COPS data, May 2002 – May 2004

We identified 19 additional non-association conditions and 201 additional place restriction conditions imposed by police in the review sample period that were not recorded in the screens. We also identified four occasions where both a non-association and a place restriction were imposed on persons for the same charge in the review sample period.

The total number of additional non-association and place restriction conditions identified in the review sample period was 224 which accounted for 34% of all conditional bails imposed.

7.4.2.3. Total number of non-association and place restriction conditions identified for the review sample period

Table 5 displays the combined statistics of those of non-association and place restriction conditions recorded in the non-association and place restriction screens by NSW Police and the additional conditions identified in the review sample period.

Table 5: Conditions recorded in the NAPR screens by NSW Police and the additional conditions identified by the Ombudsman in the review sample period

	Type of condition			
	Non-association	Place Restriction	Non-association and place restriction	Total NAPR
Number recorded in NAPR screens by NSW Police	10	59	1	70
Number of additional conditions identified by Ombudsman	19	201	4	224
Total	29	260	5	294

Source: NSW Police COPS data, May 2002 – May 2004

We found that 294 or 44% of all conditional bail imposed by police in the review sample period included a non-association condition, a place restriction condition or both. If this proportion was replicated during the review period approximately 25,000 of the 56,545 conditions imposed contained non-association or place restriction conditions.

We found that place restriction conditions were much more common than non-association conditions. We identified 29 non-association conditions and 260 place restriction conditions imposed at bail by police in the review sample period. Thus place restriction conditions accounted for 88% of the total number of these types of conditions identified and 39% of all conditional bail imposed.

7.4.2.4. Gender of alleged offenders who had non-association and place restrictions imposed at bail in the review sample period

Table 6 details the gender of the persons who had non-association and place restriction conditions imposed upon them at bail by police in the review sample period.

Table 6: Gender of persons who had NAPR conditions imposed upon them at bail by police in the review sample period

	Type of condition			
	Non-association	Place Restriction	Non-association and place restriction	Total NAPR
Male	28	219	5	252
Female	1	41	0	42
Total	29	260	5	294

Source: NSW Police COPS data, May 2002 – May 2004

In the review sample period 97% of those persons who had non-association conditions imposed upon them at bail by police were male and 84% of those persons who had place restriction conditions imposed upon them were male.

7.4.2.5. Aboriginal status of alleged offenders who had non-association and place restrictions imposed at bail in the review sample period

Following a recommendation from the Royal Commission into Aboriginal Deaths in Custody in 1991, NSW police officers have had to record whether or not the person they are charging is an Aboriginal or Torres Strait Islander. The COPS database does not allow the record to be finalised unless this question is answered.

Table 7 details the Aboriginal status of persons who had non-association and place restriction conditions imposed upon them at bail by police in the review sample period.

Table 7: Aboriginal status of persons who had NAPR conditions imposed upon them at bail by police in the review sample period

	Type of condition			
	Non-association	Place Restriction	Non-association and place restriction	Total NAPR
Number Aboriginal males	11	35	2	48
Number Aboriginal females	0	10	0	10
Total Aboriginal	11	45	2	58

Source: NSW Police COPS data, May 2002 – May 2004

In the review sample period 38% of those persons who had non-association conditions imposed upon them at bail by police identified as Aboriginal and 17% of those persons who had place restriction conditions imposed upon them identified as Aboriginal.

Data contained in Table 6 and Table 7 shows that 19% of all males who had non-association and place restriction conditions imposed upon them were Aboriginal and 24% of the female total were Aboriginal.

Overall 20% (58/294) of the non-association and place restriction conditions were imposed on Aboriginal persons in the review sample period.

7.4.2.6. Age of alleged offenders who had non-association and place restrictions imposed at bail in the review sample period

Table 8 details the ages of persons who had non-association and place restriction conditions imposed upon them at bail by police in the review sample period.

Table 8: Age of the persons who had NAPR conditions imposed upon them at bail by police in the review sample period

	Type of condition			
Age*	Non-association	Place Restriction	Non-association and place restriction	Total NAPR
< 18	18	33	1	52
18-25	11	75	3	89
26-40	0	106	1	107
> 41	0	46	0	46
Total	29	260	5	294

Source: NSW Police COPS data, May 2002 – May 2004
*** The age of the NAPR condition recipients refers to their age at the time of bail being imposed by police**

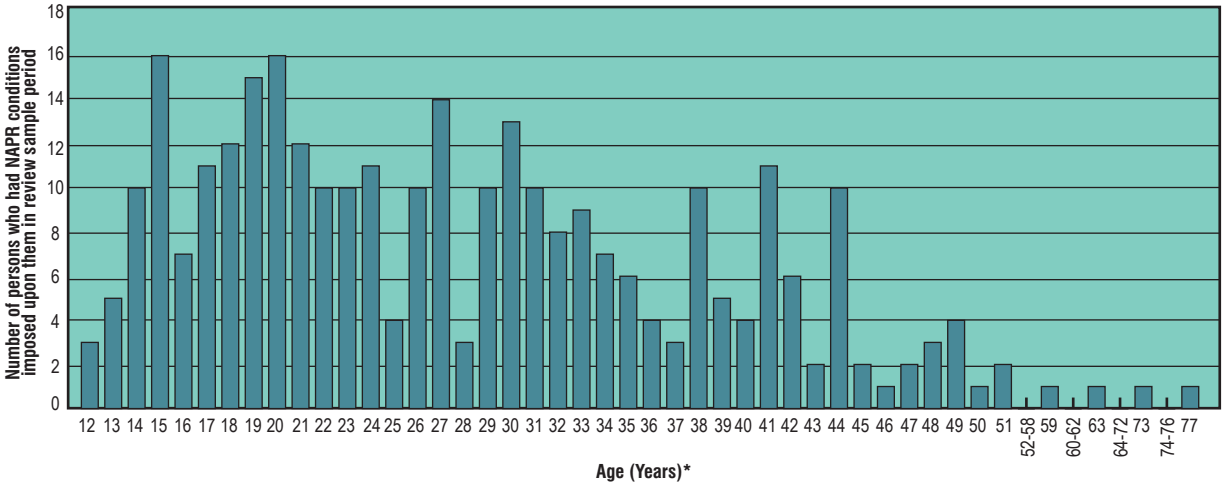
In the review sample period 62% of those persons who had non-association conditions imposed upon them at bail by police were juveniles and 13% of those persons who had place restriction conditions imposed upon them were juveniles.

Overall, juveniles accounted for 18% of persons who had non-association and place restriction conditions imposed on them in the review sample period. Persons 25 years and under accounted for just under 50% of all non-association and place restriction conditions imposed.

Persons between the age of 26–40 account for 36% of non-association and place restrictions conditions imposed upon them.

Analysis of the age distribution and the type of matters for which non-association and place restriction bail conditions were imposed reveals that a significant amount of the conditions imposed on persons aged 26 and above were for matters related to domestic and personal violence as opposed to other crime such as malicious damage, property and drug related crime and street crime.

Figure 1: Age of recipients of NAPR bail conditions imposed by police in the sample review period



Source: NSW Police COPS data, May 2002 – May 2004
*** The age of the NAPR condition recipients refers to their age at the time of bail being imposed by police**

Table 9 details the age of persons who had non-association and place restriction conditions imposed upon them at bail for a purpose other than that of solely protecting the victim or witness.

Table 9: Age of persons who had NAPR conditions imposed upon them at bail by police for a purpose other than that of solely protecting the victim or witness

	Type of condition			
Age*	**Non-association**	**Place restriction**	**Non-association and place restriction**	**Total NAPR**
< 18	18	25	1	44
18 – 25	11	48	3	62
26 – 40	0	47	1	48
> 41	0	15	0	15
Total	29	135	5	169

Source: NSW Police COPS data, May 2002 – May 2004
*** The age of the NAPR condition recipients refers to their age at the time of bail being imposed by police**

Table 9 shows that when bail conditions used solely for the purpose of protecting the victim or witness are removed, the age distribution of persons who received non-association and place restriction bail conditions is significantly different. The age group 26–40 is no longer the predominant group subject to these conditions. Those persons aged 25 years or younger are the main group subject to these conditions.

Eighty-five per cent of non-association and place restriction bail conditions imposed on juveniles were for a purpose other than that of protecting the victim or witness of a crime. In contrast for those in the age group 41 and over, only 33% of these conditions were imposed for a purpose other than protecting the victim or witness of a crime. The findings related to the use of these conditions for the protection of victims and witnesses are further examined at 7.4.13.

7.4.2.7. LAC data

The COPS data included the location of the charging station, LAC and region for each non-association and/or place restriction condition imposed for the review sample period.

Table 10 links LACs' use of non-association and place restriction conditions during the review sample period with the number of residents in each LAC. The LACs are ranked in descending order of use of the conditions per 1000 residents.[217]

Table 10: LACs use of NAPR conditions during the review sample period

Local Area Command	Population	Non-association	Place restriction	Non-association and place restriction	Total NAPR	NAPR per 1000 residents
Kings Cross	19,886	0	13	0	13	39.8
The Rocks	2,017	0	1	0	1	30.2
Darling River	17,223	0	4	0	4	17.7
Newtown	30,377	0	6	0	6	14.0
Cabramatta	52,165	0	11	0	11	12.8
Redfern	33,810	0	7	0	7	12.6
Barwon	34,744	0	7	0	7	12.3
Surry Hills	17,458	0	3	0	3	10.5
Newcastle	48,242	0	8	0	8	10.1
Barrier	30,838	0	4	0	4	7.9
Liverpool	86,695	2	9	0	11	7.7
Mudgee	31,932	0	4	0	4	7.6
Goulburn	42,657	0	5	0	5	7.1
Parramatta	58,979	2	4	0	6	6.2
Penrith	66,208	0	6	0	6	5.5
Deniliquin	36,168	2	1	0	3	5.0
Richmond	109,976	0	7	0	7	5.0
Macquarie Fields	74,433	0	5	0	5	4.9
Castlereagh	12,447	0	1	0	1	4.9
Mid North Coast	109,135	1	7	0	8	4.5
Orana	56,272	0	4	0	4	4.3
Wagga Wagga	72,405	0	5	0	5	4.2
Tweed/Byron	103,389	2	5	0	7	4.1
Oxley	74,094	3	2	0	5	4.1
Canobolas	59,635	0	3	1	4	4.1
Lower Hunter	167,236	1	10	0	11	4.0
Hawkesbury	62,149	0	4	0	4	3.9
Shoalhaven	83,548	0	5	0	5	3.6
Campbelltown	68,226	1	3	0	4	3.6
Coffs/Clarence	122,036	1	6	0	7	3.5
Burwood	89,344	1	4	0	5	3.4
Monaro	71,813	3	0	0	3	3.4
Manning/Grt Lakes	72,663	0	4	0	4	3.3
Fairfield	129,143	0	7	0	7	3.3
Mt Druitt	92,249	0	5	0	5	3.3
Brisbane Water	154,654	1	6	1	8	3.1
Lake Illawarra	144,158	0	7	0	7	3.0
Blacktown	83,496	0	4	0	4	2.9
Chifley	63,308	0	3	0	3	2.9
Far South Coast	63,388	0	3	0	3	2.9
Tuggerah Lakes	129,919	2	4	0	6	2.8
New England	65,521	1	1	0	2	2.8
Green Valley	67,263	2	1	0	3	2.7
Wollongong	113,067	0	5	0	5	2.7

Table 10: LACs use of NAPR conditions during the review sample period

Local Area Command	Population	Non-association	Place restriction	Non-association and place restriction	Total NAPR	NAPR per 1000 residents
Albury	68,785	1	1	0	2	2.7
Quakers Hill	79,330	0	3	0	3	2.3
Harbourside	81,885	0	3	0	3	2.2
Holroyd	85,760	1	2	0	3	2.1
Camden	116,556	0	4	0	4	2.1
Lake Macquarie	177,335	0	6	0	6	2.1
Eastern Beaches	119,730	0	2	2	4	2.0
Sutherland	125,366	0	2	0	2	1.9
Bankstown	164,045	0	4	0	4	1.9
St George	106,163	0	3	0	3	1.7
Northern Beaches	179,874	0	5	0	5	1.7
Blue Mountains	74,317	0	2	0	2	1.6
North Shore	111,831	0	3	0	3	1.6
Flemington	82,264	0	2	0	2	1.5
Waratah	83,411	2	0	0	2	1.5
Cootamundra	43,110	0	1	0	1	1.4
Hurstville	102,245	0	2	0	2	1.2
Eastern Suburbs	52,073	0	1	0	1	1.2
Griffith	54,038	0	0	1	1	1.2
Total	5,063,834	29	260	5	294	3.7

Source: NSW Police COPS data, May 2002 – May 2004

Our analysis of the sample reveals widespread use of non-association and place restrictions conditions in LACs. There were 80 LACs located in NSW at the time of the review. Table 10 shows that 63 of the 80 LACs imposed non-association and place restrictions conditions.

It is interesting to note that busy urban LACs such as Cabramatta and Kings Cross were amongst the highest users of these types of conditions as were LACs with high Aboriginal populations such as Darling River, Barwon, Orana and Barrier LACs.

7.4.2.8. Alleged offences for which non-association and place restriction conditions were imposed at bail in the review sample period

There were 141 types of offences for which alleged offenders were charged and non-association and place restriction conditions were imposed at bail in the review sample period. Table 11 details the most common offences.

Table 11: Most common offences for which NAPR's were imposed at bail by police in the review sample period

Alleged offence	Number of NAPR's imposed at bail for this offence
Common assault	85
Assault occasioning actual bodily harm	34
Possess prohibited drug	26
Resist officer in execution of duty	20
Assault officer in execution of duty	18
Maliciously destroy or damage property <=$2000	18
Contravene apprehended domestic violence order	15

Alleged offence	Number of NAPR's imposed at bail for this offence
Goods in personal custody suspected being stolen (not motor vehicle)	15
Affray	12
Use offensive language in/near public place/school	11
Enter inclosed land not prescribed premises without lawful excuse	11
Resist or hinder police officer in the execution of duty	11
Larceny value <=$2000	10
Shoplifting value <=$2000	10
Behave in offensive manner in/near public place/school	8
Maliciously destroy or damage property	8
B&E bldg commit serious indictable offence (steal) value <= $15000	7
Larceny	7
Shoplifting	7
Enter prescribed premises of any person without lawful excuse	6
Break and enter building (steal) value <= $15000	6
Contravene apprehended violence order	6
Fail to quit premises when refused entry by licensee	6
Possess housebreaking implements	6
Robbery in company	6
>3 people use violence cause fear	5
Break and enter with intent (steal)	4
Fail to comply with direction to move on	4
Riot	4
Stalk/intimidate with intent to cause fear physical/mental harm	4
Total	390*

Source: NSW Police COPS data, May 2002–May 2004
***The number of NAPRs imposed for these offences exceeds the number of NAPRS imposed overall for the review period (294) as many alleged offenders were charged with multiple offences.**

Table 11 shows that common assault was by far the most common offence for which non-association and place restriction type offences were imposed, followed by assault occasioning actual bodily harm and possess prohibited drug. Assault, resisting and hindering police, breach of apprehended domestic violence orders, property, drug and summary offences appear to be the types of offences which predominantly attract this type of condition.

There were two matters identified in the review sample period where the alleged offenders were charged with minor offences only and place restrictions were imposed at bail. These include a case where the person would never have been liable to a place restriction order if convicted, as the offence was not punishable by imprisonment for six months or more.[218] Table 12 details the offences and the conditions imposed in these matters.

Table 12: Matters where the alleged offenders had been charged with minor offences only and NAPR conditions were imposed at bail by police

Offence	Act	Maximum Penalty	Sentence	Non-association or place restriction Condition imposed
Enter inclosed land without lawful excuse Plus license and vehicle related offences[219]	Section 4 *Inclosed Lands Protection Act 1990*	10 penalty units in the case of prescribed premises or 5 penalty units in any other case	$200 monetary fine	Prohibited or restricted from frequenting or visiting a specified residence

Table 12: Matters where the alleged offenders had been charged with minor offences only and NAPR conditions were imposed at bail by police. Cont'd.

Offence	Act	Maximum Penalty	Sentence	Non-association or place restriction Condition imposed
Give false name Plus unlicensed for class offence	Section 9 *Police Powers (Vehicles) Act 1998*	50 penalty units or 12 mths imprisonment, or both	$500 monetary fine License disqualification: 12 mths	Prohibited or restricted from frequenting or visiting within 1000m of Kings Cross Railway Station — The accused is to sign a map indicating the area in which he is prohibited from entering

Source: NSW Police COPS data and information, May 2002–May 2004

The details of the matters listed in Table 12 are provided below:

In October 2002, a woman observed a man placing property into the rear of a vehicle parked outside the home of a deceased estate and contacted police. The police attended and conducted a search of the property. The defendant was located in the rear yard of the premises. He was cautioned and arrested for the offence of trespass. A search of the defendant revealed that he was in possession of two screw drivers. An inspection of the defendant's vehicle also revealed that the vehicle was displaying different registration numbers on the front and rear and that the registration had expired earlier in the year. The defendant was conveyed to the local police station were he admitted driving the unregistered vehicle to the estate. The defendant stated that he attended the estate in an effort to find scraps and rubbish and that the screw drivers in his possession were used to remove the metal scraps from the property. The defendant was subsequently charged with the registration offences, expired licence offences and trespass. As a condition of police bail, the man was prohibited from entering the deceased estate.[220]

*

In April 2004, police were patrolling an area well known to police for prostitution when they observed a vehicle. Police activated their warning signals in order to stop the vehicle for the purpose of a random breath test. The vehicle stopped and police approached the 27 year old man who gave police a name and date of birth, but was not able to produce a driver's licence. Police conducted a check via radio, to which no result was found. Police placed the man under arrest and conveyed him to the local police station. The man gave the vehicle owner's contact details and a contact number. The owner told the police that she had lent the vehicle to the man, but she was not able to provide police with the identity of the accused, stating that she knew him only by his first name and that he stayed with her occasionally. Checks via the Police and RTA systems failed to confirm that the man was a holder of a current driver's licence. The owner of the vehicle subsequently arrived at the police station, where she provided police with the man's real name and birth date. From the time police stopped the vehicle until the time police were provided with his correct details, three hours had lapsed. When questioned about giving police the incorrect details, the accused stated that he did not want to get the owner of the vehicle into trouble. He also stated that he used a false identity to avoid being found that he was unlicenced, believing that police would take his details as being true and correct and allow him to leave without further incident. The defendant was given police bail on the condition that he not enter within 1000 metres of a particular area.[221]

7.4.2.9. Summary of the places from which offenders were prohibited from frequenting in the review sample period

The most common places from which alleged offenders in the review sample were prohibited from visiting or frequenting were:

- the residential premises of the victim/witness
- business premises (including restaurants, service stations, supermarkets and retail stores)
- shopping centres
- central business districts
- railway stations
- hotels/licensed premises/night clubs
- suburbs/townships/streets.

The assessment of all conditional bail imposed for the review sample period revealed 17 place restriction type conditions which made inexact or very broad references to a class of place or district. Some of these conditions were described as follows:

- The defendant is not to enter any retail store within the Camden Local Government Area.
- The defendant is not to enter any retail shopping centres in Eagle Vale, Minto, Ingleburn and Macquarie Fields.
- The accused is not to enter the inclosed land or residences of any Anglican Church within the township of Wagga Wagga.
- The accused will not enter any retail store unless in the company of her mother.
- The accused is not to enter any Kmart store within NSW.
- The accused is not to enter NSW until the day of attending court.
- The defendant is not to attend any licensed premises where any of the victims may be.

These conditions were not included in the total number of place restrictions imposed for the review sample period as only those place restriction conditions that satisfied the requirements of the Act were included.

We also identified that five of the place restriction type conditions recorded by police in the screens developed for the new provisions were described in very broad or vague terms. These conditions were also not included in the total number of place restrictions imposed for the review sample period. These conditions were described as follows:

- The defendant is not to approach or enter any points of international departure.
- The defendant is prohibited from frequenting or visiting any area owned and or operated by the State Rail without being in possession of a valid rail ticket.
- The alleged offender was advised that they were prohibited from approaching within 100 metres of any residence/premises at which the victim may reside or work.
- The alleged offender was not to enter any HMV Music Stores.
- The alleged offender was prohibited from frequenting or visiting any vacant residential premises within a particular area without first obtaining a tenancy agreement or lease.[222]

7.4.2.10. Summary of the people offenders were prohibited from associating with in the review sample period

Alleged offenders were prohibited from associating with co-offenders in all the non-association type conditions imposed during the review sample period. Some of the conditions contained exceptions such as:

- an alleged offender was prohibited from associating with a co-offender except when at his home address
- an alleged offender was prohibited from associating with a particular co-offender except during the course of their employment at a particular place
- an alleged offender was prohibited from associating with a number of co-offenders, with the exception of his brother
- an alleged offender was prohibited from associating with co-offenders when within 100 metres of a particular residence.

7.4.2.11. Conditions imposed where the offences appeared to be 'gang type offences' in the review sample period

Applying the definition that a 'gang type' offence involves evidence of criminal activity involving two or more people to those 294 matters where non-association and place restriction conditions were imposed at bail we found that 64 (22%) of matters could be classified as involving 'gang type' offences.

Table 13 details the non-association and place restriction conditions imposed at bail where the offence/s appeared to be 'gang type' offences in the review sample period.

Table 13: NAPR conditions imposed at bail by police where the offence/s appeared to be 'gang type' offences in the review sample period

	Non-association	Place restriction	Non-association and place restriction	Total NAPR
Number of NAPR conditions imposed for 'gang type' offences	25	34	5	64
Number of NAPR conditions imposed for 'other' offences	4	226	0	230

Source: NSW Police COPS data and information, May 2002–May 2004

Table 13 shows that 'gang type' offences accounted for 64 (22%) of the total number of non-association and place restriction conditions imposed at bail in the review sample period.

All of the matters where both a non-association and place restriction were imposed on alleged offenders in the review sample period were imposed for offences that appeared to be 'gang type offences'. Thirty-four (13%) of the place restriction conditions imposed were imposed for offences that appeared to be 'gang type offences'. Twenty-five (86%) of the 29 non-association conditions imposed for the review period were imposed for offences that appeared to be 'gang type' offences. The details of three of these matters are provided below:

> *In August 2003, a 17 year old male person and three co-offenders left their high school in a motor vehicle. During this car trip, one of the co-offenders suggested that they 'roll' someone. All of the occupants of the motor vehicle agreed to this, as they wanted money to purchase lunch. Two of the co-accused exited the vehicle and walked toward a car park. At this location, they robbed the victim of $21.60, a weekly train ticket and an 'X Com' phone card. During this robbery offence, the victim was punched to the face three or four times by one of the co-accused and was struck twice to the top of the head by another co-accused. The offenders then fled the scene running back to the location of the motor vehicle. Whilst driving back to the high school, all four within the motor vehicle had a conversation in relation to the robbery offence. Upon returning to the high school, the four offenders used the proceeds of the robbery to purchase lunch at the school canteen. When arrested, the young person admitted to leaving school with three co-offenders on the day of the incident. The young person made further partial admissions as to being in the motor vehicle and having knowledge of the offence. The young person stated during the interview that he did not have complete knowledge of the offence and that he did not eat the food purchased with the proceeds of the offence. The young person was then charged with the offence of concealing a serious indictable offence of another person. One of the conditions of bail was that he not associate with two of the known alleged co-offenders.*[223]
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> *In August 2003 a 17 year old indigenous male was alleged to be the driver of a vehicle in a matter involving theft from a computer shop. At 3.10 am in August 2003, four people were captured on digital video surveillance standing at the front of a computer store. One of the persons was seen throwing an object at the front lower glass panel window of the shop. This caused the window to shatter, but not break. The four persons then proceeded to kick the glass panel until it broke, allowing them access. All four persons proceeded to enter the store. The owner of the store, who resided directly above the shop, heard the sound of the glass breaking and observed one of the offenders exiting the shop carrying property from the store. The owner gave chase, but failed to apprehend the person, and he was subsequently able to make his way back to the motor vehicle. A short time later, the three remaining persons within the shop exited the shop through the smashed glass panel. They were observed carrying objects out of the shop and leaving in a motor vehicle, driven by another person. The owner of the premises contacted police and police circulated the details of the motor vehicle. The vehicle was then located and police removed all persons from the vehicle. A subsequent search of the vehicle located a number of computers. The young persons were arrested and conveyed to a police station, where they all refused to participate in interviews. Police alleged that the driver of the motor vehicle at the time of, and immediately following the break, enter and steal offence was the 17 year old indigenous male. Although the police did not allege that the young person had entered the computer store, they argued that the young person acted in common purpose with all other co-accused to carry out the break, enter and steal. As a condition of bail, the young person entered into an agreement to comply with specified requirements restricting the person from associating with the alleged co-offenders, with the only exception being contact with one of the alleged co-offenders whilst in the course of employment.*[224]
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> *In October 2002, a number of young males were seen to get into a car. Subsequent inquiries in relation to this vehicle revealed that it was stolen. A security guard later sighted the vehicle with three young persons, including a 15 year old male (the defendant) standing near the car. The security guard apprehended two of the alleged offenders, including the 15 year old, however, a third offender fled the scene on foot. An initial search of the vehicle revealed a large quantity of property believed to have been stolen, which included television sets and hi fi equipment. Both young persons declined to be interviewed and were charged with property related offences. One of the conditions of bail for the 15 year old male was that he not associate or contact the alleged known co-offender.*[225]

7.4.2.12. Breach of non-association and place restriction conditions imposed at bail

In order to assess how many non-association and place restriction conditions imposed were subsequently breached we examined the criminal history records on COPS of each person who had these conditions imposed in the review sample period. Table 14 details the number of non-association and place restriction conditions breached in the review sample period.

Table 14: Breach of NAPR conditions imposed at bail by police in the review sample period

	Non-association	Place restriction	Non-association and place restriction	Total NAPR
Number of NAPR conditions breached	5	28	0	33
No record of breach recorded	24	232	5	261

Source: NSW Police COPS data and information, May 2002 – May 2004

Table 14 shows that 33 (11%) of the conditions imposed in the review sample period were subsequently recorded as breached.

This suggests a reasonably high rate of compliance amongst alleged offenders with the conditions imposed given that it appears most offenders (89%) did not have a breach of their condition detected by police. It should be noted, however, that this data does not take account of those occasions where the breach of conditions was not identified.

Non-association conditions were recorded as being breached at a greater frequency than place restriction conditions. Five (17%) of the non-association conditions imposed in the review period were breached. Twenty-eight (11%) of the place restriction conditions were breached in the review period.

Details of the circumstances of a typical breach of a non-association condition are provided below:

> *In September 2003, police received numerous phone calls concerning a car being erratically driven in the vicinity of a reserve. The police attended the location and spoke with the young person along with three other people. As a result, all four young people were arrested, cautioned and conveyed to the police station, where they were placed into custody. A check of police records revealed that the young person was currently on bail conditions not to associate with one of the young males also at the scene, as well as a condition to be in the company of his father at all times. The young person was spoken to, in the presence of his father, where he admitted driving the unregistered vehicle without a current drivers licence. He was arrested for breach of bail.*[226]

Details of the circumstances of a typical breach of a place restriction condition are provided below:

> *In June 2002, a young male person was issued with bail conditions. The conditions prohibited the young person from entering a particular railway station (except for transit to another railway station) as well as entering a particular area. In November 2002, police were patrolling the railway station in question when they approached the young person on the main concourse and asked him to produce his valid rail ticket. The young person stated that he did not have a ticket and could not give a reason as to why. Police then checked via radio as to whether the young person was currently wanted and it was revealed that he was in breach of his bail conditions. Police informed the young person that if he left the railway station he would be breaching his bail, as he was only to be there on transit to another railway station. The young person stated that he would return home, however, police then watched him exit the railway station. Police followed the young person, but were unable to apprehend him as he ran off. Later the same day, police on patrol noticed the young person within the area from which he had been banned. He was subsequently arrested for breaching his bail conditions.*[227]

Table 15 details the age of the persons who were identified as breaching their non-association and place restriction bail conditions in the review sample period.

Table 15: Age of the persons who breached their police imposed NAPR bail conditions in the review sample period

Age*	Breach of non-association condition	Breach of place restriction condition	Breach of non-association & place restriction condition	Total NAPR breached	% of total NAPR for age group
< 18	3	7	0	10	19%
18 – 25	2	7	0	9	10%
26 – 40	0	11	0	11	10%
> 41	0	3	0	3	7%

Source: NSW Police COPS data, May 2002 – May 2004
*** The age of the NAPR condition recipients refers to their age at the time of bail being imposed by police**

Juveniles were the most likely age group to be identified by police as having breached their bail conditions. When comparing the general age data of those persons who had non-association and place restrictions conditions imposed upon them (see Table 8) and the breach data, juveniles accounted for 19% of those breaches identified, almost twice the 'breach' rate of the next age group (18-25).

Similarly, indigenous people were arrested for breaching their bail conditions on 11 occasions. This accounted for 19% of the 58 non-association and place restriction conditions imposed on Aboriginal persons in the review sample period (see Table 7) and one third of all reported breaches of non-association and place restriction bail conditions.

Table 16 details the LACs in which breaches of non-association and place restriction conditions were identified in the review sample period.

Table 16: LACs in which breaches of NAPR conditions were identified in the review sample period

LAC	Breach of non-association	Breach of place restriction	Breach of non-association and place restriction	Total NAPR breached
Kings Cross	0	3	0	3
Redfern	0	3	0	3
Deniliquin	2		0	2
Fairfield	0	2	0	2
Macquarie Fields	0	2	0	2
Tuggerah Lakes	2	0	0	2
Bankstown	0	1	0	1
Barwon	0	1	0	1
Brisbane Water	0	1	0	1
Cabramatta	0	1	0	1
Canabolos	0	1	0	1
Chifley	0	1	0	1
Coffs/Clarence	0	1	0	1
Far South coast	0	1	0	1
Harbourside	0	1	0	1
Lake Illawarra	0	1	0	1
Liverpool	0	1	0	1
Manning/Great Lakes	0	1	0	1
Mid-North Coast	1	0	0	1
Mudgee	0	1	0	1
Newcastle	0	1	0	1
Newtown	0	1	0	1
North Shore	0	1	0	1
Shoalhaven	0	1	0	1
The Rocks	0	1	0	1
TOTAL	5	28	0	33

Source: NSW Police COPS data, May 2002 – May 2004

Table 16 shows that just over half (17) of the breaches were identified in Metropolitan LACs. The inner-city LACs of Kings Cross and Redfern registered the highest detection rate for breaches. It is interesting however that no metropolitan LACs identified breaches of non-association conditions. All of the breaches of non-association conditions were identified in regional areas.

7.4.2.13. Place restriction conditions imposed for the protection of the victim

When examining the content and context of the non-association and place restriction conditions imposed by police in the review sample period it became apparent that a significant number of place restriction conditions had been imposed at bail in order to secure the protection of the victim or witness of a crime.[228] Table 17 details the place restriction conditions imposed for the protection of the victim or witness in the review sample period.

Table 17: Place restriction conditions imposed for the protection of the victim or witness in the review sample period

Reason for imposition of place restriction condition	Number of Place restrictions	Proportion of the total number of place restrictions imposed
Victim/witness protection	124	48%
Other*	136	52%

Source: NSW Police COPS data, May 2002 – May 2004
***The category 'Other' includes those place restrictions conditions imposed for reasons other than for victim/witness protection.**

It was identified that these conditions were imposed in the following circumstances:

- where criminal charges had been laid and an AVO application was being made concurrently by police. The bail conditions imposed mirrored the terms of the AVO and appeared to be put in place to reinforce the protection of the victim
- where criminal charges had been laid but no AVO was in place or was being sought. The bail conditions in these circumstances may have been used instead of an AVO
- where an application for a telephone interim order had been hindered by some operational issue or refused and bail had apparently been imposed as an interim measure.

These factors were identified both in those place restrictions recorded by police in the 'place restriction screens' developed for the new provisions and in the additional place restrictions conditions identified by us in the remaining conditional bail matters in the review sample period.

This finding has implications for the following:

- the development of guidelines for consideration when imposing non-association and place restrictions at bail
- police use of place restriction conditions for the protection of victims and witnesses where other measures might be more appropriate.

Details of two circumstances where an AVO was made concurrently with criminal charges and conditional bail are provided below:

> *At 7.20 am in February 2003, the defendant was released on conditional bail, which included a place restriction. A TIO was also served upon the defendant, as a result of an earlier domestic violence incident involving the victim. The defendant entered into a conditional bail undertaking that corresponded with the conditions of the TIO. At 7.50am on the same day, the same victim attended the police station, visibly out of breath and shaken. She had swelling to her mouth area and dried blood around her lips. The victim informed the police that the defendant had been around to her unit. The defendant allegedly had climbed the balcony of their home unit. The victim, fearing the neighbours may be awoken, reluctantly let him in. Upon entering the unit, the defendant rushed towards the victim and punched her in the mouth area with a clenched right fist. As a result of this punch, the victim has received a large cut on the upper internal lining of the mouth and swelling around the left upper lip area. The defendant then said, 'Thanks a lot for getting me in trouble.' The defendant then blocked the doorway of their unit, preventing the victim from leaving. However, the victim managed to elude the defendant and leave the unit. The defendant then chased the victim all the way from their unit to the police station. Along the way, the defendant caught up with the victim and pleaded with the victim not to report him. The defendant was subsequently arrested for breaching his bail conditions and contravening an AVO.*[229]
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> *

> *In January 2004, the victim, her daughter and her boyfriend were sitting at the dining room table at their home address. When the defendant entered the residence, the victim (the daughter of the defendant) told the defendant to 'get out.' The defendant replied with, 'ring the police and get me locked up,' before walking into another room. A short time later the defendant went into the lounge room and removed a few pictures from the wall that belonged to him. He was yelling and screaming at the victim. Subsequently, the defendant opened the bedroom door and said to the victim, 'I am gonna kill you' before walking off. The victim replied with, 'I am going to call the police.' The victim, her daughter and boyfriend waited until the defendant was out of sight before leaving the house and attending the police station to report the matter to police. At the time of the incident, an*

AVO was in existence between the two persons. The AVO stated that the defendant must not enter the premises at which the victim resided. Furthermore, the defendant also had conditional bail in place which restricted the defendant from frequenting or visiting the victim's residence. Police subsequently arrested the defendant for contravening an AVO as well as breaching his bail conditions.[230]

Details of a matter where criminal charges had been laid but no AVO was in place are provided below:

In April 2005 a man and a woman arrived home from drinking with friends. Whilst at home, an argument ensued and the man punched the woman in the face with a clenched fist, causing the woman to fall to the ground. The woman then sat on the lounge next to the man, whereupon another argument developed and the man again punched the woman in the face three times. The woman attempted to stand up, but the man grabbed her and pulled her back onto the lounge. The woman then ran to the front door, being pursued by the man, who pushed her on the shoulders saying, 'No you're not going anywhere.' The woman yelled out to her neighbour, who came to the woman's driveway and attempted to render assistance. After a short verbal argument with the man, the woman went to the neighbour's house across the road. After several minutes, the man knocked on the door of the neighbour's house and when let in verbally abused the victim. After a verbal argument with the neighbour, the neighbour closed to door. The man knocked on the door several times, and then finally left, whereupon police were called. Police obtained a statement from the woman, who stated that she did not want to make an application for an AVO. She also stated that she did not wish to have the man charged with the assault. However, police charged the man with assault and gave him bail conditions on the proviso that he not enter the premises of the victim.

About 10 minutes after the man was released from police custody, the man's father attended the police station and informed police that the man refused to return home with him and was on his way to the victim's residence. Police attended the woman's premises and prior to entering, heard persons arguing within the house. Police knocked on the front door, which was answered by the man. He was arrested and conveyed to the police station where he was placed into custody and found to have failed to comply with bail conditions.

In June 2003 the assault charge was heard at the local court. The magistrate imposed an AVO on the man, in effect for 18 months. The man was also found guilty of assault and received a section 9 bond, with one of the conditions being that the man comply with the AVO.[231]

Details of a matter where a TIO was applied for but failed are outlined below:

In February 2004, the victim was at her residence. The victim had just got out of the shower, when she saw the defendant, her estranged partner, sitting on her lounge chair in the living room with their daughter. A short time later the defendant left the living area and walked down stairs. The victim followed the defendant, thinking that he was leaving the premises. The defendant said to the victim, 'you are a stupid bitch. You have broken my heart, keeping me from my children.' The victim said, 'I haven't done that.' The defendant grabbed the victim around the neck with both of his hands and started to choke her. The defendant then pushed the victim up against the wall, released his grip from the victim and pushed his way into the victim's premises. The victim contacted police and informed them of the incident. As the victim was on the phone to the police, the defendant ran out of the unit. Police contacted the defendant and subsequently informed the defendant that he was under arrest for assault of the victim. Police applied for a Domestic Violence Telephone Interim Order, but the magistrate declined it. They subsequently applied for an AVO on the victim's behalf. On granting bail the police imposed a place restriction condition prohibiting the defendant from frequenting or visiting the victim's premises.[232]

7.4.3. Comparative sample period

In order to assess the impact of the new bail provisions on police use of non-association and place restriction conditions at bail we also examined COPS bail data in the two year period prior to the introduction of the Act.

This involved the examination of a comparative sample of COPS bail data for all NSW charging stations for 12 days (the last Friday of every second month) across the comparison period (May 2000 to May 2002).[233] In the COPS data provided for this period there was no distinction made in the data as to whether conditional bail contained non-association and/or place restriction type conditions. Thus to distinguish these conditions we examined each condition imposed in this comparison sample period and identified those conditions that were non-association or place restriction type conditions.

This sample period will be referred to as the 'comparative sample period'.

Table 18 details the non-association and place restriction type conditions identified in the comparative sample period and what percentage they accounted for in the total conditional bail imposed in the period.

Table 18: NAPR type conditions identified in the comparative sample period

	Type of condition			
	Non-association	Place Restriction	Non-association and place restriction	Total NAPR
Number of NAPR type conditions identified	22	262	12	296
Percentage of all conditional bails imposed in the comparative sample period	3%	41%	2%	47%

Source: NSW Police COPS data, May 2000 – May 2002

Table 19 compares the non-association and place restriction conditions we identified in our examination of the data provided for the review sample period and the comparative sample period.

Table 19: Comparison figures of NAPR conditions imposed by police in the sample periods

	Review sample period (May 2002–May 2004)		Comparative sample period (May 2000–May 2002)	
Type of Condition	Conditions imposed	Percentage of all conditional bail for the review sample period	Conditions imposed	Percentage of all conditional bail for the comparative review period
Non-association	29	4%	22	3%
Place restriction	260	39%	262	41%
Non-association and Place restriction	5	1%	12	2%
Total NAPR	294	44%	296	47%

Source: NSW Police COPS data, May 2000 – May 2002 and May 2002 – May 2004

When comparing the data for the two sample periods it was found that the use of non-association and place restriction conditions by police when granting bail had remained remarkably static. These conditions accounted for 44% of all conditional bail in the review sample period and 47% of all conditional bail in the earlier comparative sample period.

7.4.3.1. Comparative analysis of the characteristics of the alleged offenders

Table 20 details the characteristics of the alleged offenders in the review sample period and the comparative sample period.

Table 20: Comparison figures of the characteristics of alleged offenders who had NAPR conditions imposed upon them at bail by police in the sample periods

	Review sample period (May 2002 – May 2004)		Comparative sample period (May 2000–May 2002)	
Characteristics of alleged offenders	NAPR conditions imposed	Percentage of all conditional bail for the review sample period	NAPR type conditions imposed	Percentage of all conditional bail for the comparative review period
Males	252	86%	238	80%
Females	42	14%	57	19%
Aboriginal Status	58	20%	48	16%
Juveniles*	52	18%	45	15%

Source: NSW Police COPS data, May 2000 – May 2002 and May 2002 – May 2004
*** The age of the NAPR condition recipients refers to their age at the time of bail being imposed by police.**

When comparing the age, Aboriginal status and gender of the persons imposed with non-association and place restriction conditions in the review sample period and the comparative sample period we found the following:

- there was an increase in the percentage of males who received non-association and place restriction bail conditions from 80% of all non-association and place restriction bail conditions in 2000 to 2002 to 86% in 2002 to 2004
- there was an increase in the percentage of Aboriginal persons receiving non-association and place restriction bail conditions from 16% to 20%
- there was an increase in the percentage of juveniles who received non-association and place restriction bail conditions from 15% to 18%.

7.4.3.2. Comparative analysis of the LAC and region data

When comparing the LAC and region data on the use of non-association and place restrictions in the review sample period and the comparative sample period we found that less LACs used non-association and place restriction conditions in the review period (63) when compared with the comparative sample period (73). There were some variations in individual commands.[234]

7.4.3.3. Comparative analysis of the conditions imposed for 'gang type' offences

When comparing the non-association and place restriction conditions imposed for 'gang type' offences in the review sample period and the comparative sample period we found that there was a decline in the number of non-association and place restriction bail conditions imposed for 'gang-type offences' from 73 (25%) in 2000 to 2002 to 64 (22%) in 2002 to 2004.

7.4.3.4. Comparative analysis of breaches of non-association and place restriction conditions

When comparing the non-association and place restriction conditions breached in the review sample period and the comparative sample period we found that there was a slight increase in the overall number of conditions breached from 30 (10%) in 2000 to 2002 to 33 (11%) in 2002 to 2004.

7.4.3.5. Comparative analysis of non-association and place restriction conditions imposed for the protection of the victim or witness

When comparing the non-association and place restriction conditions imposed for the protection of the victim or witness in the review sample period and the comparative sample period we found that there was a decrease in the use of these conditions in these circumstances from 152 (52%) in 2000 to 2002 to 123 (41%) in 2002 to 2004.

7.4.4. The broadcasting of information about person(s) named in a non-association order or bail condition

The Act also makes it an offence to publish or broadcast information as to the identity of any person with whom an offender is prohibited from associating pursuant to bail conditions imposed under this provision.[235]

Information obtained from NSW Local Courts and BOCSAR indicates that there have been no prosecutions of such offences during the review period.

7.5. Conditions of parole as to non-association and place restriction

7.5.1. *Crimes (Administration of Sentences) Act 1999*

An amendment by the Act to the *Crimes (Administration of Sentences) Act 1999* enables the State Parole Authority to impose non-association and place restriction conditions as part of a parole order.[236]

The State Parole Authority advised that there is no data available on the non-association and place restriction conditions imposed during the review period (May 2002 to May 2004), or any other conditions for that matter, as there were no systems in place during that time that enabled the Board to track conditions.[237]

Any conditions that were imposed were documented manually on the individual files.

The Director of the State Parole Authority made some general observations for the period:

> *The Parole Board does from time to time add special conditions to a parole order relating to 'association' and more regularly 'place restrictions'. As an example, the Board has on at least two occasions in the last two years*

added a condition to an offender's parole order that they were not to contact or associate with any person who was a member of a motor cycle gang….More regularly the Board will make a special condition eg 'that an offender is not to travel within 100 kilometres of Broken Hill without the prior permission of his supervising Probation and Parole Officer…

If an estimate is of any value, I would say that the Board would be unlikely to make special conditions relating to 'associations' or 'place restrictions' on no more than twelve (12) occasions each year.[238]

There is no suggestion from the State Parole Authority that there has been any increase in the imposition of non-association or place restriction conditions during the review period.

Indeed, as was outlined in the Implementation Chapter, the State Parole Authority has indicated that there has been no change made by the State Parole Authority to the policies and procedures related to the imposition of conditions at parole since the introduction of the Act. The 'Standard Conditions' and 'Additional Conditions' form have not been changed in response to the introduction of the Act and there is no reference to the new non-association and place restriction provisions in any of the department's documentation related to parole.

There was also no change made during the review period to the Offender Integrated Management System (OIMS) to enable parole conditions imposed to be recorded, nor was there any publication or training undertaken regarding the new provisions.

In summary the introduction of the Act appears to have had no impact on the imposition of non-association and place restriction conditions as part of parole by the State Parole Authority.

However, the State Parole Authority did advise that a module of the OIMS has been put into operation recently which now enables the Board to track such conditions.

7.6. Conditions of home detention as to non-association and place restriction

7.6.1. *Crimes (Administration of Sentences) Act 1999*

An amendment to the *Crimes (Administration of Sentences) Act 1999* enables the conditions of home detention to include non-association and place restriction provisions.[239]

As mentioned in previous chapters the State Parole Authority was already able to impose non-association and place restriction type conditions when imposing a home detention order.[240] The State Parole Authority advised that the existing 'standard conditions' were used to impose non-association and place restriction conditions during the review period.

DCS and the State Parole Authority have advised that no amendments were made to the existing forms related to home detention to explicitly incorporate the provisions introduced by the Act.[241] There is minimal reference to the new non-association and place restriction provisions in the department's documentation related to home detention and in any publication or training provided to staff on the new provisions.

DCS advised that there is no data available on the non-association and place restriction conditions imposed when ordering home detention during the review period (May 2002 to May 2004), or any other conditions for that matter, as there are no systems in place that enable the department to track conditions. There was also no change made during the review period to the OIMS to enable conditions imposed when ordering home detention to be recorded.

Any conditions that were imposed were documented manually on the individual files.

Thus it appears unlikely that many, or perhaps any of the non-association or place restriction conditions imposed when ordering home detention since the Act's implementation have been imposed with reference to the Act.

7.7. Conditions of leave as to non-association and place restriction

7.7.1. *Crimes (Administration of Sentences) Act 1999*

An amendment by the Act to the *Crimes (Administration of Sentences) Act 1999*[242] enables the conditions of a local leave permit for inmates issued by DCS to include non-association and place restriction provisions (s26A).[243]

The department had previously been able to impose non-association and place restriction type conditions when granting a local leave permit.[244] The regulations enable the Commissioner to set standard and additional conditions.[245]

DCS has advised that no amendments were made to the existing forms related to local leave permits to explicitly incorporate the provisions introduced by the Act and there is no reference to the new non-association and place restriction provisions in any of the department's documentation related to local leave permits.[246]

It also appears that apart from an article published in the *Corrective Services Bulletin* in 2002 referring to the new legislation, there has been no general instruction or training provided to staff on the new provisions. There was also no change made during the review period to the OIMS to enable conditions imposed when issuing local leave permits to be recorded.

Thus it appears unlikely that many, or perhaps any non-association or place restriction conditions imposed when issuing local leave permits since the Act's implementation have been imposed with reference to the Act.

7.7.2. *Children (Detention Centres) Act 1987*

An amendment by the Act to the *Children (Detention Centres) Act 1987* enables the conditions of leave for juveniles at detention centres to include non-association and place restriction provisions.[247]

As mentioned earlier the Director-General of DJJ had previously been able to impose non-association and place restriction type conditions when granting leave to a detainee.[248]

The department has advised that since the introduction of the Act there has been no changes to the policies and procedures related to the imposition of conditions at leave. No change has been made to the 'Order for Leave' forms and there is no reference to the new non-association and place restriction provision in any of the department's documentation related to leave.

There was also no change made during the review period to the Client Information Data System (CIDS) to enable leave conditions imposed to be recorded nor was there any publication or training provided to staff on the new provisions.

The department advised that there was no data available on the non-association and place restriction conditions imposed during the review period (May 2002 to May 2004), or any other conditions for that matter, as there are no systems in place to enable the department to track conditions.[249]

Any conditions that were imposed were documented manually on the individual files.

7.7.2.1. Examination of file sample

For the purposes of the review, we examined a sample of DJJ files of those persons eligible for leave during the review period.

DJJ advised that CIDS was not equipped to record which detainees were granted leave but CIDS could identify detainees eligible for leave, within a stated period.[250]

DJJ were able to identify that there were 2915 detainees in the state eligible for leave during the review period (May 2002 to May 2004).

We randomly selected a small sample of those files from across the review period for examination. We examined 28 detainee's files (1%) that were identified from the system as being eligible for leave during that period.

The detainees selected were located in detention centres throughout the state and included one female detainee and 27 male detainees. Of those 28 detainees randomly selected 10 were Aboriginal males (36%).

Five of those 28 detainee files (18%) examined had been granted leave in the review period.

All of those granted leave had conditions imposed upon them.

One of those detainees had place restriction conditions imposed upon him. Those conditions were detailed in the 'Other Special Conditions' section of the s24 'Order for Leave' form and read as follows:

- *Not to enter CBD Fairfield or Cabramatta*
- *Not to enter Fairfield or Cabramatta railway station.*

There was no reference to the new non-association and place restriction provisions on the 'Order for Leave' form or in the file.

7.7.2.2. Impact of legislation

Based on the information available it appears unlikely that many, or perhaps any non-association or place restriction conditions imposed when granting orders for leave within Juvenile Justice Centres have been imposed with reference to the Act.

Endnotes

[161] s17A, *Crimes (Sentencing Procedure) Act 1999.*
[162] As mentioned in Chapter 2 information on the use of non-association and place restriction orders in non-GLC Children's Courts in the review period was not provided. Children's court data in non-GLC courts is collected by the Department of Juvenile Justice. The Department was unable to provide data on non-association and place restriction orders imposed in non-GLC courts in the review period as it did not have the orders programmed as an 'outcome category' on its system. See related recommendation 2(i).
[163] Information provided by NSW Local Courts and BOCSAR. BOCSAR provided details of a further matter where it had been recorded that an order had been imposed at Wellington Local Court. However an examination by this Office of the transcript and court papers of the matter revealed that a data recording error had occurred and an order had not been imposed in this instance. This was confirmed by the court and BOCSAR. BOCSAR advised that there were no orders imposed in higher courts.
[164] These orders were imposed at Raymond Terrace and Casino Courts.
[165] s17A(4) Part 2A of the *Crimes (Sentencing Procedure) Act 1999*.
[166] Case No.14. Details obtained from the COPS event narrative and NSW Local Court papers.
[167] Rising of the court is a type of sentence where the court orders the defendant to 'remain in court until the next adjournment'. This is a symbolic way of saying that an offender is convicted but no formal sentence is imposed. Such an order is reserved for the least serious of offences.
[168] Case No.5. Details obtained from the COPS event narrative and NSW Local Court papers.
[169] Case No.7. Details obtained from the COPS event narrative and NSW Local Court papers.
[170] Case No.3. Details obtained from NSW Local Court papers.
[171] Case No.4. Details obtained from the COPS event narrative and NSW Local Court papers.
[172] Case No.17. Details obtained from NSW Local Court papers.
[173] Case No.12. Details obtained from NSW Local Court papers.
[174] Case No.13. Details obtained from NSW Local Court papers.
[175] Case No.17. Details obtained from the COPS event narratives and NSW Local Court papers.
[176] Case No.13. Details obtained from the COPS event narratives and NSW Local Court papers.
[177] s12, *Crimes (Sentencing Procedure) Act 1999.*
[178] Seven (7) of the bonds were imposed according to s9, *Crimes (Sentencing Procedure) Act 1999;* three (3) of the bonds were imposed according to *s* 33(1)(b), *Children (Criminal Proceedings) Act 1987*; and one (1) bond was imposed according to s(10)(1)(b), *Crimes(Sentencing Procedure) Act 1999.*
[179] s33(1)(e), *Children (Criminal Proceedings) Act 1987.*
[180] *Newcastle Herald*, Saturday 31 March 2001, p. 5.
[181] *NSWPD,* 15 November 2001, p. 18755.
[182] Interview with magistrate, July 2003.
[183] Interview with magistrate, July 2003.
[184] Interview with magistrate, July 2003.
[185] Interview with police prosecutor, December 2005.
[186] Interview with police prosecutor, December 2005.
[187] s100A(1), *Crimes (Sentencing Procedure) Act 1999.*
[188] s100A(2), *Crimes (Sentencing Procedure) Act 1999.*
[189] Case No.1. Details obtained from the COPS event narratives and NSW Local Court papers.
[190] Case No.6. Details obtained from the COPS event narratives and NSW Local Court papers.
[191] Ultra vires means without authority. Thus in imposing such an order the magistrate would be acting beyond their lawful power.
[192] Case No.15. Details obtained from the COPS event narratives and NSW Local Court papers.
[193] Case No.18. Details obtained from the COPS event narratives and NSW Local Court papers.
[194] s100B, *Crimes (Sentencing Procedure) Act 1999.*
[195] Case No.2. Details obtained from the COPS event narratives and NSW Local Court papers.
[196] s100C, *Crimes (Sentencing Procedure) Act 1999.*
[197] s100D, *Crimes (Sentencing Procedure) Act 1999.*
[198] Case No.1.
[299] Case No.6.
[200] Case No.13.
[201] s100E, *Crimes (Sentencing Procedure) Act 1999.*
[202] s100F, *Crimes (Sentencing Procedure) Act 1999.*
[203] s100G, *Crimes (Sentencing Procedure) Act 1999.*
[204] s100H, *Crimes (Sentencing Procedure) Act 1999.*
[205] s2(1), *Criminal Appeal Act 1912.*
[206] s51A, *Crimes (Sentencing Procedure) Act 1999.*
[207] s36B, *Bail Act 1978.*
[208] s36(2)(a) *Bail Act 1978,* states that 'the accused person enter into an agreement to observe specified requirements as to his or her conduct while at liberty on bail, other than financial requirements.'
[209] Clause 13 of the Bail Regulation 1999.
[210] See 9.2.1 for recommendations related to these findings.
[211] An authorised police officer is an officer with the rank of sergeant or higher. 'Authorised officer' is the term used throughout the *Bail Act 1978* to refer to such a police officer.
[212] s36B, *Bail Act 1978.*
[213] s36(2)(a), *Bail Act 1978* which states that 'the accused person enter into an agreement to observe specified requirements as to his or her conduct while at liberty on bail, other than financial requirements'.

[214] 'Amendments to the *Bail Act 1978*' *Tips and tricks: Online Newsletter for COPS and ICOPS*, Issue 38, July 2002.

[215] The days selected included Friday the 28/06/02, 30/08/02, 25/10/02, 27/12/02, 28/02/03, 25/04/03, 27/06/03, 29/08/03, 31/10/03, 26/12/03, 27/02/04 and 30/04/04. Friday was selected as it known to be high volume day for bails at NSW police stations.

[216] A telephone survey of 34 LACs highlighted that, whilst non-association and place restriction conditions were being used as a condition of a person's bail, they were not necessarily being imposed under the new provisions; rather they were being imposed under the general powers to make bail conditions provided under s36(2)(a) of the *Bail Act 1978.*

[217] The figures are adjusted for the review sample period.

[218] Case No. 21.

[219] These offences include use uninsured motor vehicle; use unregistered vehicle on road area; license expired 2 years or more and driver of vehicle displaying unauthorised number plates.

[220] Case No. 21. Details obtained from the COPS event narratives.

[221] Case No. 22. Details obtained from the COPS event narratives.

[222] The imposition of these imprecise conditions is further discussed in 9.3.6.

[223] Case No. 23. Details obtained from the COPS event narratives.

[224] Case No. 24. Details obtained from the COPS event narratives.

[225] Case No. 25. Details obtained from the COPS event narratives.

[226] Case No. 26. Details obtained from the COPS event narratives.

[227] Case No. 27. Details obtained from the COPS event narratives.

[228] To determine the context in which the conditions had been imposed we made our own inquiries of the COPS database to obtain details of incidents such as 'event narratives' composed by operational police who dealt with particular incidents and court outcomes.

[229] Case No. 28. Details obtained from the COPS event narratives.

[230] Case No. 29. Details obtained from the COPS event narratives.

[231] Case No. 30. Details obtained from the COPS event narratives.

[232] Case No. 31. Details obtained from the COPS event narratives.

[233] The days selected include Friday 30/06/00, 25/08/00, 27/10/00, 29/12/00, 23/02/01, 27/04/01, 29/06/01, 31/08/01, 26/10/01, 28/12/01, 22/02/02 and 26/04/02. Friday was selected as it known to be high volume days for bails at NSW police stations.

[234] Increases in the use of non-association and place restriction conditions were identified in Redfern LAC (1 in 2000 to 2002 to 7 in 2002–2004), Brisbane Waters LAC (3 to 8) and Lower Hunter LAC (6 to 11). Decreases in the use of non-association and place restriction conditions were identified in Coffs/Clarence LAC (14 in 2000 to 2002 to 7 in 2002–2004), Ku-ring-gai LAC (6 to 0), Richmond LAC (13 to 7), City/Central (5 to 0), Griffith LAC (6 to 1) and North Shore LAC (8 to 3).

[235] s36C, *Bail Act 1978*.

[236] s128A, *Crimes (Administration of Sentences) Act 1999.*

[237] Letter from the NSW Parole Board, NSW Department of Corrective Services, 22 March 2005.

[238] Letter from the NSW Parole Board, NSW Department of Corrective Services, 22 March 2005.

[239] s165A, *Crimes (Administration of Sentences) Act 1999.*

[240] s165(2), *Crimes (Administration of Sentences) Act 1999* .

[241] Letter from NSW Department of Corrective Services, 19 September 2005.

[242] An amendment to the *Crimes (Administration of Sentences) Act 1999* inserts a new s26A.

[243] s26A, *Crimes (Administration of Sentences) Act 1999*.

[244] s26 of the *Crimes (Administration of Sentences) Act 1999* states that the conditions to which a local leave permit is subject must include such conditions as are required by the regulations and that the Commissioner may at any time vary or omit, substitute or add conditions of a local leave permit or revoke a local leave permit.

[245] Clause 169 of the *Crimes (Administration of Sentences) Regulation 2001* stipulates an application under s26 for a local leave permit is to be made in the form approved by the Commissioner. The regulation stipulates that an inmate who is the subject of a local leave permit must not contravene any condition to which the order or permit is subject. Failure by an inmate to comply with the requirements of this clause is a correctional centre offence.

[246] Discussions with NSW Department of Corrective Services representatives, October 2005.

[247] s24A, *Children (Detention Centres) Act 1987*.

[248] s24(1B), *Children (Detention Centres) Act 1987.*

[249] Discussions with DJJ representatives, July 2005

[250] Discussions with DJJ representatives, July 2005.

Chapter 8. Sentencing issues

This chapter discusses the issues relating to non-association and place restriction orders imposed at sentencing that have been identified through our scrutiny of the Act.

8.1. Low level use of non-association and place restriction orders imposed at sentencing

8.1.1. Factors contributing to the low use of orders

The non-association and place restriction orders were used on only 20 occasions during the two year period of the review.

It appears a number of factors may have contributed to the low use of the orders including:

- that courts continue to use alternative means available for imposing non-association and place restriction conditions at sentencing
- lack of knowledge of the Act by the judiciary and other relevant officers.

8.1.1.1. Continued use of alternative means

The court had previously been able to impose non-association and place restriction type conditions at sentencing through good behaviour bonds[251] or a suspended sentence[252] and appears to continue to do so. A number of magistrates stated in interviews and in response to our survey:

> *Frequently I impose these types of orders as a condition of a bond or probation in the Children's Court.…Non-association type conditions of bonds and probation in the children's courts have been made for years and years. Likewise but far less commonly place restriction type conditions.*
>
> *
>
> *There is a degree of habit and you tend to do what you have done before.*
>
> *
>
> *The pre-existing good behaviour bond provisions were adequate to address any real problems. However I have not used the provisions principally because the need/issue has simply never arisen at the Courts at which I sit.*
>
> *
>
> *A lot of us I know have used non-association and place restriction orders before this legislation ever came in. Either as a condition of bail or as a condition of good behaviour bond — and continue to do so.*

In its submission to our discussion paper the Children's Court commented:

> *The Children's Court has had the experience of using orders of this type for decades so the legislation is very much a case of 'business as usual'…Experience confirms that courts continue to make such orders (especially non-association) as conditions of bonds or probation. Certainly in making recommendations to the court on sentence a suggestion of such conditions [the new provisions] is virtually unknown.*[253]

Similarly the Department of Juvenile Justice commented:

> *It is the department's experience that such orders continue to be imposed under pre-existing legislation.*[254]

8.1.1.2. Lack of knowledge of the Act

It also appears that the limited use of the orders may be related to a lack of knowledge by the judiciary and other relevant officers of the new provisions relating to sentencing. One police prosecutor observed:

> *It is an excellent idea but there seems to be either a lack of training, lack of awareness or unwillingness to impose conditions on behalf of the judiciary.*

Those magistrates and public prosecutors who responded to our survey had not or could not recall receiving any training on the Act. Most advised that they had learnt of the Act through court circulars and journal articles. A number of magistrates advised as follows:

I knew of them [the orders] but you are constantly being told of new things and it does take a little bit of time to start using them and becoming accustomed to them.

*

I think from a magisterial perspective that they are aware of it and it is a tool, but a tool that was almost already there and I think as a result a lot of us, and I am one of them, haven't really put our minds to it.

*

I think it is something that a bit more education for judicial officers wouldn't go amiss.

A senior police officer reported that in the non-metropolitan region in which he worked a number of Outlaw Motorcycle Gangs had recently been prosecuted. He commented that, had police known of the legislation, these prosecutions would have provided an opportunity to use the non-association and place restriction orders. He noted that 'there are some defendants still to be prosecuted and I will endeavour to have these orders invoked through the prosecutor applying to the court.' He further added:

the education of all involved agencies is required to formally improve the appropriate use and interpretation of the non-association and place restriction orders.[255]

Another senior police officer observed that 'it would appear that the legislation in question is not widely known to operational police, if at all.'

The NSW Police Gangs Squad commented:

it appears that there is a lack of knowledge regarding the legislation and its use…the legislation is currently under-utilised by Police. This is no doubt attributable to the Police not being aware or familiar with the legislation and its use.[256]

The Shopfront Youth Legal Centre noted it was desirable:

for police, judicial officers, probation officers and juvenile justice officers to be trained in non-association and place restriction orders. In our view it is important for such training to emphasise that, whilst the powers to make such orders is very broad, the appropriateness of such orders need to be very carefully considered.[257]

DJJ outlined its involvement in the process:

It completes an assessment of the juvenile offender, identifies areas of concern and canvasses suitable options that the courts may wish to impose when sentencing a juvenile offender by way of background report, submissions and bail interventions.[258]

In our implementation chapter we detailed the information, education and training on the legislation that had been made available to the above officers to date by the various agencies with responsibilities in this area. So far, the strategies employed by these agencies to inform and train relevant officers about the legislation appear to have been quite limited.

The limited promotion of the legislation by the relevant agencies and the comments from magistrates and police prosecutors themselves are relevant in suggesting that, if the legislation is to continue, further strategies should be developed by the agencies responsible for the training of these officers to ensure they are appropriately informed about the legislative changes.

8.1.2. Is the Act meeting its objectives?

8.1.2.1. Stated objectives

In his second reading speech, Mr Stewart MP stated that the Bill aimed to 'target gangs, break down criminal associations, promote the rehabilitation of offenders and assist in preventing crime.' In particular, he stated the following in relation to the sentencing orders introduced by the Bill:

- the aim of such orders is to prevent crime and to assist the rehabilitation of the offender by severing their ties with people or places that make them more likely to engage in criminal activity
- the orders can be imposed by the court where it believes it is reasonably necessary to ensure the offender does not commit further offences.

Mr Stewart MP also stated that the orders may be made in addition to but not instead of, other sentencing options and thus give the courts increased flexibility in sentencing.[259]

8.1.2.2. Comments on low usage and ability to target gang activity

A number of community agencies responding to our discussion paper suggested that the Act had failed to meet its objectives given the small number of orders imposed in the review period and that few, if any, appeared to relate to gang activity.[260]

It is our view that with so few matters (20) where courts imposed the orders under the Act during the review period it is difficult to assess the effectiveness of these orders in preventing crime, assisting the rehabilitation of offenders and targeting criminal gang activity.

What we can say in relation to the impact of orders on re-offending is that, of the small number of offenders who had orders imposed upon them in the review period, an examination of their police records following the imposition of the orders reveals that no offenders breached the orders. However, the records reveal that 12 offenders (60%) have been convicted of further unconnected offences following the imposition of the orders.

Only five of the orders (20%) imposed during the review period appeared to have been imposed for 'gang type' offences or offences where there was evidence of criminal activity involving two or more people. However, none of these orders were imposed for offences that involved serious, organised criminal activity. The 'gang type offences' for which orders were imposed included shoplifting, affray, assault and robbery and were primarily committed by juveniles who appeared to be involved in loosely organised groups. Only two of the matters involved more than three offenders. Thus the criminal gang activity for which orders were imposed during the review period were at the lower end of the type of gang activity which Parliament intended to target through this legislation.

There were no prosecutions of offences to publish or broadcast the fact that a named person (other than the offender) is specified in a non-association order or any information calculated to identify any such person.[261]

8.1.2.3. A sentencing alternative

As stated in the second reading speech, the orders were intended to supplement, not replace, other sentencing options and thus give courts increased flexibility in sentencing. Police prosecutors commented in relation to the legislation that:

> *It's a good tool to have in the box.*
>
> *
>
> *Having alternatives is good if they address re-offending and protect the community.*
>
> *
>
> *I believe it is a valuable tool for dealing with repeat offenders who commit offences whilst in the company of the same individuals. It is particularly valuable when the offenders are juvenile and as such are exposed to a greater degree of peer pressure (pack mentality). It is one factor in allowing an individual to maintain their liberty, but curtails their opportunity to commit similar offences.*

Despite their comments, the low usage rates recorded in the review period indicate that the legislation is not being utilised effectively by prosecutors. If the legislation is to be retained we recommend that further education strategies be developed for prosecutors and other officers involved in making sentencing submissions to court. This may have some impact in promoting the use of the orders where appropriate.

8.1.2.4. Comments on the breach offence

A number of magistrates interviewed for the review were of the view that the Act's strength may lie in the fact that, unlike a breach of non-association and place restriction conditions imposed as part of a bond and suspended sentence, a breach of the orders is in itself an offence.[262] One magistrate commented:

> *The legislation has the teeth that you can say [to an offender] this is a non-association order if you don't comply then you are liable to this and if you understand that you can't go to X and then if you don't comply they are in big trouble. I think that is what it's handy for.*

Similar comments were made by a senior police officer:

> *The advantage of this legislation is that breach is actually a criminal offence.*

However one magistrate commented:

> *I doubt the penalties are any more of a deterrent than the prospect of being called up for breaching a bond.*

Submissions received in response to our discussion paper commented that the risk inherent in the legislation is that the imposition of unrealistic conditions within orders, the breach of which is an offence, may lead to harsher consequences than were anticipated. It was suggested for example that orders may be imposed for a relatively minor offence, the breach of which carries a relatively heavy fine or six months imprisonment or both.

As no non-association and/or place restriction orders were reported as breached in the review period, we are unable to determine at this stage whether this will occur in practice.

Of the 20 offenders who had orders imposed on them, 19 were convicted of offences that attracted penalties of six months imprisonment or more. Seventeen of the offenders had previous criminal histories.

One 21 year old offender who had an order imposed upon him appears to have been convicted of minor offences that did not attract a penalty of more than three months imprisonment. This appears to have been in contravention of the Act.[263] If the offender had been convicted of a breach of the order, the penalty for breach could have potentially exceeded the penalty for the original offence.

8.1.2.5. Other comments on the effectiveness of the legislation

The submission of the Children's Court commented that the objective of the legislation 'to break down an offender's association with persons and places that may increase their likelihood of re-offending' is 'supported as a measure protective of the public interest in the deterrence of crime.' The court further commented that the orders 'are readily justifiable both in terms of rehabilitation of the offender and the protection of the community by reducing the opportunity of re-offending.'[264]

One magistrate commented that:

> *the objectives [of the legislation] are laudable…It is likely to have some effect on juvenile offending because of the tendency for offences to be committed in company and by associates. In fact peer influence is often sighted by offenders and their families as a significant factor in offending, and while in the case of offenders such claims have a high element of self interest, there is probably a lot of truth in the claim.*

Another magistrate also commented that one of the merits of the legislation was that it could be usefully employed for young people as 'You are getting people at a very critical age when they are young — trying to drag them out of the environment which is not beneficial to them'.

A police prosecutor located in the Raymond Terrace area who was involved in 11 of the matters where orders were imposed advised that he was of the view that the orders had been effective in reducing crime in the area. He advised that the place restriction orders prohibiting offenders from visiting licensed premises and shopping centres had been particularly useful in reducing criminal activity in and around those locations.

In relation to the impact of the orders on gang related activity in the area the police prosecutor commented that those offenders who had orders imposed upon them as a result of his submissions were often loosely involved with a group who consumed alcohol together. He commented that these groups did not have the 'cohesive nature of a gang'.

The police prosecutor was of the view that these orders were particularly suited for use in regional areas where police were more familiar with the offenders, persons named and locations connected with the orders.[265]

One magistrate did not think the legislation was helpful, commenting:

> *The amendments were the usual mindless, knee jerk political response to a perceived problem. The pre-existing Bail Act and Good Behaviour Bond provisions were adequate to address any real problems. However I have not used the provisions principally because the need/issue has simply never arisen at the courts at which I sit. I suggest that this is a reflection of the impropriety of the changes and the real lack of any need for them.*

8.1.2.6. Summary

Our research has revealed that the orders have been used sparingly during the two year review period — only 20 orders were imposed. When used, the orders have not been imposed for serious organised criminal gang activity. Thus the legislation as it relates to orders, does not appear to be meeting its stated objectives. While some have commented on the usefulness of the orders as an alternative sentencing option, others have reflected on the availability of measures such as suspended sentences and bonds to achieve a similar result. These observations, in our view, point to the need for a review by Parliament of whether the legislation is required.

If the legislation is to be retained, further monitoring of the use of orders is required to enable an accurate and comprehensive analysis of the use of the provisions. In addition, there is a clear need for further information and training to be provided to relevant agency staff and judicial officers about the orders and their potential use.

8.2. Orders restricting certain associations or activities

8.2.1. Conditions which restrict an offender from associating with a member of their close family

8.2.1.1. Section 100A(1) and (3) of the *Crimes (Sentencing Procedure) Act 1999*

Section 100A(1) states that persons specified in a non-association order as persons with whom the offender must not associate may not include any member of the offender's close family.

Section 100A(3) of the Act defines 'close family' as:

a) the offender's spouse, de facto or same-sex partner, and

b) the offender's parents, step-parents and grandparents, and

c) the offender's children, step-children and grandchildren, and

d) the offender's brothers and sisters, and step-brothers and step-sisters, and

e) the offender's guardians or carers.

The definition of 'close family' detailed in these Acts received commendation from stakeholders for recognising a number of issues in relation to the importance of culturally defined relationships.

However, it was explained by a number of stakeholders that, for Indigenous people, kinship ties extend beyond the immediate family of mother, father, brother and sisters, to include aunts, uncles and cousins. We were informed that for these communities, grandparents, aunts and uncles often play an important role in the development of a child in the community, and a person's relationship with their cousins can be as important as that with siblings.

It was asserted by a number of youth and legal centres and other agencies that, for certain groups of people, the definition in s100A(3) of the *Crimes (Sentencing Procedure) Act 1999* is inappropriately limited by failing to acknowledge the importance of belonging to a wider family network and community. One youth representative described the definition as '*a very white middle class way of looking at things*'.

8.2.1.2. Responses to the discussion paper and surveys

Our discussion paper asked whether there would be any benefits to amending the definition of close family as set out in s100A to reflect kinship ties which extend beyond the immediate family.

Submissions received were generally supportive of amending the definition of close family in s100A(3) to address the issue of 'kinship' in specific communities. The Minister for Community Services response is representative of those who supported the suggestion:

> *There can be important family and kinship relationships that are not defined by the relatively narrow biological or legal relationships specified in the current definition. The relatively narrow definition of family could have adverse impacts on Aboriginal people who have very strong attachments to extended kinship groups.*[266]

Shopfront Youth Legal Centre stated it was essential for a definition of close family to refect kinship ties 'to take account of the family structures of Aboriginal people'.[267]

However, NSW Police and the Children's Court did not support such an expansion of the definition. NSW Police commented:

> *Restrictions regarding the application of orders on close family members are an unnecessary limitation when targeting organised crime gangs/groups, which are often based on familial connections.*[268]

The Children's Court commented:

> *Any constraint upon the power of the court to make a non-association condition, which is otherwise appropriate, necessarily gives precedence to another public interest.* [269]

8.2.1.3. Inflexibility of conditions

NSW Police stated that the Act needed 'to be more flexible to address familial connections in organised criminal activities' and that introducing further restrictions on the application of orders under the Act would only serve to frustrate the work of police in disrupting criminal associations and thus reducing crime. The police suggested that one way to address this issue would be:

to allow orders to be applied where there is evidence of an ongoing pattern of criminal behaviour which could be attributed to criminal activity conducted in partnership with specific family members.[270]

The issue of the flexibility of orders was also raised by a number of magistrates and prosecutors surveyed for the review.

One magistrate questioned whether the orders could be made conditionally. The magistrate commented that he had a matter referred to him where he wished to impose a non-association order for a juvenile. However, the person named in the non-association order attended the same rehabilitation program the offender was required to attend. The magistrate imposed the order with an exception that the offender may associate with the named person for the purpose of attending a mandatory rehabilitation program but advised that he questioned whether it was entirely appropriate to do so in the circumstances.[271] The magistrate commented that the 'legislation seemed silent on the point' of whether exceptions were permitted when making the orders.

In one matter where a place restriction order and a non-association condition were imposed in the review period it appears the magistrate also had reservations as to whether an order could be made conditionally. In this matter a school age offender was caught shoplifting with a co-offender who attended the same school. As well as a place restriction order the offender was given a bond with a condition that the offender not associate with the co-offender except for school purposes. The details were as follows:

A juvenile male, age 13 at time of the offence, was caught attempting to steal a wristwatch with the co-offender at a large retail store in the metropolitan area. The Children's Court ordered a six month bond with the condition that the offender was not to associate with the co-offender except for school purposes. The magistrate explained the condition to the offender by saying 'So if you have got to be in the same playground or if you have got to go to the same sports day, then it will not be breaching the condition if you are there with [the co-offender]. But if you are hanging around on the weekends or something with him, then it will be a breach of it. Do you understand that?' The court also imposed a place restriction order prohibiting him from frequenting or visiting the particular retail store unless accompanied by his brother or mother. These conditions were to last the duration of the six month bond.[272]

It appears that the non-association condition was included as part of the bond and not as a non-association order because the court wished to include the 'school yard' exception and was of the view that such exceptions were not appropriate when imposing orders. Notably, however, the place restriction order included the exception that the offender not attend the retail store at Bonnyrigg unless accompanied by his brother or mother.

Another magistrate stated that he imposed non-association and place restrictions as conditions of a bond or suspended sentence as 'I have greater flexibility when imposing the restriction'.

Another magistrate believed the definitions of family set out in s100A(3) were too restrictive in the legislation. The magistrate went on to comment that 'you also have situations where people are offending with or against their family. You quite often see siblings doing break and enters together.' However s100A(3) would prevent the court from imposing a non-association order upon members of the same family. The magistrate advised that if he wished to make non-association conditions in situations like this he would 'find his way around it' by imposing the condition as part of a bond and not a non-association order.

8.2.1.4. Summary

Legislative restrictions and safeguards in respect of non-association have attracted critics from both sides of the fence — being too broad or narrow as regards family or kinship matters and not allowing for certain 'conditional' associations. This has impacted it appears, on the very limited use of these orders. In light of this, Parliament may wish to consider whether any amendment of s100A is required. A challenge in providing for increased flexibility will be to ensure that resulting orders are sufficiently precise such that they can be complied with and enforced.

8.2.2. Conditions which restrict an offender from attending specified places

8.2.2.1. Section 100A(2) of the *Crimes (Sentencing Procedure) Act 1999*

Section 100A(2) states that the places or districts specified in a place restriction order as places or districts that the offender must not frequent or visit may not include:

a) the offender's place of residence or the place of residence of any members of the offender's close family, or

b) any place of work at which the offender is regularly employed, or

c) any educational institution at which the offender is enrolled, or

d) any place of worship at which the offender regularly attends.

8.2.2.2. Inflexibility of conditions

Whilst s100A(2) provides a list of what should not be attached to a place restriction order, it has been suggested that such orders may inadvertently restrict access to a number of important services. These include health, legal and employment services, which offer support, particularly to youth who are marginalised or those not in mainstream education and employment.[273] Place restriction orders may also inadvertently restrict access to close family in some circumstances.

One community stakeholder provided us with an example which illustrates the range of considerations which might be recognised when imposing place restriction orders or conditions. It was advised that a former heroin user was arrested attempting to sell small amounts of cannabis in a suburb. By virtue of a 'blanket' condition, that is a condition that prohibited the offender from visiting that particular suburb at any time for the duration of the order, the offender was prohibited from attending both her methadone clinic and her solicitor's office.[274]

Similar concerns were raised with regard to the use of the drug-move on powers in Cabramatta. Our review of the *Drug Premises Act 2001* examined the use of these powers and reported a range of public health concerns including that:

- move-on directions were impeding drug users' access to the Drug Intervention Service in Cabramatta (DISC) and to other services such as the needle and syringe exchange van
- the use of the Needle and Syringe van had declined since the drug move-on powers had been in place
- the intensive policing in Cabramatta had caused drug users to disperse to other areas, and this had made it more difficult for health services to access their client group
- new demands were being placed on health services, such as needle and syringe exchanges, in other parts of south-west Sydney, particularly Liverpool, because drug users had moved to other areas as a consequence of police activity in Cabramatta, and
- police had confiscated unused syringes from drug users.[275]

Other examples provided in submissions raised concerns where blanket conditions imposed as part of bonds, suspended sentences and bail excluded people, particularly Aboriginal people, from country towns.[276] Of concern was that by imposing such conditions, the recipient is not only restricted from frequenting a specified area, but also from seeing family who may live there.

Conversely, one magistrate provided examples of where the definitions set out in s100A(2) were too broad. He explained, that in some situations, it may be necessary to impose a restriction to prohibit an offender from frequenting a place of worship or an educational institution where he or she is enrolled, and may be participating in criminal activity. However, s100A(2) prevents the court from imposing a place restriction condition. In these circumstances, the magistrate said that he would use a good behaviour bond to prohibit an offender from going to these establishments.

In one matter where a place restriction order was imposed in the review period an exception was detailed on the place restriction order:

> *The 21 year old offender sold a small portion of cannabis to an undercover operative in Nimbin, NSW. The offender was apprehended and charged with supply of a prohibited drug. The offender's lawyer advised the court that the defendant had a disadvantaged background and a history of bad influences in that area. The lawyer indicated that the offender had determined to make a fresh start and had moved from the town accordingly. The offender was sentenced to 12 months imprisonment, which was suspended for a period of 12 months on the condition that the offender enter into a good behaviour bond. The court also imposed a place restriction order on the offender prohibiting him from visiting or frequenting the township for 12 months. An exception on the order was included that the offender was allowed to enter the township 'for the sole purpose of driving through the said township for the purpose of visiting his mother and or sister who reside' just outside the town.*[277]

8.2.2.3. Discussion paper responses

Our discussion paper asked for responses as to whether there would be any benefits to amending the definition of what a place restriction order can and cannot restrict and whether there would be any benefits to imposing 'blanket' place restriction conditions which excluded an offender from an entire area, allowing for no exceptions.

NSW Police commented that blanket place restriction conditions or orders can be favourable to both the community and the offender. For instance, by prohibiting a person involved in street level drug supply, 'the offender is removed from the area in which they are most likely to re-offend and the amount of street level drug dealing is decreased'.

NSW Police further commented that the circumstances of each particular case should dictate what the appropriate conditions or orders should be. So if an offender needed to attend an area for the purpose of obtaining methadone, then an order should be tailored for individual requirements.[278]

Similarly, the Children's Court commented that an alternative to blanket orders are 'conditional conditions' or exceptions. For example 'you are restricted from attending this place except between certain hours or days'.[279]

Several community legal centres suggested that the list of places which may not be included in a place restriction order should recognise the need for unemployed or homeless young people to access a variety of services, and the types of activities commonly undertaken by young people. They were of the view that place restriction orders should not be made in relation to employment services, welfare services, health services, government agencies, community/ cultural centres, public transport routes and local services that a person has no realistic alternative to access. The Shopfront Youth Legal Centre commented:

> *Young people, particularly those who are homeless or otherwise disadvantaged often find it very difficult to comply with...place restriction conditions. There are a range of legitimate activities which may cause them to fall foul of the condition — including seeking employment, looking for accommodation, using health and welfare services, and socialising with peers or extended family members. Although there are some restrictions on the types of orders that can be imposed, we suggest that this is based on a set of white, middle class, adult assumptions. It does not recognise...the need for unemployed and homeless young people to access a variety of services, and the types of activities commonly undertaken by young people.*[280]

There appears to be a consensus amongst those respondents to our discussion paper that place restriction orders should, when appropriate, be tailored to suit the individual circumstances of the offence and the offender.

8.2.2.4. Summary

In light of the above discussion, we are of the view that, if the legislation is to continue, Parliament should give consideration to amending s100A of the *Crimes (Sentencing Procedure) Act 1999* to address the apparent need for flexibility in the legislation when imposing place restriction orders at sentencing. This may include permitting an offender to visit a place at specified times, or in specified circumstances (such as in the company of a parent or guardian). It may also require consideration of limited access to those places which cannot presently be included in an order — for example attendance at a school during school hours. Again a challenge for any amendments is ensuring the precision of resulting orders, such that they can be complied with and enforced.

8.2.3. Places frequented by a particular gang

In its submission to our discussion paper, NSW Police commented that the legislation would be more beneficial if police could impose place restriction orders that prohibit a person's ability to go to places frequented by a particular gang. NSW Police advised:

> *While attempts are made to disassociate an offender from a gang by imposing a place restriction, the restriction becomes obsolete when the offender simply moves from one location to another and continues to associate with other members of the same criminal organisation. The legislation would be of greater benefit if police could impose place restriction orders in terms such as: 'places frequented by members of the Big Circle Gang'.* [281]

The NSW Police Gangs Squad also commented that:

> *The legislation would be more effective if the non-association conditions were broadened and the name of the gang as opposed to a specified person was nominated in any condition.*[282]

This suggestion from police would be a significant departure from the current restrictions specified in the Act.

There is little information available in Australia about how many gangs exist, who the members are and what they do. Lozusic has emphasised that in the Australian context no matter how gangs are described they are invariably 'fairly transient, with members coming and going' and, in relation to gathering data on youth gangs that:

> *Members come and go and groups can disintegrate or splinter off into small groups. Information would therefore need to be continually updated to keep pace with such changes.*[283]

There are not exhaustive mechanisms currently available to police that enable the 'continual update' of data on gangs in NSW to meet relevant standards of proof. There will inevitably be substantial difficulties defining a criminal gang and proving membership of a gang and establishing the places for which a gang may frequent.

Given the criminal consequence of a breach of an order, the activities and associations the orders are able to prohibit should have a definite, sound and detailed basis. A prohibition imposed on an offender 'not to frequent or associate with a particular gang' is, in our view, likely to be inexact and has the potential to cause injustice.

The Director of Public Prosecutions stated that as a general principle a law must possess characteristics of certainty, generality and equality.[284] Certainty requires that the law be prospective, open, clear and relatively stable and of general application to all subjects and apply equally to all.[285] The law must be sufficiently precise for people to be

able to regulate their conduct to avoid infringement. Inexact references to 'places frequented by a particular gang' do not, in our view, appear to satisfy this principle.

Therefore, if the legislation is to continue, we do not recommend any broadening of orders to include prohibitions from associating with named gangs or to encompass places where 'a particular gang frequent'.

8.3. Offenders in custody whilst subject to a non-association and/or place restriction order

8.3.1. Suspension of non-association or place restriction order whilst an offender is in custody

The *Crimes (Sentencing Procedure) Act 1999* as amended by the Act provides, that whilst an offender is in custody, a non-association and place restriction order is suspended.[286] Similarly the *Children (Detention Centres) Act 1987* as amended provides that whilst a juvenile is in detention an order is suspended.

8.3.1.1. Consideration of the suspension of orders whilst offender is in custody

In effect, although an order stipulates that an offender is not to associate with a named person(s), when the offender is in custody his/her order is suspended and therefore any association with that named person is not unlawful.

DCS officers compared this situation with apprehended violence orders (AVOs), which are also suspended whilst an offender is in custody. Prison officers are requested by the police to advise them if a person named in an AVO has been to visit a person protected by an AVO.[287]. Such practices, it was said, help the police to build up intelligence whilst an offender is in prison.

It was assumed that similar reporting requests would be expected for recipients of non-association orders. However, because very few offenders who have been subject to non-association orders have spent time in detention, it is understood this is not current practice.[288]

8.3.1.2. Submissions

Our discussion paper asked for responses as to whether the condition(s) in a non-association order should remain operational whilst an offender is in custody.

NSW Police indicated in its response that it supported the conditions of a non-association order remaining operational while an offender is in custody commenting that:

> *While the offender cannot physically commit further offences outside gaol walls while in gaol, they can certainly encourage other people to do so and plan further offences for when they are released.*[289]

The NSW Children's Court did not support the conditions of a non-association order remaining operational while an offender is in custody. The court identified that if correctional authorities felt it was necessary for themselves to avoid criticism for permitting such associations by segregating offenders in different facilities, then this would have the potential to seriously compromise their capacity to place offenders in an appropriate facility. It was pointed out that this was particularly the case with juvenile and female detainees and high-risk offenders as there were fewer facilities available to accommodate these offenders.[290]

DCS advised that it did not support the conditions remaining operational whilst an offender is in custody, commenting that the policing of non-association orders within correctional centres would be difficult and expensive, especially when extended to all forms of communication including letter writing and phone calls.[291]

DCS also highlighted that the aim of the Act was to prohibit an offender's association with persons and places that may increase the likelihood of their re-offending and 'such likelihood arises when the offender is at liberty in the community rather than when the offender is in prison'.[292]

Mr Stewart MP's comments in relation to s100D in the second reading speech confirm this view:

> *These orders are meant to operate whilst an offender is in the community. Accordingly, new s100D of the Crimes (Sentencing Procedure) Act provides that an order is suspended whilst an offender is in custody or on escorted leave from custody.*[293]

8.3.1.3. Summary

Whilst we acknowledge that the absence of any powers to stop 'associations' between visitors and co-inmates is a genuine concern for authorities, we are of the view that enforcement of orders whilst in custody would generate a number of practical difficulties for correctional authorities, including placement and operational issues, and additional

expense. It is also noted that such enforcement would be inconsistent with procedures followed for other types of orders such as AVO's and does not appear to accord with Parliament's original intention.

For these reasons, if the legislation is to continue, we do not recommend the alteration of the legislation to enforce the orders whilst an offender is in custody.

8.3.2. Non-postponement of non-association and/or place restriction orders whilst an offender is in custody

An order commences at the time it was made by the court[294] and is suspended if the offender is taken into custody. The suspension of an offender's order does not operate to postpone the date on which the order comes to an end.[295]

Therefore if a place restriction or non-association order is granted at the same time that a sentence of imprisonment is handed down to an offender, the order would be effective only for the period that the offender was outside a correctional facility rather than the actual length of the order.

Three of the 20 persons subject to orders in the review period spent time in custody whilst subject to orders.[296]

In circumstances where an offender is given a non-association or place restriction order and a short term of imprisonment, it was recommended by one magistrate that these orders should commence when a person's sentence is completed.

This occurs for those non-association orders granted under New Zealand's *Criminal Justice Act 1985*, s28E (2) which states:

> *Where a non-association order is cumulative on a sentence of imprisonment for a term of 12 months or less, the period of non-association specified by the non-association order commences on the day, which the offender is released from the penal institution [or from home detention (as the case may be)].*

8.3.2.1. Submissions

Our discussion paper asked for responses to whether the date of a non-association order should cease, or be postponed, to refect an offender's time in custody.

NSW Police supported the commencement of an order upon release, commenting as follows:

> *The commencement of an order upon release would, from a policing perspective, make it more difficult for an offender to engage in further criminal activity for a longer period. Thus, it is the NSW Police position that, while the order should remain in force when the offender is in custody (to ensure the offender is unable to continue any criminal associations), the time spent in custody should not reduce the period of the order.*[297]

DCS and other agencies did not support the suggestion that the orders commence on release.[298]

The Children's Court questioned the practicality of the suggestion noting that a driving disqualification or an AVO is not extended to take account of a period in custody and it would be increasingly difficult for all involved (including the offenders) to calculate whether an order is still in force if an offender has gone in and out of custody or remand during the duration of the order.[299]

In order to assess the Children's Court assertion that postponement of the commencement of the order whilst an offender is in prison may cause calculation difficulties for authorities and offenders, we examined the records of those three offenders in the review period who were granted an order at the same time that a sentence of imprisonment was handed down to them.

The examination reveals that one offender, a juvenile subject to a 12 month place restriction order and a one month custodial sentence, was convicted of further offences four months after the order was imposed. This offender spent a further six months in detention whilst the order was operational.[300] The second offender suffered from a mental illness and spent time in a mental health institution during the period the order was operational.[301] The third offender spent his initial time in custody but no further time in custody for the duration of the order.[302]

In relation to the first offender, if the commencement of the order was postponed for the juvenile offender whilst he spent time in detention this would have required two calculations of when the order was to commence or continue and result in the order being operational 19 months after it was originally imposed. Court, police and juvenile justice records would have to be amended to reflect this and authorities would have to ensure that the offender was advised of the adjustments to his order each time.

8.3.2.2. Summary

Postponement of commencement of the orders could be confusing for offenders. Such an approach would not be consistent with procedures followed for other types of orders such as AVOs or with suspension of driving licences.

It is also questionable whether the order would remain relevant if still operational a number of years after the original order was imposed.

Therefore, if the legislation is to continue, we do not recommend the alteration of the legislation to postpone the operation of the orders whilst an offender is in custody as it does not appear practicable.

8.4. Extension of the term of an order

The Act stipulates that an order must not exceed 12 months.[303]

NSW Police commented in their response to our discussion paper that in addition to an order being commenced upon an offender's release from custody, the period the order can be imposed should be extended to five years. NSW Police commented as follows:

> *NSW Police believes the length of orders (12mths) to be insufficient. Consideration should be given to increasing the order to a period of 5 years.*[304]

NSW Police went on to explain that it holds this view because the organisations which the legislation seeks to dismantle 'contain many members who are career criminals engaging in various criminal enterprises. The increased period will be more effective in reducing the chance of associations reforming'.[305]

In the second reading speech Mr Stewart MP detailed the Government's rationale for limiting the length of the orders to 12 months as follows:

> *The Government recognises that an offender's personal circumstances will change over time and that non-association and place restriction orders made at sentencing should not have an indefinite life, particularly as criminal penalties attach to a breach of an order.*[306]

The current legislation effectively allows for an order to be extended should an offender be convicted of a further crime. Section 100F of the *Crimes (Sentencing Procedure) Act 1999* as amended by the Act provides for the variation or revocation of a non-association and place restriction order following any subsequent conviction. Thus if an offender is sentenced for a new offence while subject to an order in respect of another offence, the court may vary or revoke that order. It is open to the court to impose a further order for another 12 months, if it determined this was appropriate.

Mr Stewart MP noted in the second reading speech that s100F:

> *Gives the court maximum flexibility. It can change an order that is no longer appropriate, as well as impose a further order in respect of the new offence.*[307]

Offenders' circumstances often change substantially throughout a five-year period, rendering the circumstances for the imposition of a non-association or place restriction order no longer applicable or relevant. Should an offender remain engaged in 'criminal enterprises' and be convicted of a further crime when subject to the order, the legislation appears to adequately provide for the order to be revoked and for a further order to be imposed, effectively extending the length of the order.[308]

Therefore, if the legislation is to continue, we do not recommend that the period of time an order can be given should be increased from 12 months to 5 years.

8.5 Lack of data

8.5.1. Lack of data on variations, revocations and appeals against non-association and place restriction orders imposed at sentencing

NSW Local Courts advised that statistical reports containing information on variations, revocations or appeals against non-association and place restriction orders in the review period could not be generated under the current system.[309]

If the legislation is to continue, it is recommended that this data be collected and analysed in a systematic way by all courts to ensure appropriate monitoring of the use of the legislation.

8.5.2. Lack of data on non-association and place restriction orders imposed on juveniles at sentencing in non-GLC courts

DJJ was not able to provide data on non-association and place restriction orders imposed in non-GLC courts in the review period as the department did not have the orders programmed as an 'outcome category' on its system.[310]

If the legislation is to continue, it is recommended that this data be collected and analysed to ensure appropriate monitoring of the legislation.

8.5.3. Inability to track use of court imposed conditions of parole as to non-association and place restriction

The Act amends the *Crimes (Sentencing Procedure) Act 1999* to enable the court to impose non-association and place restriction conditions as part of a parole order.[311]

As outlined previously, no changes were made to processes or systems to facilitate the implementation of court ordered non-association and place restriction parole conditions. Consequently it is not possible to determine the impact the new provisions have had on the non-association and place restriction conditions imposed on parole determined at court.

NSW Local Courts have advised that the NSW Attorney General's 'Courtlink' project, which is working towards implementing a new electronic case management system for NSW courts, will update and improve access to court information for purposes such as general inquiries, reporting and research. This will assist in the collection of data in relation to court imposed conditions of parole as to non-association and place restriction.[312]

If the legislation is to continue, it is essential that data relating to court imposed parole conditions be collected and analysed to ensure appropriate monitoring of the legislation.

8.6. Summary

The objective of these sentencing orders was to target gangs, break down criminal associations, promote the rehabilitation of offenders and assist in preventing crime. Our research reveals that the legislation presently does not meet these objectives.

The orders have been infrequently used — only 20 times in the two year period of the review. When used, they have not been imposed for serious organised criminal gang activity. Only five of the 20 orders relate to criminal activity involving two or more persons.

Factors contributing to the low use appear to be that courts continue to use alternative means available for imposing non-association and place restriction conditions at sentencing and a lack of knowledge of the Act by the judiciary and other relevant officers.

The only substantive difference of the orders over the alternatives available appears to be that there are criminal sanctions available should the offender breach the order. However, our research has revealed that there were no breach charges prosecuted in the review period. In addition the consequences of breaches when other options (eg. suspended sentences) are used may also be grave.

We have also found that the list of associations and activities that the orders may not restrict is inflexible for certain circumstances. With non-association orders for example, it appears that the definition of close family requires broadening to accommodate kinship ties, which extend beyond the immediate family. Consideration should also be given to allowing restrictions of association with close family in certain exceptional circumstances where there is evidence of an ongoing pattern of criminal behaviour within families. Clearly such changes should be approached with extreme caution and with clear evidence of the inadequacy of other remedies.

In relation to place restriction orders, there is an apparent need to expand the list of places, which may not be included in a place restriction order, to accommodate an offender's access to vital services such as health, welfare and other such related services.

Furthermore, the legislation is silent on whether an order can be tailored for an individual offender. Our research indicates that, if the legislation is to continue, there is a need to clearly express in the legislation that exceptions are permitted (such as attendance at an educational institution but only during class hours) when deemed appropriate by the court.

In light of the observations above, we make the following recommendations:

Recommendation 1

That Parliament consider this report in reviewing the ongoing need for the non-association and place restriction orders, as an option to target gang activity.

Les Tree, the Director General of the Ministry of Police, responding on behalf of the Ministry and NSW Police, did not address this specific recommendation. Mr Tree did make the following general comment:

> *Notwithstanding the infrequency of its use, the Police Portfolio considers that the Act should continue. The Government will shortly introduce further anti-gang legislation and in the light of some of the new offences contained in that bill, it is likely that there will be greater use made of the Act in the future.*[313]

Recommendation 2

If the non-association and place restriction orders remain:

a) Parliament give consideration to amending s100A of the *Crimes (Sentencing Procedure) Act 1999* to address the apparent need for flexibility in the legislation when imposing non-association orders and place restriction orders at sentencing. Such consideration should take account of the following issues:
   i. the need to accommodate kinship ties which extend beyond the immediate family in any definition of close family
   ii. in exceptional circumstances, allowing orders to be applied to close family where a court is satisfied of an ongoing pattern of criminal behaviour within the close family of an offender
   iii. the need to expand the list of places which may not be included in a place restriction order to accommodate health, welfare and related services
   iv. in exceptional circumstances, allowing orders to be applied to places that otherwise may not be included in a place restriction order, where a court is satisfied of an ongoing pattern of criminal behaviour (in which the offender is involved) occurring at that place
   v. the need to clearly express in the legislation that exceptions are permitted when deemed appropriate by the court.

b) The Attorney General continue to monitor the Act to ensure the proper, fair and effective use of the non-association and place restriction orders imposed at sentencing.

c) The Attorney General make enhancements to the Local Court computer system to ensure that statistical reports can be generated containing information on variations, revocations or appeals against non-association and place restriction orders to enable the resulting data to be included in any further monitoring of the legislation undertaken by the Attorney General.

d) The Attorney General make arrangements for the:
   i. non-association and place restriction conditions imposed at parole to be recorded accurately on the available court computer systems to enable future monitoring of the provisions
   ii. details of the non-association and place restriction conditions imposed at parole to be electronically transferred to COPS
   iii. data recording requirements for court imposed non-association and place restriction provisions at parole to be considered in the design and implementation of the 'Courtlink' project.

e) The Department of Corrective Services provide additional training and information to probation and parole officers and any other relevant personnel within the department about non-association and place restriction orders available at sentencing.

f) The Judicial Commission of NSW provide additional training and information to judicial officers about non-association and place restriction orders available at sentencing.

g) The NSW Police provide additional training and information to police prosecutors about non-association and place restriction orders available at sentencing.

h) The Department of Juvenile Justice provide additional training and information to relevant juvenile justice officers about non-association and place restriction orders available at sentencing.

i) The Department of Juvenile Justice include non-association and place restriction orders imposed at sentencing as an 'outcome category' on its system to enable the resulting data to be included in any further monitoring of the legislation undertaken by the Attorney General.

Ian McLean the A/Commissioner of the Department of Corrective Services offered the following comments in response to recommendation 2(e):

> *It is questionable whether changes to training, policies, procedures etc. will have any impact on the use of NAPR-type conditions. Assuming that it would have some impact, it is my view that the cost involved would outweigh any benefit received.*[314]

The Attorney General's Department advised, as regards recommendation 2(f) that the recommendation will be brought to the attention of the Judicial Commission's Education Committee and Research Department.[315]

The Ministry for Police supports recommendation 2(g) and advised legal services will provide the necessary training.[316]

Jennifer Mason, Director General of the Department of Juvenile Justice in response to our draft report advised with regard to recommendation 2(h):

> *While the department was not able to implement training and information to relevant juvenile officers ('JJO's') in the review period about 'place restriction' and non-association' orders available at sentencing, the department will incorporate such training into its formal training program.* [317]

The Department of Juvenile Justice offered the following comments in response to recommendation 2(i):

> *At the time of the implementation of the Act and during the review period the department operated a database known as the Client Information Data System (CIDS) that recorded information about supervised offenders.*
>
> *Since late 2002, the department has been involved in the development of a new Client Information Management System known as CIMS. Stage 1 of CIMS went live in August 2005, and has progressively enabled better tracking and management reporting in a number of areas.*
>
> *While CIMS cannot currently record the imposition of orders imposed under s33D of the Children (Criminal Proceedings) Act 1987 at sentencing, the department will have the capacity to do so with the Stage 2 release of CIMS; presently scheduled for implementation in November 2006.*[318]

Endnotes

[251] s95, Part 8 of the *Crimes (Sentencing Procedure) Act 1999.*
[252] s12, *Crimes (Sentencing Procedure) Act 1999.*
[253] Children's Court of NSW submission, 22 March 2004.
[254] NSW Department of Juvenile Justice submission, 4 March 2004.
[255] NSW Police, Southern Region Command submission, 4 March 2004.
[256] Letter from NSW Police Gangs Squad, State Crime Command, 7 December 2005.
[257] The Shopfront Youth Legal Centre submission, 15 March 2004.
[258] NSW Department of Juvenile Justice submission, 4 March 2004. The department further commented on the 13 October 2006 when responding to a draft of this report that:
> *It should be made clear that the department does not have a direct role in the imposition of sentences by Courts. Pre-sentence reports prepared by JJO's* [Juvenile Justice Officers] *address background issues relevant to sentencing but do not generally make specific recommendations as to sentence. While references relevant to decisions in respect of non-association and place restriction orders can be incorporated into such reports, it will ultimately be a matter for the Court to determine what orders, if any, will be made and under what provision of a particular Act of Parliament.*
[259] NSWPD, Legislative Assembly, 26 October 2001, pp. 18104–18107.
[260] At the time of the discussion paper 12 orders had been imposed by courts.
[261] s100H, *Crimes (Sentencing Procedure) Act 1999.*
[262] Unlike orders under the Act, a breach of a good behaviour bond or a suspended sentence is not in itself an offence and there are no provisions which make it an offence to publish the identity of a non-offender named in such conditions. s98, *Crimes (Sentencing Procedure) Act 1999.*
[263] s17A(1), *Crimes (Sentencing Procedure) Act 1999* states that the section applies to any offence that is punishable by imprisonment for 6 months or more, whether or not the offence is also punishable by fine.
[264] Children's Court of NSW submission, 22 March 2004.
[265] Interview with police prosecutor, December 2005.
[266] Minster for Community Services submission, 27 April 2004.
[267] The Shopfront Youth Legal Centre submission, 15 March 2004.
[268] NSW Police submission, 8 March 2004.
[269] Children's Court of NSW submission, 22 March 2004.
[270] NSW Police submission, 8 March 2004.
[271] This matter appears to have occurred outside the review period.
[272] Case No. 3. Details obtained from the COPS event narrative and NSW Local Court papers.
[273] Interviews with youth and Aboriginal legal services representatives, May 2003.
[274] Submission received by the review from a youth legal service.
[275] NSW Ombudsman final report on the *Review of the Police Powers (Drug Premises) Act 2001*, January 2005, pp. 206–216.
[276] The review received information that this was prominent practice in country towns.
[277] Case No.18. Details obtained from the COPS event narrative and NSW Local Court papers.
[278] NSW Police submission, 8 March 2004.
[279] Children's Court of NSW submission, 22 March 2004.
[280] The Shopfront Youth Legal Centre submission, 15 March 2004.
[281] NSW Police submission, 8 March 2004.
[282] Letter from NSW Police Gangs Squad, State Crime Command, 7 December 2005.
[283] R. Lozusic, *Gangs in NSW*, NSW Parliamentary Briefing Paper 16/2002, 30/12/2002, p. 3.
[284] Australia's constitutional system is founded upon the rule of law. That doctrine requires that laws be clear, certain and widely understood.

[285] N. Cowdery QC , Director of Public Prosecutions, NSW; President, International Association of Prosecutors 'The Rule of Law', Paper given at the Heads of Prosecutors Agencies Conference, Edinburgh, 4 May 2001. The paper comments 'the rule of law is in effect an institutional morality which requires certain ethical values to be observed by those who govern and those who administer public affairs'.

[286] s100D of the Act states that an offender's non-association order or place restriction order is suspended while the offender is in lawful custody (otherwise than while unescorted as referred to in s38(2)(a) of the *Crimes (Administration of Sentences) Act 1999,* and while the offender is under the immediate supervision of a public servant employed within the Department of Juvenile Justice pursuant to a condition of leave imposed under s24 of the *Children (Detention Centres) Act 1987*.

[287] Discussions with representatives from the Department of Corrective Services.

[288] Only one offender subject to a non-association order during the review period spent time in custody. This offender served six months of periodic detention.

[289] NSW Police submission, 8 March 2004.

[290] Children's Court of NSW submission, 22 March 2004.

[291] NSW Department of Corrective Services submission, 4 March 2004.

[292] NSW Department of Corrective Services submission, 4 March 2004.

[293] NSWPD, Legislative Assembly, 26 October 2001, p. 18105.

[294] s100C, *Crimes (Sentencing Procedure) Act 1999.*

[295] S100D, *Crimes (Sentencing Procedure) Act 1999.*

[296] See 7.1.1.12.

[297] NSW Police submission, 8 March 2006.

[298] NSW Department of Corrective Services submission, 4 March 2004.

[299] Children's Court of NSW submission, 22 March 2004.

[300] Case No.1.

[301] Case No.6.

[302] Case No.13.

[303] s17A(5), *Crimes (Sentencing Procedure) Act 1999.*

[304] NSW Police submission, 8 March 2004.

[305] NSW Police submission, 8 March 2004.

[306] NSWPD, Legislative Assembly, 26 October 2001, p. 18106.

[307] NSWPD, Legislative Assembly, 26 October 2001, p. 18106.

[308] Letter from NSW Local Courts, 2 August 2005.

[309] Letter from NSW Local Courts, 2 August 2005.

[310] Discussions with representatives from NSW Department of Juvenile Justice. See also 2.9.1.1.

[311] s51A, *Crimes (Sentencing Procedure) Act 1999.*

[312] Local Courts staff advised of the 'Courtlink' project in interviews. The 'Courtlink' project is discussed in L. Glanfield *Consistency in Court Rules — The NSW Partnership,* paper presented at the 'Proportionality — cost-effective justice?', Australian Institute for Judicial Administration Conference, 17–19 September 2004, Sydney, p. 3.

[313] Letter from the Ministry for Police, 8 August 2006.

[314] Letter from the NSW Department of Corrective Services, 14 September 2006.

[315] Letter from the Attorney General's Department of NSW, 28 August 2006.

[316] Letter from the Ministry for Police, 8 August 2006.

[317] Letter from the NSW Department of Juvenile Justice, 13 October 2006.

[318] Letter from the NSW Department of Juvenile Justice, 13 October 2006.

Chapter 9. Bail issues

9.1. Interpretation of amendments to the Bail Act

Prior to the commencement of the Act, the *Bail Act 1978* included — and still includes — a general power to grant bail subject to the accused person entering an agreement to observe specific requirements — including not to associate with persons or visit places — while on bail. A foundation issue for this review is the effect of the Act (new s36B) on this general power (s36).

9.1.1. Police and courts uncertain as to which section of the Bail Act should be referred to when imposing non-association and place restrictions conditions

Interviews and surveys of magistrates indicate some uncertainty since the introduction of the Act as to what section in the *Bail Act 1978* provides for the imposition of non-association and place restriction conditions at bail. Most magistrates and prosecutors who provided responses were of the view that either s36(2)(a) or s36B of the *Bail Act 1978* could be legitimately used.

In any case, magistrates appear to generally not make the distinction when they document their decisions. As one magistrate commented:

> *I have never been asked either by a prosecutor or defence lawyer to specify the section under which such a bail condition is imposed.*

Similarly it is clear that there has been uncertainty among police since the introduction of the Act as to whether they were imposing non-association and place restrictions conditions at bail under s36(2)(a) or s36B of the *Bail Act 1978*. It appears that most officers were of the view that either s36(2)(a) or s36B of the *Bail Act 1978* could be used to impose such conditions.

A telephone survey we conducted of 34 LACs highlighted that, while non-association and place restriction conditions were regularly being used as a condition of a person's bail, they were not necessarily being imposed under the new provisions, rather they were being imposed under the general powers to make bail conditions provided under s36(2)(a) of the *Bail Act 1978*. Similar comments were also received in face-to-face interviews with custody managers who made no distinction between s36(2)(a) and s36B. As far as custody managers were concerned, they were 'just doing as they always had done'. As one police officer stated, 'pragmatically it doesn't matter as long as the condition is appropriate at the time'.

The views and practices of magistrates in relation to court imposed bail and practices of police, raise a question as to whether the powers under s36 and s36B of the *Bail Act 1978* run concurrently, or whether s36B limits s36, such that non-association and place restriction conditions of the type outlined in s36B(1) can now only be imposed under that section.

9.1.1.1. Discussion paper responses

Our discussion paper invited comments about whether 'non-association bail conditions could be imposed under s36 or s36B of the *Bail Act 1978*'. Most of the respondents were of the view that s36 and s36B ran concurrently and that non-association bail conditions could be imposed under s36(2)(a) or s36B of the *Bail Act 1978*. However, the submission from the NSW Children's Court stated that:

> *This may be a matter to be resolved by a superior court, but given that s36 had acquired an established interpretation that such conditions could be imposed under that section, a possible interpretation of s36B is an intention to remove any doubt and confirm that existing power, rather than s36B creating an independent authority to make such orders.*[319]

9.1.1.2. Legal advice

Due to the apparent uncertainty we sought advice from senior counsel as to the nature of the interaction between s36 and s36B of the *Bail Act 1978* and whether they run concurrently.[320]

The legal advice obtained (see Appendix C) stated that as Parliament had provided a specific power to prohibit who a person associated with and restrict where they may go in s36B, together with the amendment requiring s36(2) to operate subject to s36B, the imposition of 'non-association and place restriction conditions' were now, effectively beyond the scope of s36(2)(a). Senior counsel further advised:

the fact that s36B(2) provided that conditions of this kind might be imposed 'in addition to' or 'instead of' any condition imposed under s36 did not mean that there is an alternate or concurrent source of power to impose such conditions under that section. Section 36 remains the general power to impose conditional bail, but it now operates subject to the specific power for the imposition of non-association and place restrictions conditions which are regulated by s36B.

Senior counsel advised that s36B should be regarded as codifying the conditions to which a grant of bail may be subject where it is intended to prohibit who a person associates with and restrict where they may go and was of the view that courts and police that continue to impose non-association and place restriction conditions under s36(2)(a) are in error in doing so.

9.1.1.3. Summary

We agree with the advice of senior counsel on this matter.

On receipt of the advice, we forwarded a copy to the NSW Attorney General's Department and NSW Police for consideration.

The NSW Attorney General's Department has advised that it agrees with the advice that such conditions should be imposed pursuant to s36B of the Act rather than s36(2)(a). The department further commented that it awaits provision of the Ombudsman's final report on the matter in order to ascertain what practice has been adopted when such orders are imposed before proposing any amendment to the legislation.[321]

NSW Police indicated that it 'concurs with the advice provided by Counsel and has initiated enhancements to the Computerised Operational Policing System (COPS) to ensure compliance with the *Bail Act 1978*.' It also advised that 'a Police Notice has been drafted by Legal Services outlining the change to COPS and that document has been approved for publication'. The enhancements generate a warning on the system that 'Non-association' and 'Place Restriction' information must not be recorded under conduct but in the screens created for the new provisions.[322]

9.1.2. Section 36C of the Bail Act — certain information not to be published or broadcast

Section 36C of the *Bail Act 1978* makes it an offence for a person to publish or broadcast information as to the identity of any named person with whom an offender is prohibited from associating pursuant to bail conditions imposed under this provision.[323] The stated rationale behind these non-publication provisions was to ensure that a person named in a bail condition would not have any '*inappropriate adverse influences being drawn against them*'.[324]

While courts and police could impose non-association conditions as part of bail under s36 prior to the Act, there were no equivalent provisions which made it an offence to publish the identity of a non-offender named in such a condition.

9.1.2.1. Discussion paper responses

In our discussion paper we referred to initial advice received from the NSW Attorney General's Department which suggested that this section did not apply when a non-association bail condition was made under s36. We were advised that the non-disclosure clause was not intended to apply 'across the board' and that as the legislation was introduced to deal specifically with gang-related crimes, it was decided that the non-disclosure provision should relate specifically to these offences, and to the new s36B of the *Bail Act 1978*.

Our discussion paper asked for responses as to whether there appeared to be any ambiguity about whether it is an offence to publish or broadcast a named person(s) for all non-association bail conditions or only those specifically under s36B of the *Bail Act 1978*.

The majority of respondents advised that they did not believe the legislation was ambiguous and were of the view that it was clear from the wording of s36C that the non-publication restrictions only applied to orders made under s36B.

However, the submission from the NSW Children's Court suggested that if its interpretation is correct that s36B confirms existing powers, the offence created by s36C(1) would cover an order made pursuant to s36 as the grant of bail 'referred to in s36B(1)(a)' is an order that is authorised by s36.[325]

9.1.2.2. Legal advice

Due to the apparent uncertainty we sought legal advice from Senior Counsel as to whether there was any ambiguity regarding whether it is an offence to publish or broadcast a named person(s) for all non-association bail conditions or only those specifically under s36B.

Senior Counsel's advice drew attention to the following statement by Mr Stewart MP in the second reading speech:

> *The amendments contained in schedule 2.1 to the Bill give legislative recognition to non-association and place restriction conditions of bail and make consequential amendments to the Bail Act. Importantly, the new section 36C of the Bail Act prohibits the publication of the identity of persons named in non-association bail conditions, other than the identity of the accused. Currently there is no such protection for non-association conditions imposed under the general bail conditions powers of the Bail Act.*[326]

Counsel was of the view that the language of the second reading speech did not limit the prohibition to persons named in non-publication orders made under s36B stating that:

> *It is clear from the statutory language of s36C that the purpose of the amendment, was to prohibit the publication of the identity of persons named in all non-association bail conditions and not simply to have an undifferentiated class of persons unprotected simply because the person granting bail elected to grant bail under s36(2).*[327]

Counsel further stated that given the lawful imposition of restraint on the liberty of the subject by conditions of this kind, a construction which promotes greater certainty as to the use of such a power is and should be preferred.

In relation to whether the legislation intended to place a limit on the application of the section to gang-related offences, counsel commented that if it was intended to place any limit on the application of the section then the amending legislation failed to refer to any such limitations. Counsel observed that 'there is nothing in the words of the statute that are even vaguely suggestive of such a limitation' and stated:

> *Though the second reading speech clearly confirms that the amending legislation is a part of a 'comprehensive anti-gang package', the legislation amending the Bail Act and the relevant passages in the second reading speech, make no attempt to limit the application of section 36, 36B or 36C to gang related offending or offences. The Bail Act as amended cannot be read down to achieve this result.*

Counsel further stated that if it was the intention of Parliament to limit the legislation, or the non-disclosure legislation to gang-related crimes, it would require the introduction of additional amending legislation to achieve this result.

9.1.2.3. Summary

We agree with the advice of counsel on this matter and believe that it clarifies that s36C is applicable to all non-association bail conditions.

The NSW Attorney General's Department indicated 'that the prohibition against disclosure provided by s36C appears to apply 'across the board' to all non-association restrictions placed on bail irrespective of whether they related to 'gang related activities'' and that it concurs with the advice that there is nothing in the wording of the legislation to limit s36B to those activities alone.[328]

NSW Police indicated that it 'concur[s] with the advice provided by Counsel'.[329]

9.2. Non-association and place restrictions conditions imposed by courts at bail

9.2.1. Inability to track impact of legislation on court imposed bail

As stated previously (see 7.3), no changes were made to the court systems to implement the changes introduced by the Act. Therefore, it is not possible to determine the impact the new provisions have had on the non-association and place restriction conditions imposed when granting bail at court.

The conditions which are entered onto the computer system by court officers make no distinction as to which section has been used to impose the conditions.

It is therefore impossible to assess from court data and files whether the Act is meeting its objectives in promoting further use of non-association and place restriction conditions at bail.

The Director of Local Courts in responding to our questions regarding the work undertaken in order to fully implement this section of the Act and track its impact stated:

- Arrangements for these conditions to be recorded on the GLC system and transferred to COPS were not completed. A 'skeleton system' was developed by the Police Department which would have enabled bail conditions to be transferred from GLC to COPS however this system was never fully developed or implemented.[330]

- That a review of the *Bail Act 1978* was currently being conducted which is considering, among other things, whether it is preferable to have the Minister prescribe the forms rather than having them in the regulations.
- That the 'Courtlink' project when implemented will allow details of all bail conditions to be collected and address many of the current limitations of transferring data from Local Courts to COPS.[331]

If the legislation is to continue we recommend that to enable accurate future assessment of the court data and files in relation to the use of these bail conditions and to provide for future monitoring of the provisions a number of matters be addressed in relation to the use of these bail conditions at court.

9.3. Non-association and place restrictions conditions imposed by police at bail

9.3.1. Is the Act meeting its objectives?

In his second reading speech, Mr Stewart MP made the following comments with regard to the new provisions relating to bail:

> *It amends relevant legislation to specifically recognise that non-association and place-restriction conditions may be attached to bail.*[332]

He also stated that:

> *Express legislative recognition of non-association and place restriction conditions will require bodies with bail responsibilities to specifically consider the appropriateness of such orders, thereby promoting their further use.*[333]

The main objective of these amendments as stated in Parliament was to 'break down an offender's association with persons and places that increase the likelihood of their re-offending' and the central focus of the legislation was to 'curb gang activity'.[334]

9.3.1.1. Use of non-association and place restriction conditions by police at bail in the review period

As outlined above (see 7.4.2) in order to determine the impact of the new provisions on the use of non-association and place restriction conditions imposed by police when granting bail we examined samples of COPS bail data for the review period (May 2002 to May 2004) and a comparison period (May 2000 to May 2002).

When comparing the data for the two sample periods it was found that the use of non-association and place restriction conditions by police when granting bail had remained relatively static.

In the comparative sample period non-association and place restriction conditions accounted for 47% (296/634) of all conditional bail for the period. In the review sample period it was found that non-association and place restriction conditions accounted for 44% (294/662) of all conditional bail for the period.

When comparing the non-association and place restriction conditions imposed for 'gang type' offences in the review sample period and the comparative sample period we found that there appeared to be some decline in the number of non-association and place restriction conditions imposed for gang-related offences, from 25% (73/296) in 2000 to 2002 to 22% (65/294) in 2002 to 2004.

As it was the aim of Parliament to 'promote' the further use of non-association and place restriction conditions when granting bail, the fact that the use of the conditions by police had remained static over the two periods, is evidence that the legislation did not meet this objective.

Similarly, the fact that use of these type of conditions for 'gang type' offences had declined in the review period is evidence that the legislation did not meet the objective of reducing criminal gang activity.

9.3.2. Implementation and operational issues identified

Our examination of the activities undertaken by NSW Police in order to implement the Act and our assessment of the operation of the Act in relation to police bail has revealed a number of issues. These issues include:

1. No amendments have been made to the bail forms to explicitly incorporate the provisions introduced by the Act.
2. The two additional 'create non-association condition' and 'create place restriction condition' COPS screens developed for the Act have not been consistently used by police officers when imposing non-association and place restriction conditions at bail.
3. A significant percentage of place restrictions are being imposed in order to protect a victim or witness.

4. A significant number of conditions were being imposed by police which made inexact reference to a class of place or district or similar.
5. There were identified occasions where non-association and place restriction conditions were being imposed for summary or minor offences.
6. A significant number of non-association and place restriction conditions were being imposed on young and Aboriginal persons by police when granting bail.[335]

9.3.3. Bail forms

No amendments were made to bail forms to explicitly incorporate the new provisions. Police have instead been directed to 'manually alter the existing relevant forms' when applying the new provisions.[336]

Such forms are prescribed under the *Bail Regulation 1999* and any amendment would have to occur by way of amending the regulation. In our view, if the legislation is to continue, the forms should be amended as originally intended, to enable the correct provision of the *Bail Act 1978* to be clearly and simply referred to when authorised officers are recording their decisions in relation to non-association and place restriction conditions. Such an amendment would have the effect of highlighting the existence and consequence of the new provisions and also provide for accurate future monitoring of the legislation. It would also serve to highlight the legislative restrictions accompanying relevant bail conditions; this is a benefit to officers and the bailee.

9.3.4. COPS screens developed for the Act have not been consistently used by NSW Police

Enhancements to the COPS system were made to incorporate the amendments to the *Bail Act 1978*. Two additional 'create bail condition' screens were introduced, namely 'Create non-association condition' and 'Create place restriction condition'. These screens were developed to enable officers to enter details of the new bail conditions directly into COPS.

However, our examination of the police use of the non-association and place restriction screens in the review sample period has revealed that police have not been using the screens consistently. Approximately 24% of non-association and place restrictions conditions imposed in the review period were recorded on the screens. It appears that the failure to appropriately record conditions has occurred for reasons including the following:

- police were uncertain as to whether they were imposing non-association and place restrictions under s36B or s36(2)(a) and were therefore not consistently using the screens
- police were unaware of the existence of the screens.

The inconsistent recording of non-association and place restriction conditions restricts the ability to scrutinise the operation of the amendments made by the Act in relation to bail.

Given the acceptance by NSW Police that s36B is the appropriate provision when imposing non-association and place restrictions conditions, there is no reason why these screens should not be used in all appropriate cases.

Therefore, if the legislation is to continue, we recommend that NSW Police advise officers (including police supervisors who review COPS events) of the correct way to record non-association and place restriction conditions imposed at bail on COPS.

9.3.5. Place restrictions being imposed at bail by police in order to protect a victim or witness

As noted above (see 7.4.2.13) examination of the content and context of the non-association and place restriction conditions imposed by police in the review sample period revealed that a significant number of place restriction conditions[337] were being imposed at bail in order to secure the protection of the victims or witnesses.[338]

9.3.5.1. Survey of custody managers

Our telephone survey of custody managers in 34 LACs conducted in 2003 also revealed the use of conditional bail for domestic violence offences. The survey was conducted to ascertain custody managers views in relation to conditional bail. Custody managers were asked 'when would you generally impose conditional bail?' The two most common grounds cited for granting conditional were for victim protection (24%) and the likelihood of the offender appearing at court (18%). In response to the question as to 'what type offence would you tend to give conditional bail?' the most prevalent offences were offences related to domestic violence (26%) and assault (26%).

9.3.5.2. NSW Police comments on the use of the conditions for the protection of victims

We note that when NSW Police provided information to officers on the Act as it related to bail through the *Policing Issues and Practice Journal* the following comments were made:

> *There is potential for the new conditions to be imposed where other measures might be more appropriate.*
>
> *Non-association and place restriction bail conditions should not ordinarily be used where other measures such as Apprehended Violence Orders would be appropriate. AVO applications are designed as a civil response to the complex issues of domestic violence, while the new Act provides for non-association and place restriction conditions to be imposed at distinct stages of the criminal justice process.*
>
> *In some cases police may consider it appropriate for an AVO application to be made concurrently with criminal changes being laid. The new provisions in the Bail Act 1978 in no way limit the ability of persons to apply for, or courts to grant, AVOs in these circumstances.* [339]

The main objective of the Act as stated by Parliament was to 'break down an offender's association with persons and places that increase the likelihood of their re-offending' and the central focus of the legislation was to 'curb gang activity'. [340] It was envisaged that the legislation would predominantly be used to prevent a person from associating with other gang members or from attending an area where they are more likely to commit a criminal act.

Notwithstanding this, it was also envisaged that the conditions could apply to offences that are not gang-related. Indeed, as discussed above, prior to the legislation being enacted in relation to bail, non-association and place restriction type conditions were routinely imposed at bail under s36(2)(a) in a variety of circumstances, including for the protection of victims. This practice accords entirely with s37 of the *Bail Act 1978* which provides that courts and police may impose conditions on the accused person for the purpose of promoting further effective law enforcement or for the protection and welfare of any especially affected person (including the victim), or the community.

9.3.5.3. Implications of the practice

The police practice of using place restrictions for the protection of victims and witnesses has implications for the following:

- the use of these conditions for the protection of victims and witnesses following the laying of criminal charges where other measures might be more appropriate
- the development of guidelines for consideration when imposing non-association and place restrictions at bail.

In relation to police use of the place restriction conditions when granting bail for the protection of victims where other measures might be appropriate, it appears that police may be adopting this practice in some circumstances for the following reasons:

- due to apparent difficulties associated with obtaining and issuing telephone interims orders (TIO's) and interim orders
- to restate and reinforce the conditions already outlined in an existing AVO following the laying of criminal charges
- for additional protection for a person who is making a complaint themselves to the court and seeking an AVO on their own behalf
- where a TIO has been applied for but refused by the authorised justice
- where police are not operating in accordance with their own standard operating procedures by using conditional bail as means of providing protection for the victim instead of TIOs, interim orders and final apprehended violence orders when appropriate.[341]

Particular concerns arising from the reasons listed above include:

- that the current procedures relating to the issue of TIOs and interim orders are not sufficient to provide immediate protection for victims against actual or threatened violence
- that police are not operating lawfully or in line with recommended standard operating procedures as they may be imposing conditional bail instead of issuing a TIO, interim order or seeking an AVO.

9.3.5.4. Current procedures relating to the issue of TIOs and interim orders are not sufficient

TIOs exist to 'provide effective and immediate relief' to victims of domestic or personal violence when it is not practicable for a court to make an immediate order because of the time or place at which the incident occurs. Only police are permitted to apply for such orders[342] and can do so if, when attending an incident, they have good reason to believe an order is necessary to ensure the safety of the person who would be protected by the order or to prevent substantial damage to any property of that person.[343]

Police officers may apply for an interim order (including in some circumstances a TIO) if they suspect or believe that domestic violence, stalking or child abuse 'has recently been or is being committed, or is imminent, or is likely to be committed, against the person for whose protection an order would be made',[344] unless the person is at least 16 years of age and intends to make the complaint themselves or if the police officer believes there is good reason not to apply for an interim order.[345]

However, it has been identified that police often experience practical difficulties in obtaining TIOs in an emergency. The Law Reform Commission in its 2003 Report on Apprehended Violence Orders noted that:

> *concern was expressed that courts do not grant TIOs during court hours. This means that an application for an ordinary interim order must be made during those times, which can involve delays involving hours, even days. Indeed, the Commission heard that if an incident occurs at 10am, it is often quicker for police to wait until after 5pm to apply for a TIO than to apply for an ordinary interim order immediately at 10am.*[346]

It appears from our examination of conditional bail that police may in some circumstances grant conditional bail with similar or the same conditions as they seek in a TIO or other order.

9.3.5.5. Police not applying for TIOs when needed

The Law Reform Commission in its report also noted that there was some concern expressed about police not applying for TIOs when they are clearly needed.

It is important to note here that bail is generally a weak substitute for a TIO when there is clear evidence that a domestic violence offence has been committed. The granting of bail, by itself, offers limited protection for the victim as it is not a criminal offence to breach a bail condition imposed. A TIO or interim order provides better protection to the victim than a bail undertaking. A breach of either will render the defendant liable to immediate arrest, as the breach of an interim order is an offence punishable under s562I of the *Crimes Act*.[347] However a breach of bail merely brings the defendant before the court for a re-assessment of the bail.

The police practice of using place restrictions for the protection of victims and witnesses also has implications for the development of any guidelines for consideration when imposing non-association and place restrictions at bail.

9.3.5.6. Suggestions to resolve the issue

The Law Reform Commission noted that the following suggestions had been made by various agencies and groups in order to resolve these issues:

- that further police guidelines should be developed as to when to apply for TIOs
- that it should be mandatory to apply for a standard TIO if the police charged a person with a domestic violence offence and that s562H(2A) should be strengthened to require police to apply for a TIO where they believe a domestic violence offence has been committed or is imminent, unless the officer knows an AVO is already in place
- that there should be a presumption in favour of granting a TIO where a domestic violence offence has been committed, pending determination of a final order
- that police should have the power to issue interim orders on the spot in certain specific situations, such as when charging someone with a domestic violence offence, in the same way they can impose bail conditions. In these circumstances the applicant will receive immediate protection without having to wait for a magistrate to be available or an authorised justice to be contacted after hours. It could also form part of the bail conditions relating to the charge.[348]

The Law Reform Commission recommended the following in relation to the need for prompt issue of TIOs and the police obligation to issue them:

- Section 562H(2)(b) should be amended to clarify that TIOs are available on a 24 hour basis (whether or not the court is sitting) in circumstances where the police officer making the application has good reason to believe that a person requires immediate protection under such an order, and it is not practicable to lodge a complaint for an interim order.[349]
- Section 562H should be amended to clarify that a police officer must apply for a TIO where a defendant is charged with a domestic violence offence, unless an AVO is already in place.[350]
- Where an authorised justice cannot be contacted, a police officer above the rank of Inspector may grant a TIO which shall be in force for 48 Hours.[351]

9.3.5.7. Summary

Our examination of conditional bail imposed in the review sample period appears to provide further confirmation for the need to amend the legislation in relation to TIOs to ensure that victims of domestic or personal violence are provided with effective and immediate relief.

Therefore we recommend that the NSW Attorney General consider the observations and findings in relation to the use of conditional bail for the protection of victims and witnesses contained in this report when considering any further amendments to Part 15A (Apprehended Violence) of the *Crimes Act 1900*.

9.3.6. Imprecise place restriction conditions being imposed

The Act requires that any conditions imposed when granting bail must specify the place where the alleged offender must not frequent or visit.

Our examination of non-association and place restriction bail conditions imposed in the review sample period revealed that a significant number of conditions were being imposed by police when granting bail which made inexact reference to a category of place or district. We also identified that a number of place restriction conditions recorded by police in the screens developed for the new provisions were described in very broad/vague terms (see 7.4.2.9). These identified conditions do not appear to satisfy the requirements of the Act.

An example of such a condition is that a defendant 'not enter NSW'. This is a condition relating to entire state and not a specified place or district in the sense requires in s36B(1).

Similarly a condition that a defendant 'not enter any retail shopping centres' is potentially confusing. A defendant must distinguish between shopping centres and malls, arcades and single shops, which the police officer has envisaged as being part of the condition.

Some conditions are clearly unworkable and in any event not in the form of s36B(1) such as not to enter retail stores unless in the company of another person; or not to enter licensed premises where the victims may be.

A prohibition imposed on an alleged offender not to frequent or visit 'any' category of place is also vague and inexact and has the potential to cause injustice. The more imprecise a condition is, the more difficult it is for a bailee to comply fully with it, and the more likely the person may breach the condition.

The consequences of a breach are significant. In particular a person may be arrested for breach and brought before a court.[352] Non-compliance will be a relevant factor in any further bail decision.

The Shopfront Youth Legal Centre commented in relation to the imposition of inexact and inappropriate bail conditions and risk of breach:

> *Although breach of bail is not an offence itself, it typically leads to the person being arrested by police and held in custody until they can be brought to court (usually overnight).*[353]

And while an alleged offender may seek to vary or revoke an unreasonable bail condition, in reality this is difficult for many offenders to achieve. The Shopfront Youth Legal Centre also commented on this matter:

> *We concede that, if such conditions are imposed as part of a bail undertaking, a defendant may apply to have them varied. However, this is no simple matter for many people. To have a bail variation application listed, it is necessary to submit forms, contact the police officer in charge of the case, etc. Even for young people who have access to legal advice, this can be an onerous process. Some young people do not even realise they can apply to vary their bail conditions, or even get free legal advice, prior to their listed court date...Many young people therefore do not apply to vary their bail conditions, instead running the risk they will be arrested for breach.*[354]

In light of the above discussion, should the legislation continue, we recommend that guidelines be developed to assist police to impose specific, clear and appropriate non-association and place restriction conditions at bail in accordance with the Act.

9.3.7. Non-association and place restriction conditions imposed at bail for minor offences

9.3.7.1. Views about bail for minor offences

Concerns were raised in the Parliamentary debate and interviews and submissions from stakeholders regarding the Act that police are imposing conditions that are disproportionate to or more onerous than is warranted given the severity of the alleged offence. The Shopfront Youth Legal Centre commented:

We have observed that police are frequently imposing bail conditions that are unwarranted by the seriousness of the alleged offences. In our experience, it is relatively common for place restrictions conditions to be imposed as a condition of police bail for summary offences. Some of these offences (eg disobey police direction) are punishable by fine only. Others (eg. possess prohibited drug, solicit within view of a dwelling) potentially carry custodial sentences but are usually dealt with by way of a fine or other non-custodial sentence.[355]

The centre went on to refer to typical cases where street sex workers working in Canterbury Road Bankstown, an industrial area well known for street sex work, had been charged with soliciting within view of a dwelling or church and had a place restriction imposed upon them prohibiting them from visiting the area. The centre commented that:

In many cases the alleged offender was clearly not guilty of the charge …however defendants would plead guilty in order to rid themselves of the restrictive bail conditions so they could return to pursue their lawful occupation in an area where it is lawful to solicit for prostitution. If a defendant pleads not guilty, it can take several weeks or months before a hearing date is set. In the meantime, the bail conditions continue unless the magistrate sees fit to vary them…The fact that there is such strong disincentive to defend the charge — even when there appears to be a strong defence — leads to grave injustice.[356]

The centre also referred to cases in Cabramatta where the police would direct a person to stay out of Cabramatta for seven days and if the person disobeyed the direction more than once they would be arrested and charged with disobeying a police direction and granted bail on the condition that the person not come within a certain radius of Cabramatta railway station. The centre commented that:

The bail conditions imposed are far more onerous than is warranted by the nature of the charge, and we suggest that they are being used inappropriately as a means of punishment and social control.

The centre also observed:

Conditions of this kind imposed are out of proportion with the seriousness of the alleged offence. They are unjustified from a civil liberties point of view, even if the person has no difficulty complying with the conditions. It would be ludicrous to expect a middle-class person to be banned from, say, Bondi Beach, just because they were caught drink-driving, swearing or littering in the area. However many police officers seem to think it is reasonable to ban disadvantaged people for certain offences of similar gravity.[357]

Our review of the *Drug Premises Act 2001* examined the use of these types of seven day directions and the subsequent bail conditions imposed in Cabramatta and concluded that arrest and charge should only be used as a last resort. Reasons for this included that there were other options open to police, such as issuing an infringement notice and that the consequences that may arise for a person who obtains a criminal record as a result of a conviction for disobeying a move-on direction outweigh the nature of the offence.

The Shopfront Youth Legal Centre recommended that offences by way of a fine only should never have bail conditions attached (except perhaps in truly exceptional circumstances) but should be brought to court by way of a 'no bail' court attendance notice (CAN) and that 'no bail' CANs or unconditional bail should be used for summary offences generally, unless special circumstances exist (e.g. if is an offence such as breach of an AVO, or there is otherwise a risk of violence, intimidation or serious property damage).[358]

The NSW Law Society agreed with the recommendations made by the Shopfront Youth Legal Centre regarding the imposition of conditional bail for minor offences.[359]

The Juvenile Justice Advisory Council of NSW commented:

It is of concern that unnecessarily onerous conditions are placed on bail…often attached to public order or summary offences. These conditions set up young people to be breached and, in many cases, to spend time in custody for offences that do not warrant any custodial penalty. The potential incarceration of people for public order offences is a problem for Aboriginal communities, and has been identified as such for some time, particularly since the Royal Commission into Aboriginal Deaths in Custody. The current legislation exacerbates this problem by placing restrictions on movement and increasing the likelihood of breaches. This issue can be particularly acute for Aboriginal people in isolated areas where it may prove to be impossible to comply with restrictions on movement.[360]

The NSW Children's Court commented in relation to this issue that:

A concentration on the single issue of the 'severity' of the alleged offence in the context of an examination of bail misses the point that the matters that may be considered when bail is being granted or refused are set out in s32. The 'severity' of the alleged offence is only one of those factors and it is only relevant when considering the probability of whether or not the accused will appear at court. The alleged offence may not be of the highest order of seriousness but the accused may have a long history of not attending court on bail, may seek to intimidate witnesses or use the opportunity of having bail to commit further offences.[361]

The Shopfront Youth Legal Centre also identified that one benefit of not imposing such conditions for minor offences is the saving of police, court and legal aid resources.[362]

9.3.7.2. Review sample period cases

In the review sample period there were two matters identified where place restriction conditions had been imposed for minor offences. One matter involved charges against a man who was an area known to police for prostitution. He provided the police with a false name, was charged and given bail conditions not to enter 1000 metres of the particular area. In another matter an itinerant defendant was charged for entering the premises of a deceased estate without lawful excuse. He was granted bail with a place restriction condition prohibiting him from entering the deceased estate. The conditions imposed could be interpreted as being more onerous than the offence warranted.[363]

9.3.7.3. Summary

The imposition of unreasonable bail conditions on accused persons may be of great consequence. A person may lose their entitlement to bail because they are arrested for breaching a bail condition. For persons charged with offences for which the maximum penalty is a fine only, a breach of bail may result in the accused spending time in custody even though the original offence did not carry a custodial penalty.

The Children's Court commented in relation to unreasonable bail conditions that 'there are avenues by which inappropriate bail conditions may be reviewed and the court would not be slow to change bail conditions not considered appropriate'. However, in reality this may be difficult to achieve.

Therefore, should the legislation continue, we recommend that the suitability of imposing non-association and place restrictions when granting bail for minor offences be considered in the development of guidelines to assist police to impose appropriate non-association and place restriction conditions at bail. In our view, such restrictions should only be imposed as a last resort for these type of offences, and should be approved by a senior officer — for example the duty officer.

9.3.8. The development of guidelines for consideration when imposing non-association and place restrictions at bail

9.3.8.1. Section 100A of the *Crimes (Sentencing Procedure) Act 1999*

Section 100A of the *Crimes (Sentencing Procedure) Act 1999*, as amended, recognises that non-association and place restriction orders should not be imposed as part of a sentence where 'the burden of such an order would be unreasonable and frustrate the offender's reintegration into society'.[364] In effect, this section qualifies the scope for non-association and place restriction orders so as not to restrict certain associations or activities, such as prohibiting an offender from associating with members of their close family or attending their place of residence or the place of residence of any member of the alleged offender's close family.[365]

9.3.8.2. Safeguard provisions contained in s100A not reflected in the amendments to the *Bail Act*

The qualifications detailed in s100A of the Act are not reflected in the amendments to the *Bail Act 1978*, and are therefore not binding on police or court grants of bail.[366]

However, when providing information to officers on the legislation through the *Policing Issues and Practice Journal* NSW Police recommended that police use s100A as a guide as to what constitutes reasonable and appropriate conditions to be applied when using non-association and place restriction bail conditions.[367] NSW Police further acknowledged that 'the list [contained in s100A] is not exhaustive and that in some circumstances, kinship relationships should also be considered'. NSW Police commented:

> *Police should always be mindful of the impact that prohibiting an Aboriginal person from associating with any distant relatives may have.*[368]

Representatives from youth and Aboriginal legal services provided us with a number of examples which highlighted the need for a formalised set of guidelines to be developed in relation to bail with consideration to the safeguards contained in s100A.

For instance one legal centre advised that a bail condition was imposed on a 10 year old boy prohibiting him from residing with any member of his family, after having been arrested and charged for an offence. As the NSW Department of Community Services was unable to find a placement for him, he had to remain in custody until his court hearing date.[369]

The view of a solicitor from an Aboriginal legal service was that it 'is poor public policy to hope that police and courts will be guided by s100A as to what are reasonable and appropriate conditions when these bail restrictions are imposed', and that if such practices are recommended by authorities they should be formalised.[370]

9.3.8.3. Submissions

Our discussion paper asked for responses as to how consideration of issues relating to the use of non-association and place restriction conditions when imposing bail may be made more effective. For example: by encouraging further training; drafting standard guidelines which set out matters to be considered when devising non-association and place restriction conditions when imposing bail; or by expanding s100A of the Act so it applies to non-association and place restrictions conditions imposed at bail.

Submissions received in response to this issue were generally not supportive of expanding s100A of the Act to apply to conditions imposed at bail. However much support was expressed for the development of a set of guidelines based on the considerations contained in s100A to assist officers involved in granting bail. The NSW Director of Public prosecutions (DPP) commented:

> *It would be useful to develop a set of guidelines setting out matters to be taken into account when the imposition of a non-association or place restriction bail conditions was under consideration. Factors such as those mentioned in s100A of the Crimes Sentencing Procedures Act 1999 are relevant.*[371]

The NSW Commission for Children and Young People commented:

> *I support the use of these matters as a guide to what might constitute a reasonable and appropriate condition in association with bail…these safeguards are essential in ensuring that children and young people are not isolated from important support networks and are able to continue with day to day life as much as possible in the circumstances.*[372]

Shopfront Youth Legal Centre advised that it supported the development of guidelines and commented that it believed it was essential for a definition of close family to refect kinship ties 'to take account the family structures of Aboriginal people'. The centre suggested that as some police and judicial officers will find it difficult to assess a particular person's kinship ties there should be a 'requirement to consult with an appropriate Aboriginal liaison officer as to the person's kinship ties before making a non-association order against a person of Aboriginal or Torres Strait Islander origin.' [373]

The exception to the support for the use of the s100A as a guide when granting bail came from the NSW Children's Court which advised:

> *The recommended practice by police to apply s100A when considering the imposition of bail conditions was without authority and may well deflect from proper consideration of the stringent considerations regarding the imposition of bail conditions outlined in s.37 of the Bail Act.*[374]

Certainly if such guidelines were to be developed they would need to be in accordance with and take account of those restrictions on imposing bail conditions already detailed in s37 of the *Bail Act 1978*.[375]

NSW Police and the DPP also emphasised the need for such guidelines to be flexible in their approach. NSW Police commented:

> *The guidelines themselves would need to be flexible to allow individual circumstances to be taken into account in each determination.*[376]

Examples of where such flexibility may be required were provided by the DPP:

> *For example, it may well be appropriate in the circumstances of a particular case to impose a bail condition which precludes an accused person having contact with a member of his close family (as defined in s100A(3) of the Act) in licensed premises, because the accused and that family member have together been engaged in a fight which resulted in the laying of assault charges at the location and have previous convictions for assault at this type of premises.*
>
> *Similarly, it may be appropriate to place a restriction on an accused person attending a particular educational institution or place of worship if that person has shown a propensity to commit offences while attending those locations.*[377]

9.3.8.4. Applicability of guidelines to the imposition of non-association and place restriction conditions for the protection of victim and witnesses

A significant number of place restriction conditions imposed in the review sample period were imposed for the protection of the victims or witnesses. These conditions were most often imposed where a domestic or personal violence offence had been committed.

In these circumstances the qualifications outlined in s100A of the *Crimes (Sentencing Procedure) Act 1999* will often not be relevant or appropriate. For instance, a qualification that an accused person is not to be prohibited from attending the residence of any member of the accused's close family may not be applicable as police may be of the view that the accused should be restricted from attending the family home in order to protect the victim. Similarly the qualifications not to restrict an accused from associating with members of their close family may very often not be applicable in circumstances where a domestic violence offence has allegedly been committed on the accused's spouse or another family member.

Thus any guidelines developed for consideration when imposing non-association and place restrictions at bail need to accommodate circumstances where non-association and place restriction conditions are imposed for the protection of victims or witnesses.

9.4. Is s36B necessary?

The legislation relating to bail codified existing powers. The objective of codification or express legislative recognition of non-association and place restriction conditions was to require bodies with bail responsibilities such as NSW Police to specifically consider the appropriateness of such conditions, thereby promoting their further use. Parliament sought promotion of these conditions to target gangs, break down criminal associations, promote the rehabilitation of offenders and assist in preventing crime.

Our research revealed that the legislation at present does not meet these objectives. There has been no increase in the use of these type of conditions during the two year review period and no increase in the use of these provisions for gang type activity. The conditions are largely imposed for offences other than serious organised criminal gang activity.

Our research revealed that there were no charges relating to the non-publication provisions (s36C) prosecuted in the review period.

Our research has also revealed that the provisions as they relate to bail are misunderstood by magistrates and police. There has been general uncertainty as to whether conditions were being imposed under s36(2)(a) or s36B of the *Bail Act 1978* and whether the non-publication offence, s36C, applied to conditions made under s36B only.

Advice received from Senior Counsel has now clarified the position. However, further education and training of magistrates and police is required to be undertaken to outline the agreed legal interpretation.

Our research has also identified a number of implementation and operational difficulties with the provisions as they relate to bail. It was found that the relevant court and police bail forms were not appropriately amended and that Local Courts did not specifically record their use of the provisions. It was also found that NSW Police recorded the provisions inconsistently.

To make the provisions more workable, NSW Police recommended that police use s100A as a guide to what constitutes reasonable and appropriate conditions to be applied when using non-association and place restriction bail conditions. Likewise many agencies supported the development of a set of formalised guidelines with reference to s100A which set out appropriate matters to be considered when imposing these conditions.

However we have identified that there are a number of complex issues requiring consideration in the use of s100A as a guide. Section 37 of the *Bail Act 1978* already sets out comprehensive considerations regarding the imposition of bail conditions. These considerations would need to be properly taken account of in the development of any guidelines.

The guidelines would also need to be made flexible to allow individual circumstances to be taken into account in determinations. With non-association conditions for example, it appears that a broad definition of close family would need to be employed to accommodate kinship ties and consideration would need to be given to allowing restrictions of association with close family where there is evidence of an ongoing pattern of criminal behaviour within families.

In relation to place restriction conditions, the list of places that may not be included in a place restriction condition would need to accommodate an offender's access to vital services such as health and welfare and related services and consideration would need to be given to allowing conditions to be applied to an educational institution or place of worship where there is evidence of an ongoing a pattern of criminal behaviour.

We have also found that the restrictions listed in s100A are often not relevant or appropriate in circumstances where place restrictions conditions are imposed for the protection of victims or witnesses. This is of particular significance given that we identified that 49% of place restriction bail conditions are imposed for the protection of the victim or witness. This issue would need to be considered in any development of guidelines for the imposition of non-association and place restriction bail conditions.

Thus it appears that little has been achieved by the amendments. There appears to be few advantages to police or courts in using s36B and the criminal justice outcomes sought, that is, an increase in the use of these types of provisions and an increase in use for gang type offences in particular, have not been achieved.

We have considered whether to recommend the repeal of s36B. The introduction of s36B has resulted in a provision which has the clear potential to be less flexible than s36(2)(a) and more complex to apply.

However, the Act, and insertion of s36B and s36C does:

- provide guidance as to the nature of non-association and place restriction conditions, reducing the possibility of uncertainty
- provide guidance on when a condition will not be breached
- provide a clear definition of 'associate with', and
- provide protection for persons named in a condition.

Further, the issues of inflexibility and low use which are relevant to our recommendations concerning orders, are not especially relevant to bail conditions, both because similar conditions were previously available before the Act and continue to be used, and no provision similar to s100A applies to bail conditions.

On balance, and given misunderstandings and less than comprehensive implementation, we do not at this time recommend repealing s36B. Full implementation may better contribute to delivering the objectives of the legislation.

In light of those observations above, we make the following recommendations:

Recommendation 3

That Parliament consider this report in reviewing the ongoing need for a specific provision in the *Bail Act 1978* to permit the grant of bail subject to non-association and place restriction conditions.

Recommendation 4

If the Act is to continue, the Attorney General, in conjunction with NSW Police and appropriate representatives of other interested groups such as Legal Aid, community legal centres, victims' representatives, the Director of Public Prosecutions and Aboriginal and youth legal centres and community organisations, give consideration to the development of a set of formalised guidelines which set out appropriate matters to be considered when imposing non-association and place restriction conditions at bail. Such consideration should take account of the following:

i. those qualifications contained in s100A of the *Crimes (Sentencing Procedure) Act 1999*
ii. those restrictions on imposing bail conditions already detailed in s37 of the *Bail Act 1978*
iii. the apparent need for flexibility when imposing non-association conditions at bail
iv. circumstances where bail conditions may be imposed for the protection of victims or witnesses
v. the need for police and courts to impose specific, clear and appropriate non-association and place restriction conditions at bail in accordance with the Act
vi. the suitability of imposing non-association and place restrictions when granting bail for minor offences
vii. the impact of the conditions on Aboriginal and young persons.

The Ministry for Police has advised that this recommendation is supported.[378]

Recommendation 5

If the Act is to continue, that:

a) NSW Police provide a briefing to police prosecutors and those police who have responsibility for imposing bail, outlining the agreed legal interpretation regarding the interactions of the powers under s36 and s36B and the application of s36C of the *Bail Act 1978* and the relevant implications.

b) NSW Police advise officers (including police supervisors who review COPS events) of the correct way to record non-association and place restriction conditions imposed at bail on COPS.

The Ministry for Police supports recommendation 5(a) and advises:

> *Legal Services will brief police prosecutors and develop a 'Law Notes' article for distribution to police generally within the in-house Police journal Police Weekly in relation to s.36, s.36B and s36C of the Bail Act.*[379]

The Ministry for Police support recommendation 5(b).

Recommendation 6

If the Act is to continue, the:

a) Attorney General consider the advice regarding the interactions of the powers under s36 and s36B of the *Bail Act 1978* and the application of s36C and the findings and observations in this report in relation to adopted practice, and provide advice to those courts who have responsibility for imposing bail as appropriate.

b) Attorney General make arrangements for:

   i. the pending review of the Bail Regulation to consider an amendment to the 'Bail Undertaking' forms used for documenting bail conditions imposed at court and by police so that the relevant provisions of the *Bail Act 1978* are clearly and simply referred to when magistrates and other officers are recording their decisions in relation to any non-association and place restriction conditions imposed

   ii. all non-association and place restriction conditions imposed at bail, including reference to the relevant *Bail Act 1978* provisions, be recorded accurately on the available court computer systems

   iii. details of the non-association and place restriction conditions imposed in accordance with the Act and recorded on the courts computer systems to be electronically transferred to COPS

   iv. data recording requirements for non-association and place restriction provisions imposed at bail to be included in the design and implementation of the 'Courtlink' project.

c) Attorney General continue to monitor the Act to ensure the proper, fair and effective use of non-association and place restriction conditions imposed at bail by courts.

Recommendation 7

That the Attorney General consider the observations and findings in relation to the use of conditional bail for the protection of victims and witnesses contained in this report when considering any further amendments to Part 15A (Apprehended Violence) of the *Crimes Act 1900* to ensure that victims of domestic and personal violence are provided with effective and immediate relief.

Endnotes

[319] Children's Court of NSW submission, 22 March 2004.
[320] Legal advice was provided by Elizabeth Fullerton SC, 1 July 2005.
[321] Letter from the NSW Attorney General's Department, 23 August 2005.
[322] Letter from NSW Police, 11 October 2005.
[323] We are not aware of any person having been named in contravention of this section of the Act during the review period.
[324] Mr Stewart MP, NSWPD, Legislative Assembly, Second Reading Speech, 26 October 2001, p. 18106.
[325] Children's Court of NSW submission, 22 March 2004.
[326] NSWPD, Legislative Assembly, 26 October 2001, p. 18106.
[327] Legal advice provided by Elizabeth Fullerton SC, 1 July 2005. See Appendix C.
[328] Letter from the NSW Attorney General's Department, 23 August 2005.
[329] Letter from NSW Police, 11 October 2005.
[330] Letter from the Director of NSW Local Courts, 4 August 2005. The Director of Local Courts advised 'a skeleton system was developed by the Police Department which would have enabled bail conditions to be transferred from GLC to COPS however this system was never fully developed or implemented. The reasons for this are not known to this office'.
[331] Letter from NSW Local Courts, 4 August 2005.
[332] NSWPD, Legislative Assembly, 26 October 2001, p. 18106.
[333] NSWPD, Legislative Assembly, 26 October 2001, p. 18106.
[334] NSWPD, Legislative Assembly, Second Reading Speech, 26 October 2001, p. 18105.
[335] See Chapter 11 for discussion and recommendations relating to this issue.
[336] The July 2002 *Police Weekly* article directed that 'until the bail forms are amended, police should manually alter the existing relevant forms'. '*Commencement of the Justice Legislation Amendment (Non Association and Place Restriction) Act 2001*', *Police Weekly*, Vol. 14, No 28, 22 July 2002, p. 13.
[337] Only those conditions that satisfied the requirements of the Act, in that they specified the place or district where the offender must not frequent or visit, were included as a place restriction in the review sample period.
[338] To determine the context in which the conditions had been imposed we made our own inquiries of the COPS database to obtain details of incidents such as 'event narratives' composed by operational police who dealt with particular incidents and court outcomes.
[339] '*Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001*', *Policing Issues and Practice Journal*, Vol. 10, No. 3, July 2002.
[340] NSWPD, Legislative Assembly, Second Reading speech, 26 October 2001, p. 18105.
[341] The NSW Police *Domestic Violence: Policy and Standard Operating Procedures*, 2002 at 'No.4 — Apprehended Domestic Violence Orders' states 'Police officers MUST (Mandatory) apply for an Apprehended Violence Order (s562C(3) *Crimes Act 1990*) when the officer suspects or believes' that a domestic violence offence (s4(1) of the *Crimes Act 1900* Appendix 1) has recently been committed OR is being committed OR is imminent OR is likely to be committed against the person for whose protection the order would be made.
[342] s562H(1), *Crimes Act 1900.*
[343] s562H(2), *Crimes Act 1900.*
[344] s562H(2A, *Crimes Act 1900.*
[345] s562H(2B), *Crimes Act 1900.*
[346] NSW Law Reform Commission, *Report 103 (2003) — Apprehended violence orders*, 2003, 7.4.
[347] s562H(2B), *Crimes Act 1900.*
[348] NSW Law Reform Commission, *Report 103 (2003) — Apprehended violence orders*, 2003, 7.3–7.51.
[349] NSW Law Reform Commission, *Report 103 (2003) — Apprehended violence orders*, 2003. Recommendation 21.
[350] NSW Law Reform Commission, *Report 103 (2003) — Apprehended violence orders*, 2003. Recommendation 22.
[351] NSW Law Reform Commission, *Report 103 (2003) — Apprehended violence orders*, 2003. Recommendation 23.
[352] s50, *Bail Act 1978.*
[353] The Shopfront, Youth Legal Centre submission, 15 March 2004.
[354] The Shopfront, Youth Legal Centre submission, 15 March 2004.
[355] The Shopfront, Youth Legal Centre submission, 15 March 2004.
[356] The Shopfront, Youth Legal Centre submission, 15 March 2004.
[357] The Shopfront, Youth Legal Centre submission, 15 March 2004.
[358] The Shopfront, Youth Legal Centre submission, 15 March 2004.
[359] Law Society of NSW submission, 18 March 2004.
[360] Juvenile Justice Advisory Council of NSW submission, 1 April 2004.
[361] Children's Court of NSW submission, 22 March 2004.
[362] The Shopfront Youth Legal Centre submission, 15 March 2004.
[363] Further details of these matters are described in 7.4.2.8.
[364] Mr Stewart MP, NSWPD, Legislative Assembly, Second Reading Speech, 26 October 2001, p. 18105.
[365] s100A(1), *Crimes (Sentencing Procedure) Act.1999.*
[366] Regarding the background to the Act the Attorney General's Department advised that as non-association and place restriction conditions previously existed under the general condition-making powers of the *Bail Act 1978*, it was determined that qualifications on what cannot be included in a non-association and place restriction condition were not deemed necessary. It was suggested that such qualifications might confuse police officers who are used to imposing all sorts of non-association and place restriction conditions. It was felt that the qualifications set out in s100A which included the creation of an offence should they be breached would be more suited to court orders.
[367] 'Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001', *Policing Issues and Practice Journal*, Vol. 10, No. 3, July 2002.

[368] 'Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001', *Policing Issues and Practice Journal*, Vol. 10, No. 3, July 2002.
[369] Interview with youth legal centre representatives, May 2003.
[370] Interview with Aboriginal Legal Service, April 2003.
[371] The Shopfront, Youth Legal Centre submission, 15 March 2004.
[372] NSW Commission for Children and Young People submission, 17 February 2004.
[373] The Shopfront Youth Legal Centre submission, 15 March 2004.
[374] Children's Court of NSW submission, 22 March 2004.
[375] s37 of the *Bail Act 1978* states that bail shall be granted unconditionally unless the court or police officer determining bail is of the opinion that one or more conditions should be imposed for:

a) the promotion of effective law enforcement; or
b) the protection and welfare of any specially affected person (the alleged victim, their close relatives, and any other person whose needs warrant special consideration because of the circumstances of the case); or
c) the protection and welfare of the community; or
d) reducing the likelihood of future offences being committed by promoting the treatment or rehabilitation of an accused person.

s37(2) provides that conditions shall not be imposed that are any more onerous for the accused person than appear to the court or police to be required:

a) by the nature of the offence, or
b) for the protection and welfare of any specially affected person (as above), or
c) by the circumstances of the accused person.

Other technical restrictions on the imposition of bail conditions are outlined in s37(3)–(4).
[376] NSW Police submission, 8 March 2004.
[377] NSW Director of Public Prosecutions submission, 19 February 2004.
[378] Letter from the Ministry for Police, 8 August 2006.
[379] Letter from the Ministry for Police, 8 August 2006.

Chapter 10. Sentence administration issues

This chapter discusses the issues relating to non-association and place restriction conditions imposed in sentence administration that have been identified through our scrutiny of the Act.

10.1. Is the Act meeting its objectives with regard to the new provisions relating to parole, leave and home detention?

In his second reading speech, Mr Stewart MP acknowledged that non-association and place restriction conditions may already be imposed under the general condition making-powers that attach to leave, parole and home detention but stated that:

> *express legislative recognition of non-association and place restriction conditions will require bodies with parole and leave management responsibilities to specifically consider the appropriateness of such orders, thereby promoting their further use.*[380]

He further commented that the Bill would encourage the NSW Department of Correctives Services (DCS) and the State Parole Authority to consider the appropriateness of attaching non-association and place restriction conditions to leave, parole and home detention and the Department of Juvenile Justice (DJJ) to consider the appropriateness of attaching non-association and place restriction conditions to leave granted to juvenile detainees.[381]

Thus the objective of the legislation in relation to sentence administration was to encourage consideration and use the conditions when appropriate when imposing non-association and place restriction conditions in relation to leave, parole and home detention.

As noted in earlier discussion on implementation and operation issues, it is apparent that minimal work has been undertaken by DCS, the State Parole Authority and DJJ to implement the new provisions and thereby promote their further use.[382]

Both departments advised that there is minimal reference to the new non-association and place restrictions provisions in any of the departments' documentation related to these areas.

It also appears that there has been minimal publication of educational material and training provided to staff on the new provisions nor any change made during the review period to the data recording systems to enable conditions imposed when determining leave, parole and home detention to be recorded.

The fact that the legislation has in the main not been publicised and promoted within these departments has led us to conclude that the legislation has had minimal impact on the imposition of non-association and place restriction conditions in these areas.

Whilst it is recognised that the main reason for the departments' failure to publicise and implement these provisions is because they provide no additional power in relation to imposing non-association or place restriction conditions, it is impossible to see how Parliament's objective of further promotion of these conditions can be achieved without doing so.

The specific provisions introduced by the Act in relation to sentence administration provide a definition of what 'associate with' means and details the circumstances where an offender does not contravene a non-association and place restriction condition and when such conditions are considered to be suspended. These provisions provide protections and clarity that would not necessarily be available when making these type of conditions under the existing mechanisms.

10.2. Recording of data

It was apparent from the information obtained from DCS regarding their ability to track conditions imposed when granting parole, leave and ordering home detention and DJJ when imposing leave that the client information systems operating within those departments were not set up to record the conditions.

Indeed in the case of DJJ it was apparent that they were not able to determine from CIDS who had been granted leave in any period let alone the conditions attached.

It is impossible to see how systems can be appropriately monitored and evaluated to ensure the fair, proper and effective use of the conditions if no such tracking can be done.

A recent performance audit of DJJ conducted by the Auditor General came to similar conclusions regarding that department noting that:

> *We are unable to determine how well the department meets its long-term goals. We do not know whether it reduces re-offending and rehabilitates young offenders. It has limited performance information on the effectiveness of its activities and programs. This is partly due to limitations with its client information systems, which prevent it extracting quality performance data.*[383]

The report further commented that the department needed good performance data on its activities to develop a strategic approach based on what works in NSW and recommended that the department design its data systems so that it can extract quality performance data to measure the effectiveness of its activities.

We support such a recommendation, as the implementation of an effective data system would allow the future tracking of all conditions including non-association and place restriction conditions imposed when granting leave and enable the evaluation of the effectiveness of these measures in reducing re-offending.

Likewise DCS client information systems appear to be limited in that the department is unable to extract quality data on the use of non-association and place restriction conditions imposed when granting leave, parole, and home detention. Such limitations restrict our ability to scrutinise the operation of the amendments made by the Act in relation to sentence administration. They also appear to inhibit the department from measuring the effectiveness of its activities generally and in particular in relation to its use of conditions when granting leave, parole and home detention.

Summary

The objective of the legislation in relation to sentence administration was to encourage DCS and the State Parole Authority to consider and use the conditions when appropriate when imposing non-association and place restriction conditions in relation to leave, parole and home detention and DJJ when imposing conditions on leave.

Our research reveals that the legislation at present does not meet these objectives. Minimal work has been undertaken by DCS, the State Parole Authority and DJJ to implement the new provisions and thereby promote their further use. Consequently, the legislation has had minimal impact on the imposition of non-association and place restriction conditions in these areas.

The main reason for the departments' failure to publicise and implement these provisions is because they provide no additional power in relation to imposing non-association or place restriction conditions. DCS and the State Parole Authority continue to use alternative means available for imposing non-association and place restriction conditions when imposing these conditions at parole, home detention and when granting leave and DJJ when imposing conditions on leave.

We have considered whether to recommend the repeal of the non-association and place restriction provisions related to parole, home detention and leave introduced by the Act.

However, the Act, and insertion of the provisions relating to parole, leave and home detention provide protections and clarity that would not necessarily be available when making these type of conditions under the existing mechanisms as they:

- provide guidance as to the nature of non-association and place restriction conditions, reducing the possibility of uncertainty
- provide guidance on when a condition will not be breached
- provide a clear definition of 'associate with'.

Further, the issues of inflexibility and low use which are relevant to our recommendations concerning orders, are not especially relevant to sentence administration conditions, because similar conditions were previously available before the Act and continue to be used.

On balance, and given the less than comprehensive implementation, we do not at this time recommend repealing the sentence administration provisions. Full implementation may better contribute to delivering the objectives of the legislation.

In light of those observations above, we make the following recommendations:

Recommendation 8

That Parliament consider this report in reviewing the ongoing need for specific provisions enabling non-association and place restrictions conditions to be attached to leave, parole and home detention.

DCS offered the following comments on this recommendation:

> *The power to impose NAPR-type conditions was already available, in use and well understood by Departmental officers under other provisions within the Crimes (Administration of Sentences) Act 1999. Whether or not the provisions are repealed will have no impact on Departmental practices.*[384]

Recommendation 9

If the Act is to continue, the Attorney General, in conjunction with the Department of Correctives Services and Department of Juvenile Justice and relevant representatives of other interested groups give consideration as to whether it would be appropriate to develop a set of formalised guidelines, comparable to those recommended in the bail context, which set out applicable matters to be considered when imposing non-association and place restriction conditions when issuing leave, parole and home detention.

DCS indicated provisional support for recommendation 9 advising:

> *The Department supports a representative of the Department participating in such a working party. However, funding may be required to implement any resultant guidelines.*[385]

DJJ indicated provisional support for recommendation 9 advising:

> *The department would not oppose the introduction of appropriate guidelines to guide its delegates and staff on the appropriate considerations to be applied in the granting of conditional leave. However, the department does not consider that it would be productive to legislate or issue limiting and proscriptive guidelines that might affect or limit the ability to impose appropriate conditions on leave.*[386]

Recommendation 10

If the Act is to continue that:

a) NSW Department of Corrective Services:
   i. incorporate specific information regarding the non-association and place restriction provisions introduced by the Act into their forms, policies and procedures, and education and training materials relating to parole, leave and home detention
   ii. enhance its client information systems to enable data on non-association and place restriction conditions imposed when granting leave, parole and home detention to be recorded and evaluated
   iii. monitor and evaluate the non-association and place restriction conditions imposed on leave, home detention and parole to ensure the fair, proper and effective use of the conditions.

b) NSW Department of Juvenile Justice:
   i. incorporate specific information regarding the non-association and place restrictions provisions introduced by the Act into their forms, policies and procedures, and education and training materials relating to leave
   ii. enhance its client information systems to enable data on non-association and place restriction conditions imposed when granting leave to be recorded and evaluated
   iii. monitor and evaluate the non-association and place restriction conditions imposed when granting leave to ensure the fair, proper and effective use of the conditions.

DCS does not support recommendation 10(a)(i) advising:

> *It is questionable whether changes to training, policies, procedures etc. will have any impact on the use of NAPR-type conditions. Assuming that it would have some impact, it is my view that the cost involved would outweigh any benefit received.*

DCS notes in respect of recommendation 10(a)(ii) and 10(a)(iii), as follows:

> *While it may be the case that data would permit better evaluation of NAPR conditions, funding and re-direction of staffing would be required to record, evaluate and monitor non-association and place restriction data collected.*[387]

DJJ support recommendation 10(b)(i) advising:

> *During the review period, and to the current date, forms have not been amended by the department to specifically reflect the uitilisation of s24A in the making of non-association and place restriction conditions when leave is granted. However, the department intends to amend the relevant forms so that when technical databases permit, this information can be uploaded and reported on electronically.*
>
> *It should be noted that under the current system when a young person is on leave from a detention centre they should carry and produce their order for leave when required by Police or departmental staff. This form does list on it the conditions imposed on the leave, although it does not specifically mention section 24A.*[388]

DJJ responded to recommendation 10(b)(ii) as follows:

> *The department is prepared to include a specification in its next business case for CIMS further development to enable leave forms to be either electronically retained or leave conditions, in particular those imposed under section 24A, to be recorded on the CIMS database.* [389]

DJJ provided the following response to recommendation 10(b)(iii):

> *The department has had a long history of successfully imposing non-association and place restriction type conditions on its orders for leave issued under section 24 of the Children (Detention Centres) Act 1987.*
>
> *Technical systems limitations have in the past made it difficult for the department to centrally collate data that can be utilised for monitoring and evaluation purposes.*
>
> *However, as has been detailed in earlier departmental responses to the Act, the Serious Young Offenders Review Panel (SYROP) considers the risks associated with leave for young people sentenced for children's indictable offences. This panel, inter alia, makes recommendations on leave conditions before the Director-General makes a determination on the appropriateness of granting a leave order or the conditions to be imposed thereto.*
>
> *While the department feels confident that its existing structures and policies ensure that non-association and place restrictions are used fairly, properly and effectively, it strongly supports development of its information systems such as CIMS to accommodate better reporting and tracking so that objectives and achievements can more properly and transparently be evaluated. The department is restricted by its operational and core responsibilities and these must limit from time to time its expenditure on non-core functions. However, subject to funding restrictions and technical limitations, it supports effective and transparent reporting at all times.* [390]

Endnotes

[380] Mr Stewart MP, NSWPD, Legislative Assembly, Second Reading Speech, 26 October 2001, p. 18105.

[381] Mr Stewart MP commented in relation to leave that 'the bill will encourage the Department of Corrective Services to consider the appropriateness of attaching non-association and place restrictions conditions to leave permits authorising unescorted leave... and contains similar arrangements in respect to leave granted to juvenile detainees by the Department of Juvenile Justice'. In relation to parole Mr Stewart MP commented that the 'Proposed section 128A of the Crimes (Administration of Sentences) Act will allow the Parole Board to explicitly consider the appropriateness of attaching non-association or place restrictions conditions to parole.' He also commented in relation to home detention that 'Proposed section 165A of the Act recognises that the Parole Board may impose such conditions when ordering that a person subject to periodic detention enter into home detention.' NSWPD, 26 October 2001, p. 18105.

[382] See 6.3, 6.4, 7.5, 7.6 and 7.7.

[383] *Managing and measuring success: Department of Juvenile Justice*, Auditor-General's Report: Performance Audit, September 2005, p. 2.

[384] Letter from the NSW Department of Corrective Services, 14 September 2006.

[385] Letter from the NSW Department of Corrective Services, 14 September 2006.

[386] Letter from NSW Department of Juvenile Justice, 13 October 2006.

[387] Letter from the NSW Department of Corrective Services, 14 September 2006.

[388] Letter from the NSW Department of Juvenile Justice, 13 October 2006.

[389] Letter from the NSW Department of Juvenile Justice, 13 October 2006.

[390] Letter from the NSW Department of Juvenile Justice, 13 October 2006.

Chapter 11. Impact on young and Aboriginal people

11.1. Impact of non-association and/or place restriction orders imposed at sentencing

Concern was raised both during the Parliamentary debate and in consultation with relevant parties about the impact that non-association and place restriction orders imposed at sentencing could have upon young and Aboriginal people. This was considered to be most apparent for people who experience difficult lives and have little social support and who therefore spend a lot of time with their friends and extended family, often in public places.

Of particular concern was the potential 'net widening' effect these orders may have on Aboriginal and young people as the prosecution of breaches of orders may lead to an increase in the number of these persons in custody.

11.1.1. Insufficient data to identify an established pattern of impact in relation to non-association and place restriction orders imposed at sentencing

Our research reveals that only 20 non-association and place restriction orders were imposed at sentencing in the review period. Of those orders imposed 25% (5) of the offenders were juveniles, and 25% (5) identified themselves as Aboriginal. Two of the Aboriginal persons were juveniles.

It is considered that the low number of orders imposed in the review period coupled with the fact that there were no reported breaches of the orders, means there is insufficient data to identify established patterns of impact on these groups. Even so, the fact that such high proportions of this small sample relate to orders imposed on juveniles and Aboriginal persons is of concern.

11.1.2. Incidence of orders — young people

When the order recipients' age is compared proportionally to the overall age population of Australia it reveals a marked tendency for orders to be issued to younger people and juveniles in particular.

Whilst 55% (11) of the orders were imposed on persons aged between 15-24 years, Australian Bureau of Statistics (ABS) population data as at 30 June 2004 reveals that this age group accounts for only 13.9% of the population.[391]

This disparity of age and orders imposed may be explained in part by the disproportionate offending rates of young persons. Persons aged 15-19 years comprise the group most likely to be dealt with by police. The ABS reports that in 2002-2003 the offending rates for persons aged 15-19 years was more than four times the offending rate for the rest of the population. The next highest offending rate was for the population aged between 20-24 years of age, almost double the rate for the remainder of the population.[392] Thus the rate of police contact with young people is high compared to the contact police have with other sections of the community.

The fact that young people appear more likely to be order recipients could also perhaps be attributed to the fact that orders are generally imposed for offences not attracting terms of imprisonment exceeding 12 months.[393] Orders are typically imposed where the offending is less serious, making it more likely that orders will be issued to younger rather than older persons.

Also the Children's Court noted that these type of orders are often imposed on juveniles as they are perceived as a group that is more suited to this type of sentencing option:

> *There are features of juvenile offenders that make such orders appropriate. Juveniles to a greater extent than adult offenders, commit offences in groups. Almost every interview of a parent of an offender will bring forth the comment that the involvement of his/her child was attributable to either peer pressure or becoming involved with the 'wrong crowd'. Submissions seeking leniency on sentencing will frequently stress a change of friends, associates or location since the offence and thus a reduced chance of re-offending…Courts also try to reduce the temptation of re-offending by restricting the presence of the offenders in particular areas (notably Kings Cross and Cabramatta in drug cases). The conditions are readily justifiable both in terms of rehabilitation of the offender and the protection of the community reducing the opportunity of re-offending.*[394]

11.1.3. Incidence of orders — Aboriginal people

The five yearly Census of Population and Housing conducted by the ABS provides an essential source of descriptive information about Australia's population, including its Indigenous peoples. The most recent census, conducted on 30 June 2001, estimated the Indigenous population to be 460,140, or 2.4% of the total estimated resident population of Australia.[395] NSW recorded the highest Indigenous population amongst the states and territories with an estimated 135,319 residents, or 2.0 %, of the NSW population.[396]

When compared to the national (2.4%) or state (2.0%) proportion of the population that are Indigenous, the five orders imposed on Aboriginal individuals during the review period, representing as it does 25% of the total number of orders imposed, suggests a disproportion of orders were imposed on Aboriginal persons.

This disparity of Aboriginal status and orders imposed may be explained in part by the disproportionate offending rates of Aboriginal persons. Aboriginal people in NSW are significantly over-represented among offenders identified by the NSW Police[397] and in the prison population. Currently Aboriginal people comprise approximately 17% of adult inmates in NSW gaols. Approximately one in every four women in prison is Aboriginal.[398] Aboriginal young people in detention are also overrepresented as they comprise 43% of all juveniles in detention in NSW.[399] Thus the rate of police contact with Aboriginal people is high compared to the contact police have with other sections of the community.[400]

However, the disproportionate rate at which orders were imposed (on Aboriginal people) means there is further potential to disenfranchise a community that is already over-exposed to the criminal justice system.

11.1.4. Young and Aboriginal people more vulnerable to breach of orders

Concerns were raised by a number of community and government organisations who work with youth and Aboriginal persons that these groups are more likely, to be 'picked up' for allegedly breaching orders.

Legal Aid's submission on the issue is representative of concerns raised by these organisations. Legal Aid commented on the potential practical effect of increasingly harsh consequences arising from an offender's incapacity to adhere to stringent conditions:

> *The risk inherent in the legislation is that the imposition of unrealistic conditions, the breach of which is an offence, may lead to far more drastic consequences than were anticipated. An order may be imposed for a relatively minor offence, the breach of which carries a maximum penalty of $1,100.00 fine or 6 months imprisonment or both. This can adversely affect accused persons, but particularly young and Aboriginal people who are usually more visible in the community. Breaching a non-association or place restriction order can lead to a fine which if unpaid could lead to more serious problems.*[401]

The Shopfront Youth Legal Centre commented that 'we believe that, by creating a new offence of breaching a non-association or place restriction order, the Act has the potential to further entrench disadvantaged people in the criminal justice system.' It further commented that, 'This contradicts efforts to reduce the over-representation of disadvantaged and vulnerable people in the criminal justice system, particularly young people and Aboriginal and Torres Strait Islander people'.[402]

It was asserted by groups that juveniles, more so than adults, were vulnerable to breach of these orders as juveniles very often have a narrow world made up of friends. Orders made indiscriminately in respect of those friends are therefore likely to be breached, particularly in the case of those with strong cultural ties such as Aboriginal young people.

In previous reviews, we have received submissions to the effect that juveniles tend to associate with their friends in groups, and because they have a limited number of places to go to, often hang around in public places where it is more likely there will be surveillance by the police, security guards and/or closed circuit television cameras.[403] By virtue of their congregating in groups, juveniles are more visible to the public, particularly senior citizens and retailers, who often perceive them to be engaging in intimidating behaviour, regardless of whether that was their intention.[404]

One officer of the Department of Juvenile Justice (DJJ) suggested that it is a misconception that non-association and place restriction orders are going to stop young people from doing what they are accustomed to do, which is associate in public places. She stated that it was unrealistic to expect certain juveniles to reject friends and strong community ties and a penalty was unlikely to deter this type of behaviour.[405]

Several youth and Aboriginal representatives stated that young and Aboriginal people often did not have the capacity to observe the non-association and place restriction orders. They commented that it is impossible for them to go about their daily lives without running into certain people and going to certain places. They go to the same pubs, the same schools, the same hangouts and this can be a problem.

This problem was identified in a recent paper by the Aboriginal Justice Advisory Council which cautioned that 'Aboriginal communities often complain that imposing such conditions on people, who can't meet them, is simply setting them up to fail'.[406] A consequence of this being that Aboriginal juveniles may have a number of convictions for breaching their orders before they are even 18 drawing them further into the criminal justice net.

DJJ further commented that juvenile offenders tend to breach conditions of such orders more easily than adults. They commented that 'Generally juvenile offenders could be further criminalised primarily due to their level of maturity and variable level of psychosocial development especially when non-association and place restrictions orders are imposed for non-gang related offences.' [407]

In reference to the incidence of breach the Children's Court commented that it should be acknowledged that just because a non-association or place restriction order or condition is breached does not necessarily suggest that the conditions were inappropriate:

> *If an order is appropriately made but the offender has difficulty complying, then the problem is not necessarily with the terms of the orders.*[408]

11.1.5. Review period example

A matter identified in the review period where a place restriction order had been imposed at sentencing revealed the potential risk that in some cases these orders are imposed in circumstances where the individual may find it difficult to abide by them as it isolates them from their peers and support networks or family.

In this matter a young male juvenile offender with a long criminal history was prohibited from frequenting the township where he previously lived and where many of his friends/associates remained for a 12 month period. DJJ report on the matter indicated that one of the main reasons the offender's family had moved from the township was to ensure the offender 'remained trouble free'. His parents stated that 'when he is not in [the township] he does not represent a supervision problem' and the report indicated that the offender 'appears to be at greater risk of offending when he returns to the negative influences of the town'.[409]

It was identified from the court papers in the matter however, that the offender initially refused to sign the order. He eventually signed advising the court staff that he was not going to comply with the restriction order and would continue to visit the area.

We examined the profile of this offender following the imposition of the order and found that the offender was not prosecuted for breach of the order. The examination did reveal however that the offender was convicted of further offences, which were committed in another district while the order was in operation.

11.1.6. Reasonable excuse and variation of orders

The legislation attempts to address circumstances whereby an offender inadvertently breaches the orders. Section 100E details circumstances where it is a reasonable excuse for associating with a specified person in contravention of a non-association order. These include that the offender may have done so in compliance with a court order or that they may have unintentionally associated with a specified person. Section 100E also details that it is a reasonable excuse for frequenting or visiting a specified place in contravention of an order if the offender did so in compliance with a court order.[410]

In the second reading speech Mr Stewart MP stated that:

> *New section 100E does not provide an exhaustive list of what constitutes a reasonable excuse. This is ultimately a matter for the courts to consider on a case-by-case basis.*[411]

Also s100G recognises that an offender's circumstances may change during the life of a non-association or place restriction order and thus allows offenders to apply to the local court for the variation or revocation of an order that is no longer appropriate.

However, applying for a variation of an order or establishing a successful defence to a charge of breach of the orders would require a certain amount of knowledge, organisation and support often not available to offenders who are subject to orders.

The Shopfront Youth Legal Centre commented that it believes there is a lot of potential for defendants to misunderstand place restriction orders, due to their limited knowledge of local geography and poor skills at reading maps. They also commented that they have seen conditions of this type imposed upon people with intellectual disabilities who are often unable to comprehend the consequences of breaching the conditions. The centre also commented that Aboriginal and young people are less likely to seek out legal assistance to vary unreasonable or unworkable conditions.[412]

11.1.7. A fine for breach of an order not a realistic consideration for some groups

The NSW Children's Court commented that the penalty provisions may have some practical limitations as for 'most juvenile offenders who are without financial means a fine is not a realistic consideration.' The court noted that the alternative to a fine is six months imprisonment which 'would be reserved for the most serious offence'. The court further noted that the penalty for a breach offence 'does not permit consideration of a period of parole. It is also sufficiently short that a recommendation for conditional release under s24(1)c of the C*hildren (Detention Centres) Act* is unlikely.' [413]

The NSW Legal Aid Commission also expressed some concerns regarding the imposition of a fine for breach of an order commenting that an unpaid fine 'could lead to more serious problems', particularly for young and Aboriginal people who are usually more visible in the community.[414]

It is noted that the court is required to consider the means of the offender in determining the quantum of a fine imposed but, as the Children's Court suggests, in the case of juveniles, any fine may not be a practical consideration.[415]

11.1.8. *Aboriginal Strategic Direction 2003-2006*

Issues relating to the disproportionate representation of Indigenous people within the criminal justice system generally and the appropriateness of particular penalties as sanctions for these people are not dissimilar to those previously identified as issues of concern in the report into the Royal Commission Into Aboriginal Deaths in Custody (RCIADIC).[416] As a partial response to the recommendations contained within that report, NSW Police has developed, and continues to implement and monitor, the *Aboriginal Strategic Direction 2003-2006*, which is a specific policing strategy aimed at improving police and Aboriginal relationships.

In its *Aboriginal Strategic Direction*, NSW Police has indicated that it has committed itself to examining and monitoring performance indicators on the use of different legal treatment processes (such as, arrest and charge; field court attendance notice (FCAN); court attendance notice (CAN); summons; caution; conference), by tasking specific staff with the responsibility to provide reports.

These initiatives offer an opportunity to develop meaningful performance information on the policing of non-association and place restriction orders and their impact on Aboriginal communities in particular.

11.2. Impact of non-association and/or place restriction conditions imposed at bail

Concerns were raised in the Parliamentary debate and interviews and submissions that promotion of the imposition of non-association and place restriction conditions at bail may lead to increased use of the conditions and a subsequent increase in breach of the conditions which may have a particular impact on young and Aboriginal persons.

The Shopfront Youth Legal Centre commented that although the Act has not given police any new powers in relation to bail 'we believe it has legitimised the use of such conditions in circumstances where they might previously have been considered inappropriate'.[417] The Aboriginal Unit of DJJ commented that 'there remain a number of concerns about the types of bail conditions placed on Aboriginal offenders by police that are setting Aboriginal people up to fail'.[418]

11.2.1. Incidence of conditions imposed at bail — young people

Conditional bails imposed in the review sample period was 662. We identified that 294 of the conditional bails imposed against alleged offenders in the review sample period contained non-association and place restrictions conditions.

Juveniles accounted for 18% (52/294) of persons who had non-association and place restriction conditions imposed on them in the review sample period. Sixty-two percent (18/29) of those persons who had non-association conditions imposed upon them at bail by police in the review sample period were juveniles. Twelve percent (33/260) of persons who had place restriction conditions imposed upon them were juveniles.

When comparing the data from the two sample periods (2000–2002 and 2002–2004) we found that the use of non-association and place restriction conditions imposed by police when granting bail had remained comparatively static. These conditions accounted for 44% of all conditional bail in the review sample period and 47% of all conditional bail in the earlier comparative sample period. When comparing the age of the persons imposed with non-association and place restriction against both periods we found there was a slight increase in the review sample period in the amount of juveniles who received non-association and place restriction bail conditions from 15% to 18%.

When the age of the recipients is compared proportionally to the overall age population of Australia, it reveals a marked tendency for conditions to be issued to younger people and juveniles in particular.

Although 40% (119) of the conditions were imposed on persons aged between 15-24 years, ABS population data as at 30 June 2004 shows that this age group accounts for only 13.9% of the population.[419]

11.2.2. Incidence of conditions imposed at bail — Aboriginal people

One in five people (58/294) who had these conditions imposed upon them at bail in the review sample period were identified as Aboriginal. Thirty-eight percent (11/29) of those persons who had non-association conditions imposed upon them at bail by police identified as Aboriginal. Seventeen percent (45/260) of those persons who had place restriction conditions imposed upon them were Aboriginal.

Although when comparing the two sample periods the use of these conditions remained relatively static, there was some increase in the percentage of Aboriginal persons receiving the conditions from 16% to 20%.

The most recent census, conducted on 30 June 2001, estimated the Indigenous population to be 460,140 or 2.4% of the total estimated resident population of Australia.[420] NSW recorded the highest indigenous population amongst the states and territories with an estimated 135,319 residents, or 2.0 %, of the total population.[421] When compared to the national (2.4%) or state (2.0%) proportion of the population that are Aboriginal the conditions imposed on Aboriginal individuals during the review sample period, representing as it does 20% of the total number of conditions imposed, suggests a disproportionate number of these type of bail conditions were imposed on Aboriginal persons.

11.2.3. Breaches of non-association and/or place restriction orders imposed at bail

Breach of any bail condition can result in the accused person being arrested and their bail re-determined. The breach will be considered in any new determination. Our examination of conditional bail imposed in the review sample period and the comparative period revealed that a number of non-association and place restriction conditions were being breached.

In the review sample period (2002-2004) 11% of the non-association and place restriction conditions imposed were subsequently breached and in the comparative period (2000-2002) 10% were breached.

In all we identified 33 matters where a non-association or place restriction condition was breached in the review sample period. Significantly, it was also found that when looking at breach data, juveniles were the most likely age group to be identified by police as having breached their bail conditions. Juveniles accounted for 19% of those breaches identified.

Indigenous people were charged with breaching their bail conditions on 11 occasions. This accounted for 18% of all non-association and place restriction conditions imposed on Aboriginal persons in the review sample period and one third of all reported breaches of non-association and place restriction bail conditions.

Eighty-two percent (9/11) of those Indigenous persons charged with breaching their bail conditions were aged 25 or younger, including seven juveniles.

11.2.4. Young people more vulnerable to breach of bail conditions

The fact that a disproportionate number of juveniles breach their non-association and place restriction bail conditions is a matter of concern.

Youth legal services commented to us that they were aware of cases where place restriction conditions restricting access to specified public places had been imposed on young people at bail, but they regularly breach these conditions in order to 'hang out' with their friends. When questioned about breaching his bail, one boy reportedly explained:

> *I know that I am in breach, but this is where my life is [associating with his friends at a prohibited place], what am I supposed to do?*[422]

The Law Society, NSW Commission for Children and Young People and the Shopfront Youth Legal Centre have commented on the applicability of bail laws in NSW to young people in their responses to the questions posed in the NSW Attorney General's 'Review of the Bail Law in NSW'. In particular, their view is that the special principles that apply in the Children's Court as set out in the *Children Criminal Proceedings Act 1987* should be included in the *Bail Act 1978* and that there should be separate principles applicable to young people on the question of bail. For example the Law Society commented:

Section 6 of the Children (Criminal Proceedings) Act sets out the principles that a court exercising criminal jurisdiction with respect to children is to have regard to. These following principles specifically relate to children and bail:

a) That children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them

b) That it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption

c) That it is desirable wherever possible, to allow a child to reside in his or her own home.

It is important for these principles to be specifically mentioned in the Bail Act as it will alert judicial officers, police and lawyers to the importance of these principles when dealing with children.

Young people face particular disadvantages in relation to bail. Among young people, there are also groups at specific disadvantage, including girls, state wards, ATSI young people, and mentally ill and intellectually disabled young people…These aspects of disadvantage faced by young people favours separate principles applicable to young people being included in the Bail Act.[423]

This report provides further evidence of the disproportionate effect of bail on young persons — matters that may be considered in the *Bail Act 1978* review. We have recommended the development of formal guidelines which set out appropriate matters to be considered when imposing non-association and place restrictions conditions at bail. This report supports the need for those guidelines to include special considerations for children.

11.2.5. Aboriginal people more vulnerable to breach of bail conditions

Our statistics for the review sample period reveal a disproportionate number of Aboriginal identified persons who were apprehended for breach of non-association or place restriction conditions imposed at bail.

We were also informed that, to avoid going into custody, Aboriginal and young people often agree to conditions, regardless of whether they are able to commit themselves to the terms of the conditions. As a result, they potentially leave themselves open to the consequences of a breach action and the possibility of incarceration or a heavy fine.[424]

Indigenous young people caught up in the criminal justice system are especially vulnerable.

A report by the Aboriginal Justice Advisory Council (AJAC) on 'Aboriginal people and Bail Courts in NSW' released in April 2002 considered the disproportionate impact of bail laws on Aboriginal people and made a number of recommendations. The data in the AJAC report was based on a review of 100 bail cases from court locations in NSW.

According to the report there was evidence that some courts imposed place restriction conditions which required defendants to leave town until appearing at court. It was noted that these conditions could be especially difficult for Aboriginal people who were low income earners or had close connections with family.

The recommendations were aimed at courts and referred to court imposed bail but they also have major relevance to police imposed bail. The recommendations relevant to the imposition of non-association and place restriction condition at bail are as follows:

- Minor offences: Remove the potential for over policing and discriminatory policing decisions to influence bail by amending the *Bail Act 1978* to provide for an automatic bail entitlement for offensive language and behaviour charges.
- Employment and training of Aboriginal people: Create greater Aboriginal input into the bail process and provide equity of access to bail for Aboriginal people in remote areas. That the Attorney General's Department employ and train Aboriginal people to act as bail justices, similar to those currently operating in Victoria particularly in locations without court houses, or full time court staff.
- Plain English bail information: Improve the level and quality of information to court and Aboriginal communities regarding bail. That the Attorney General's Department develop and provide specific plain English information on bail conditions and on the process of amending those conditions for Aboriginal communities. That the information be designed by Aboriginal people.
- Training for magistrates: That the Judicial Commission provide specific training to magistrates on Aboriginal community issues including Aboriginal connection to place, kinship and family ties, and reasons for Aboriginal people breaching bail conditions.
- Specialist support persons: That Aboriginal Client Services specialists develop a local list of respected Aboriginal people that can act as 'acceptable persons' to speak for defendants in bail hearings, and provide

advice and information to courts on acceptable bail conditions. The Aboriginal Client Service Specialist provide assistance for those people to travel to court and provide information to those people on the bail process.

- Initial informal discussion on bail conditions: That the Attorney General's Department pilot a bail project for 12 months based on the circle sentencing format, where magistrates or bail justices can discuss bail conditions informally with defendants and their families to ensure that those conditions are appropriate and that the defendants and their family fully understand those conditions. If the pilot is successful to expand it across NSW.
- Recording of information: That the Attorney General's Department record information on Aboriginal access to bail and bail conditions as required by recommendation 89 of the Royal Commission into Aboriginal deaths in custody and publish it annually.[425]

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) national report[426] noted the policing of bail as a particular concern. The Commission found that a lack of flexibility of bail procedure and the difficulties Aboriginal people frequently faced in meeting police bail criteria contributed to their needless detention in police custody. The Commission recommended that changes in relation to bail would also need to address the way in which police themselves grant bail.

The *Aboriginal Strategic Direction 2003-2006* developed by the NSW Police as a partial response to the recommendations contained within the RCIADIC report offers an opportunity to specifically record, monitor and evaluate data relating to the use of the non-association and place restriction conditions imposed at bail including data relating to breaches, through the systems proposed for examining legal treatment process in NSW.[427]

The Law Society, NSW Commission for Children and Young People and the Shopfront Youth Legal Centre have commented on the consideration of Aboriginal adults and children in legislation relating to bail in NSW in their responses to the questions posed in the NSW Attorney General 'Review of the Bail Law in NSW'. In particular, they have expressed a view that specific reference should be made to Aboriginal people and Aboriginal children in the *Bail Act 1978*. The Law Society commented:

> *The Royal Commission into Aboriginal deaths in custody was particularly concerned with unrealistic conditions that are imposed on ATSI young people and which were regularly broken. This resulted in young people being recycled through the court system. Onerous or oppressive bail conditions may include curfews and residential requirements that effectively amount to exclusion from the supports that young people may have…Having specific reference to ATSI children in the Bail Act acknowledges the particular disadvantages faced by ATSI children in their dealings with the criminal justice system.*[428]

This report provides further evidence as to the effect of bail conditions on Aboriginal persons. We have recommended the development of formal guidelines which set out appropriate matters to be considered when imposing non-association and place restrictions conditions at bail. This report supports the need for those guidelines to include special considerations for Aboriginal persons. In addition, the report may be of use in any further consideration of the *Bail Act 1978*.

11.3. Summary

As only 20 non-association and place restriction orders were imposed at sentencing in the review period there is insufficient data to identify established patterns of impact of the orders on Aboriginal and young people.

What can be noted based on the small number of cases is that a high proportion of orders were imposed on Aboriginal and young people in the review period. This is of particular concern when considering that a breach of these orders renders an offender liable to a fine or imprisonment.

Our examination of sample data on police bail imposed in the review period also revealed a marked tendency for conditions to be imposed on Aboriginal and young people. 40% of persons who had non-association and place restriction conditions imposed upon them at bail were aged between 15-24 years and 20% identified as Aboriginal. It was also found that juvenile and Aboriginal persons were the most likely groups to be identified by police as having breached their bail conditions.

The disparity of age and Aboriginal status and orders/conditions imposed and breaches detected may be explained in part by the disproportionate offending rates of young and Aboriginal persons. Another factor appears likely to be that these groups include disadvantaged young and Aboriginal people who commonly associate with their peers in public spaces often because they have no support and nowhere else to go.

In light of the observations above, we make the following recommendations:

Recommendation 11

If the Act is to continue that:

a) The Attorney General give particular consideration to further monitoring of the Act to assess:
   i. the impact of orders and conditions on young and Aboriginal persons
   i. the appropriateness of orders imposed and the prosecution of any breaches of the orders to assess whether any punishment imposed is proportionate to the original offence
   ii. any evidence that an inability to pay a fine imposed for breach of an order is resulting in adverse consequences for recipients.

b) NSW Police keep under scrutiny the policing of:
   i. non-association and place restriction orders imposed at sentencing through the systems proposed for examining legal treatment process in the *NSW Police Aboriginal Strategic Direction 2003-2006*.
   ii. non-association and place restriction conditions imposed at bail and specifically record, monitor and evaluate data relating to the use of the conditions including data relating to breaches through the systems proposed for examining legal treatment process in the NSW *Police Aboriginal Strategic Direction 2003-2006.*

c) NSW Police consider the relevant Aboriginal Justice Advisory Council recommendations in light of police practice relating to the imposition of non-association and place restriction conditions at bail.

The Ministry for Police indicated that recommendation 11(b)(i) is under consideration. The Ministry advise:

> *The Current (ASD)[Aboriginal Strategic Direction] is due for review and areas for reporting will be considered as part of the review. A new area already identified for reporting is victim data. Bail and the Justice Legislation (Non-association and Place Restriction) Act 2002 if it continues, may also be considered by the ASD Steering Committee. However, given the [Act's] limited use, the value of collecting this information at this stage is questionable.*

The Ministry for Police indicated that recommendation 11(b)(ii) is under consideration. The Ministry advises:

> *If the Act continues, NSW Police will give consideration to including this within future reporting as part of the review of the ASD.*

The Ministry for Police support recommendation 11(c). The Ministry advise:

> *NSW Police will consider the relevant Aboriginal Justice Advisory Council recommendations in the development of the new ASD.*[429]

Recommendation 12

The Attorney General consider the findings of this report in any review of the *Bail Act 1978*, especially in respect of any consideration of the *Bail Act 1978* as it effects young and Aboriginal persons.

Endnotes

[391] Australian Bureau of Statistics, Population by Age and Sex, Australian States and Territories, Canberra, June 2004 p. 32.
[392] Australian Institute of Criminology, *Australian Crime: Facts and Figures 2004*, Canberra, 2004, p. 53.
[393] s5, *Crimes Sentencing Procedure Act 1999.*
[394] Children's Court of NSW submission, 22 March 2004.
[395] Australian Bureau of Statistics, *Population Distribution Aboriginal and Torres Strait Islander Australians*, Canberra, 2001, p. 2.
[396] Australian Bureau of Statistics, '4705.0 Population Distribution, Indigenous Australians', http://www.abs.gov.au/ausstats/, 2004.
[397] J Fitzgerald and D Weatherburn, *Aboriginal Victimisation and Offending: The Picture from Police Records,* Crime and Justice Statistics: Bureau Brief, NSW Bureau of Crime Statistics and Research, December 2001, p. 1.
[398] NSW Department of Corrective Services *Facts and Figures: Corporate Research, Evaluation & Statistics*, 6th Edition, February 2006.
[399] Department of Juvenile Justice *Annual Report 2004/2005,* p. 35.

[400] B Thomas, *The consequences of poor evidence, responding to Aboriginal crime*, presented at *Delivering crime prevention: making the evidence work*, Conference, Sydney, November 2005.
[401] Legal Aid, New South Wales submission, 1 March 2004.
[402] The Shopfront,Youth Legal Centre submission, 15 March 2004.
[403] NSW Ombudsman, *Policing Public Safety: Report under s6 of the Crimes Legislation Amendment (Police and Public Safety) Act 1998*, 1999, pp. 74–75.
[404] NSW Ombudsman, *Policing Public Safety: Report under s6 of the Crimes Legislation Amendment (Police and Public Safety) Act 1998*, 1999, pp. 74–75.
[405] Interview with senior officer of the Department of Juvenile Justice.
[406] Aboriginal Justice Advisory Council, *Aboriginal People and Bail Courts in NSW*, 2002, p. 15. The report is based upon an examination of data on Aboriginal people and bail in NSW, a review of 100 bail cases from five NSW court locations and submissions received from a range of government and non-government organisations.
[407] NSW Department of Juvenile Justice submission, 4 March 2004.
[408] Children's Court of NSW submission, 22 March 2004.
[409] Case No.2.
[410] s100E, *Crimes (Sentencing Procedure) Act 1999*.
[411] Mr Stewart MP, NSWPD, Legislative Assembly, Second Reading Speech, 26 October 2001, p. 18105.
[412] The Shopfront Youth Legal Centre submission, 15 March 2004.
[413] Children's Court of NSW submission, 22 March 2004.
[414] Legal Aid, New South Wales submission, 1 March 2004.
[415] s6 of the *Fines Act 1996* states that the court when exercising discretion regarding fixing the amount of a fine is required to consider the means of the accused and other matters that are relevant.
[416] Royal Commission Into Aboriginal Deaths in Custody, *National Report*, 5 Volumes, AGPS, Canberra, 1991.
[417] The Shopfront Youth Legal Centre submission, 15 March 2004.
[418] NSW Department of Juvenile Justice submission, 4 March 2004.
[419] Australian Bureau of Statistics, *Population by Age and Sex, Australian States and Territories*, Canberra, June 2004, p. 32.
[420] Australian Bureau of Statistics, *Population Distribution Aboriginal and Torres Strait Islander Australians*, Canberra, 2001, p. 2.
[421] Australian Bureau of Statistics, '4705.0 Population Distribution, Indigenous Australians', http://www.abs.gov.au/ausstats/2004.
[422] Discussions with youth legal services representatives, May 2003.
[423] Law Society of NSW Submission, 18 March 2004.
[424] The Shopfront Youth Legal Centre submission, 15 March 2004.
[425] Aboriginal Justice Advisory Council, 'Aboriginal People and Bail Courts in NSW', April 2002.
[426] Royal Commission Into Aboriginal Deaths in Custody, *National Report*, 5 Volumes, AGPS, Canberra, 1991.
[427] NSW Police, *Aboriginal Strategic Direction (2003-2006)*, Sydney, June 2003.
[428] Law Society of NSW Submission, 18 March 2004.
[429] Letter from the Ministry for Police, 8 August 2006.

Chapter 12. Other issues identified

12.1. Use of community sources by police

Section 100H of the *Crimes (Sentencing Procedure) Act 1999*, as amended by the Act, states that:

> *(1) A person must not publish or broadcast:*
>
> *(a) the fact that a named person (other than the offender) is specified in a non-association order pursuant to section 17A(2)(a), or*
>
> *(b) any information calculated to identify any such person.*
>
> *Maximum penalty: 10 penalty units*

Section 51B of *Crimes (Sentencing Procedure) Act 1999* and s36C of the *Bail Act 1978* contain the same prohibition and offence.

Mr Stewart MP in the second reading speech stated that the rationale for the creation of an offence for the publication or broadcast of details of a person named in an order or condition was to ensure that a person named in an order or condition would not have any 'inappropriate adverse inferences being drawn against them.' [430]

12.1.1. Concerns raised by NSW Police regarding the operation of the non-publication and broadcast provisions

NSW Police when responding to our discussion paper commented in relation to the *Crimes (Sentencing Procedure) Act 1999* (ss100H and 51B) and the *Bail Act 1978* (s36C) that 'the restriction on naming persons nominated in non-association orders largely prevents the use of community and other sources being used'. NSW Police advised:

> *There is an inherent problem with this system in that police often rely on the community for information. The provisions of the Crimes (Sentencing Procedure) Act which make it an offence to publish or broadcast persons named in a non-association order, leaves the onus on police to detect any possible breaches by an offender within the community. Without the ability to notify a neighbourhood or community affected by criminal activity, the chances of enforcing non-association orders are reduced.*[431]

12.1.2. Exceptions to the prohibition to publish or broadcast

The legislation as it applies to non-association and place restriction orders imposed at sentencing attempts to address the restrictions a publication and broadcast prohibition places on police by providing a list of persons to whom the prohibition does not apply. Section 100H(2) (and similarly s51B(2) and s36C(2)) states that:

> *Subsection (1) does not apply to the disclosure of information to any of the following persons:*
>
> *(a) the offender,*
>
> *(b) any person specified in the non-association order as a person with whom the offender is prohibited or restricted from associating,*
>
> *(c) any member of the Police Service,*
>
> *(d) any person involved in the administration of the non-association order or any other penalty to which the offender is subject in relation to the same offence,*
>
> *(e) any person involved in proceedings for an alleged breach of the non-association order,*
>
> *(f) any other person specified in the non-association order as a person to whom such information may be disclosed,*
>
> *(g) any other person to whom such information is required to be disclosed pursuant to any other act or law, and does not apply to the publication or broadcasting of an official report of the proceedings of the court.*

Thus s100H does not authorise the release of information about named persons into the public domain but does not prevent the publication of the person's name to the offender, any person named in the order, the bodies responsible for administering the order or the accompanying sentence, NSW Police Service, any person involved in proceedings for the breach of an order, any other person approved by the court, or any person to whom such information is required to be disclosed under any law.

This appears to be a reasonably broad list of exceptions to the prohibition and in practice could mean that probation and parole officers, juvenile justice personnel, any police street patrols, PCYC workers and relevant liaison officers could be informed of the details of the order and assist in policing them.[432]

It is also interesting to note that the *Policing Issues and Practice Journal* article on the legislation contained case studies which interpreted the exceptions reasonably broadly. The case studies were put together 'to illustrate appropriate ways in which the new provisions of the *Bail Act 1978* might be applied'.

One case study provided a scenario where three young Aboriginal men were arrested after a fight at a pub in a town. All three men are charged with assault and have been arrested in similar situations together before. The three men are all cousins and have grown up in close daily contact with each other. The authorised officer in the scenario determined to impose a bail condition that the accused were not to associate with each other in any licensed premises. The bail agreement specified:

> *the condition might be disclosed to local licensees and also to elder members of the accused families, so they do not arrange family or community events that would lead to the young men breaching their bail conditions.*[433]

Presumably the licensees, having been advised of the conditions, would be in a position to report a breach to police as would family members.

12.1.3. Comments regarding policing of orders/conditions

A number of sources commented on the challenges associated with policing non-association and place restriction orders and conditions. In particular a number of magistrates commented on the difficulties associated with policing the orders/conditions in metropolitan areas:

> *If you make a non-association order and they live in the middle of Sydney then you can bet that the police aren't going to know that other person so the chances of being caught for breaching an order are one in a million, whereas if you are in the country and you made that order then probably every police officer would know who x was and there is a chance that it would be enforced, so they might be more inclined to use those orders there as there is the expectation that something will happen.*

*

> *I think the main issue with the orders is policing them. The police in these communities know these offenders, but I think in the city in large metropolitan areas it is harder, unless the police are out there all the time, I think they are most effective in the country where the police do know most people.*

The NSW Legal Aid Commission in its submission to our discussion paper commented 'The practicalities of effective policing in busy Sydney patrols are more difficult than in regional areas of the State'.[434]

One Commander of an LAC located in south western NSW commented:

> *It would be more effective in areas where your police or the people who are enforcing the Act, have knowledge of the offenders and of their actual associates, which would happen in the country areas than in the city…In the city you would have to check more information as there is a lesser amount of local knowledge of the offenders whereas if you see an offender in the street here, nine out of ten police would recognise them.*[435]

One court official commented:

> *How you police something that is so vague I don't know. There is a central bank that these orders exist but until you actually break the law again and come under police notice there is no reason for them to know, unless they know who you are and have some kind of suspicion or something going on anyway.*[436]

One magistrate commented that because of the difficulties associated with policing these types of orders/conditions the judiciary may be reluctant to use them because 'the court is not going to go down a path of futility, if they are not going to see people being arrested and charged for breach then they might think this is an area that we might not want to go down'.

Redfern Legal Centre commented that the impact of the legislation 'differs significantly between city and rural community areas' and is:

> *contingent upon the resources of the police in the offender's area and the attitude of police to a particular offender. We have strong reservations about the effect of orders where the subject offender is regarded by police as a 'trouble maker' and may be targeted and effectively put under surveillance in order to catch him/her out.*[437]

The Children's Court commented that compliance with such conditions/orders is not necessarily contingent on vigilant policing and use of community sources:

The suggestion that compliance is dependant on police monitoring does not reflect the situation. Many offenders are likely to be compliant because they see the benefit to themselves of so doing and because of a risk of being detected (even if the risk is a small one). In the case of juvenile offenders there is a tendency not to give sufficient recognition of the monitoring parents do in relation to their children. The movements of (well known) high risk offenders are often visible to police and other persons in the community and especially in small towns.[438]

12.1.4. Detection of breaches in the review sample period

Eleven percent (33/294) of the non-association and place restriction conditions imposed in the review sample period were breached. Non-association conditions breaches were detected at a greater frequency than place restriction conditions. Five (17%) of the non-association conditions imposed in the review period were identified as breached. Twenty-eight (11%) of the place restriction conditions were identified as breached in the review period.

This appears to indicate that, despite the restrictions associated with the use of community sources, police do detect some breaches. One conclusion that could be drawn from this finding is that police detection of breaches is sufficient without further use of community sources.

12.1.5. Discussion

While it is recognised that the restrictions on police use of community sources can hinder NSW Police's capacity to detect breaches, it is our view that there are important public interest reasons for maintaining the prohibition not to publish or broadcast in its present form.

It must be emphasised that named persons in a non-association order or condition are not so named because they have committed an offence, have done something wrong, are 'wanted' by police or have been convicted of offences.

It is extremely important that such persons do not have '*inappropriate adverse inferences*' drawn against them as a result of the imposition of such orders/conditions on another person. If such inferences were drawn these persons will effectively have had areas of their personal liberty removed without recourse.

The broad public release of such sensitive information has the potential to have a significant adverse impact on the reputation and social life of a named person and thus should be utilised with extreme caution. Even limited disclosure of information to non-government agencies and specific members of the public who are not bound by the statutory privacy and other obligations, raises significant concerns about the potential for inappropriate disclosure and use of the information.

The current legislation effectively authorises the release of information about named persons to, amongst others, the bodies responsible for administering the order or the accompanying sentence, any person involved in proceedings for the breach of an order, any other person approved by the court, or any person to whom such information is required to be disclosed under any law.[439] This appears to be a reasonably broad list of exceptions to the prohibition which could be strategically used by police should they need to utilise select community sources. For the reasons set out above we do not recommend any amendments to the legislation to enable police to use community sources for information relating to the orders/conditions.

However we do support the development of a warning system on COPS to ensure officers in the field are provided with prompt information regarding the existence of non-association or place restriction orders imposed upon persons. We note NSW Police initiated enhancements to COPS to generate a warning on the system that non-association and place restriction bail conditions be recorded in the appropriate screens to improve the visibility of the information police can use to restrict the behaviour of recidivist offenders. With this enhancement police no longer need to look into charge management to discover the existence of such a condition. A simple name check through police radio (VKG) will provide the information. It is recommended that a similar warning system be developed for non-association and place restriction orders imposed by courts at sentencing.[440]

Recommendation 13

NSW Police should ensure that information regarding any non-association and place restrictions orders imposed upon persons at sentencing be recorded on the COPS system in a manner that allows rapid warning of their existence to officers in the field.

The Ministry for Police support recommendation 13. It advises:

Currently, when an outcome is received from the Local Courts via the Electronic Exchange of Court Outcomes (EECO) exchange, then a warning is created on COPS in relation to the person of interest. In addition, COPS is currently being enhanced to allow for the creation of a warning by Criminal Records Services (CRS) when one of these outcomes is recorded.[441]

12.2. Alternatives to law and order interventions

A number of agencies drew attention in their submissions to our discussion paper to the need to address alternatives to coercive measures when responding to issues of youth crime and gangs. Shopfront Youth Legal Centre commented:

> *We acknowledge that negative peer influences and frequenting certain areas may increase the likelihood that a young person will commit offences. However, this problem would be better addressed by providing young people with positive alternatives, rather than imposing coercive measures.*[442]

Redfern Legal Centre commented:

> *The Government's agenda should not be to restrict youths and adults from associating together. Rather, the Government needs to provide funds for the establishment of full-time supervised youth and adult facilities in the inner city. The emphasis needs to be on assisting youths and adults to socialise, work and play together. They require structured facilities to occupy them in an educative and constructive atmosphere. On our view these measures will go much further to securing a reduction in the likelihood of both first-time offending and re-offending.*[443]

The National Children's and Youth Law Centre commented that the Government should consider assembling:

> *various programs that educate youths in particular of the dangers of joining gangs. This could be in the form of school forums with guest speakers or regional centres that offer youth places to come together and learn about the dangers that can be exposed to…This proactive approach could see youths gaining confidence to reject gang liaisons that would certainly disrupt the increase in number of gang related crime.*[444]

Similarly in the Parliamentary debates on the legislation concerns were raised that the legislation did not address the 'root causes of crime in society, namely poverty, economic and social stress'. The Hon. A Chesterfield-Evans MLC drew attention to the Standing Committee on Law and Justice report on 'Crime Prevention Through Social Support' which had stated 'that there is a great deal of evidence that crime can be effectively prevented by investing in social support'. He commented that the government had largely neglected the report when it came to developing programs to tackle the causes of crime in society. He went on to urge the government to 'opt for a more enlightened and community based approach to crime prevention'.[445]

The Australian Institute of Criminology has analysed overseas attempts to deal with gang related activity and drawn attention to the positive features of the 'leading comprehensive community wide intervention model in the USA' designed to deal with gang related activity. The model places great importance on dual forms of intervention:

> *Namely intervention must not be exclusively coercive (through increased supervision and suppression of youth), but must also involve provision of services and opportunities (through education and job programs) that make attractive pro-social alternatives to gang membership and engagement in gang-related behaviour.*[446]

The Institute is of the view that the key message of the gang research examined is that 'police and community responses to gangs must combine several different kinds of measures, in ways that enhance the participation and social inclusion of young people generally'.

The Institute also emphasised that another key lesson of the overseas research 'is the importance of evaluation. Particularly in the context of interventions that are frequently experienced by young people as racially based and anti-youth, evaluation of any tactic or strategy is essential.'[447]

Non-association and place restriction orders and bails conditions are in essence a reactive response to gang crime. They are clearly not an entire solution in themselves. We therefore support the development of strategies to respond to gang related activity that involve departmental strategies and active community involvement. This would include the implementation of multi-agency programs that encourage coordination and integration among youth services, police, probation and parole, grassroots organisations, and corrections in controlling and redirecting criminal gang activity. Broad-based community collaboration is essential for long-term success. Comprehensive programs that incorporate prevention, intervention, and enforcement components are most likely to be effective and should be promoted.

Endnotes

[430] NSWPD, Legislative assembly, 26 October 2001, p. 18106.
[431] NSW Police submission, 8 March 2004.
[432] Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001', *Policing Issues and Practice Journal*, July 2002, pp. 8–15.
[433] Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001', *Policing Issues and Practice Journal*, July 2002, pp. 8–15.
[434] Legal Aid NSW submission, 1 March 2004.
[435] NSW Police, Southern Region Command submission, 4 March 2004.
[436] Interview with Children's Court officer, September 2003.
[437] Redfern Legal Centre submission, 8 March 2004.
[438] Children's Court of NSW submission, 22 March 2004.
[439] s100H(2) (and similarly s51B(2) and s36C(2)) of the Act.
[440] T Collins, Deputy Commissioner Specialist Operations, 'Recording of bail conditions: Automatically generated warning', Police Notices 05/23, *Police Weekly*, Vol. 17 No. 41, 7 November 2005, p. 22.
[441] Letter from the Ministry for Police, 8 August 2006.
[442] The Shopfront Youth Legal Centre submission, 15 March 2004.
[443] Redfern Legal Centre submission, 8 March 2004.
[444] National Children's and Youth Law Centre submission, 10 March 2004.
[445] The Hon. Dr A Chesterfield-Evans MLC, NSWPD, Legislative Council, 27 November 2001, p18863.
[446] R White, *Trends and Issues in Crime and Criminal Justice: Police and Community Responses to Youth Gangs*, No. 274, Australian Institute of Criminology, February 2004.
[447] R White, *Trends and Issues in Crime and Criminal Justice: Police and Community Responses to Youth Gangs*, No. 274, Australian Institute of Criminology, February 2004.

Appendices

Appendix A: List of submissions received in response to the discussion paper

In December 2003 we released a discussion paper inviting various government and community agencies to comment on various aspects of the *Justice Legislation Amendment (Non-association and Place Restriction) Act 2001* legislation. We received 19 responses, 15 of those 19 chose to comment.

Submission	Dated
Children's Court of NSW	22 March 2004
NSW Department of Corrective Services	17 March 2004
NSW Department of Juvenile Justice	4 March 2004
NSW Director of Public Prosecutions	19 February 2004
Juvenile Justice Advisory Council of NSW	1 April 2004
Law Society of NSW	18 March 2004
Legal Aid, NSW	1 March 2004
NSW Minister for Community Services	27 April 2004
National Children's and Youth Law Centre	10 March 2004
NSW Commission for Children and Young People	17 February 2004
NSW Police, Deputy Commissioner Operations	8 March 2004
NSW Police, Southern Region Command	4 March 2004
Police Association of NSW	11 March 2004
Redfern Legal Centre	8 March 2004
The Shopfront, Youth Legal Centre	15 March 2004

Acknowledgements	Dated
Office of the Privacy Commissioner	22 January 2004
NSW Police Integrity Commission	4 March 2004
Mr Peter Black MP	25 February 2004
NSW Youth Justice Advisory Committee	4 February 2004

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Appendix C: Legal advice

MEMORANDUM OF ADVICE

I am briefed to advise generally on the interpretation that ought be given to sections 36B and 36C of the *Bail Act* 1978 (" the Act") which operate as amended provisions of the Act consequent upon commencement of the operation of the *Justice Legislation Amendment (Non- Association and Place Restriction) Act* 2001 No 100 ("the Amending Act") in December 2001.

I understand that the Ombudsman has a statutory obligation to review the operation of those provisions and to report to the Parliament. In that context I have been asked to address two specific questions as follows:

1. What is the nature of the interaction between sections 36 and 36B of the *Bail Act*, and are sections 36 and 36B concurrent provisions?

2. Whether the offence under section 36C is applicable to all 'non-association' bail conditions or only those specifically imposed under section 36B(1)(a)?

As to the first question, it is matter of legislative history that until the commencement of the Amending Act section 36(2) was the only source of legislative power for the imposition of conditions on a grant of bail. It is equally uncontroversial that what are now specifically provided for in sections 36B (1) (a) and (b) as "non association and place restriction conditions" were conditions of a kind previously open to be imposed pursuant to the general 'conduct' condition provided for in section 36(2) (a). I also understand that some police and Courts continue to impose conditions of this kind under section 36(2). In my view, they are in error in so doing.

By reason of the Parliament providing a specific source of power to prohibit or restrict not only *who* a person granted bail might associate with but *where* they might associate in section 36B, together with the related amendment to section 36 (2) requiring that section

1

36 (2) operate subject to section 36B , in my view, the imposition of " non association and place restriction conditions" are now, effectively, beyond the scope of the section 36(2) (a). The fact that section 36B(2) provides that conditions of this kind might be imposed 'in addition to' or 'instead of' any condition imposed under section 36 does not, on a proper construction, mean that there is an alternate or concurrent source of power to impose non association and place restriction conditions under that section. The Parliament is simply confirming that there may be other conditions imposed 'as well as' or 'in substitution for' conditions of this kind and that the source of power in that instance is found in sections 36 or 36A.

Support for this interpretation is derived from the express language of the legislation and that canon of construction that provides that where the legislature explicitly confers power, and proscribes the way in which it shall be exercised, then general sources of the same power are excluded (see Saraswati v the Queen (199165 ALJR 402 at 411 where McHugh cited Anthony Horden and sons and Amalgamated Clothing and anor (1932) 47 CLR 1 at 7 and 8) . Support for this interpretation is also derived from the legislative history of the section and from what may be inferred as the legislative purpose of the Amending Act to which I will later refer.

That said, the language of section 36(2) which now provides that it is subject to sections 36Aand 36B does convey a degree of ambiguity. It could mean simply that section 36 is no longer the only source of power by which conditional bail might be granted and that additional sources are power are also provided in the two nominated sections and are available to be utilized when it is thought to be appropriate. It is telling however that the Parliament have given no statutory guidance as to the circumstances when s36B should be utilized. It cannot be that the Parliament left the election as to the source of power at the whim of the person who is considering the grant of bail any more than it can be thought to have left it to the applicant for bail to persuade or to seek to persuade, that person that one or other source of power is to be preferred in any given circumstance.

Alternatively, the amendment to section 36(2) could have the intended effect of ensuring that any bail conditions prohibiting or restricting association are now to be imposed subject to the additional requirements and regime provided for in section 36B. That is, if it is proposed to impose either or both non-association and place restriction conditions when granting bail (in whatever form of words those conditions are articulated), they must comply with section 36B as follows:

- the agreement must be in writing (s36B(3));
- the conditions may be entered into for more than one offence (s36B(4)),
- the condition will suspend when the accused is in custody (s36B(5)),
- the condition will define the circumstances when an accused does not contravene an association condition (s36B(6)),
- the condition will define the circumstances when a person does not contravene a specified place or district access restriction (s36B(7)) and
- the condition will define the term 'associate with' to include being in company with (s36B(8a) and to communicate with by any means (including post, facsimile, telephone and email) (s36B(8b)).

In my view the ambiguity should be resolved by regarding section 36B as codifying the conditions to which a grant of bail may be subject where it is intended to restrict or prohibit where that person may associate or with whom they may associate. In this way the Amending Act operates not so much to eschew the general power to impose such conditions under section 36 as to regulate the way in which the conditions are to be further qualified and /or regulated when conditional bail of this kind is under consideration or is ultimately granted. As the Hon A Stewart MP observed when introducing the Bill:

> *Express legislative recognition of non-association and place restrictions conditions will require bodies with bail, parole and leave management responsibilities to specifically consider the appropriateness of such orders, thereby promoting their further use . (emphasis added)*

I note from my instructions that some members of the New South Wales Police Service have advised the Ombudsman's Office that they are uncertain as to whether they are imposing (or seeking to have imposed) non-association or place restriction conditions under section 36 or section 36B. In my view this confusion results from the ambiguity to which I have referred and also from what I believe is a misunderstanding of the way in which the Bail Act was intended to operate following the passage of the Amending Act. As I have sought to make clear, the two sections do not create independent, or concurrent sources of power to make non-association or place restriction conditions. Section 36 remains the general power to impose conditional bail, but it now operates subject to the specific source of power for the imposition of non-association and place restriction conditions which are regulated by section 36B.

The legislative history of the Bail Act confirms Parliament's clear intention to have section 36 operate subject to section 36B. Prior to the assent of the Amending Act, section 36(2) read as follows:

> '*<u>One or more</u> of the following conditions <u>only</u> may be imposed on the grant of bail.*'
>
> > *(a) that the accused person enter into an agreement to observe specified requirements as to his or her conduct while at liberty on bail, other than financial requirements (whether for the giving of security, the depositing of money, the forfeiture of money or otherwise) and other than requirements of the kind referred to in paragraph (a1) or section 36A (2).*

As I observed earlier, subsection 36(2)(a) permitted bail conditions to be imposed requiring an accused to observe specified requirements as to his or her conduct whilst at liberty on bail, and conditions were not infrequently imposed under this section restricting or prohibiting the accused from frequenting specified places and/or from

associating with specified persons. However, the Amending Act specifically amended section 36 of the *Act* to omit the words "*One or more conditions only*' from section 36 (2) and inserted the words '*Subject to sections 36A and 36B, one or more of the following conditions only may be imposed on the grant of bail* '. In this way, section 36B did not create a concurrent source of power to make conditions of the subject kind but stipulates the way in which non-association and place restriction conditions are to be imposed and regulated.

Finally, the legislative purpose of the amendment is also made manifest in the second reading speech. The *Justice Legislation Amendment (Non- Association and Place Restriction) Act* (2001) No 100 was introduced into Parliament on 26 October 2001 and received assent on11 December 2001. In addition to amendments to the *Crimes (Sentencing Procedure) Act* (1999), the *Children (Criminal Proceedings) Act* (1987), the *Crimes (Administration of Sentences) Act* 1999, and the *Children (Detention) Centres* Act (1987), the Act also amended the Bail Act (1978).

The second reading speech delivered by the Hon A Stewart MP to the Legislative Assembly on 26 October 2001 indicated that the main objective of the Act was to prohibit an offender's association with persons and places that may increase the likelihood of re-offending. Specifically the Hon A Stewart MP said:

> *The bill not only provides for non-association and place restriction orders to be made at sentencing. It amends relevant legislation to specifically recognise that non-association and place restriction conditions may be attached to bail, unescorted leave from custody, conditions of home detention imposed by the parole board upon revocation of periodic detention and parole. Most of these provisions are in schedule 2 of the bill. Non- association and place restriction conditions may already be imposed under the general condition making power that attach to bail, leave parole, and revocation of periodic detention.*

Recently police officers have begun to use the general condition making powers of the Bail Act to attach place restriction conditions to police bail. From 1 July to 26 September 2001, under the new police drug bail scheme in Cabramatta, the region target action group and local police imposed place restriction conditions of bail on 144 persons ordering that they not return to Cabramatta. Express legislative recognition of non-association and place restrictions conditions will require bodies with bail, parole and leave management responsibilities to specifically consider the appropriateness of such orders, thereby promoting their further use.

The amendments contained in schedule 2.1 to the bill give legislative recognition to non-association and place restriction conditions of bail and make consequential amendments to the Bail Act. Importantly, the new section 36C of the Bail Act prohibits the publication of the identity of persons named in non-association bail conditions, other than the identity of the accused. Currently there is no such protection for non-association conditions imposed under the general bail condition powers of the Bail Act.

It is clear from the language of the second reading speech that the purpose of the Amending Act was not only to give legislative recognition to non-association and place restriction conditions of bail but to also make consequential amendments to the Bail Act to regulate the use of these conditions. Given the lawful imposition of restraint on the liberty of the subject by conditions of this kind, a construction which promotes greater certainty as to the use of such a power is and should be preferred. I note in this regard that section 36B(7) defines circumstances that will not amount to a breach of bail and that under s.36B(8) associate is statutorily defined to include communication by all telephonic means including email.

The specific reference to section 36C in the second reading speech confirms that it was introduced to create a prohibition on the publication of the identity of persons named in

all non-association orders with penalties for a breach imposed as a matter of strict liability.

36C Certain information not to be published or broadcast

(1) A person must not publish or broadcast:

(a) the fact that a named person (other than the accused person) is specified in a condition imposed on the grant of bail referred to in section 36B (1) (a), or

(b) any information calculated to identify any such person.

Maximum penalty: 10 penalty units.

(2) Subsection (1) does not apply to the disclosure of information to any of the following persons:

(a) the accused person,

(b) any person specified in the bail agreement as a person with whom the accused person is prohibited or restricted from associating,

(c) any member of the Police Service,

(d) any person involved in the administration of the bail agreement or of any penalty to which the accused person is subject while on release on bail,

(e) any person involved in proceedings for an alleged breach of the bail agreement,

(f) any other person specified in the bail agreement as a person to whom such information may be disclosed,

(g) any other person to whom such information is required to be disclosed pursuant to any other Act or law,

and (in the case of bail granted by a court) does not apply to the publication or broadcasting of an official report of the proceedings of the court.

The language of the second reading speech does not limit the prohibition to persons named in non-publication orders made under section 36B, nor does it make any reference to section 36 as an alternative source of power. It simply nominates the person protected by the non publication order as being a person *specified in a condition imposed on the grant of bail refered to in section 36B(1)(a)*. It is clear from the statutory language that the purpose of the amendment, was to prohibit the publication of the identity of persons named in all non-association bail conditions and not simply to have an undifferentiated class of persons unprotected simply because the person granting bail elected to grant bail under section 36(2).

This raises specifically the second question I am asked to advise upon namely, is section 36C applicable to all 'non-association' bail conditions.

I note that my instructions at page 4.9 state:

> *'The Attorney General's Department advised us that section 36C was not intended to apply when a 'non-association' bail condition was imposed under section 36(2)(a). It advised us that the non-disclosure clause was not intended to apply 'across the board' – that, because the Justice Legislation was introduced to deal specifically with gang related crimes, it was decided that the non-disclosure provision should relate specifically to such offences and to the new section 36B of the Bail Act.'*

In my view, and for the reasons I advance above, the language of section 36C is mandatory and unlimited. If the Attorney General's Department intended to place any limit on the application of the section then the amending legislation failed to refer to any such limitations. In fact there is nothing in the words of the statute that are even vaguely suggestive of such a limitation. There is no mention in section 36, 36B or 36C to 'gang-related' crimes and no such limitation can be inferred from the legislation. Though the second reading speech clearly confirms that the amending legislation is part of a 'comprehensive anti-gang package', the legislation amending the Bail Act, and the

relevant passages in the second reading speech, make no attempt to limit the application of sections 36, 36B or 36C to gang related offending or offences. The Bail Act as amended cannot be read down to achieve this result. If it was the intention of the Attorney General's Department to limit the legislation, or the non-disclosure legislation to gang-related crimes, it would require the introduction of additional amending legislation to achieve this result.

Equally, if it was intended that section 36B be restricted in its application to certain undefined accused or particular offending, and that it was only in these circumstances that it was intended that additional regulations and prohibitions would be imposed as provided for in sections 36B(3) to (8), then Parliament's intention should be made manifest by express language in amending legislation.

FORBES CHAMBERS
29 June, 2005.

E. FULLERTON SC

Glossary and Abbreviations

ABC	Acceptable Behaviour Contracts
Aboriginal	Refers to Aboriginal and Torres Strait Islander persons
Aboriginal Strategic Direction	NSW Police *Aboriginal Strategic Direction 2003–2006*
ABS	Australian Bureau of Statistics
'the Act'	*Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001*
AGD	NSW Attorney General's Department
AJAC	Aboriginal Justice Advisory Council
ALRC	Australian Law Reform Commission
ASBO	Anti Social Behaviour Orders
'authorised officer'	a police officer with the rank of sergeant or higher
AVO	Apprehended Violence Order
'the Bill'	Justice Legislation Amendment (Non-Association and Place Restriction) Bill
BOCSAR	NSW Bureau of Crime Statistics and Research
CAN	Court Attendance Notice
CCIS	NSW Children's Court Information System
CIDS	Client Information Data System (NSW Department of Juvenile Justice)
CIN(s)	Criminal Infringement Notice(s)
CNI	Criminal Names Index number
COPS	Computerised Operational Policing System. A centralised database maintained and operated by NSW Police, used to record incidents and events involving police
CSO	Community Service Order
DCS	Department of Corrective Services
DISC	Drug Intervention Service in Cabramatta
DJJ	Department of Juvenile Justice
DPP	NSW Director of Public Prosecutions
EDO(s)	Education and Development Officer(s) (NSW Police)
FCAN	Field Court Attendance Notice
GLC	General Local Courts
Juvenile	A person under the age of 18 years
LAC(s)	Local Area Command(s) (NSW Police)
LMI(s)	Local Management Issue(s) (NSW Police)
MLC	Member of the Legislative Council
MP	Member of Parliament
NSWPD	New South Wales Parliamentary Debates (Hansard)

NA	Non-Association
NAPR	Non-association and Place Restriction
NSWLRC	New South Wales Law Reform Commission
OIMS	Offender Integrated Management System (NSW Department of Corrective Services)
PR	Place Restriction
POI	Person of Interest (generally used by police to describe a suspect)
RCIADIC	Royal Commission Into Aboriginal Deaths into Custody
SOPs	Standing Operating Procedures
STEP Act	California Street Terrorism Enforcement and Protection Act
SYORP	Serious Young Offenders Review Panel
TIO	Telephone Interim Order

Note: Figures reported have been rounded up to the nearest whole number or to one decimal point. Percentages may not add up to 100 due to rounding.

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