

Discussion Paper:

*The Justice Legislation Amendment
(Non-association and Place Restriction)
Act 2001*

December 2003

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Foreword

Several incidents of gang-related crime in recent years have contributed to a growing concern about such offences in NSW and how the police respond to this trend. The Government has asserted the community's disapproval of such behaviour, by introducing a raft of legislation specifically designed to amend or modify existing laws with the intention of targeting gang-related crime. *The Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001* ('the Act') is one such piece of legislation.

The Act aims to break down an offender's association with persons and places that increase the likelihood of their reoffending, by establishing non-association orders, which prohibit an offender from associating with specified persons, and place restriction orders, which prohibit an offender from attending a specified place or area.

The NSW Parliament has determined that the operation of some pieces of new legislation be reviewed by my Office. It decides which new powers the NSW Ombudsman will review, and the length of each review.

This review will monitor whether the Act is being applied properly, fairly and effectively. To do this, it will use a range of research methodologies including consulting with stakeholders such as community groups and police; examining court decisions; inspecting records of the use of the new powers; and analysing complaints. The Act will be reviewed for the first two years of its operation.

This Discussion Paper describes those issues raised to date about the Act's implementation, as identified by a variety of government and non-government agencies. It also examines the use of non-association and place restriction conditions, whether attached to bail, parole, probation, custodial leave or a court order. In addition, it examines specific issues related to breaches of non-association and place restriction bail orders.

This Paper will be of particular interest to those involved in the process of implementing the provisions of the Act. It will also be of significance to individuals affected by the amendments, and those who represent them such as youth and Aboriginal legal services.

I encourage and look forward to receiving contributions from all those with an interest in this aspect of the criminal justice system.



Bruce Barbour
Ombudsman

Introduction

The *Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001* was introduced into Parliament on 26 October 2001 and received assent on 11 December 2001. The Act amended:

- Schedule 1 of the *Crimes (Sentencing Procedure) Act 1999*, in relation to sentencing procedure;
- Schedule 1 of the *Children (Criminal Proceedings) Act 1987*, in relation to sentencing procedure;
- Schedule 2 of the *Bail Act 1978*, in relation to bail conditions;
- Schedule 2 of the *Crimes (Administration of Sentences) Act 1999*, in relation to sentence administration (leave, parole and home detention); and
- Schedule 2 of the *Children (Detention Centres) Act 1987*, in relation to custodial leave.

In doing so, its main objective is to prohibit an offender's association with persons and places that may increase the likelihood of their re-offending. The provisions relating to bail and sentence administration commenced on 13 May 2002 and those relating to sentencing orders commenced on 22 July 2002.

Section 5 (1) of the Act specifies that:

For the period of 2 years from the commencement of this section, the Ombudsman is to keep under scrutiny the operation of the amendments made by this Act.

As soon as practicable after the completion of the two year review period, that is July 2004, the Ombudsman is to report to each Minister responsible for administering statutory provisions affected by the Act.

The review will incorporate a variety of strategies including:

- Analysis of statistics generated by the use of the Act;
- Consultation with agencies responsible for implementing the Act, mainly NSW Police, the Department of Corrective Services, Local Courts Administration and the Department of Juvenile Justice;
- Consultation with relevant community stakeholders - Aboriginal Legal Services, Legal Aid, Youth Legal Services, legal advisors, etc;
- Consultation with recipients of non-association and/or place restriction conditions; and
- Review of associated complaints and enquiries about the Act received by this office.

This Discussion Paper welcomes persons and organisations with an interest in the implementation of the Act to provide their comments and suggestions on issues identified in this Paper, and any other issues related to the implementation of the Act. All submissions will be considered in the review of the Act.

Submissions or correspondence relating to this review should be sent to:

Justice Legislation Amendment (Non-Association and Place Restriction) Act review
NSW Ombudsman
Level 24, 580 George Street
Sydney, NSW, 2000

Inquiries about this review should be directed to **Glenn Payton** on ph. **02 9265 0424** or at **gpayton@ombo.nsw.gov.au**

Date for submissions: 1 March 2004

Background

In 2001, the Government introduced a series of legislation¹ specifically designed to amend or modify existing laws with the intention of targeting gang-related crime. The Justice Legislation Amendment (Non-Association and Place Restriction) Act was one of these and has since been described as ‘the cornerstone of the Carr Government’s anti-gang package’².

A partial rationale for developing the Act was provided by the 1995 Youth Gang Survey, conducted by the United States of America Federal Bureau of Justice Assistance, which identified that, in general, gangs have a number of common characteristics. The two most important were cited as ‘*ongoing criminal association in a group*’ and ‘*identification with a particular territory or turf*’³. The Act therefore, aimed to break up ‘gangs’, by establishing non-association orders with the intention of prohibiting an offender from associating with specified persons and place restriction orders, prohibiting an offender from attending a specified place or area.

To an extent, the Act also developed out of the success of the police drug-bail scheme being trialled in Cabramatta at that time⁴. It also benefited from similar legislation⁵ in New Zealand, which provided for non-association orders to be made at point of sentencing, although the New Zealand approach has been modified to suit the particular needs of New South Wales. For example, in response to a series of widely reported gang rapes in August 2000, which were mainly organised by the use of mobile phones, the Act makes provision for an unlimited non-association order to be granted at the point of sentencing. Such an order not only prohibits an offender from being in company with a specified person, but also from communicating with them by any means⁶. In addition, for bail, leave, parole, and home detention, the Act explicitly defines association as ‘*to be in company with, or to communicate by any means (including post, facsimile, telephone and email)*’⁷.

The intention of non-association and place restriction orders, regardless of whether the conditions are attached to a court order, bail, parole, leave or home detention, is to break down an offender’s association with persons and places that may increase their likelihood of reoffending⁸. To ensure that an offender is compliant with the conditions prescribed in an order, presumes, to some extent, that an offender receives monitoring by the police⁹. Reality, however, suggests that this is unlikely to be achieved, as reflected in comments made to the review by some police officers:

The police don’t have the capacity to check that someone is complying with their order. So if the order is not to go within 100m of a Woolworth store, we are not going to put police round a Woolworth store to check that Joe Bloggs does not come within 100m of that shop.

¹ Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001; Police Powers (Vehicles) Amendment Act 2001; Crimes Amendment (Gang and Vehicle Related Offences) Act 2001; Motor Trade Legislation Amendment Act 2001; Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001.

² Second Reading Speech, the Hon. Mr. A. Stewart MP, NSWPD, 26 October 2001, p. 18104.

³ *Ibid.*

⁴ The scheme came into operation in July 2001. It enables a police officer to refer an offender to health assessment and drug treatment services as a condition of their bail. This is available only to offenders who are Cabramatta residents and who pose no risk to the community. For non-residents, the police can impose a bail condition which specifies that the offender is not to return to Cabramatta unless they have a legitimate reason for doing so. By March 2002, 393 offenders had been bailed by the police with conditions prohibiting them from returning to Cabramatta: Cabramatta Anti-Drug Strategy – the first 12 months: Information Sheet, Community Drug Information Strategy, NSW Premier’s Department, May 2002.

⁵ *Criminal Justice Act 1985 (NZ)*.

⁶ S. 17A (3) (b) (i) and (ii), Schedule 1.1 of the Act.

⁷ S. 36B (8), Schedule 2.1; ss. 128A (5) and 165A (5), Schedule 2.2 of the Act.

⁸ *Supra*, footnote 2.

⁹ Consultation with stakeholders.

A comparison was made between policing in country towns and cities. Due to the size of the population that requires policing, it was suggested that it is easier to monitor bail conditions in the country. In country towns, where the population is relatively small, the police are more likely to be familiar with individual offenders, whether they are subject to conditional bail, and if so, the nature of the conditions. This enables them to check whether an offender is complying with his/her bail in the course of their normal duties. For example, an officer might, whilst on foot patrol in a town centre, see an offender, and know that they are not allowed to be there by virtue of their bail order. It is likely, under such circumstances, the offender would be arrested for alleged breach of bail. In contrast, in cities and larger country towns, it is unlikely that an officer on patrol would know individual offenders, or that they may be in breach of their bail conditions.

Whilst the aim of the Act is to reduce the likelihood of offenders reoffending, the apparent difficulty of monitoring non-association and place restriction conditions raises questions about their effectiveness. It is possible, therefore, that offenders, subject to bail conditions, may be associating with people whom they are prohibited from associating with, and attending places they are prohibited from being in.

The review has been unable to identify any other jurisdiction in Australia which has implemented similar legislation. However, Western Australia has considered it as an option to crackdown on gangs, primarily motor-cycle gangs, and gang members¹⁰. To date this has not been implemented. Non-association and place restriction type orders are available in the USA and Canada¹¹.

While the impetus behind the legislation relates to curtailing criminal gang activity, the potential for its use goes beyond this by its application to non-gang related offences as well¹². For example, a man was convicted of 'fail to quit premises when refused entry by licensee'. During the incident, the offender became abusive, and assaulted a person after she had refused to serve him and asked him to leave, as he was intoxicated. A place restriction order was subsequently granted to prohibit the offender from entering the pub.

The Act amends a number of Acts in relation to sentencing procedure, bail and sentence administration¹³. It is to the potential effect of these amendments that this discussion now turns.

Changes to Crimes (Sentencing Procedure) Act

Schedule 1 of the Act amends the Crimes (Sentencing Procedure) Act to the effect that when sentencing an offender for an offence punishable by six months imprisonment or more, whether or not the offence is also punishable by a fine, a court may make a 'non-association order'. Such an order prohibits an offender from associating with a specified person(s); either being in company with that person(s) or from communicating with them by any means. The court may also make a 'place restriction order', prohibiting the offender from visiting a specified place(s) or district(s)¹⁴. A court may also make a parole order with similar conditions attached¹⁵.

¹⁰ Assistant Commissioner Tim Atherton, W.A. Police, on Radio National discussing gangs and the law, 11th September 2001.

¹¹ In April 1997, the Canadian Federal Government introduced national anti-gang measures into their Criminal Code. It has subsequently been used against a Hells Angels gang in Quebec. Cities in the U.S. have enacted a number of measures to restrict or prohibit youth and adult gang activities. For example, in Los Angeles the City Attorney's Office, pending approval from a judge, can issue a restraining order (gang injunction) against specific gang members of a particular gang. These can prohibit members from engaging in a host of activities including congregating in groups, being out after a particular time, and being in possession of a pager or cellular telephone. Other cities have followed suit including San Diego, San Jose, San Antonio and Chicago. For further information see: www.streetgangs.com/injunctions/

¹² *Commencement of the Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001*, Police Weekly, Vol. 14, No. 28, 22 July 2002.

¹³ *Supra*, footnote 1.

¹⁴ S. 17A of the Crimes (Sentencing Procedure) Act.

¹⁵ S. 51A of the Crimes (Sentencing Procedure) Act.

The scope for such orders is qualified in that the person(s) specified in a non-association order may not include any member of the offender’s close family¹⁶. In addition, the places specified in a place restriction order may not include the offender’s home or their family’s home, their workplace, any educational institution at which the offender is enrolled or any place of worship the offender regularly attends¹⁷.

The court is only to make such orders if it is satisfied that it is reasonably necessary to do so to ensure the offender does not commit any further offences. Non-association and place restriction orders are not to exceed 12 months in duration.¹⁸

If an offender contravenes his/her order, s/he is liable to up to 10 penalty units¹⁹ or imprisonment for 6 months, or both²⁰.

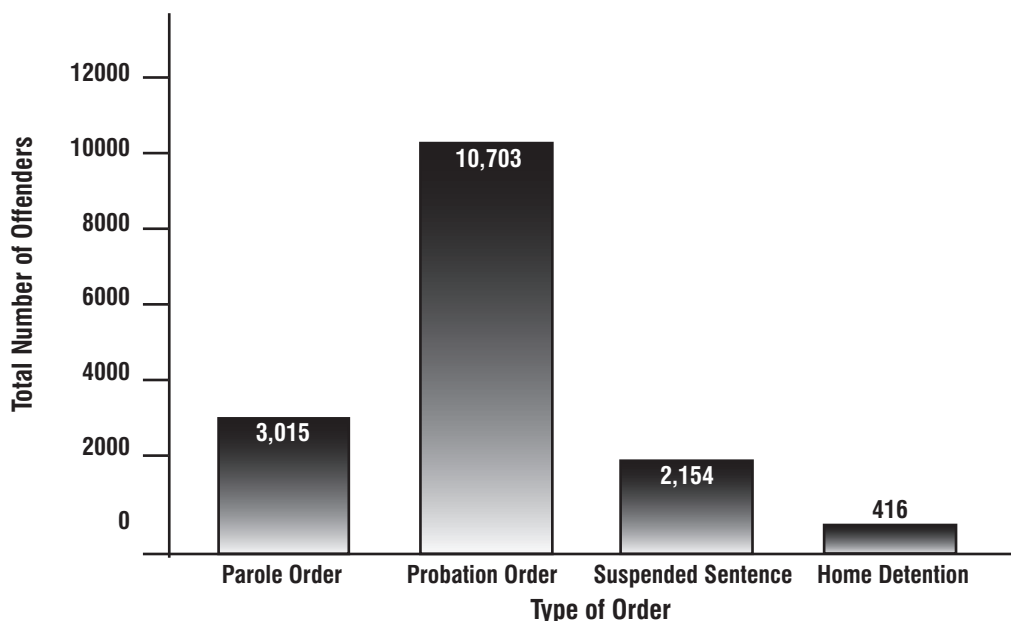
The Act also makes it an offence to publish or broadcast the fact that a named person (other than the offender) is specified in a non-association order or any information calculated to identify any such person²¹. A similar provision applies to parole orders²².

Amendments made to the Children (Criminal Proceedings) Act mean that these orders may also be imposed on juvenile offenders.

Use of non-association and place restriction orders

This paper will now examine the use of non-association and place restriction orders for the period 22 July 2002 to 21 July 2003. In order to contextualise this, it is useful to look more broadly at the use of orders made under pre-existing legislation in order to reduce an offender’s likelihood of their reoffending. The following graphs illustrate the use of such orders over a one-year period.

TABLE 1: Number of Offenders with Orders — 1 July 2001 - 31 June 2002



Source: NSW Department of Corrective Services Annual Report 2001-2002

¹⁶ S. 100A (3), Part 8A of the Crimes (Sentencing Procedure) Act defines ‘close family’ as: (a) the offender’s spouse, de facto or same-sex partner; (b) the offender’s parents, step-parents and grandparents; (c) the offender’s children, step-children and grandchildren; (d) the offender’s brothers and sisters, and step-brothers and step-sisters; and (e) the offender’s guardians or carers.

¹⁷ S. 100A (2), Part 8A of the Crimes (Sentencing Procedure) Act.

¹⁸ S. 17A (5) of the Crimes (Sentencing Procedure) Act.

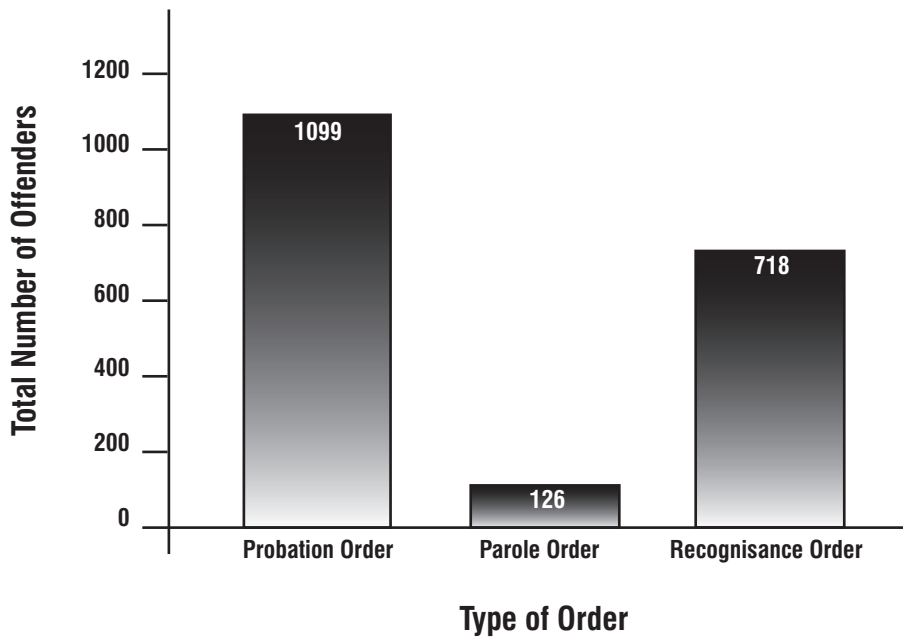
¹⁹ One penalty unit presently equals \$110 (s. 17, Crimes (Sentencing Procedure) Act).

²⁰ S. 100E (1), Part 8A of the Crimes (Sentencing Procedure) Act.

²¹ S. 100H (1), Part 8A of the Crimes (Sentencing Procedure) Act.

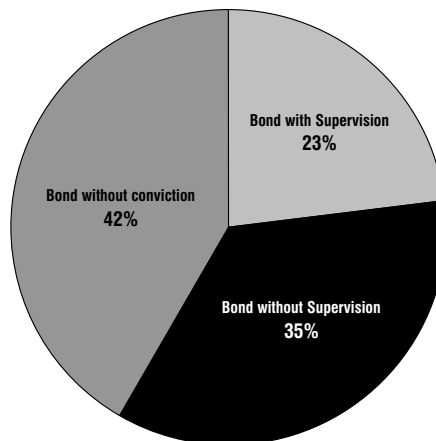
²² S. 51B (1) of the Crimes (Sentencing Procedure) Act.

TABLE 2: Number of Juvenile Offenders with Orders — 1 July - 31 June 2002



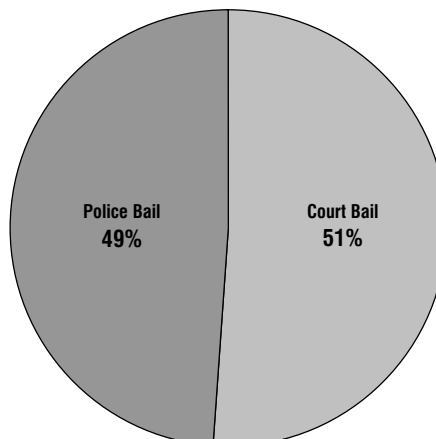
Source: Department of Juvenile Justice Annual Report 2001-2002

TABLE 3: Percentage Breakdown of Bonds Granted by NSW Local Courts in 2002 (n=1090)



Source: BOSCAR NSW Criminal Courts Statistics 2002

TABLE 4: Percentage Breakdown of Bail Granted by NSW Police and Local Courts in 2002 (n=78747)



Source: BOSCAR NSW Criminal Courts Statistics 2002, and NSW Police

Information obtained from NSW Local Courts indicates that the use of non-association and place restriction orders has been low. For the period 22 July 2002 to 21 July 2003, there have been 12 non-association and place restriction orders imposed by the courts²³, none of which have been reported as having been in breach²⁴. These orders have been granted at five local courts, with one local court, Raymond Terrace, being responsible for eight of these. 10 of these orders prohibit an offender from visiting a specified place or district, whilst the remaining two prohibit an offender from associating with a specified person and persons²⁵. Two-thirds of the orders were made for a period of 12 months, whilst the remainder were for six months.

Some general observations can also be made about the types of offenders subject to non-association and place restriction orders. 11 of the 12 non-association and place restriction orders which had been granted apply to male offenders. Three-quarters of offenders were aged under 30 years, and five identified themselves as Aboriginal.

Table 5 shows the specific details of each of the 12 orders granted by the courts 22 July 2001 – 21 July 2002. (See Below)

TABLE 5: Details of Non-association and Place Restriction Orders granted between 22 July 2001 and 21 July 2002

Gender	Age (yrs)	Date of Order	Type of Order	Length of Order (mths)	Court	ATSI Status
Male	17	11/09/2002	Place restriction: must not enter or be within 5 kilometres of Bonalbo	12	Casino	Aboriginal
Male	17	14/05/2003	Place restriction: city of Cessnock	12	Cessnock	No
Male	13	3/10/2002	Place restriction: not to go inside Big W store at Bonnyrigg, unless accompanied by brother or mother	6	Lidcombe	No
Male	23	2/09/2002	Non association: Prohibited from being in the company of the specified person	12	Raymond Terrace	No
Male	31	18/11/2002	Place restriction: prohibited from frequenting/visiting Clare Castle Hotel, William Street, Raymond Terrace	12	Raymond Terrace	Aboriginal
Male	29	24/01/2003	Place restriction: prohibited from frequenting/visiting Kearsley	12	Raymond Terrace	No
Female	25	21/02/2003	Place restriction: Katie's or Sussans stores, Hunter Street mall, Newcastle.	12	Raymond Terrace	Aboriginal
Male	22	26/05/2003	Place restriction: Mobil service station, Pacific Highway, Karuah	6	Raymond Terrace	Aboriginal
Male	32	5/05/2003	Place Restriction: Medowie indoor sports centre	6	Raymond Terrace	No
Male	29	10/03/2003	Place Restriction: Railway Tavern, Glen Innes	12	Raymond Terrace	No
Male	41	22/04/2003	Place Restriction: Seabreeze Hotel, Nelson Bay	6	Raymond Terrace	No
Male	15	11/02/2003	Non association: Prohibited from being in the company of the specified person	12	Tamworth	Aboriginal

²³ Information provided by NSW Local Courts

²⁴ *Ibid.*

²⁵ One is a limited non-association order which prohibits the offender from being in company with a specified person, whilst the other an unlimited non-association order which prohibits the offender from being in company with a specified person and from communicating with that person by any means (s. 17A (4) Part 2A of the Crimes (Sentencing Procedure) Act.)

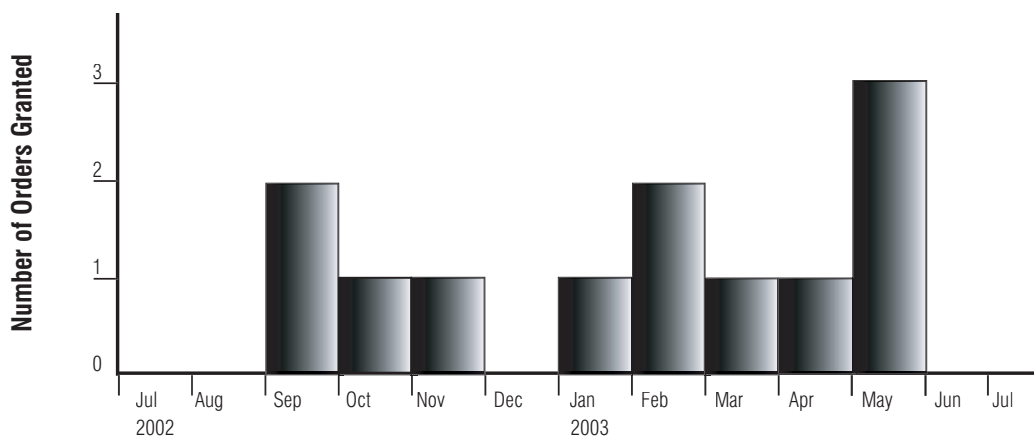
The types of offences committed which resulted in a non-association or place restriction order being granted by the court were:

- Shoplifting value
- Stalk/intimidate with intent to cause fear/physical/mental harm
- Common assault
- Assault occasioning actual bodily harm
- Fail to quit premises when refused entry by licensee
- Maliciously destroy or damage property value
- Contravene apprehended domestic violence order
- Affray
- Break and enter building and committing serious indictable offence
- Take and drive conveyance without consent of owner
- Steal motor vehicle
- Threaten violence causing fear
- Larceny

Interestingly, none of these offences were gang related.

The timing of these orders does not follow any obvious trend, although it appears that the majority have been granted in the last six months of the Act's operation, i.e. since July 2002, with the highest number in May 2003. (See Table 6 below)

TABLE 6: Number of Non-associated and Place Restriction Orders Granted at Court — 22 July 2002 - 21 July 2003



Changes to bail and sentence administration

Existing laws

Bail in NSW operates under the provisions set out in the Bail Act. Bail, which can be granted in two ways, comes into play when a person has been arrested, and subsequently charged by the police, with a criminal offence. To manage an accused's behaviour prior to the initial hearing at court, a police officer may grant bail. When deciding to grant a bail application, an officer must consider certain criteria to determine whether conditions are necessary. This includes the probability of that person appearing in court, the interests of the accused, the protection of victims and relatives, and the protection and welfare of the community²⁶. Similarly, having also considered the relevant criteria²⁷, a magistrate or justice may grant bail to a person charged with an offence²⁸. This applies to the Local, District and Supreme Courts.

Alternatively, a person may be refused bail, and consequently will remain in police custody, before being brought before the court 'as soon as practicable'²⁹.

Bail can be conditional, where the accused must abide by specified conditions which relate to that person's conduct, or unconditional, where no conditions are attached.

Sections 36 to 37 of the Bail Act specify the types of conditions which may be imposed on a grant of bail. These include:

- *The accused observing specified requirements regarding his or her conduct while at liberty on bail;*
- *The accused residing in accommodation for persons on bail;*
- *An acceptable person to acknowledge that the accused is likely to comply with the bail undertaking;*
- *The accused, or acceptable person, agreeing to forfeit a specified amount of money if the accused person fails to comply with his or her bail undertaking; and*
- *The accused surrendering to the police or the court any passport(s) they hold.*

Likewise, the Crimes (Administration of Sentences) Act sets out provisions which enable the Probation and Parole Service to impose conditions on parole, leave and home detention in order to direct an offender's conduct on release. Section 128 sets out the types of conditions which may be imposed on a parole order:

- *The standard conditions imposed by the regulations;*
- *Any additional conditions imposed by the sentencing court; and*
- *Any additional conditions imposed by the Parole Board under this section.*

Similarly, s. 26 (1) of the Crimes (Administration of Sentences) Act stipulates that 'a person may be absent from a correctional centre on (a) such conditions and for such period as may be specified in the permit, and (b) for such purposes as the Commissioner (of Corrective Services) considers appropriate'.

With respect to home detention, s. 165 (2) of the Crimes (Administration of Sentences) Act refers to Part 6 of the Crimes (Sentencing Procedure) Act, which states that a court may impose such conditions as it considers appropriate.

²⁶ S. 36, Part 5 of the Bail Act.

²⁷ *Ibid.*

²⁸ S. 23, Part 4 of the Bail Act.

²⁹ S. 20, Part 3 of the Bail Act.

Amended laws

Schedule 2 of the Act inserts provisions into the Bail Act and the Crimes (Administration of Sentences) Act which explicitly state that conditions attached to bail, parole, leave from custody and home detention may be imposed to prohibit or restrict a person from associating with a specified person or visiting a specified place or district. For the purpose of the Act, 'associate' is defined as being in the company of or communicating with by any means (including post, facsimile, telephone and email)³⁰. These conditions may also be imposed on juveniles³¹.

Whilst s. 100A of the Crimes (Sentencing Procedure) Act specifies what should not be imposed in a non-association or place restriction condition³², there are no such limitations in the bail, parole, leave or home detention provisions. Both NSW Police and the NSW Law Society suggested that the guidelines set out in s. 100A should be used as a guide by police and courts for determining reasonable and appropriate conditions when imposing bail³³. NSW Police also suggest that these types of conditions should not ordinarily be used where other measures such as an Apprehended Violence Order (AVO) would be appropriate. NSW Police further stipulate that the Act is not intended to affect the operation of the *Young Offenders Act 1997*, and that the provisions of the Young Offenders Act will continue to apply to those offenders who meet the necessary requirements under that Act³⁴.

The Act inserted a s. 36C into the Bail Act which prohibits the publication or broadcast of the identity of any person named in a non-association condition, with the exception of the name of the offender. There was formerly no such protection under the Bail Act.

A breach of a non-association or place restriction condition of bail, leave, parole or home detention is to be treated in the same way as a breach of any other condition attaching to those stages of the judicial process³⁵.

The following is an example of when the new provisions of the Bail Act might be applied. Similar conditions are likely to be attached to a person's home detention, parole or custodial leave.

³⁰ S. 36B (8) of the Bail Act; ss. 26A (5), 128A (5), 165A (5) of the Crimes (Sentencing Procedure) Act.

³¹ S. 24A (5) of the Children (Detention Centre) Act.

³² *Supra*, footnotes 14 and 15.

³³ *Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001* Policing Issues and Practice Journal, Vol. 10, No. 3, July 2002 and *New Powers to Restrict Association and Movement* Law Society Journal, Vol. 40, No. 7., August 2002.

³⁴ *Ibid.*

³⁵ For bail see s. 50 (1), Part 7 of the Bail Act. For home detention, parole and custodial leave see ss. 163 (1), 167 (1) and 170 (1), Part 7 of the Crimes (Administration of Sentences) Act.

Case Study: Scenarios of when a non-association and place restriction condition might be used with respect to bail

Scenario 1:

Three young men are arrested after a fight... All three men are charged with assault and have been arrested in similar situations together before. The three men are cousins and have grown up in close daily contact with each other.

Condition

The accused are not to associate with each other in any licensed premises.

Scenario 2:

An 18 year old female, Jane Smith was arrested for possession and self-administration of heroin. She is a resident of the suburb of Reasonville. She has a number of prior convictions for possession. Police are considering bail. The arresting officer informs the authorised officer³⁶ the young woman has been purchasing her heroin from a known drug dealer, John Jones, who is suspected of operating (supplying) from a unit within a block of units at 15 Zero St, Reasonville.

Condition 1:

Smith was not to associate with John Jones. There was evidence that her association with Jones was centred on purchasing heroin.

Condition 2:

The accused is not to frequent 15 Zero Street, Reasonville. The restriction did not prevent Smith from going about her legitimate activities.

Extract from *Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001* Policing Issues and Practice Journal, Vol. 10, No. 3, July 2002.

Despite the introduction of new powers in relation to bail³⁷ under the Bail Act, it has long been possible for a police officer, or a judicial officer, when granting bail, to make orders to ensure that an accused will remain within a certain area, and not associate with certain people or go to certain places. Similarly, probation and parole officers have been able to impose non-association and place restrictions as a condition of a person's parole, leave and home detention under the Crimes (Administration of Sentences) Act³⁸. Whilst non-association and place restriction orders, *per se*, did not exist prior to the introduction of the Act, court officers were able to prohibit a person from associating with a specified person(s), or frequenting a specified area(s) or locality as part of a good behaviour bond³⁹ or suspended sentence⁴⁰.

The review has received advice to the effect that the 'new' powers under the Act do not over-ride the 'old' powers in the Bail Act or the Crimes (Administration of Sentences) Act. Consequently, there are two different sections, within each of the above-named Acts, which enable NSW police, judicial, probation and parole officers to achieve the same aim: to prohibit an accused person or offender from associating

³⁶ S. 17 (1), Part 3 of the Bail Act defines the 'authorised officer' as '(a) of or above rank of sergeant and present at the police station, or (b) for the time being in charge of the police station'.

³⁷ S. 36 of the Bail Act.

³⁸ Ss. 26 (1), 128 (1), and 165 (2) of the Crimes (Administration of Sentences) Act.

³⁹ S. 95, Part 8 of the Crimes (Sentencing Procedure) Act.

⁴⁰ S. 12 of the Crimes (Sentencing Procedure) Act.

with specified persons or attending a specified place or area. This makes it difficult to determine whether the 'old' or the 'new' powers are being used when such orders are made. As illustrated in the following discussion, this may have an impact on the use of the provisions of the Bail Act which make it an offence for a person to publish or broadcast a named person (other than the offender) in a non-association bail order⁴¹. This issue will be explored further in the subsequent section.

⁴¹ S. 36C of the Bail Act.

Issues for discussion

This part of the Paper discusses issues arising from the amendments to legislation made by the Act. The issues are based upon information obtained from the parliamentary debate surrounding the Act and consultations with practitioners. Whilst specific questions are provided in relation to each issue, we welcome any comments that you may have about a particular issue and any comments about the implementation of the Act in general.

1. New provisions

This section examines whether the amendments made by the Act have given NSW Police, the Department of Corrective Services, the Department of Juvenile Justice and the Local Courts any additional powers to prohibit an offender's association with persons and/or places that may increase the likelihood of their re-offending.

1.1 Amendments made by the Act

As discussed, the Act provides for NSW Police to impose conditions on bail, and Corrective Services to impose similar conditions on leave, parole and home detention orders which restrict an offender from associating with a specified person(s) or from visiting a specified place or district. However, it would appear that, in the main, these powers existed prior to the implementation of the Act pursuant to those statutes amended by the Act⁴².

This became apparent through discussions with criminal justice system practitioners who suggested that the legislation had provided them with no additional power in relation to imposing non-association or place restriction conditions. A response typical of those received from custody managers was:

We always had the capacity to put any sort of restrictions on a conditional bail, it has had very little effect on us as we have basically always had the powers under the Bail Act to put whatever conditions that are necessary.

NSW Department of Corrective Services and Youth and Aboriginal Legal Services officers also made similar comments.

An example of where police officers were frequently using the general condition-making powers of the Bail Act to attach place-restriction conditions to police bail is provided by the Police Drug Bail Scheme in Cabramatta. From 1 July to 26 September 2001, the Region Target Action Group and local police imposed place-restriction conditions on the bail of 144 persons, ordering that they not return to Cabramatta⁴³.

In the Second Reading of the Bill, the Hon. A. Stewart MP recognised that such conditions could be imposed prior to the Act, but argued that:

Express legislative recognition of non-association and place-restriction conditions will require bodies with bail, parole and leave management responsibilities to specifically consider the appropriateness of such orders, thereby promoting their further use⁴⁴.

⁴² For bail: s. 36 of the Bail Act, for leave: s. 26 (1) of the Crimes (Administration of Sentences) Act, for parole: s. 128 (1) of the Crimes (Administration of Sentences), and for home detention: s. 165 (2) of the Crimes (Administration of Sentences) which relates to s. 82 (1) of the Crimes (Sentencing Procedure) Act.

⁴³ *Supra*, footnote 2.

⁴⁴ *Ibid.*

The Act also amended the Crimes (Sentencing Procedure) Act to introduce non-association and place restriction orders. As with bail, leave, parole and home detention, the court had previously been able to impose such conditions by other means, such as a good behaviour bond⁴⁵, or suspended sentence⁴⁶. As explained by one youth legal services officer:

One of the magistrates is keen to give people good behaviour bonds or suspended sentences telling people that they are not allowed to come within 3 km of X railway station. Effectively it is a place restriction but made as part of a good behaviour bond or a suspended sentence.

Similarly, a magistrate described how these types of conditions were being used to try to control the drug problem in a particular NSW country town:

A lot of defendants that were picked up in a country town came to the local court and we started bailing them and in the end a conviction of placing bonds on them for the purpose of not allowing them back there. The reason was to try and cut the cycle of them going back and the supply of drugs. So it was being used.

The relatively low use of non-association and place restriction orders since their inception in July 2002⁴⁷ may be explained by comments such as those made by one magistrate:

It is just a perception. My gut reaction would be that it is the type of legislation that you would read and think well we are doing it anyway, or we were doing it already so why bother going the extra step when you are doing it anyway and we are already imposing it... feeling that we do this anyway in another way.

However, there is at least one fundamental difference between the 'old' and the 'new' powers. A breach of either a good behaviour bond or suspended sentence is not in itself an offence⁴⁸. However, the contravention of a non-association and/or place restriction order is, in itself, an offence⁴⁹. Discussions with magistrates indicate this is perhaps where the Act's strengths lie and therefore this aspect of the Act should be promoted to encourage further use of the orders.

It was suggested by two magistrates that training in relation to the Act should be promoted and directed to three audiences: NSW police, through the prosecutors⁵⁰, as to when an order would be appropriate; judicial officers, so they are aware of its existence and to highlight that it is an offence to breach an order; and the probation and parole service, who should also be thinking about recommending such sentencing options to the court.

The Act also allows the court to impose non-association and place restriction conditions on parole orders.

⁴⁵ S. 95, Part 8 of the Crimes (Sentencing Procedure) Act.

⁴⁶ S. 12 of the Crimes (Sentencing Procedure) Act.

⁴⁷ 12 have been awarded since inception (July 2002 to July 2003).

⁴⁸ S. 98, Part 8 of the Crimes (Sentencing Procedure) Act.

⁴⁹ S. 100E of the Act states that 'an offender must not, without reasonable excuse, contravene a non-association or place restriction order. Maximum penalty: 10 penalty units [penalty \$1100] or imprisonment for 6 months, or both'.

⁵⁰ All of those granted at Raymond Terrace court were made on the application of the police prosecutor.

Questions for consideration

1. The review welcomes your comments and suggestions on whether the courts, police, corrective services and/or the Department of Juvenile Justice, have used or are utilising the additional powers conferred by the Act, when they were able to impose similar conditions under existing legislation.
2. It was suggested that a session on non-association and place restriction orders be incorporated into police, probation and parole, and judicial training modules on similar subjects such as AVO's, DVO's, bonds and bail. What do you think of this suggestion? Have you been involved in similar training? Please provide details if possible.

1.2 The broadcasting of information about a person(s) named in a non-association order or bail condition.

The Act contains new provisions in the Crimes (Sentencing Procedure) Act (ss. 100H and 51B) and the Bail Act (s. 36C) concerning the publication and/or broadcast of a person or people named in a non-association order or condition⁵¹. Further, ss. 100H and 51B of the Crimes (Sentencing Procedure) Act and s. 36C of the Bail Act make it an offence (maximum 10 penalty units, presently \$1100⁵²) for a person to publish or broadcast a named person (other than the offender) or any information which is calculated to identify them. The stated rationale behind this was to ensure that a person named in an order or bail condition would not have any 'inappropriate adverse influences being drawn against them'⁵³.

Whilst courts can impose non-association conditions as part of a good behaviour bond and/or a suspended sentence, there are no equivalent provisions which make it an offence to publish the identity of a non-offender named in such a condition.

Some police officers expressed uncertainty as to whether they were imposing non-association or place restriction conditions under s. 36 or s. 36B of the Bail Act. Section 36 (2) (a) 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.

whilst s. 36B (1) states:

Either or both the following conditions may be imposed on the grant of bail:

(a) that the accused person enter into an agreement to comply with specified requirements prohibiting or restricting the person from associating with a specified person

(b) that the accused person enter into an agreement to comply with specified requirements prohibiting or restricting the person from frequenting or visiting a specified place or district.

⁵¹ There are no such provisions in place for parole, leave or home detention. In relation to leave there are already disclosure provisions in the *Crimes (Administration of Sentences) Regulation 1999* and the *Children (Detention Centres) Act*.

⁵² S. 17, of the Crimes (Sentencing Procedure) Act.

⁵³ *Supra*, footnote 2, p. 18106.

It was explained by police officers that they interpreted ‘*specified requirements as to his or her conduct while at liberty on bail*’ to include non-association and place restriction type bail conditions.

This poses the question of whether the powers under s. 36 and s. 36B of the Bail Act run concurrently or whether s. 36B overrides s. 36 so that these conditions can now only be imposed under s. 36B. The review has been advised that the conditions run concurrently⁵⁴. However, the potential for ambiguity leaves this open to challenge.

The provisions in s. 36C specifically refer to conditions imposed in s. 36B:

S. 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)*

Initial advice received by the review suggests that this section does not apply when a non-association bail condition is made under s. 36, since these protections do not exist under the general bail making powers of the Bail Act.

There is currently no record available of whether police are imposing these types of conditions under s. 36 of the Bail Act or under the amended s. 36B of the Act⁵⁵. A telephone survey of 34 Local Area Commands 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 s. 36 of the Bail Act. Similar comments were also received in face-to-face interviews with custody managers who made no distinction between ss. 36 and 36B. As far as they were concerned, they were ‘just doing as they always had done’. As one police officer stated, ‘*pragmatically it doesn’t really matter as long as the condition is appropriate at the time*’. However, as discussed above, the source of an order does have implications for the protection of the identity of persons named in a non-association bail order.

Whilst the legislation may have intended it to be an offence to publish or broadcast a named person in a non-association condition⁵⁶, that intention is not immediately reflected in the Act as it currently stands: it remains ambiguous as to whether s. 36C will apply to all cases when a non-association bail condition is imposed. The Attorney General’s Department informed the review that the non-disclosure clause was not intended to apply ‘across the board’. Under s. 36 of the Bail Act, the police can impose non-association conditions for a broad range of offences. The review was also informed 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 section 36B of the Bail Act. Therefore, an assumption has apparently been made that all gang-related bail conditions should be imposed under s. 36B of the Bail Act. However, this is not clearly stated in the Bail Act. Given the apparent uncertainty as to whether non-association conditions are being imposed under s.36 or s.36B, it may be that clarification is required as to the scope of the application of s.36C.

The review will examine any offences under s. 36C of the Bail Act, and ss. 51B and 100H of the Crimes (Sentencing Procedure) Act.

This ambiguity also raises the question as to whether the legislation is promoting the further use of non-association and place restriction conditions as it intended⁵⁷. As discussed above, custody managers are ‘*just doing as they had always done*’, and as far as they were aware were not using the new powers under s. 36B of the Bail Act, but rather the general bail making powers under s. 36⁵⁸.

⁵⁴ S. 36B (2) states ‘Conditions of this kind referred to in subsection (1) may be imposed in addition to, or instead of, any condition imposed under 36 or 36A’, ‘in addition to’ implying that s. 36 and s. 36B run concurrently.

⁵⁵ This became apparent through discussions with custody managers and our attendance at a police training session on bail.

⁵⁶ *Supra*, footnote 2, p. 18106.

⁵⁷ *Supra*, footnote 2.

⁵⁸ Discussions with custody managers.

Questions for consideration

3. Section 36C of the Bail Act, and ss. 51B and 100H of the Crimes (Sentencing Procedure) Act make it an offence to publish or broadcast a person(s) named in a non-association order or bail condition. Are you aware of any circumstances where a person(s) has been so named? Please provide examples where possible.
4. It would appear that non-association bail conditions could be imposed under s. 36 or s. 36B of the Bail Act. What are your views on this?
5. The legislation appears to be ambiguous in terms of whether it is an offence to publish or broadcast a named person(s) for all non-association bail conditions or only those specifically under s. 36B of the Bail Act. What are your views on this and do you think that clarification is necessary?

2. Non-association and place restriction conditions

2.1 General issues

Concern was raised both during the parliamentary debate and in consultation with relevant stakeholders about the impact that non-association and place restriction conditions 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 places⁵⁹. Whilst recognising that bail conditions offer an important tool to help manage a person's offending behaviour prior to going to court, representatives from youth and Aboriginal services cited a number of examples where police were perceived to be using bail conditions inappropriately. This led a number of representatives to express the view that in some circumstances, the police were 'setting them [the offender] up to fail [i.e. by breaching their bail conditions]' (see discussion later on breach of bail)⁶⁰. Such conditions included:

- prohibiting a young boy from associating with his brother when the brother lived in the same house;
- prohibiting a boy from associating with a long list of about 20 young people from his local area even though the youth did not know most of them; and
- preventing a man from providing care for five children he was responsible for as he was prohibited from returning to the town where he and the children lived.

The review will also therefore be examining the use and impact of non-association and place restriction conditions when imposed by the NSW Police, NSW Corrective Services, NSW Department of Juvenile Justice and NSW Local Courts.

Questions for consideration

6. The review welcomes your comments and suggestions in relation to your experience or knowledge of allegedly inappropriate non-association and place restriction conditions in general.
7. Please provide examples of where you consider inappropriate conditions have been made, either as part of a non-association and place restriction order, bail, parole, home detention or custodial leave. Please explain your reasons for believing the conditions to be inappropriate.

⁵⁹ As expressed during a discussion with a youth legal services officer.

⁶⁰ No examples were offered to the review of direct experience with inappropriate conditions attaching to a non-association and/or place restriction order, home detention, parole and leave. Similar comments were, however, made in relation to good behaviour bonds.

Section 100A of the Crimes (Sentencing Procedure) Act, as amended, recognises that non-association and place restriction conditions 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’⁶¹. In effect, this section qualifies the scope for non-association and place restriction conditions so as not to restrict certain associations or activities, such as prohibiting an offender from associating with members of their close family.

Section 100A (3) 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.*

Similarly, s. 100A (2) states that a place restriction order may not be made to prohibit a person from attending, at the time that the order is made:

- (a) *the offender’s place of residence or the place of residence of any member 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.*

Such provisions are not reflected in the amendments to the Bail Act, and are therefore not binding on police or court grants of bail⁶². However, NSW Police have recommended using s. 100A as a guide as to what constitute reasonable and appropriate conditions to be applied when using non-association and place restriction bail conditions⁶³. NSW Police further acknowledged that the list is not exhaustive and that in some circumstances, kinship relationships should also be considered: ‘*Police should always be mindful of the impact that prohibiting an Aboriginal person from associating with any distant relatives may have*’.

Despite this, representatives from youth and Aboriginal legal services cited a number of examples where Aboriginal people were bailed on conditions which prohibited them from associating with members of even their close family. In one instance, it has been reported that a bail condition was imposed on a 10 year old Aboriginal boy that he not reside with any member of his family, after having been arrested and charged for an offence. As the Department of Community Services was unable to find a placement for him, he had to remain in custody until his court hearing date⁶⁴.

⁶¹ *Supra*, footnote 2; p. 18105.

⁶² Consultation with the Attorney General’s Department informs the Review that as non-association and place restriction conditions previously existed under the general condition-making powers of the Bail Act, temporary conditions imposing restrictions on what cannot be included in a non-association and place restriction condition was not deemed necessary. Furthermore, restrictions on family and places would prevent these types of bail conditions from being used in domestic incidents, such as to protect a victim (usually spouse or de facto) by preventing an offender from associating with them and from being within a certain distance of their house. It was also suggested that new restrictions might confuse police officers who are used to imposing all sorts of non-association and place restriction conditions. Due to their length and the fact that a breach could result in a term of imprisonment such restrictions were perceived to be more suited to court orders.

⁶³ *Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001* Policing Issues and Practice Journal, Vol. 10, No. 3, July 2002.

⁶⁴ Letter received by the NSW Ombudsman, prior to the Act’s enactment, from N. Meagher, President of the NSW Law Society, November 2001, about the potential impact of the Act.

This issue was reiterated by a solicitor at an Aboriginal legal service who stated:

It is poor public policy to hope that police and courts will be guided by s. 100A of the Crimes (Sentencing Procedure) Act as to what are reasonable and appropriate conditions when these bail restrictions are imposed. The places or districts listed in s. 100A are limited. Likewise, the 'close family' lists in s. 100A are limited.

Questions for consideration

8. How might we make consideration of issues relating to the use of non-association and place restriction conditions 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; or by expanding section 100A of the Act. Please explain your reasons providing suggestions as to how this might be achieved.

2.2 Issues around conditions which restrict an offender from associating with a member of their close family

The definition of 'close family' in the Crimes (Sentencing Procedure) Act received commendation for recognising a number of issues in relation to the importance of culturally defined relationships, particularly for Aboriginal people and Torres Strait Islanders and/or people from non-English speaking backgrounds⁶⁵. However, it was explained that, for indigenous people, kinship ties extend beyond the immediate family of mother, father, brother and sisters, to include aunts, uncles and cousins.⁶⁶ To such communities, the review was informed, 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 with a sibling. However, it has been suggested that, for certain groups of people, the definition in s. 100A (3) of the Crimes (Sentencing Procedure) Act is inappropriately limited by failing to acknowledge the importance of belonging to a wider family network and a community. One youth representative described the definition as '*a very white middle class way of looking at things*'.

Questions for consideration

9. The review welcomes your comments and suggestions on the use of non-association conditions.
10. Are you aware of any such conditions having been imposed which prohibit a person from associating with members of their close or extended family. Please provide examples where possible.
11. Would there be any benefits to amending the definition of close family to reflect kinship ties which extend beyond the immediate family and, if so, what would the benefits? Please explain your reasons and feel free to offer suggestions as to what should be included or excluded.

⁶⁵ Comments made by a solicitor at an Aboriginal legal service.

⁶⁶ *Ibid.*

2.3 Issues around conditions which restrict an offender from attending specified places

Whilst s. 100A (2) of the Crimes (Sentencing Procedure) Act provides a list of what should not be attached to a place restriction condition, it has been suggested that such orders may inadvertently restrict access to a number of services, e.g. health, legal and employment services, which offer support, particularly to youth who are marginalised or those not in mainstream education and employment⁶⁷. The review was provided with the following example which illustrates the range of considerations which might be recognised when imposing place restriction conditions. The review was informed of one situation where a former heroin user was arrested attempting to sell small amounts of cannabis and, by virtue of a blanket condition, prohibited from attending both her methadone clinic and her solicitor's office⁶⁸. This potential predicament was also identified by a magistrate who explained that in some circumstances blanket conditions were neither appropriate nor necessary:

You can tailor it [the bail condition] so that the evil that you seek to be stopped can be stopped without a blanket that you can or cannot go there.

Another concern raised in relation to blanket conditions was that they excluded Aboriginal people from missions, particularly in country towns⁶⁹. By imposing such conditions, the recipient is not only restricted from frequenting a specified area, but also from seeing close family who may live there.

Conversely, one magistrate informed the review that in some circumstances, the definitions set out in s. 100A (2) are too restrictive. He explained, that in some situations, it may be necessary to impose a restriction to prohibit an offender from frequenting his place of worship or an educational institution where s/he is enrolled, where they may be participating in criminal activity. However, s. 100A (2) would prevent 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. However, as previously described, the breach of a good behaviour bond would not constitute a criminal offence (see section 1.1).

Questions for consideration

12. The review welcomes comments and suggestions on the use of place restriction conditions generally.
13. In particular, are you aware of any situations where people have been prohibited, intentionally or unintentionally, from accessing support services (e.g. employment and health services)? Please provide examples where possible.
14. Are there any benefits to amending the definition of what a place restriction order can and cannot restrict? Please explain your reasons and offer suggestions as to what might be included or excluded.
15. Are there any benefits to imposing 'blanket' place restriction conditions? Please explain your reasons and provide examples where possible.

⁶⁷ Interviews with youth and Aboriginal legal services personnel.

⁶⁸ Submission received by the Review from a youth legal service.

⁶⁹ The Review received information that this was prominent practice in country towns.

3. Offenders in custody whilst subject to a non-association and/or place restriction condition

We now turn to examine particular issues which were raised by NSW Police and the Department of Corrective Services in relation to offenders who are in custody whilst subject to a non-association and/or place restriction condition.

3.1 Suspension of non-association or place restriction conditions whilst an offender is in custody

The Crimes (Sentencing Procedure) Act provides, that whilst an offender is in custody, a non-association and place restriction order is suspended:

S. 100 D Suspension of non-association and place restriction orders while offenders are in custody

(1) *An offender's non-association order or place restriction order is suspended:*

- (a) *while the offender is in lawful custody (otherwise than while unescorted as referred to in section 38 (2)(a) of the Crimes (Administration of Sentences) Act 1999⁷⁰, and*
- (b) *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 section 24 of the Children (Detention Centres) Act 1987.*

This has been interpreted by practitioners to mean that effectively these provisions suspend any non-association order⁷¹ whilst an offender is in custody⁷². Although an order stipulates that an offender is not to associate with a named person(s), when that offender is in custody his/her order is suspended and therefore any association with that named person is legitimate. Staff from Corrective Services compared this situation with apprehended violence orders ('AVOs'), which are also suspended whilst an offender is in custody. The review was informed, however, that prison officers are requested by the police to advise them if a person named in an AVO has been to visit an AVO recipient⁷³. 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 none of the offenders who have such orders are presently in prison, this is not current practice. Corrective Services viewed this as 'pretty pointless' since neither the police nor Corrective Services have the 'power to do anything', i.e. prohibit a non-association individual from visiting the offender in custody. It was, however, hypothesised that a co-offender may visit an offender in prison on the pretence of socialising, whereas the visit may be for crime-related purposes. For this reason it was suggested to the review that the conditions within a non-association order should be maintained even whilst an offender is in custody⁷⁴.

3.2 Non-postponement of non-association and/or place restriction orders whilst an offender is in custody

The interpretation of s.100D (1) is also relevant when considering subsection 100D (2) of the Crimes (Sentencing Procedure) Act, which states *'the suspension of an offender's non-association or place restriction order does not operate to postpone the date on which the order comes to an end'*, which also raised concern for practitioners. We were provided with an example of one place restriction order which was granted at the same time that a sentence of three months imprisonment was handed down to the offender. This means that the place restriction order will be effective (outside prison) for nine months rather than the actual length of the order which was 12 months. In such 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 such orders should commence when a person's sentence has finished.

⁷⁰ S. 38 (2) (a) of the Crimes (Administration of Sentences) Act states 'if unescorted, the inmate is taken to be in the custody of the correctional centre from which he or she is absent'.

⁷¹ For obvious reasons, place restriction orders will not be relevant when an offender is in custody.

⁷² Discussions with representatives from Corrective Services and Magistrates.

⁷³ Discussions with representatives from Corrective Services.

⁷⁴ *Ibid.*

This occurs for those non-association orders granted under New Zealand's Criminal Justice Act, s. 28E (2) of 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)].

Questions for consideration

16. The review welcomes your comments and suggestions in relation to:

- whether the condition(s) in a non-association order should remain operational whilst an offender is in custody; and
- whether the date of a non-association order should cease, or be postponed, to reflect an offender's time in custody.

4. Breaches of non-association and/or place restriction conditions

This section discusses a number of issues raised in the parliamentary debate and interviews with community stakeholders about the potential consequences for breaching either non-association or place restriction conditions attached to police bail, court bail or a court order. It also examines the likelihood of certain groups being picked up for a breach of bail, and the type of offences committed where the police are imposing these types of conditions on grants of bail.

4.1 Potential for a breach of a non-association and/or place restriction order to increase the number of people in custody

An accused or offender potentially breaches a non-association and/or place restriction order if, without reasonable excuse, s/he associates with an individual or attends a locality prescribed in the order. Once proven, a breach, as a criminal offence, renders an offender liable to a '*maximum penalty of 10 penalty units*⁷⁵ [presently \$1100] or imprisonment of 6 months, or both'⁷⁶. None of the 12 orders granted between 22 July 2002 and 21 July 2003 have been reported as potentially involving a breach⁷⁷.

It has been suggested that the punishment for a breach of a non-association and/or place restriction order is 'too harsh'⁷⁸. Interviews with community organisations have highlighted a concern that the consequence for a breach of such orders may lead to an increase in the number of people in custody. However, as no non-association and/or place restriction orders been reported breached⁷⁹, we are unable to determine at this stage whether this will occur in practice.

Although it would have been helpful to make a comparison with the outcome of breaches for non-association and place restriction conditions attached to bail, i.e. to see whether there has been an increase in the number of people who were subsequently refused bail at court, this was not possible (data were not readily available).

⁷⁵ *Supra*, footnote 51.

⁷⁶ S. 100E (1), Part 8A, Schedule 1.1 of the Crimes (Sentencing Procedure) Act.

⁷⁷ Data obtained from NSW Local Courts.

⁷⁸ Initial discussions with stakeholders.

⁷⁹ *Supra*. footnote 77.

4.2 Issues relating specifically to the breach of a grant of bail

The following discussion relates specifically to non-association and/or place restriction conditions attached to a grant of bail order. Whilst non-association and place restriction conditions can also be imposed as part of a court order, parole, leave or home detention, consultations with a range of government and non-government agencies concentrated on the bail provisions as these were the provisions with which they had had most direct experience to date.

It was suggested by youth and Aboriginal legal services advisors that Aboriginal and young people are more likely, compared to non-Aboriginal and non-youth, to be 'picked up' for allegedly breaching bail requirements. One possible explanation offered was 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 cameras⁸⁰. In addition, 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 intention⁸¹. Comments received suggest that in some areas, this has encouraged police to impose place restriction conditions which prohibit individuals from frequenting certain public places such as shopping malls and CBD's⁸².

However, even though their bail conditions prohibited individuals from going to specified public places, some youths would continuously breach those conditions in order to 'hang out' with their friends. When questioned about breaching his bail, one boy reportedly explained to his legal representative:

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 do⁸³.

In relation to non-association bail conditions, an officer from the Department of Juvenile Justice suggested to the review that:

Having a bail condition doesn't stop a kid from going to visit an auntie or whoever. I think there is a bit of a misconception that bail conditions and particularly non-association conditions are going to stop young people from doing what they ordinarily do, and that is, associate.

Several youth and Aboriginal representatives suggested that young and Aboriginal people particularly were more likely to be 'picked up' for breach of bail as a result of police imposing bail conditions which their clients were finding virtually impossible to abide by. As one youth representative commented:

Some of them don't have the capacity to observe the conditions, 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.

The review was alerted to one instance where the police imposed a bail condition for a person not to associate with his co-accused and a long list of about 20 other people from his local area, some of whom were not known to the offender⁸⁴. The possibility of this person having accidental contact with someone on their list, and subsequently inadvertently breaching his bail, was thereby increased⁸⁵. 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'⁸⁶.

⁸⁰ NSW Ombudsman *Policing Public Safety: Report under s. 6 of the Crimes Legislation Amendment (Police and Public Safety) Act 1998*, 1999, pp. 74-75.

⁸¹ *Ibid.*

⁸² Discussions with custody managers.

⁸³ Discussions with a youth legal services solicitor.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ AJAC *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.

It has also been suggested that this problem is exacerbated by Aboriginal and young people not understanding⁸⁷ their bail conditions⁸⁸ and the implications for not complying with their bail conditions⁸⁹. In addition, the review was informed that, to avoid going into custody, Aboriginal people often agree to bail 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 incarceration⁹⁰.

It is the review's understanding that a breach of a non-association and place restriction bail condition is not *per se* an offence⁹¹. However, where a police officer believes, on reasonable grounds, that the person has or is about to fail to comply with a bail undertaking which is, in effect, a non-association and/or place restriction order, a 'police officer may arrest the person without warrant and take the person as soon as practicable before a court'⁹². If a person is arrested at night, especially a Friday night, the first 'practicable' occasion to bring the person before a court will be the following day or the following Monday. This means in practice that a person could be detained over night or even over a weekend.

Questions for consideration

19. It has been suggested to the review that Aboriginal and young people are more likely, compared to non-Aboriginal and non-youth, to be 'picked-up' for allegedly breaching bail requirements. Drawing upon your own experience and knowledge of bail, the review welcomes your comments on this.
20. Are you aware of, and able to provide examples, of people having breached their bail because they did not understand the conditions imposed?

4.3 Offences that attract non-association and place restriction bail conditions

Another issue which has been raised with the review is the possibility that the police may be imposing bail conditions which are disproportionate to the severity of an alleged offence. Legal representatives have informed the review of cases where police apparently imposed place restriction conditions on bail orders for offences which carried a fine as a maximum penalty. In these circumstances, it was suggested, non-association and place restriction conditions were generally inappropriate, and their use should be restricted to more serious offences. The examples of offensive language⁹³ and disobey a police direction⁹⁴ were offered to illustrate this. In both situations, offenders who breached their bail conditions could potentially spend a night in custody (see 4.2) for an offence which, standing alone, did not carry a custodial penalty. Concern was thus raised about inadvertently drawing people, especially youth, deeper into the criminal justice system when the original offence is relatively minor, i.e. where the substantive offence for which the person is charged has no custodial penalty⁹⁵. Such a practice would represent a contradiction of the philosophy underpinning grants of bail, i.e. to keep people out of custody.

⁸⁷ The examples provided by youth and Aboriginal legal services may raise the issue of a lack of comprehension rather than a lack of explanation by the police.

⁸⁸ Youth and Aboriginal legal services explained that poor literacy remains a problem with many of their clients.

⁸⁹ Discussions with an Aboriginal legal services solicitor.

⁹⁰ *Ibid.*

⁹¹ S. 50 (1), Part 7 of the Bail Act.

⁹² S. 50 (1) (a), Part 7 of the Bail Act.

⁹³ S. 4A (1) of the *Summary Offences Act 1988*, states 'a person should not use offensive language in or near, or within hearing from a public place or school. Maximum penalty: 6 penalty units (\$660)'.

⁹⁴ S. 28F (6) of the *Summary Offences Act*, states 'a person must not, without reasonable excuse (proof of which lies on the person), fail to comply with a direction given in accordance with...'. (If a person fails to comply with a direction, a police officer may again give the direction and must warn the person that failure to comply with the direction may be an offence Maximum penalty: 2 penalty units (\$220)).

⁹⁵ An officer, Department of Juvenile Justice.

It has been suggested that for minor offences, i.e. those that do not carry a custodial penalty, avoiding the bail process altogether by either issuing a CAN (Court Attendance Notice) or alternatively, granting unconditional bail, would be a more appropriate way of proceeding⁹⁶. Furthermore, that conditional bail, specifically the imposition of place restrictions, should only be used for relatively serious alleged offences⁹⁷.

Questions for consideration

21. The review welcomes your views on the suggestion that the police are imposing conditions which are disproportionate to the severity of alleged offences.
 22. Are you aware of situations where bail conditions are being imposed for offences which could be dealt with by way of fine? If so please provide examples.
 23. The review welcomes your views on the benefits to not imposing place restriction conditions for minor offences (those which can be dealt with by way of a fine)? Please provide examples if possible.
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⁹⁶ Discussions with a youth legal services solicitor.

⁹⁷ *Ibid.*

Conclusion

This Paper provides an overview of the issues raised to date, as identified by a variety of government and non-government agencies, about the implementation of the Justice Legislation (Non-association and Place Restriction) Act. It has discussed whether the amendments made by the Act have provided NSW Police, the Department of Corrective Services, the Department of Juvenile Justice and the Local Courts with any additional powers toward prohibiting an alleged offender's association with persons and places that increase the likelihood of their re-offending. It has taken account of the views of community stakeholders about the operation of non-association and place restriction conditions, and the views of government stakeholders generally.

In particular, it presents the views of Department of Corrective Services officers in relation specifically to the effects of non-association or place restriction orders when the subject of such an order is imprisoned.

In addition, it has examined specific issues related to breaches of non-association and place restriction bail orders.

We are interested in seeking further views, and welcome submissions and comments from any interested stakeholders and members of the community, on any of the issues raised in this Paper, or any other issues related to the implementation of the Justice Legislation Amendment (Non-association and Place Restriction) Act.

If your comments refer to a particular question, please cite the question in your response. Likewise, please identify which issues your comments relate to.

We also welcome your identifying any related court cases that you believe may be of interest to the review. Please send case details, if appropriate, so that we can obtain the relevant transcript of the hearing(s).

Inquiries in relation to the Justice Legislation Amendment (Non-association and Place Restriction) Act review can be directed to **Glenn Payton** on ph. **02 9265 0424** or at **gpayton@ombo.nsw.gov.au**

The closing date for submissions is: 1 March 2004

