Kids and Cops: some common issues

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1 Introduction

In this paper I aim to highlight a few important and recurrent issues relating to the policing of young people.

Like any good lawyer, let me start with a disclaimer: I do not practice in the Children's Court as often as I used to. I certainly don't appear there on a daily or even a weekly basis like many ALS solicitors do, and my experience is largely confined to the specialist Children's Courts around the Sydney metropolitan area.

Secondly (despite the length of the papers I have written about the subject), I do not know all there is to know about LEPRA and police powers! I am still learning, and have been greatly assisted by my colleagues, especially current and former ALS lawyers.

For more detail on police powers and the *Law Enforcement (Powers and Responsibilities) Act* (LEPRA) please see my Police Powers Update paper (most recent version January 2013, hopefully soon to be updated) at www.theshopfront.org or www.criminalcle.net.au.

2 Stop and search

It goes without saying that illegal stop and search is a huge problem facing young people. I have nothing really new to offer on this topic. For an overview of the law, I would direct you to Part 2 of my Police Powers paper.

Search by consent

A particular issue for young people is when police rely on "consent" to a search, to get around the absence of reasonable suspicion. Although the reported cases on this issue do not appear to be of much assistance, remember that these cases involved adults who were no doubt less vulnerable than our juvenile clients.

Whether the young person truly consented to the search is always a question of fact. The crucial issue is not whether the young person knew they had a right to refuse, but whether their will was overborne. If you are running a voir dire you may need to call evidence from your client about their state of mind, and what they thought would happen if they did not co-operate with the police request.

Pre-search questioning

Another thing to watch out for is when police stop and detain a young person for the purpose of a search, but ask a whole lot of questions before performing the search. While some pre-search questioning is permissible, the police have no power to detain a person simply for the purpose of questioning.

Further, if police are relying on the answers to these questions as the basis for their reasonable suspicion, remember that they must have reasonable grounds to *stop* the young person in the first place.

Also, consider whether s13 of the *Children (Criminal Proceedings) Act* would prohibit the police from relying on any admissions made by the young person in the absence of an appropriate adult. There may be some cases where (at least for the purpose of a voir dire about the legality of a search) the prosecution will be able to satisfy the court that there is a “proper and sufficient reason” for the absence of an appropriate adult.

3 Demanding identity

It is regrettably common for police to approach young people and ask for their name and address, and often for documentary ID as well. This information is then used to build up “intelligence”, and will often result in (mostly misleading) assertions in fact sheets and statements that the young person is “well known to police”.

In most cases this is merely a request and the young person has no obligation to comply. Young people often face the difficult choice of whether to give the police what they want (and hope they go away, at least until next time) or risk the consequences of being unco-operative.

That said, police do have broad powers to demand identity (see Part 9 of my Police Powers paper).

Note that s11(2) of LEPRA now empowers police to demand the name and address of a person whose identity is unknown to them and to whom they intend to give a direction to leave a public place in accordance with Part 14. Given the frequency with which move-on directions are given to young people (see Part 11 of my Police Powers paper), this provides yet another opportunity for police to gather children’s names and addresses.

While s19 empowers police to request a person to provide proof of his or her identity, failure or refusal to provide proof of identity is not an offence. Nor do police have the power to search a person for identification documents.

As far as I am aware, the only relevant situations where it is an offence not to produce documentary ID are the requirement to produce a licence if driving a vehicle, and the requirement to produce documentary evidence of age if suspected of being under 18 and possessing or consuming alcohol in a public place (s11 of the *Summary Offences Act*.)

4 Commencement of proceedings and arrest

As all ALS lawyers know, arrest is a measure of last resort. This was a long-standing common law principle which has been given legislative form in LEPRA s99(3). There is ample commentary on this issue in my Police Powers paper (see Part 6) and elsewhere.

The principle of arrest as a last resort has even more force when combined with s8 of the *Children (Criminal Proceedings) Act*, which provides that proceedings against children should generally be commenced by “attendance notice”. While the language of the section is now outdated (having not been amended to take account of the fact that all proceedings are now commenced by CAN and the procedure that used to be known as “charge” is now a “bail CAN”), the apparent intention is to create a presumption that proceedings against children should be commenced without resort to arrest and bail.

Even when police have used their power of arrest, it could be argued that s8 requires them to strongly consider issuing a Field, Future or No Bail CAN rather than a Bail CAN.

Arrest for breach of bail is a particular problem for children. This will be discussed further in the section below.

5 Detention after arrest and the rights of vulnerable people

Part 9 of LEPRA provides for suspects to be held at police stations for a reasonable period after arrest for the purpose of investigation. Part 9 does *not* create a power of arrest and does not allow police to detain someone who is not already lawfully under arrest.

Part 9 and the LEPRA Regulations also set out the rights of people so detained, and extends these rights to people under deemed arrest. Of particular importance are the protections afforded to vulnerable persons (including children, Aboriginal people and Torres Strait Islanders).

Part 9 is briefly discussed in Part 7 of my Police Powers paper, and more comprehensively in Stephen Lawrence's paper *Admissibility Issues Arising From Detention of Suspects for Investigation Under Part 9 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* (March 2012) at www.criminalcle.net.au.

ALS lawyers will of course be familiar with most of the provisions about vulnerable persons, and I will not re-hash them here. However, I wish to make some comments about support people.

Provisions relating to support persons

Section 123 gives a person subject to Part 9 (not just a vulnerable person) the right to communicate with a friend, relative, guardian or independent person, to have that person attend the police station and to be given reasonable facilities to communicate with them in private.

Clauses 26 and 27 of the regulations entitle a vulnerable person to have a support person attend the police station and be present during any investigative procedure. Clause 29 provides that a child cannot waive their right to a support person.

Clause 28 provides that a vulnerable person is not entitled to *both* a "friend, relative, guardian or independent person" under s123 and a support person under cl 27, but makes it clear that one person can perform both roles.

Curiously, cl 27 does not require the police to allow the vulnerable person and the support person to communicate in private at the police station (although subclause(4) entitles a vulnerable person to privacy when contacting their support person to arrange for them to attend). However, in most cases a vulnerable person's support person will also be the "friend, relative, guardian or independent person" referred to in s123, and thus they will be entitled to communicate in private.

Explanatory material provided to support persons

The explanatory material provided to support persons by the custody manager has recently been updated, in response to concerns expressed by the Law Society. It now provides a more comprehensive and accurate explanation of the role of the support person and the rights of the vulnerable person.

Unlike the previous version, which referred to "the interview" in a way that implied that there would always be an interview, the new version makes it clear that a suspect's participation in an interview is voluntary.

It also contains a warning which is particularly important in the light of the CCA decision in *JB* (see section on admissions below):

> "You may consult with the vulnerable person in private. However, it is not part of your role as support person to talk with a vulnerable person about alleged offences for which that person has been arrested. If you do, you may become a witness in future criminal proceedings and may be required to give evidence about these conversations."

It goes on to say that a support person is not a substitute for a lawyer, and provides contact details for the ALS and the Legal Aid Youth Hotline.

6 Interviews and admissions

Angela Cook provides a good summary of the law relating to children's admissions in *Section 13 Children (Criminal Proceedings) Act 1987 - A Practical Approach* (January 2013) at www.criminalcle.net.au.

Admissions made to support people

The most significant (and worrying) case in recent times is *JB v R* [2012] NSWCCA 12. The young person was convicted of murder. During his trial he applied for the exclusion of an admission made during a private conversation with a support person at the police station. The support person worked as a youth liaison officer with the Sudanese community.

The trial judge admitted the evidence of the admission, holding that it fell into the category of "unguarded incriminating statements", that it was not covered by client legal privilege and nor did it fall within the concept of "protected confidence" under s126B of the *Evidence Act*.

On appeal to the CCA, it was argued on behalf of the appellant that the relevant inquiry was the suspect's state of mind and in particular whether his freedom to speak or refrain from speaking had been compromised. The young person had refused to speak to the police. He was allowed to speak to the support person in private and in the absence of the police. In those circumstances, it was submitted, it is reasonable to infer that he comprehended the role of the support person as that of someone to whom he could speak as a confidant.

However, Whealy J (with whom Hislop J and Grove AJ agreed), in dismissing the appeal, said:

> [29] With respect, I am unable to accept this argument. I shall briefly state my reasons. First, Mr Clayton's relationship with the appellant did not fall within any of the restricted categories of relationship (as outlined by Parliament) that protect unique relationships. There is, for example, no protection equivalent to s118 *Evidence Act* for the relationship between a support person and a juvenile. There is no protection for the relationship between a support person and a juvenile as a "special relationship" such as may arise under s126A, or in the case of religious confessions (s127) and other privileged communications.
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> [30] Secondly, it may be seen that there is a fundamental difference between each of those "protected" relationships and the relationship, on the other hand, of a support person and young person. Certain specific relationships have been given special legislative protection because it is central to the function of those relationships that free and frank disclosure exists between the two persons involved. For example, a lawyer needs to obtain confidential information from his client to do his job adequately. It is part of the legal requirement of the solicitor/client relationship that confidences exchanged between them are to be strictly treated as confidential by the practitioner. No such legal or ethical relationship applies to a person playing a support role for a juvenile at a police station. The fundamental role of the support person is to assist the juvenile in his or her dealings with the police. It is to protect children from the disadvantaged position they are in as a consequence of their age. It is to protect them from police impropriety or from the disadvantages that arise simply because they are in a custodial situation and at the mercy of mature and

> experienced police officers (*R v Honan*; *DPP v Toomalatai*; *R v Huynh and Phung*).
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> …
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> [36] In my opinion neither the Act nor the Regulations on which Mr Smith placed reliance alter or enlarge the essential role of a support person. Nor do they provide an absolute prohibition on the admissibility of an admission or confession made by a juvenile to a support person.
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> [37] Of course, it does not follow that every admission made to a support person, even if given freely, will be admissible in criminal proceedings against the juvenile. If the support person has cajoled or tricked the accused into making an admission, it may well be that s90 has effective work to do. Similarly, if the support person has been acting at the direction of the police, there may emerge a powerful argument as to why the admission should not be allowed at the trial. There is no need to envisage or list the many possible circumstances that might be said to constitute unfairness so as to warrant the justified use of the safety-net provided by s90 *Evidence Act* .
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> …
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> [40] Mr Smith's principal argument fails ultimately because his attempt to equate the position of a support person with that of a lawyer, counsellor, priest or other confidant in a special position is simply not warranted. If the legislature thought that special protection should be extended to communications between a support person and a juvenile, it could have extended the range of protected relationships. It has not done so.

Special leave to appeal to the High Court was refused on 15 February 2013.

This case and its implications are discussed by Dina Yehia SC in her excellent paper on *Admissibility of Admissions - Aboriginal and Torres Strait Islanders Suspects* (August 2012) at www.criminalcle.net.au or http://www.publicdefenders.lawlink.nsw.gov.au/agdbasev7wr/pdo/documents/pdf/admissibilityofadmissionsatsisuspects.pdf

Admissions made for purposes of *Young Offenders Act*

To be eligible for a police caution or a youth justice conference under the *Young Offenders Act*, the young person must admit to the offence in the presence of an appropriate adult. The categories of adults are similar to those set out in s13 of the *Children (Criminal Proceedings) Act* (*Young Offenders Act* ss10, 19 ,36).

Even when they are intending to deal with the young person under the *Young Offenders Act,* it is common practice for police to demand that a young person make their admissions on ERISP. This is not required by the Act or the Regulations; a simple notebook admission will suffice. In many cases, ERISPs are best avoided, as they provide an opportunity for unscrupulous police officers to extract a range of admissions beyond the matter under investigation.

Induced admissions are another issue to watch out for. Police may tell the young person that they will be receiving a caution if they just admit to the offence. After the young person makes admissions, the police then change their minds and commence court proceedings. In such a case there is a strong argument for having the admissions excluded. It is important for support people and hotline lawyers to take careful notes of what was said by the police before the interview.

7 Bail and breach of bail

Curfews and enforcement conditions

There is some commentary on curfew conditions and “bail checks” in Part 5.7 of my Police Powers paper.

The power of police to impose “present self at front door when required” type bail conditions was called into question by *Lawson v Dunlevy* [2012] NSWSC 48. As of 20 November 2012, s37AA of the *Bail Act* allows a court to impose “enforcement conditions” at the request of the police, but does not allow these conditions to be imposed as part of police bail. For further discussion see Mark Dennis’ paper at www.criminalcle.net.au/attachments/The_New_Section_37AA_of_the_Bail_Act_1978_NSW.pdf

Arrest for breach of bail

Although the number of “fresh custodies” in the Children’s Court cells appears to have declined of late, it is still common for children to be arrested for breach of bail conditions. The “zero discretion” approach to breach of bail, which still seems to be alive and well in many Local Area Commands, is arguably unlawful and at least improper.

Section 50 of the *Bail Act* provides that a police officer may arrest if he or she believes on reasonable grounds that a person has breached (or is about to breach) a bail condition.

The requisite state of mind is *belief* which is higher than mere suspicion. Given that the COPS system is notoriously inaccurate when it comes to bail conditions and variations, it is questionable whether the information on COPS provides reasonable grounds for a belief, especially in the face of “but Miss, I got my curfew dropped last time I was at court - you can call my lawyer at the ALS and they’ll tell you”.

Even if the police officer holds the requisite belief on reasonable grounds, the use of “*may*” in s50 makes it clear that there is a discretion conferred on the officer (see s9 of the *Interpretation Act*). Firstly, the police officer has a discretion whether to take any action at all. If they do decide to take action, there is a discretion to apply to have a summons or a warrant issued instead of arresting without warrant.

The discretion to arrest was considered by Bryson JA, with whom Santow JA and Adams J agreed, in the NSW Court of Appeal decision of *Zaravinos v New South Wales* (2005) 214 ALR 234). This decision concerned the now-repealed s352(2) of the *Crimes Act*, the predecessor to s99 of LEPRA (but the power under s352 was not subject to the limitations now provided by s99(3) of LEPRA).

Bryson JA stated:

> “…there must be an exercise of the discretion alluded to by the word “may”, and it must be an effectual exercise. Literal fulfilment of s 352(2)(a) is not enough.” (at [24]).

In *R v Metropolitan Police Commissioner; Ex parte Blackburn* [1968] 1 All ER 763, Lord Denning MR pointed to the independence of “every constable in the land.” (at 769). This is still good law and it means that every police officer must exercise their own discretion, not simply do as they are told.

In some cases a police officer will exercise their discretion to arrest inappropriately; in many cases they will fail to exercise any discretion at all.

Where an arrest for breach of bail leads to further charges, a *Lance Carr* type application may meet with some success. This was successfully employed by the Aboriginal Legal Service in *N T v R* [2010] NSWDC 348, a District Court appeal concerning a 14-year-old girl arrested at her own home for an alleged breach of a curfew condition the previous night.

Tupman DCJ referred to the common law on arrest as a last resort and held:

> "It seems to me, however, that the same provisions and considerations that apply, or ought to apply, in deciding whether or not to arrest a person on [sic] warrant for an offence, or deal with the matter by way of summons, ought equally apply to a decision how to deal with an allegation of breach of bail. There are alternatives available to police, one out of three of which does not involve the issue of a warrant and the taking of a person into police custody. The evidence in this case is that the police officer did not turn her mind to whether or not it would have been appropriate to approach an authorised Justice to issue a summons under s 50 of the *Bail Act* because she did not understand that that was an available option."

A police officer's failure to exercise discretion may be in good faith, based on ignorance of the fact that he or she has any discretion. However, this does not preclude a finding that the impropriety is grave. Where senior police fail to train officers about appropriate exercise of discretion (and, worse still, promulgate "no discretion" policies), this is a systemic impropriety that calls for a strong deterrent approach. See the discussion in Part 14.1 of my Police Powers paper, and Arjun Chhabra's paper on *Reckless conduct and section 138 of the Evidence Act* (December 2012) at www.criminalcle.net.au.

When the new *Bail Act* 2013 commences (on an unspecified date, probably in 2014) there will be a hierarchy of options that police must consider when deciding how to respond to a breach of bail (see s77 of the new Act).

8 Section 201

When exercising most of their powers, police must comply with s201 of LEPRA (discussed in Part 12 of my Police Powers paper).

Note that s201 does not apply to arrest for breach of bail, as the *Bail Act* is specifically excluded by Schedule 1. However it *does* apply to common law powers such as arrest for breach of the peace.

The obligation to comply with s201 was recently examined in *Semaan v Poidevin* [2013] NSWSC 226.

Mr Semaan was convicted in the Local Court of resisting a police officer in the execution of his duty. In a nutshell, he resisted a police officer's attempt to seize his phone. He appealed to the Supreme Court on a point of law.

After one of the best opening lines in any judgment I have read ("A woman walks into a bar") and a lengthy discussion of the defence of honest and reasonable mistake of fact, Rothman J held that the prosecution had not proved the "execution of duty" element because there was no evidence that the police officer had complied with s201.

In essence, His Honour held that:

1. An important purpose of s201 is to ensure that people who are subject to the exercise of police powers are made aware of the motive of the police.
2. Failure to comply with s201 takes the police outside the lawful execution of their duty, except perhaps where the information required by s201 is already known to the accused.
3. In those situations where the section allows the police to comply with s201 as soon as reasonably practicable *after* exercising the power, failure to comply with s201 as soon as reasonably practicable *retrospectively* affects the lawfulness of the police officer's conduct.

His Honour said:

> [105] The provisions of s201 must be given a purposive construction: *Project Blue Sky*. The purpose of the provision includes overcoming the difficulty to which I have already averted, namely, a mistaken, honest and reasonable belief as to the motive of the officer.
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> [106] The officer is required to inform the person of the fact that s/he is a police officer; the station from which the officer derives; and the reason [or motive] for the exercise of power. After being so informed, the possibility of honest and reasonable mistake would not ordinarily arise (or, at least, would require some evidence to overcome the necessary inference from the provision of the information).
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> [107] The effect of s201(2) of LEPRA is that the time for compliance does not arise until (or as soon as) it is not impracticable to comply. When it is first "not impracticable", the duty arises. Failure to comply (or compliance) with the duty, if that time were later than the exercise of the power, has a retrospective effect on the status of the conduct. In so doing, the officers are protected from any "unlawfulness" associated with the exercise of power.
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> [108] In the absence of evidence of compliance with s 201(1) of LEPRA, when first "not impracticable", prosecuting authorities are not entitled to rely on or to assert that the conduct was lawful. In other words, even if the conduct may not, at the time of the exercise of power, be "unlawful", in the absence of compliance with the mandatory provisions of s 201(1) of LEPRA, at the time prescribed, prosecuting authorities are not entitled to rely on the "lawfulness" of the conduct, unless, again reverting to a purposive construction, they can prove that the person, against whom the lawfulness is to be asserted, was otherwise aware of the facts prescribed in s 201(1) of LEPRA, or that it had not yet become "practicable". Neither has been proved in this prosecution.
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> [109]The prosecuting authority must prove that the police officer was executing his duty, and, to do so, must assert and prove the "lawfulness" of the officer's conduct. Because of the non-compliance with s 201(1) of LEPRA, and the failure to prove that the time for compliance had not yet arisen or passed, the prosecution is unable to do that and, therefore, it is unable to prove that Mr Semaan has resisted the officer in the execution of his duty.

The police have now filed an appeal with the Court of Appeal.

9 Powers of authorised officers on public transport

Railway stations, trains and other forms of public transport are fertile ground for negative interactions between young people and police or transit officers.

Note that the *Rail Safety Act* was repealed in early 2013 and conduct on all forms of public transport, including trains, is now regulated by the *Passenger Transport Act* and Regulations.

An "authorised officer" is defined in s3 as “an authorised officer appointed under section 46W or a police officer”.

In practice, authorised officers include such people as ticket inspectors on buses, and transit officers on trains. I understand that transit officers are being phased out and replaced with police officers. This is a concern, as police have broader powers.

Authorised officers have various powers set out in the Act and Regulations. The most relevant ones for young people are:

Demand name and address

Section 55 requires a person to state their full name and address if requested by an authorised officer if the authorised officer:

> (a) reasonably suspects that the person has committed an offence under the Act or Regulations;
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> (b) reasonably suspects that the person has committed an offence against the *Graffiti Control Act* 2008 on railway premises; or
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> (c) finds the person in circumstances that lead, or has information that leads, the officer reasonably to suspect the person has committed such an offence.

It is an offence to fail to provide correct name and address, but only after the authorised officer has warned the person that a failure or refusal to comply with the requirement is an offence and identified himself or herself as an authorised officer or a police officer.

If the authorised officer reasonably suspects the stated name or address is false, they may request evidence of the correctness of the stated name or address, but failure to provide documentary ID is not an offence.

Obstruction

Section 56 makes it an offence to hinder or obstruct an authorised officer in a manner that interferes with the performance of their functions under the Act or Regulations.

Direction to leave

Authorised officers have the power to direct people to leave railway premises, trains, and other public passenger vehicles in a variety of circumstances (Regulations cl 55). Failure to comply is an offence (and, unlike s55 of the Act, there appears to be no requirement for the authorised officer to identify themselves or issue a warning) and also empowers an authorised officer to physically remove the person.

See also cl 68J, which empowers authorised officers to direct trespassers to leave certain areas, and creates an offence of failing to comply.

10 Shopping centres

Shops and shopping centres can also be problem areas for young people.

Banning notices

Banning notices are issued at the discretion of the shopping centre management and there is little legal recourse, as an occupier is lawfully entitled to revoke an implied licence to enter premises. In some areas, local police have (inappropriately!) taken on the task of serving banning notices on behalf of shopping centre management.

Citizen's arrest and subsequent police involvement

It is common for young people to be arrested for shoplifting or trespassing by loss prevention officers, security guards and the like, relying on the citizen's arrest power in s100 of LEPRA.

A citizen does not have the power to arrest on suspicion; the person making the arrest must have witnessed the offence or be otherwise satisfied that the offence has been committed (*Brown v G J Coles* (1985) 59 ALR 455).

Police usually attend shortly afterwards, tell the young person "You're under arrest …", administer the caution and take the young person into their custody.

I would argue that what the police are doing at this point is exercising their discretion to perform a fresh arrest. They would thus be obliged to comply with s99(3).

The alternative view is that they are simply continuing an existing arrest that was effected by the loss prevention officer (who of course has no obligation to comply with s99(3)). If this is the case, it could perhaps be said that they do not have to turn their minds to s99(3). However, they would still be obliged to consider whether it is appropriate to *continue* the arrest.

Section 105 provides that a police officer may discontinue an arrest at any time. Without limiting the scope of the section, subs(2) provides that an arrest may be discontinued if the arrested person is no longer a suspect or the reason for the arrest no longer exists, or *if it is more appropriate to deal with the matter in some other manner* (eg warning, caution, penalty notice, court attendance notice, *Young Offenders Act*).

Failure to discontinue an arrest when the person is no longer a suspect or the reason for the arrest no longer exists would, in my view, make the continued arrest unlawful and would amount to false imprisonment. Failure to discontinue an arrest because some other option (eg caution, field CAN) is more appropriate would make the continued arrest at least improper.

11 Consorting

Finally, a word about consorting, which is an emerging issue for our clients.

Since the commencement of the new consorting provisions (ss93W-93Y of the *Crimes Act*) on 9 April 2012, there have been few prosecutions. However, anecdotal evidence suggests that police have been issuing a lot of warnings, including to children, in some areas.

“Habitually consorting with convicted offenders” is an indictable offence with a maximum penalty of 3 years’ imprisonment or 150 penalty units.

A person is not guilty unless they consort with at least two convicted offenders on at least two occasions (not necessarily together), and they consort after having been given an official warning by the police about each of those persons.

A “convicted offender” is defined as a person who has been convicted of an indictable offence (other than the offence of consorting). It is unclear whether this includes spent convictions or findings of guilt without a conviction being recorded.

Certain forms of consorting are to be disregarded (eg consorting with family members, or in the course of lawful employment, business, education of the provision of a health or legal service) but only if the defendant satisfies the court that the consorting was reasonable in the circumstances. There is no general “reasonable excuse” type defence.

The Shopfront Youth Legal Centre has prepared a fact sheet on consorting:
http://www.theshopfront.org/documents/Consorting.pdf

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