Form 27E

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S36 of 2014

BETWEEN:

**CHARLIE MAXWELL FORSTER**
Plaintiff

and

**STATE OF NEW SOUTH WALES**
Defendant



## PLAINTIFF'S REPLY

**Part I:**

1. This Reply is suitable for publication on the internet.

**Part II:**

2. **Plaintiff's Reply to the Submissions of the Attorney-General of Queensland (Intervening):**

a) There is nothing in the way Section 93 is drafted that suggests the restriction on political and government communications is incidental to some other more important purpose. The purpose of attacking criminal groups or organised crime is not reflected in the words used in section 93.

b) It could not be realistically said that the burden upon the freedom is small. It is significant and unlimited. Once a warning not to communicate with a person (convicted offender) is given there is to be no communication whatsoever. There are 6 defences which only apply once you have been charged and then, only if you prove to the court it is reasonable. There are no exceptions to the official warning.

c) While, on its face, section 93 does not restrict communication on political and governmental matters, it also does not restrict communication on criminal acts or acts which may lead to building criminal networks. Each is still restricted.

d) The only limitation on the police giving an official warning is that the person being warned about must have a conviction for an indictable offence. It does not follow that a person who has such a conviction is a member of the criminal milieu or a person otherwise involved in crime. It also provides no

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support for any particular purpose to be attributed to section 93.

e) It is not relevant to say that a person who has been warned may still communicate with other persons. If you are seeking opinions concerning an election or referendum, or any other matter, one might readily think that you would be more likely to consort with those whose opinions you seek rather than those whose opinions you are not interested in. Thus making you more susceptible to being warned, assuming the other person has an indictable conviction. In any event, others cannot decide from whom or where you should obtain information.

**3. Plaintiff's Reply to the Submissions of the Attorney-General of South Australia (Intervening):**

a) While it is suggested that there is nothing in section 93 which allows for a conclusion as to what its real purpose is, there is also nothing to suggest that, even if the section is directed to preventing persons from becoming involved in crime, section 93, as written, could achieve that. A police officer giving an official warning under section 93 is not required to have any knowledge of any criminal behavior by, either the person being warned or the person being warned about. The only requirement is that the person being warned about has a conviction for an indictable offence and this does not allow for a conclusion that some kind of criminal behaviour will or is likely to occur. The conviction maybe a relatively minor one and may have happened many years ago.

b) Section 93 cannot be reasonably appropriate and adapted, or proportionate to achieving the legitimate end of preventing others from being enlisted into or aiding in the commission of crime, when being enlisted into, or aiding in, the commission of a crime, is not knowledge that a police officer must have before giving an official warning nor is it an element of an offence under section 93.

c) Habitually consort is defined in section 93 as consorting with 2 convicted offenders on 2 occasions each. Nothing further is required, despite references to Johanson v. Dixon and the second Reading Speech. There is also no necessity to prove that the 2 convicted offenders knew each other or were part of a group.

d) There is no mention in section 93 of criminal groups, organised crime or criminal behaviour. The section provides the police with a power to prevent persons from associating with other persons (with an indictable conviction) but, discloses no apparent reason and no need for the police to hold any reasonable belief that some criminal act may ensue. The section also provides a sanction for breach of the warning. None of the elements of the offence require criminal knowledge or behaviour.


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e) The modified Lange test as set by French CJ in Hogan v. Hinch (2011) 243 CLR 506 makes reference to the " ... informed decision of the people ...". An informed decision maybe reached in a variety of ways, but one significant way is discussing issues with other people. Section 93 can be used against members of a criminal group so as to disrupt the operation of the group. It could just as easily be used against other social or political groups.

**4. Plaintiff's Reply to the Submissions of the Attorney-General of Victoria (Intervening):**

a) The freedom to communicate on government and political matters is to be seen in terms of the need to be able to communicate so as to inform oneself about the relevant issues when voting for a government or a referendum. An important manner of informing oneself is the ability to be able to discuss issues with others.

b) Police may use section 93 to prevent any person in New South Wales from communicating with any other person on penalty of being charged. The only limitation is that the person whom the police are warning about has a conviction for an indictable offence. Indictable offences range from the most serious to those which are relatively minor. When police issue an official warning there is no requirement to hold any particular belief or any reasonable suspicion that anything of a criminal nature may occur.

c) The effect of section 93 upon the freedom must be seen as substantial. Firstly, the section provides the police with a significant power to prevent people from communicating as well as creating a criminal offence of behaviour many view as not being appropriate for criminal sanctions. Secondly, the police may give an official warning to any person and there is no limit to whom the police may warn. Thirdly, while the person being warned about must have an indictable conviction, this still involves a significant number of persons. Fourthly, an indictable conviction may only involve a relatively minor breach of the criminal law. Fifthly, having an indictable conviction does not lead to a view the person may engage in any further criminal conduct. Sixthly, it is not necessary for any person to engage in criminal conduct. Seventhly, it is not necessary for the police to hold any suspicion of impending criminal conduct before issuing an official warning. Eighthly, while habitual consorting is a part of an offence under section 93 it is not a part of an official warning. Ninthly, an official warning lasts a person's lifetime. A tenth reason is even if a person is charged and convicted of a breach of the official warning the official warning still continues. Other reasons include that there is no way to stop an official warning once it has been given, there is no judicial oversight over official warnings, there is no requirement to keep records of warnings, there is no requirement warnings need be reasonable and there is no provision to consider the effects of a warning.


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d) The definition of an official warning in section 93X(3) is misleading as it provides that the police must tell a person being warned that the person being warned about is a convicted offender and consorting with an convicted is an offence, when it is only an offence when you consort with 2 convicted offenders on 2 occasions each.

e) The offence created by section 93 is made out with the proof of 2 elements. Firstly, that the police gave the person an official warning about 2 convicted offenders and, secondly, that the person consorted with each of the 2 convicted offenders twice. Nothing more needs to be proved.

f) It is not relevant to say that a person who has been given an official warning still may speak to some other person. It is the freedom to communicate with whom you choose that makes it a freedom. It is not a freedom if you can only communicate with someone, someone else chooses.

g) Section 93, could be construed as a law against communicating. While historically the consorting laws prevented consorting with named groups that cannot be said to be the situation today.

**5. Plaintiff's Reply to the Submissions of the Attorney-General of Western Australia (Intervening):**

a) No matter how section 93 is construed it cannot be construed to reflect what is asserted in the second Reading Speech as the legitimate end of the section. There is no mention of criminal groups, organised crime or criminal behaviour of any kind. It can be construed as a section which prevents communications between anyone in New South Wales and any person in New South Wales who has been convicted of an indictable offence. No reason for this is apparent from the section.

b) Section 93 not only creates an offence but also provides the police with a significant power to prevent certain persons from communicating. To the extent that section 93Y may be used to find the object of the section, it may only be useful when the section is considered as creating an offence, but, offers no assistance when considering the reason behind the power given to the police. Those matters which apply to the offence of consorting, such as proof beyond reasonable doubt, proving the elements of the offence, so-called defences in section 93Y, oversight by a magistrate or judge or the application of case law, to the extent any case law is applicable, offer no assistance when considering the object of the power given to police. The power to give official warnings is only limited by the requirement that the person being warned about has been convicted of any indictable offence. There is no other limitation on the exercise of this power.


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c) A person maybe given an official warning about 1 person or many. It is only when a person has been charged that the requirement for consorting with 2 persons arises and while habitually consorting maybe defined in Johanson v. Dixon, that case has no relevance to a police officer issuing an official warning. It also seems that this definition has been purposefully ignored in 93X(2).

d) All the States agree that the purpose of section 93 is essentially as stated in the 2nd Reading Speech. It is to prevent persons getting involved in criminal behaviour or to have some effect upon organised crime or criminal groups. This is despite section 93 being written in a way that a simple warning from a police officer can prevent any form of communication between any person in New South Wales and any person who has a conviction for an indictable offence and there being no obligation upon the police officer to be suspicious of any past or impending criminal behaviour or to suspect anything untoward will happen or be reasonable in giving the warning or to suspect or believe one or the other of the persons belongs to a criminal group or desires to belong to a criminal group or wishes to engage in any kind of criminal behaviour. There is no reason suggested by the section for giving the police such a broad power. There is no constraint upon the police when exercising the power. Once the power is exercised there is no provision for it to be withdrawn. It cannot be changed if circumstances change. There is no requirement to record the exercise of the power. There is no judicial oversight of the exercise of the power. If there was an intention by a government to prevent communication on matters of politics and government this would be the way to achieve it.

e) Section 93 is so broad that there appears nothing which would prevent the NSW Police from sending a notice to every person in New South Wales listing every person who has a conviction for an indictable offence and advising each recipient that to consort with any person on the list is a criminal offence. The section does not limit criminal offenders to those whose convictions were incurred in NSW.

Dated: 12 May 2014

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