IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S36 of 2014

BETWEEN: **SLEIMAN SIMON TAJJOUR**
Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

No. S37 of 2014

BETWEEN: **JUSTIN HAWTHORNE**
Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

No. S38 of 2014

BETWEEN: **CHARLIE MAXWELL FORSTER**
Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

PROPOSED

SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION SEEKING LEAVE TO INTERVENE

Part I: Publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Basis of intervention

2. By summons filed on 1 April 2014, the Australian Human Rights Commission (**the Commission**) seeks leave to intervene in these proceedings.

3. The Commission seeks leave to make submissions on the following issues that arise in the matters before the Court, which it will address in the following order:

    a. Is there implied in the Constitution, as a matter of text and structure, a freedom of association which is cognate with the implied freedom of communication on government and political matters?

    b. Is s 93X of the *Crimes Act 1900* (NSW) (**Crimes Act**) invalid on the basis that it impermissibly burdens the implied freedom of

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communication on government and political matters and/or an implied freedom of association?

c. Is s 93X is invalid because it is inconsistent with the *International Covenant on Civil and Political Rights* (**ICCPR**)?[1]

4. In relation to the first two issues identified above, the Commission seeks leave to intervene in support of the plaintiffs in each proceeding (noting that the first issue is not raised by Mr Forster (see Joint Special Case Book (**JSCB**) at 52). As to the third issue, the Commission contends that inconsistency with the ICCPR is not a basis on which to invalidate s 93X of the Crimes Act.

5. These submissions are the submissions of the Commission and not of the Commonwealth Government.

Part III: Why leave to intervene should be granted

6. The Commission is an independent body established by the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) which has the statutory function of intervening in legal proceedings that involve human rights issues, where the Commission considers it appropriate to do so and with the leave of the court hearing the proceeding, subject to any conditions imposed by the court.[2] The term 'human rights' is defined in s 3 of the AHRC Act to include the rights and freedoms recognised in the ICCPR.

7. The Commission has expertise in relation to the interpretation and application of Australia's international human rights obligations, including those arising under the ICCPR. The questions in the Special Cases involve consideration of concepts for which the ICCPR makes provision, in particular freedom of association and freedom of expression.

8. The Commission does not contend that the ICCPR is binding in domestic law, or that it should influence the interpretation to be given to the implied freedom of political communication or the existence and content of an implied freedom of association. Nonetheless, the Commission's experience in dealing with such concepts in the context of individual rights, including the relationship between them, may provide some insight into the application of those concepts in the context of constitutional restrictions on legislative power.

9. In addressing those matters, the Commission's submissions aim to assist the Court in a way that it may not otherwise be assisted. Should the Commission be granted leave, its intervention will neither delay nor unduly prolong the

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1 ICCPR, opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally 23 March 1976, except Article 41, which came into force generally on 28 March 1979; entered into force for Australia 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993).

2 Section 11(1)(o) of the AHRC Act.

proceedings, nor lead to the parties incurring additional costs in a manner that would be disproportionate to the assistance that is proffered.[3]

Part IV: Applicable provisions

10. The Commission adopts the list of applicable provisions contained in the written submissions of the plaintiffs in proceedings S36 of 2014 and S37 of 2014. In addition, the Commission refers below to the *Crimes Amendment (Consorting and Organised Crime) Act* 2012 (NSW) (the **Amending Act**), pursuant to which Division 7 of Part 3A, of which s 93X forms part, was inserted into the Crimes Act. A copy of the Amending Act is attached to these submissions at Annexure A.

Part V: Issues addressed

Implied freedom of association

11. The implied freedom of political communication on government and political matters arises from the text and structure of the Constitution, particularly ss 7 and 24, which require that the members of the Senate and the House of Representatives be "directly chosen by the people".[4] People who are so chosen "exercise their executive and legislative powers as representatives of the people"; they "are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act".[5]

12. Freedom of communication on matters of government and politics is "an indispensable incident" of the system of representative and responsible government to which ss 7 and 24 of the Constitution give effect.[6] The efficacy of the system "depends upon free communication between all persons and groups in the community", with an elector's judgment on many issues turning "upon free public discussion, often in the media, of the views of all those interested".[7]

13. By way of amplification of this point, both Mason CJ, in *Australian Capital Television Pty Ltd v The Commonwealth*, and the plurality in *Unions NSW v New South Wales*, extracted the observations of Archibald Cox to the effect that "freedom of speech, of the press, and of association" were the only means by which people "can build and assert political power, including the

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3 See *Levy v State of Victoria* (1997) 189 CLR 579 at 605 (Brennan CJ).
4 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 557-559.
5 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 138 (Mason CJ), referred to with approval in *Unions NSW v New South Wales* [2013] HCA 58; (2013) 88 ALJR 227 (***Unions NSW***) at [28] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
6 *Lange* (1997) 189 CLR 520 at 559.
7 *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at [28] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

power to change the men who govern them".[8] In a passage extracted by the Court in *Lange v Australian Broadcasting Corporation*, Birch identified free elections as a requirement of representative government, "with all that this implies in the way of freedom of speech and political organisation".[9]

14. In *Kruger v The Commonwealth*, Gaudron J described communication as "impossible if 'each person was an island'", and substantially impeded if citizens were held in enclaves.[10] As her Honour further observed, the circumstances in which a law may validly restrict freedom of movement and association "are, to some extent more circumscribed than is the case with the implied freedom of political discussion":[11]

> In this respect, it is to be noted that not every restriction on communication is a restriction on the communication of political ideas and information. On the other hand, any abridgment of the right to move in society and to associate with one's fellow citizens necessarily restricts the opportunity to obtain and impart information and ideas with respect to political matters.

15. It was for this reason that her Honour qualified her earlier description of freedom of association as "subsidiary" to the implied freedom of communication on government and political matters, noting that it and the freedom of movement were so described "only in the sense that they support and supplement that latter freedom, and not in the sense that they are inferior to or less robust than it".[12]

16. The freedom of association has been described, in *Kruger* and in subsequent decisions of this Court, as an "aspect", "essential ingredient" or "incident" of the implied freedom of communication on government and political matters;[13] it was most recently described in obiter as "only a corollary of" the implied freedom of communication.[14] However, freedom of association may best be conceived of as a cognate of the freedom of communication, arising by implication from the same provisions of the Constitution and imposing the same limitation on legislative power. So to characterise it would accord significance to association as affording people the opportunity, amongst other

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8 *The Court and The Constitution* (1987) p 212, cited by Mason CJ in *ACTV* at 139 and by French CJ, Hayne, Crennan, Kiefel and Bell JJ in *Unions NSW* at [29].

9 *Lange* (1997) 189 CLR 520 at 560. The same passage from Birch had earlier been set out by McHugh J in *ACTV* at 230.

10 (1997) 190 CLR 1 at 115.

11 (1997) 190 CLR 1 at 126-127. Although her Honour refers to "freedom of movement and discussion" as being more circumscribed, the context, including the fact that freedom of political discussion is the comparator, suggests that her Honour intended to refer to freedom of movement and association.

12 (1997) 190 CLR 1 at 126.

13 See for example *Kruger v Commonwealth* (1997) 190 CLR 1 at 142 (Toohey J), cf 142 (McHugh J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [148] (Gummow and Hayne JJ), [364] (Heydon J) cf [114] (McHugh J), [285]-[286] (Kirby J); *South Australia v Totani* (2010) 242 CLR 1 at [31] (French CJ).

14 *Wainohu v New South Wales* (2011) 243 CLR 181 at [112] (Gummow, Hayne, Crennan and Bell JJ).

things (noting association does not readily lend itself to compartmentalisation), to develop attitudes and responses to government and political matters and to discuss and respond to such matters, collectively or otherwise.[15]

17. A similar relationship between freedoms from governmental interference necessary for the democratic process is apparent in the ICCPR. As noted above (at [8]), Australia's ratification of the ICCPR does not result in it having any binding effect as a matter of domestic law; nor should it influence the interpretation to be given to the implied freedom of political communication in the Constitution, noting that the freedom operates as a restriction on legislative power and does not confer a personal right on individuals.[16] Nevertheless, the ICCPR articulates in a principled way certain freedoms from governmental interference (although expressed as individual rights) that are necessary to give effect to a democratic political system and may provide some insight when considering the implications that may be drawn from the text and structure of the Constitution.

18. Relevantly, article 25(a) of the ICCPR provides that every citizen shall have the right and opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives. This is reflected in the freedom of participation recognised by McHugh J in *ACTV*.[17] Full participation in public affairs requires the freedom to "engage in political activity individually or through political parties or other organisations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas".[18] This conduct is supported by ensuring the right to freedom of expression (article 19(2)), assembly (article 21) and association (article 22(1)).[19]

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15 Cf the notion of a "free and confident society" in the Ch III reasoning of Gummow and Crennan JJ in *Thomas v Mowbray* (2007) 233 CLR 307 at [61].

16 See *Unions NSW v New South Wales* [2013] HCA 58; (2013) 88 ALJR 227 at [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [109] (Keane J).

17 (1992) 177 CLR 106 at 227 and 232.

18 UN Human Rights Committee, *General Comment No 35 on article 25 of the ICCPR*, UN Doc CCPR/C/21/Rev.1/Add.7 (27 August 1996) at [25].

19 UN Human Rights Committee, *General Comment No 35 on article 25 of the ICCPR*, UN Doc CCPR/C/21/Rev.1/Add.7 (27 August 1996) at [8]. On the interaction between these rights, see: Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association,* UN Doc A/HRC/20/27 (21 May 2012) at [12]; United Nations General Assembly, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, UN Doc A68/299 (7 August 2013) at [6]. See also *R (Countryside Alliance and others) v Attorney-General* [2008] 1 AC 719 at [17]-[18] per Lord Bingham of Cornhill; at [56] per Lord Hope of Craighead: "The right to exercise these freedoms [of assembly and association], combined with the protection to hold opinions and the freedom to express them guaranteed by article 10 [of the European Convention on Human Rights], is essential to the proper functioning of a modern democracy"; and at [118] per Baroness Hale of Richmond.

19. Although article 22(2) contemplates that the freedom of association will not be absolute, consistently with the nature and significance of the right conferred by article 22(1) any such interference is to be closely confined. The sub-article stipulates that no restrictions may be placed on the exercise of the right "other than those which are prescribed by law *and* which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others" (emphasis added). In the context of the similarly-worded article 11 of the European Convention on Human Rights,[20] the European Court of Human Rights has observed that when assessing any interference with the right conferred, it "must look at the interference complained of in light of the case as a whole and determine whether it was 'proportionate to the aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'".[21]

Does s 93X impose a burden on freedom of association or the freedom of communication on government and political matters?

20. Given that the freedom of communication on government and political matters and freedom of association arise from the same source and through the same process of implication, it is appropriate that they attract the same test of infringement and validity.[22]

21. The first question is whether s 93X of the Crimes Act effectively burdens the relevant freedom, either in its terms operation or effect, which requires consideration as to how the section affects the freedom generally.[23]

22. Issues of association and communication are inextricably linked in the offence provided for in s 93X. The conduct that gives rise to the offence is "consorting" in particular circumstances. The ordinary meaning of "consorting" in offences of this type is "associates" or "keeps company", and denotes some physical seeking or acceptance of the association on the part of the defendant.[24] However, the consorting prohibited by s 93X is intended to prevent any form of communication, with s 93W defining the term as meaning to "consort in person or by any other means, including by electronic or any other form of communication".

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20 *Convention for the Protection of Human Rights and Fundamental Freedoms*, commonly referred to as the European Convention on Human Rights, opened for signature by the member States of the Council of Europe 4 November 1950, entered into force 3 September 1953.

21 *United Communist Party of Turkey v Turkey*, European Court of Human Rights, Application No 133/1996/752/951, Grand Chamber judgment of 30 January 1998 at [47].

22 *Wainohu v New South Wales* (2011) 243 CLR 181 at [112] (Gummow, Hayne, Crennan and Bell JJ).

23 *Unions NSW* at [35] (French CJ, Hayne, Kiefel, Crennan and Bell JJ), citing *Lange* at 567 and *Wotton v Queensland* (2012) 246 CLR 1 at [80].

24 *Johanson v Dixon* (1979) 143 CLR 376 at 383 (Mason J); 395 (Aickin J).

23. Even on the ordinary meaning of "consorting", the offence creates a direct burden on the freedom of association. Any association between a person described in an official warning given under s 93X(1)(b) and the recipient of the warning, whether for political or other purposes, will amount to an offence by the recipient unless the association comes within one of the categories described in s 93Y and the defendant satisfies the court that the association was reasonable in the circumstances.

24. Section 93X also directly burdens the freedom of communication on government and political matters. The provision does more than regulate the time, manner or place of communication,[25] or an activity or mode of communication[26] – it prohibits communication between identified persons entirely. The prohibition applies not only to physical meetings, but to consorting "by electronic or any other form of communication". It also prohibits non-speech communicative activity, which is also protected by the implied freedom on the basis that "actions as well as words can communicate ideas".[27] There is no exception, whether in the terms of the offence itself or the available defences, for political communication.[28]

25. The burden on the implied freedom which is imposed by laws which prohibit or regulate communications which are a necessary ingredient of political communication is more readily seen to satisfy the second *Lange* question than the burden imposed by laws which incidentally restrict political communication.[29]

The end of s 93X

26. The second question in the test for validity is whether s 93X of the Crimes Act is reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[30]

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25 *ACTV* (1992) 177 CLR 106 at 234-235 (McHugh J).

26 *ACTV* (1992) 177 CLR 106 at 143-144 (Mason CJ).

27 *Levy v Victoria* (1997) 189 CLR 579 at 594 (Brennan CJ). See also at 613 (Toohey and Gummow JJ); 622-623 and 625 (McHugh J) and 638 (Kirby J).

28 Compare the by-laws considered in *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; (2013) 295 ALR 197 at [217] (Crennan and Kiefel JJ); at [224] (Bell J).

29 *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

30 *Lange* (1997) 189 CLR 520 at 567-568 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), as modified in *Coleman v Power* (2004) 220 CLR 1 at 50 (McHugh J), 77-78 (Gummow and Hayne JJ) and 82 (Kirby J) and recently restated in *Unions NSW* at [44] (French CJ, Hayne, Kiefel, Crennan and Bell JJ).

27. In order to answer this question, it is first necessary to determine the ends of s 93X. Determining the object or end of a law is achieved by applying the ordinary processes of statutory construction.[31]

28. As discussed in more detail below, commission of an offence against s 93X turns on the status of the people described in the official warning as "convicted offenders". It is a reasonable implication from the use of that term that the aim of preventing the recipient of the official warning from seeking or accepting an association with persons who are defined by reference to whether they have been convicted of an indictable offence, is to prevent or inhibit the commission of future crime. The concern appears to be that a person who consorts with more than one "convicted offender" may later also act in the way that led to those convictions.

29. This meaning is confirmed by a review of the extrinsic material.[32] In the second reading speech for the Crimes Amendment (Consorting and Organised Crime) Bill 2012 (NSW), the Parliamentary Secretary to the Minister for Police described the goal of the offence as "not to criminalise individual relationships, but to deter people from associating with a criminal milieu".[33] He went on to say:

> It does not extend to chance or accidental meetings, and it is not the intention of the section to criminalise meetings where the defendant is not mixing in a criminal milieu or establishing, using or building up criminal networks.
>
> The bill puts police in a position to do what they do best every day and make a judgment about whether observed behaviour reaches the level sought to be addressed by the bill, that is, behaviour which forms or reinforces criminal ties.

30. The references to "associating with a criminal milieu", "establishing, using or building up criminal networks" and "form[ing] or reinforc[ing] criminal ties" all point to a perceived threat of future criminal activity, and potentially organised criminal activity.

31. In considering the end of s 93X, it is relevant to consider the other amendments to the Crimes Act which were enacted pursuant to the Amending Act. The long title to the Amending Act described it is an Act to amend the Crimes Act "in relation to consorting and organised crime", suggesting an interconnection between the two courses of conduct. The amending Act also introduced into the Crimes Act:

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31 *Monis v R* [2013] HCA 4; (2013) 295 ALR 259 at [125]-[126], [175] (Hayne J); [317] (Crennan, Kiefel and Bell JJ); *Unions NSW* at [50].

32 *Interpretation Act 1987* (NSW), s 34.

33 Parliament of New South Wales, Legislative Council, Hansard, *Crimes Amendment (Consorting and Organised Crime) Bill 2012* (the Hon David Clarke, Parliamentary Secretary), 7 March 2012, p 65.

a. an offence of firing a firearm at a dwelling-house or buildings (s 93GA(1B)). The element of this offence that distinguishes it from the previously existing s 93GA(1A) is that it must be done 'in the course of an organised criminal activity';

b. amendments to s 93T, which deal with participation in criminal groups; and

c. a new s 93TA, which deals with receiving material benefits derived from criminal activities of criminal groups.

32. Each of these offences involves criminality arising from particular associations, again suggesting that the consorting offence is aimed at preventing or inhibiting the commission of crime of this kind.

33. Preventing crime is an end that is compatible with the constitutionally prescribed system of representative and responsible government.[34]

Is s 93X appropriate and adapted to a legitimate end?

34. In addressing whether s 93X is appropriate and adapted to the end of preventing crime, it is necessary to consider a number of separate issues.

The elements of the offence

35. In *South Australia v Totani*, French CJ observed that there was "a long history of laws concerned to prevent or impede criminal conduct by imposing restrictions on certain classes or groups of persons and on their freedom of association".[35] As with its legislative predecessors, such as the consorting offence considered in *Johanson v Dixon*,[36] and the repealed s 546A which it replaced, in order to commit an offence under s 93X a person must "habitually consort", in this provision with "convicted offenders". Unlike earlier provisions, however, in respect of which "habitual" bore its ordinary meaning, the term "habitually consorts" is defined in s 93X(2) by reference to a minimum number of occasions of consorting. On the application of that definition, it is sufficient to commit the offence if a person:

a. consorts with two "convicted offenders" (as defined) "(whether on the same or separate occasions)"; and

b. consorts with each convicted offender on two occasions; and

c. has received an oral or written warning from a police officer with respect to each convicted offender, before the second occasion of consorting.

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34 *Wotton v Queensland* (2012) 246 CLR 1 at [31]-[32] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

35 (2010) 242 CLR 1 at [32].

36 (1979) 143 CLR 376.

36. A further distinction with earlier versions of the offence of consorting is that although commission of the offence under s 93X still requires a person to consort with more than one person, it does not require consorting with "a plurality of persons" at the same time. Rather, consorting separately with individual convicted offenders on two occasions will result in a contravention of the provision (subject to receipt of a warning). In *Johanson*, Mason J dismissed the appellant's argument that the construction adopted by the Full Court "would operate to ostracize a person in the designated classes, cutting him off from any form of friendship" on the basis that "to constitute the offence habitually consorting with more than one person, with a plurality of persons, is required. Association with a reputed thief would not be enough."[37]

37. In both of these respects, the prohibition in s 93X casts a wider net on consorting than its legislative predecessors. The legislative intention to cast that net more widely is reflected also in the terms of the defence in s 93Y, which is formulated by reference to particular forms of consorting, in addition to which the defendant has to satisfy the court that such consorting was "reasonable in the circumstances".

The relevance of status as a "convicted offender"

38. Section 93X specifies a particular group of persons, consorting with whom might attract an official warning, namely those who at any time in the past have been convicted of an indictable offence (other than an offence under s 93X). A warning given pursuant to s 93X(1)(b) will effectively prohibit association between persons with that status who are the object of the warning and the recipient of the warning. Absent that status, the warning amounts to nothing more than a prohibition on identified people associating together.

39. The use of such a serious and coercive power in respect of persons who have been convicted of an indictable offence is not reasonably appropriate and adapted, or proportionate, to serve the identified end. This is so for a number of reasons:

    a. The threshold of offences which qualify a person as a 'convicted offender' is low.[38] At the election of a prosecutor, this could include a conviction for shoplifting.[39]

    b. A person who is a "convicted offender" need only have been convicted of a single indictable offence (other than an offence under

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37 (1979) 143 CLR 376 at 385-386.

38 Cf *Summary Offences Act 1966* (Vic), s 49F and *Summary Offences Act 1953* (SA), s 13 which prohibit consorting with a person reasonably suspected of having committed an "organised crime offence" or a "serious and organised crime offence" respectively.

39 *Crimes Act 1900* (NSW), s 117; *Criminal Procedure Act 1986* (NSW), s 5(2) and Sch 1, Table 2, Part 2, item 3(a).

s 93X). This does not suggest a pattern of criminality or a propensity to recidivism.

c. The conviction could have happened at any time in the past. Once a person has been convicted of a single indictable offence, he or she forever has the status of a "convicted offender" pursuant to s 93X. An indictable offence committed as a young person will make that person liable to being the object of an official warning throughout that person's life. The section ignores any consideration of the extent to which the person has reintegrated into society following conviction.

40. In *Roach v Australian Electoral Commissioner* (***Roach***), it was observed that:[40]

> ... there is long established law and custom, stemming from the terms of the institution in the Australasian colonies of representative government, whereby disqualification of electors (and candidates) was based upon a view that conviction for certain descriptions of offence evinced an incompatible culpability which rendered those electors unfit (*at least until the sentence had been served* or a pardon granted) to participate in the electoral process. (Emphasis added.)

41. The law in question in that case marked a break with that tradition by disqualifying people from participation in the electoral process if they were currently serving a sentence of imprisonment of any duration for an offence against federal, State or Territory law. It operated without regard to the nature of the offence committed, the length of the term of imprisonment imposed, or the personal circumstances of the offender.[41] In circumstances where the law had "no regard to [the] culpability of the offender", the pursuit of an end which stigmatised offenders by imposing a civil disability during any term of imprisonment took the legislation beyond what was reasonably appropriate and adapted to the maintenance of representative government.[42]

42. The offence provision in the present case goes beyond the laws under consideration in *Roach*. It operates to prevent people who have *already* served a sentence from associating with others for any purpose, including the purposes necessary to support the system of representative government provided for by the Constitution.

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40 *Roach v Australian Electoral Commissioner* (2007) 233 CLR 162 at [90] (Gummow, Kirby and Crennan JJ). See also at [19] (Gleeson CJ): "It is consistent with our constitutional concept of choice by the people for Parliament to treat those who have been imprisoned for serious criminal offences as having suffered a *temporary suspension* of their connection with the community, reflected at the physical level in incarceration, and reflected also in *temporary deprivation* of the right to participate by voting in the political life of the community" (emphasis added).

41 *Roach* at [90] (Gummow, Kirby and Crennan JJ); see also at [23]-[24] (Gleeson CJ).

42 *Roach* at [95] (Gummow, Kirby and Crennan JJ); at [25] (Gleeson CJ).

43. By way of illustration, s 44 of the Constitution provides that a person who "has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer" is disqualified from being chosen or of sitting as a senator or a member of the House of Representatives. This disqualification does not continue once such a person has served his or her sentence. Persons who may be the object of an official warning issued pursuant to s 93X(1)(b) may be eligible for election as a senator or member of the House of Representatives once any sentence has been served, and yet a person to whom an official warning is given in the circumstances described by s 93X would be prohibited from associating with them.

The absence of any element adapted to the prevention of criminal activity

44. The elements of the offence in s 93X do not include any aspect that is adapted to the prevention of future criminal activity. There is, for example, no requirement for the police to reasonably form the view that it was necessary to give an official warning to prevent (or reduce the likelihood of) future offences.[43]

45. Further, as noted above, and unlike consorting offences in other jurisdictions, it is not a defence to a charge of consorting under s 93X that the person had a reasonable excuse; instead, establishing a reasonable excuse is additional to falling within one of the enumerated categories of consorting in s 93Y.[44]

46. The operation of the offence on the recipient of a warning is significant in this context and illustrates the absence of proportionality between the end sought to be achieved and the means selected to achieve it:

    a. A person may have no criminal convictions and no future criminal conduct within even reasonable contemplation.

    b. That person may have initial contact with two "convicted offenders" (noting that contact may occur at the same time or separately) in circumstances which are entirely innocent.

    c. Upon receipt of a warning from the police, any further association between the recipient of the warning and the object of the warnings is prohibited, upon pain of committing an offence under s 93X.

    d. In order to associate again with the "convicted offenders" identified in the warning, the recipient would have to bring their association into

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43 Cf *Summary Offences Act* (NT), s 55A which requires the Commissioner to reasonably believe, prior to giving a written notice under that section, that giving the notice is likely to prevent the commission of a prescribed offence involving two or more offenders and substantial planning and organisation.

44 *Summary Offences Act 1966* (Vic), s 49F; *Summary Offences Act 1953* (SA), s 13; *Summary Offences Act* (NT), s 55A.

one of the limited categories in s 93Y and establish the consorting was reasonable in the circumstances.

Does the law leave open alternative means of communication?

47. In *Attorney-General (SA) v Corporation of the City of Adelaide*, it was relevant to a consideration of the second limb in the *Lange* test that:[45]

    a. the prohibition on preaching and canvassing was limited to areas designated as "roads";

    b. the restriction did not apply to a designated area known as "Speakers Corner"; and

    c. the restriction did not apply to surveys or opinion polls conducted, or literature distributed, by or with the authority of a candidate during the course of a federal, State or local government election, or during the course and for the purpose of a referendum.

48. By contrast, in the present case, s 93X prohibits consorting by any means of communication, in any place and at any time between the persons described in the official warning and the recipient of the warning.

Were less restrictive alternatives available?

49. Consideration of whether a provision is proportionate in the means it employs to achieve its object may involve consideration of whether there are alternative, reasonably practicable and less restrictive means of doing so.[46] Paragraphs [39] to [45] above consider ways in which consorting laws in other jurisdictions have been more closely adapted to the end of preventing future criminal activity. Each is an example of a measure that is also less restrictive of political communication and the freedom of association.

50. There are other examples of restrictions on association that can be, and are, imposed on people with no criminal conviction. Typically, however, those restrictions are targeted to particular anticipated mischief. For example, an apprehended violence order may be imposed to restrict an individual from associating or communicating with another person.[47] In New South Wales, such an order can be made if a magistrate is satisfied on the balance of probabilities that the person in need of protection has an actual and reasonable fear that the person against whom the order is sought will:[48]

    a. commit a personal violence offence against them, or

    b. intimidate or stalk them.

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45 [2013] HCA 3; (2013) 295 ALR 197 at [68] (French CJ); [141] (Hayne J); [212] and [217] (Crennan and Kiefel JJ); [224] (Bell J).

46 *Unions NSW* at [44], citing *Monis v The Queen* (2013) 87 ALJR 340 at [347]-[348].

47 *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

48 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 16 and 19.

51. A magistrate must consider whether the conduct alleged is sufficient to warrant the making of an order, although there is no requirement for charges to be laid in relation to the conduct. Further, the magistrate is required to ensure that the order imposes only those restrictions that the magistrate considers are necessary for the safety and protection of the protected person, any affected child, and the protected person's property.[49] This regime is addressed towards anticipated misconduct in a far more targeted way than s 93X.

52. A similarly targeted approach can be found in the regime applicable in New South Wales to the granting of bail. Conditions may be imposed on bail which restrict who an accused person can associate with before their matter is finalised in court. However, police officers and courts are unable to impose bail conditions unless they are satisfied that the conditions are necessary for protecting certain people or the community, promoting effective law enforcement or reducing the likelihood of future offences.[50] Further, restrictions on association which may be the subject of an order under the *Bail Act* can only be imposed on a person who is charged with an offence.

53. The breadth of s 93X, its operation with respect to any "convicted offender", the lack of any sufficient link with likely future criminal conduct and the availability of other regimes addressed to preventing crime which are less restrictive of political communication and association, means that it is not appropriate and adapted to the end identified.

54. The contrast with the qualifications to relevant freedoms in the ICCPR is instructive in this context, albeit by way of analogy only. Using article 22 by way of example, sub-article (2) creates a carve-out from the absolute right to freedom of association, but only to the extent that interfering with the right is necessary in a democratic society in the interests of, relevantly for present purposes, public safety, public order, or the protection of the rights and freedoms of others. In the present case, although the end sought to be achieved by s 93X is legitimate, the breadth of the provision, both in its terms and its effect, exceeds what is necessary for its achievement, curtailing in the process the freedom of persons to associate and communicate in relation to government and political matters in a manner which is incompatible with the maintenance of the system of representative and responsible government.

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49 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 17(3) and 20(3).

50 *Bail Act 1978* (NSW), ss 36B and 37. This regime will be replaced by the *Bail Act 2013* (NSW) later this year. Section 25 of the new Act will allow the imposition of "conduct requirements" which may include restrictions on association with other persons. Section 24 of the new Act provides that bail conditions may only be imposed for the purpose of mitigating an unacceptable risk, and they must be reasonable, proportionate and appropriate to that risk.

Is s 93X invalid because it is inconsistent with the ICCPR?

55. The ICCPR is only found in Schedule 2 to the AHRC Act. An act or a practice that is contrary to a right set out in the ICCPR may form the basis of a complaint to the Commission by a person who is aggrieved by such an act or practice by or on behalf of the Commonwealth or under an enactment.[51] The Commission is required to inquire into the act or practice and either endeavour to effect a settlement by conciliation or, if the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and conciliation is either inappropriate or unsuccessful, to make a report to the Attorney-General in relation to the inquiry.[52]

56. Legislation is to be interpreted and applied as far as its language admits so as not to be inconsistent with the comity of nations or with the established rules of international law.[53] Once Australia has ratified a treaty or international convention, it becomes relevant to the interpretation of legislation even though the treaty may not have been given effect in domestic legislation.[54] Where a statute is ambiguous, the courts should favour a construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into or ratification of the relevant international agreement.[55] There are strong reasons for rejecting a narrow conception of ambiguity.[56]

57. Domestic legislation is not, however, required to conform to international agreements entered into by Australia. Where there is no ambiguity of meaning, an Act must be given effect according to its terms even though it is inconsistent with Australia's international obligations.[57]

58. Section 93X is not invalid on the basis that it is inconsistent with the ICCPR.

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51 AHRC Act s 20(1)(b).

52 AHRC Act ss 11(1)(f), 27 and 29.

53 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363 (O'Connor J).

54 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (***Teoh***).

55 *Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 (Gummow and Hayne JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33 (McHugh and Gummow JJ).

56 *Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J).

57 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ).

Part VI: Timing of oral submissions

59. The Commission seeks leave to intervene by filing these written submissions, and also briefly to address the Court. If permitted, any oral submissions would not exceed 20 minutes.

Dated: 4 April 2014

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Crimes Amendment (Consorting and Organised Crime) Act 2012 No 3

New South Wales

Status Information

Currency of version
Repealed version for 14 March 2012 to 9 April 2012 (accessed 4 April 2014 at 12:58).
Legislation on this site is usually updated within 3 working days after a change to the legislation.

Provisions in force
The provisions displayed in this version of the legislation have all commenced. See Historical notes

Repeal:
The Act was repealed by sec 30C of the Interpretation Act 1987 No 15 with effect from 10.4.2012.

Authorisation
This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the Interpretation Act 1987.

File last modified 10 April 2012.

Contents

New South Wales

An Act to amend the *Crimes Act 1900* in relation to consorting and organised crime; and to make consequential amendments to other Acts.

1 Name of Act

This Act is the *Crimes Amendment (Consorting and Organised Crime) Act 2012*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Crimes Act 1900 No 40

[1] Section 93GA Firing at dwelling-houses or buildings

Insert after section 93GA (1A):

(1B) A person who, in the course of an organised criminal activity, fires a firearm at a dwelling-house or other building with reckless disregard for the safety of any person is liable to imprisonment for 16 years.

[2] Section 93GA (4)

Insert after section 93GA (3):

(4) If, on the trial of a person for an offence under subsection (1A) or (1B), the jury is not satisfied that the accused is guilty of the offence but is satisfied on the evidence that the person is guilty of an offence under subsection (1), it may find the person not guilty of the offence charged but guilty of an offence under subsection (1), and the accused is liable to punishment accordingly.

[3] Part 3A, Division 5, heading

Omit the heading. Insert instead:

Division 5 Criminal groups

[4] Section 93T Participation in criminal groups

Omit section 93T (1). Insert instead:

(1) A person who participates in a criminal group is guilty of an offence if the person:

(a) knows, or ought reasonably to know, that it is a criminal group, and

(b) knows, or ought reasonably to know, that his or her participation in that group contributes to the occurrence of any criminal activity.

Maximum penalty: Imprisonment for 5 years.

(1A) A person who participates in a criminal group by directing any of the activities of the group is guilty of an offence if the person:

(a) knows that it is a criminal group, and

(b) knows, or is reckless as to whether, that participation contributes to the occurrence of any criminal activity.

Maximum penalty: Imprisonment for 10 years.

[5] Section 93T (4A)

Insert after section 93T (4):

(4A) A person who participates in a criminal group whose activities are organised and on-going by directing any of the activities of the group is guilty of an offence if the person:

(a) knows that it is a criminal group, and

(b) knows, or is reckless as to whether, that participation contributes to the occurrence of any criminal activity.

Maximum penalty: Imprisonment for 15 years.

[6] Section 93TA

Insert after section 93T:

93TA Receiving material benefit derived from criminal activities of criminal groups

(1) A person who receives from a criminal group a material benefit that is derived from the criminal activities of the criminal group is guilty of an offence if the person:

(a) knows that it is a criminal group, and

(b) knows, or is reckless as to whether, the benefit is derived from criminal activities of the criminal group.

Maximum penalty: Imprisonment for 5 years.

(2) In this section, a material benefit ***derived***from the criminal activities of a criminal group is a material benefit derived or realised, or substantially derived or realised, directly or indirectly, from the criminal activities of a group.

[7] Section 93U Alternative verdicts

Omit "93T (2), (3) or (4)". Insert instead "93T (1A), (2), (3), (4) or (4A)".

[8] Section 93U (2)

Insert at the end of section 93U:

(2) If, on the trial of a person for an offence under section 93T (1), (1A) or (4A), the jury is not satisfied that the accused is guilty of the offence charged but is satisfied that the accused is guilty of an offence under section 93TA, it may find the accused not guilty of the offence charged but guilty of an offence under section 93TA, and the accused is liable to punishment accordingly.

[9] Part 3A, Division 7

Insert after Division 6 of Part 3A:

Division 7Consorting

93W Definitions

In this Division:

consort means consort in person or by any other means, including by electronic or other form of communication.

convicted offender means a person who has been convicted of an indictable offence (disregarding any offence under section 93X).

93X Consorting

(1) A person who:

(a) habitually consorts with convicted offenders, and

(b) consorts with those convicted offenders after having been given an official warning in relation to each of those convicted offenders,

is guilty of an offence.

Maximum penalty: Imprisonment for 3 years, or a fine of 150 penalty units, or both.

(2) A person does not ***habitually consort*** with convicted offenders unless:

(a) the person consorts with at least 2 convicted offenders (whether on the same or separate occasions), and

(b) the person consorts with each convicted offender on at least 2 occasions.

(3) An ***official warning*** is a warning given by a police officer (orally or in writing) that:

(a) a convicted offender is a convicted offender, and

(b) consorting with a convicted offender is an offence.

93Y Defence

The following forms of consorting are to be disregarded for the purposes of section 93X if the defendant satisfies the court that the consorting was reasonable in the circumstances:

(a) consorting with family members,

(b) consorting that occurs in the course of lawful employment or the lawful operation of a business,

(c) consorting that occurs in the course of training or education,

(d) consorting that occurs in the course of the provision of a health service,

(e) consorting that occurs in the course of the provision of legal advice,

(f) consorting that occurs in lawful custody or in the course of complying with a court order.

[10] Section 546A Consorting with convicted persons

Omit the section.

[11] Schedule 11 Savings and transitional provisions

Insert at the end of the Schedule with appropriate Part and clause numbers:

Part Crimes Amendment (Consorting and Organised Crime) Act 2012

Report by Ombudsman on consorting offence

(1) As soon as practicable after the end of the period of 2 years from the commencement of Division 7 of Part 3A (as inserted by the *Crimes Amendment (Consorting and Organised Crime) Act 2012*), the Ombudsman must prepare a report on the operation of that Division.

(2) For that purpose, the Commissioner of Police is to ensure that the Ombudsman is provided with information about any prosecutions brought under section 93X.

(3) The Ombudsman may at any time require the Commissioner of Police, or any public authority, to provide any information or further information the Ombudsman requires for the purposes of preparing the report under this clause.

(4) The Ombudsman must furnish a copy of the report to the Attorney General and to the Commissioner of Police.

(5) The Attorney General is to lay (or cause to be laid) a copy of the report before both Houses of Parliament as soon as practicable after the Attorney General receives the report.

(6) If a House of Parliament is not sitting when the Attorney General seeks to lay a report before it, the Attorney General may present copies of the report to the Clerk of the House concerned.

(7) The report:

(a) is, on presentation and for all purposes, taken to have been laid before the House, and

(b) may be printed by authority of the Clerk of the House, and

(c) if so printed, is for all purposes taken to be a document published by or under the authority of the House, and

(d) is to be recorded:

(i) in the case of the Legislative Council, in the Minutes of the Proceedings of the Legislative Council, and

(ii) in the case of the Legislative Assembly, in the Votes and Proceedings of the Legislative Assembly,

on the first sitting day of the House after receipt of the report by the Clerk.

Schedule 2Consequential amendment of other Acts

2.1Criminal Assets Recovery Act 1990 No 23 (as amended by theCrimes (Criminal Organisations Control) Act 2012)

Section 6 Meaning of"serious crime related activity"

Insert "or 93TA" after "section 93T" in section 6 (2) (g1).

2.2Criminal Procedure Act 1986 No 209

[1] Schedule 1 Indictable offences triable summarily

Omit "93T (2) or (3)" from item 10C in Table 1 to the Schedule.

Insert instead "93T (1A), (2), (3) or (4A)".

[2] Schedule 1, Table 2, item 4D

Omit "93T (1)". Insert instead "93T (1) or 93TA".

[3] Schedule 1, Table 2, item 4E

Insert after item 4D:

4E Consorting

An offence under section 93X of the *Crimes Act 1900*.

2.3Police Act 1990 No 47

[1] Section 207A Commissioner may conduct integrity testing programs

Insert "93X," after "section" in section 207A (4) (d).

[2] Section 207A (4) (d)

Omit ", 546A".

Historical notes

The following abbreviations are used in the Historical notes:

Am	amended	LW	legislation website	Sch	Schedule
Cl	clause	No	number	Schs	Schedules
Cll	clauses	p	page	Sec	section
Div	Division	pp	pages	Secs	sections
Divs	Divisions	Reg	Regulation	Subdiv	Subdivision
GG	Government Gazette	Regs	Regulations	Subdivs	Subdivisions
Ins	inserted	Rep	repealed	Subst	substituted

Table of amending instruments

Crimes Amendment (Consorting and Organised Crime) Act 2012 No 3. Assented to 14.3.2012. Date of commencement, 9.4.2012, sec 2 and 2012 (143) LW 5.4.2012.

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