CASE NOTE

TAJJOUR v NEW SOUTH WALES [2014] HCA 35

The High Court recently held that the consorting provisions in sections 93X and 93Y of the *Crimes Act 1900* (NSW) were constitutionally valid. The offence was held to be compatible with the implied freedom of political communication. Moreover, the Court reaffirmed its position that no separate implied freedom of association exists under the Australian Constitution.

The decision runs contrary to Justice Action's responses to the New South Wales Ombudsman's critical review of consorting laws,[1] contained in the *Freedom of Association: Minorities and Consorting Laws* published earlier this year.[2] The failure of the High Court to counteract the 'law and order' rationale that is being used to justify increasingly significant incursions into individual rights in recent months is worrying.

Consorting

As French CJ makes clear at [8]-[12], consorting laws have a long history in New South Wales. They are akin to the vagrancy offences that sought to target individuals who were thought by the police to have immoral propensities or

[1] New South Wales Ombudsman, *Consorting Issues Paper*: *Review of the use of consorting provisions by the NSW Police Force*: *Division 7, Part 3A of the Crimes Act 1900* (2013).
[2] Justice Action, *Freedom of Association: Minorities and Consorting Laws* (2014) <http://www.justiceaction.org.au/cms/images/final%20freedom%20of%20association.pdf>.

tendencies. Indeed, French CJ explains at [10] that consorting laws have been practically important not as substantive offences, but as devices for affording discretionary power to police officers to interfere in suspect populations in circumstances in which actual or planned criminal misconduct could not be conclusively proved.

While such laws might seem draconian or anachronistic, they have recently been revived under the *Crimes Act 1900* (NSW) as a means to deterring individuals from 'associating with a criminal milieu.'[3] Under section 93X (1), an individual is liable to be convicted of consorting if he or she habitually associates with two or more convicted offenders after having received a warning from a police officer in respect of each offender. These warnings must inform the individual that the person with whom he or she is associating is a convicted offender and that consorting with him or her is a crime. Section 93W makes it clear that consorting includes any form of communication and applies to any person convicted of an indictable offence, no matter how trivial. A person convicted of this offence is subject to a maximum period of imprisonment of three years.

Section 93Y provides a defence which a defendant can rely upon if he or she satisfies the court on the balance of probabilities that his or her consorting was reasonable in the circumstances for the purposes of certain types of relationship. These include family relationships, employment relationships, and the provision of educational, legal, or health services. However, it does not include religious

[3] New South Wales, *Parliamentary Debates*, Legislative Council, 7 March 2012, 9093 (David Clarke).

associations, social groups, or Aboriginal and Torres Strait Islander kinship groups.

Summary of the Judgment

The major point of contention before the High Court was whether the law was invalid for impermissibly burdening the implied freedom of political communication. As French CJ explained at [32], a law will be held to be invalid if it:

1. Effectively burdens the freedom of political communication in either its terms, operation or affect, and
2. Is not reasonably appropriate and adapted, or proportionate, to serve a legitimate legislative purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of government.

Crennan, Kiefel and Bell JJ provided some useful commentary on the operation of the test in their joint judgment. Particularly, they draw attention to the fact that the second test has two distinct elements that are to be considered in turn. They explained at [112] that the first limb of the test requires an identification of a 'rational connection' between the impugned law and a legitimate legislative object or purpose. This requires the impugned law to have been 'capable' of pursuing an identified objective. As Hayne J asserted at [61], this limb of the test does not

require an analysis of the extent of the burden. They proceeded to explain at [113] that the second limb requires a consideration of whether there is an alternative means that is equally capable of achieving the legislative object but is less restrictive in its effect on the implied freedom. They suggested at [133] that 'strict' proportionality might play a role in the second limb of the test. This would require a consideration of whether the burden is so undue that it ought not to be enforced irrespective of there being no equally practicable yet less restrictive means of achieving the object.

Two of the plaintiffs submitted that the offence was invalid on account of its inconsistency with a separate implied freedom of association and the *International Covenant on Civil and Political Rights* ('*ICCPR*'), the Court was unanimous in rejecting these submissions. Hayne J at [95] and Keane J at [242]-[244] held that the implied freedom of association exists only as a corollary of the implied freedom of political communication and cannot be used as a separate or distinct basis for invalidating legislation. Similarly, Hayne J at [96]-[98] and Keane J at [246]-[249] held that Australia's ratification of the *ICCPR* in no way affected the legislative power of the New South Wales Parliament. The importance of these findings, although perhaps less contentious than the Court's decision in relation to the implied freedom of political communication, should not be underestimated.

Majority Opinions

HAYNE J

Hayne J held at [71] that the offence burdened the implied freedom of political communication insofar as it both practically and legally serves to 'prohibit occasions on which there could be political communications.' He found at [77] that the offence pursued the legitimate purpose of preventing crime. He went on to consider whether any of the alternatives proposed by the parties at the hearing constituted a less drastic, yet equally effective and practicable, means of pursuing the legislative purpose. He found at [89] that the inclusion of a reasonable excuse defence or an exception for political communication would 'radically alter' the character of the offence by shifting the focus of the offence from the mere fact of association to the content or reason for the association. He held at [91] that, by basing the offence on 'a different premise,' the effectiveness of the offence in preventing crime would be undermined. He also noted at [91] that the burden imposed by the offence was not undue, insofar as it only limited the occasions on which political views could be expressed or disseminated, rather than preventing political communication altogether. He based this reasoning on an opinion, expressed at [92], that while consorting laws enjoyed a historical prominence in Australia, they had not had any discernable impact on political communication. As such, he held the law to be valid.

CRENNAN, KIEFEL AND BELL JJ

The plurality judgment proceeded on a similar footing to the reasoning of Hayne J. They found at [108] that, by proscribing all forms of communication between certain parties, the offence burdened the implied freedom. Similarly, to Hayne J, they went on to consider whether the legislative purpose of crime prevention could be pursued by a measure that was equally practicable yet had a less detrimental effect on the implied freedom. They found at [121] that the inclusion of a defence that removed political communication from the scope of the offence would be a less effective means of preventing crime than the current offence. Particularly, they drew attention to the perception that such a defence would be easy to claim but difficult for the Crown to disprove. They noted at [124] that a restriction of the offence to convicted offenders who had been found guilty of an offence of a minimum gravity or who had served a sentence of a minimum number of years would be equally as restrictive as the current offence. They concluding by finding at [133] that the impact of the offence on the implied freedom was purely 'incidental' and not 'substantial.' As such, they agreed with Hayne J and dismissed the appeal.

KEANE J

Keane J proposed to dismiss the appeal by a different route. He emphasised the construction of the offence of consorting in *Johanson v Dixon*[4] at [214]-[218] and [206], which indicated that the active 'seeking out' of a relationship of 'personal intimacy' was an essential element of the offence. He held at [226] that political

[4] (1979) 143 CLR 376.

association and participation in the public and political affairs of the Commonwealth did not involve the seeking out of such a relationship of personal intimacy. He found at [234] that the proposition that political communication 'might' occur during the course of other forms of association between convicted offenders does not indicate that it places a burden on the implied freedom. He hypothesised that, were proscribed offences to be held to be invalid on account of the 'mere possibility' of a detrimental impact on the implied freedom, the scope of the implied freedom would be unduly expanded in an 'unprecedented fashion.' Ultimately, the link needed to be more direct. As such, he held that the offence did not burden the implied freedom and that it was not invalid.

Dissenting Opinions

FRENCH CJ

French CJ held at [38] that s 93X had the potential to both directly and indirectly burden the implied freedom of political communication. While he recognised at [41] that the offence had a legitimate legislative object insofar as it had the effect of 'deterring non-criminals from associating with a criminal milieu and deterring criminals from establishing or building up a criminal network,' he held at [45] that the offence was not reasonably appropriate or adapted to this end as it 'does not discriminate between cases in which the purpose of impeding criminal networks may be served, and cases in which it patently is not.' He found at [51] that any

such reading down of the provision would 'be inconsistent with the statutory text and context.' As such, he held the law to be invalid.

GAGELER J

Gageler J sought to differentiate the circumstances in which s 93X would effectively burden the implied freedom of political communication. He explained at [155] that the offence would not effectively burden incidental political communication, such as the discussion of political matters that might occur during a game of cards between convicted offenders. In these circumstances, the effect of the offence on political communication is purely 'adventitious' and not sufficient to constitute a burden. However, he went on to find at [156] that the offence would effectively burden political communication that occurred during the course of a meeting or association formed for the purposes of political discussion or agitation, such as an electoral rally. He held at [164] that any law that prohibits association for the purposes of political communication warrants 'close scrutiny, congruent with a search for compelling justification.' He found at [166] that there was not a compelling reason why associations formed for the purpose of political communication could not be excluded from the ambit of the offence, as are other forms of association under s 93Y. He held at [178] that this unjustifiable burden could be removed by reading down the provision so as not to apply to consorting 'which is or forms part of an association for a purpose of engaging in communications on governmental or political matter.'

Analysis

Consorting as a Police Power

In response to the decision of the Court, Attorney-General Brad Hazzard reaffirmed the importance of the offence of consorting to the suite of laws that seek to tackle organised crime. He said that 'the anti-consorting laws give police the powers they need to disrupt and dismantle criminal organisations, including outlaw motorcycle gangs.'[5]

However, substantive offences such as consorting should not be enacted purely to give police more powers. If police cannot make out the level of criminality sufficient to found liability for conspiracy or attempt, they should not be able to charge consorting as a back up offence to ensure that people whom they suspect of being involved in criminal activity are charged and convicted, If the offence is used in this way, it becomes little more than a means of evading the proper procedural guarantees that are given to the accused at criminal law. Alex Steel's case study of the use of consorting laws in Bowral indicates that there is a very real potential for this to happen.[6]

---

[5] Louise Hall, 'Controversial NSW Consorting Laws to Target Bikies Valid, High Court Finds', *Sydney Morning Herald* (Online), 8 October 2014 <http://www.smh.com.au/nsw/controversial-nsw-consorting-laws-to-target-bikie-gangs-valid-high-court-finds-20141008-10rqwv.html>.

[6] Alex Steel, 'Consorting in New South Wales: Substantive Offence or Police Power?' (2003) 26(3) *University of New South Wales Law Journal* 567.

The plurality decision seems implicitly to countenance the offence as a discretionary police power. They argue, at [108], that 'there is no real prospect of a person committing an offence because they meet with convicted offenders on some occasions.' It is not entirely clear whether this is an attempt to construe the statute in such a way as to limit its operation, or an expression of a belief that the police will not misuse the offence to proscribe trivial conduct. If the latter is true, the plurality is making a dangerous assumption that the police will exercise their discretionary power properly in all instances.

Confusion

Rather than ruling the offence invalid, Keane J attempts to confine the scope of the offence so that it does not impinge upon the implied freedom of political communication. As this perhaps the most comprehensive articulation of the elements of the offence to arise from the judgment, it is likely that trial judges in lower courts will have recourse to it in the future. This is problematic, as the distinction he draws between intimate relationships and political relationships may be difficult to apply in practice.

He held at [226] that the offence requires a degree of 'intimacy' that is not present in associations formed for the purpose of participating in public affairs. It is difficult to see how a recently released prisoner without legal training would be able to distinguish between purely political relationships and relationships that

involve the requisite degree of intimacy. It is also possible for 'intimate' and political relationships to overlap. While participation in political campaigning would not, in Keane J's formulation, constitute consorting, any social bond that is formed with other campaigners and extends beyond purely political activities would. Defendants and magistrates alike may have difficulty knowing where to draw the line.

Context of the Decision

The decision has been handed down in the context of an increasing proliferation of 'law and order' discourses that seek to crack down on associations that are perceived as inherently dangerous or unlawful. The 'vicious lawless association' legislation in Queensland, that is currently being challenged before the High Court,[7] and the expansion of police powers in relation to terrorist groups nationally,[8] are two particularly pertinent examples.

The majority's failure to critically engage with the assumption that the offence was rationally connected to the prevention of organised crime is problematic. It indicates that the Court is unlikely to be particularly suspicious to overly broad laws that seek to expand police discretion to intervene in situations in which they perceive future criminal activity to be likely. This could embolden parliaments to make further additions to the current tranche of offences.

[7] *Kuczborski v State of Queensland* [2014] HCATrans 187.
[8] *National Security Legislation Amendment Bill (No. 1) 2014* (Cth).

Appropriateness of Consorting as a Means of Preventing Crime

The majority of the Court held that the offence was reasonably appropriate and adapted to the legitimate legislative object of preventing crime. This, however, is a problematic conclusion. While the majority focused on the question of whether there were equally effective alternative means of preventing crime, the 'rational connection' element ought to have been subject to greater scrutiny.

Firstly, the offence does not require the police to prove any criminal misconduct, or planned criminal misconduct, on the part of the accused.[9] It can apply to a person who associates with another for an entirely innocent purpose completely unrelated to criminal misconduct. It does not even require the police to hold a 'reasonable suspicion' of planned criminal misconduct, a qualification which has been introduced in Northern Territory legislation.[10] Secondly, the offence is not limited to offenders that have previously engaged in organised crime or serious crime. It can apply to any offender that has committed an indictable offence, no matter how trivial. Indeed, as French CJ explained at [45], the offence is far too wide to be appropriately adapted to the prevention of crime. Rather than insisting on a link between the consorting and the commission of a crime, it paints all past offenders as objectively dangerous. As Keane J argued at [227] and [236], associations between convicted offenders have 'criminogenic tendencies' and are

[9] See *Johanson v Dixon* (1979) 143 CLR 376, 383 (Mason J).
[10] s 55A (4) *Summary Offences Act 1923* (NT).

'apt to lead to further criminal activity.' Clearly, such broad-brush assumptions have no place in the modern criminal law. Offences such as the common law crimes of conspiracy and attempt, problematic though they may be, are a far more appropriate means of combatting organised crime.

Freedom of Association

The failure of the High Court to recognise the freedom of association as a separate and distinct right guaranteed by the Australian Constitution is disappointing. The existence of offences such as consorting, and the growing range of crimes that proscribe participation in 'criminal' or 'terrorist' groups, highlights the need for such a protection. The Commonwealth government, as a party to the *ICCPR*, is obliged to provide it.

The inclusion of the freedom of association in a statutory bill of rights would be ideal. However, its recognition as a free-standing implied right in the Constitution would force policymakers to account for the impact of prospective legislation on the right of individuals to associate, and provide a means of redress to groups to which the freedom has been denied. The scope of any such implied freedom of association would be limited to communication for the purposes of political mobilization and discussion.[11] However, it would at least constitute a separate basis for challenging the validity of laws that would limit the risk that the implied freedom of political communication could become strained or unduly expanded

[11] *Mulholland v Australian Electoral Commission* [2004] HCA 41, [116] (McHugh J); [286] (Kirby J).

under the weight of litigation. This risk was examined by Keane J at [234], and informs the confusing and arguably nebulous distinction between 'adventitious' and purposeful political communication made by Gageler J at [146].

The freedom of association is particularly crucial for ex-prisoners, the very group who are targeted by the consorting provisions. The provisions isolate ex-prisoners by denying them the social support networks that will most effectively aid their reintegration back into the community. It stereotypes these networks of ex-prisoners as inherently dangerous and criminogenic, without requiring the Crown to prove that this is the case. Moreover, as French CJ and Gageler J recognised, the provisions deny ex-prisoners a collective democratic voice by preventing them from mobilising to agitate for political reform.

It is important to remember that consorting affects particular marginalised groups disproportionately. Aboriginals are overrepresented in the criminal justice system, and by reason of that fact will be disproportionately be liable to conviction for consorting. Moreover, reasonable association with members of kinship groups is not excluded from the ambit of the offence under s 93Y. Muslim and other minority religious groups are also particularly vulnerable, in that reasonable association for religious purposes is not excluded under s 93Y either. As we explained in our recent submission to the Ombudsman:

The consorting laws are just one instance of the unjust denial of the human rights of minorities in order to promote the interests of the majority. The laws speak to the disenfranchised position of minorities in the Australian political system generally. Ultimately, it will only be through the promotion and codification of fundamental rights such as the freedom of association, which allows disadvantaged individuals and minority groups to have an intelligible collective voice, that such issues will be resolved. This, in turn, will promote an increasingly tolerant and inclusive democracy.

Mark Watts, Assistant Coordinator