



FREEDOM OF ASSOCIATION

Minorities and consorting laws

Justice Action



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Freedom of Association: Minority Groups and Consorting Laws

“The freedom of association in political matters is not so dangerous to public tranquillity as is supposed; and that possibly, after having agitated society for some time, it may strengthen the State in the end.”¹ – Alexis De Tocqueville, *Democracy in America* (1840)

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I. Introduction

The ‘freedom of peaceful assembly and association’ is a fundamental right possessed by each individual.² Despite its importance, it is, like other human rights, absent from the Australian Constitution and inadequately protected by the political system. The majoritarian tendencies implicit in the Australian system of responsible government and its ‘politically constitutionalist’ treatment of rights often see the rights of minority groups forgotten in the attempt to protect the interests of the majority. The consorting provisions in the *Crimes Act 1900* (NSW) are a particularly prominent example of this failure, ignoring the sociocultural and political needs of minority individuals due to a pervasive fear of ‘gang culture.’ These provisions need to be significantly revised in order to ensure that the freedom of association is applicable to minority groups.

While the revision of these laws will actively promote the freedom of association held by disadvantaged individuals, they are but one instance of a wider issue concerning the disenfranchised position of unpopular minorities in the Australian political system. It is only through the protection of the freedom of association, perhaps through a codified bill of rights, that this disenfranchisement can be corrected.

This paper first considers the position of the freedom of association in Australia’s contemporary legal system. It proceeds to analyse the impact of the consorting provisions on the freedom in its sociological, sociocultural, and political contexts.

¹ Alexis De Tocqueville, *Democracy in America: Volume II, Unabridged* (Digireads, 2007) 77.

² *Universal Declaration on Human Rights*, GA res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, Un Doc A/810 (10 December 1948) (“UDHR”).

Ultimately, it is argued that the consorting laws neglect the origins, purpose and value of the associations that they unjustly seek to disperse. After an analysis of the extent to which consorting as an offence undermines the presumption of innocence, the paper proposes a number of alternative solutions to the complex issues which the consorting laws seek to address.

II. The freedom of association in the Australian democratic system

The freedom of association

The freedom of association refers to the human right to form and join associations for the pursuit and promotion of common goals.³ This, in conjunction with the freedom of peaceful assembly, serves as a vehicle for the exercise of many other human rights and is an essential component of democracy. The importance of the right is demonstrated by its inclusion in key human rights instruments, most notably in articles 21 and 22 of the ICCPR, article 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 20 of the Universal Declaration of Human Rights (UDHR).

Article 20 of the UDHR stipulates that:

1. “Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.”⁴

Similarly, Article 22 of the ICCPR, recognised as a definitive statement on the freedom of association in international law, provides that:

1. “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this 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. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.”⁵

The importance of freedom of association for Australia’s democratic system was affirmed by the High Court in *Kruger v Commonwealth*.⁶ Despite such recognition, there is no statutory or common law protection of the right in all circumstances. It has only been tentatively recognised as a corollary of the implied constitutional freedom

³ European Commission for Democracy through Law (Venice Commission), ‘Compilation of Venice Commission opinions on the freedom of association’, (Compilation document no. 35, Venice Commission, 27 November 2013) 4.

⁴ UDHR art. 20.

⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976) (“ICCPR”) art 22.

⁶ *Kruger v Commonwealth* (1997) 190 CLR 1, 91 (Toohey J); 116, (Gaudron J).

of political communication in *South Australia v Totani*.⁷ This is due to the position of rights within Australia's democratic system.

Rights and freedoms in the Australian democratic system

Under the rubric developed by comparative constitutional lawyers, the Australian Constitution is predominately influenced by a “political” brand of constitutionalism.⁸ Political constitutionalism relies on primarily democratic mechanisms such as the legislature in order to hold those exercising governmental power to account.⁹ Legal constitutionalism, on the other hand, seeks to hold the government to account through judicially enforceable rights and obligations.¹⁰ As Stephen Gardbaum quite rightly concludes, while the Australian democratic system adheres to a legal constitutionalist treatment of ‘structural issues’ pertaining to the distribution of governmental power, its treatment of the rights of the individual is exceptionally political.¹¹ While structural issues are codified in the first three chapters of the constitution, many human rights and freedoms are conspicuously absent.

As the Constitution deals predominantly with structural issues, it is only through judicial inference that human rights can be constitutionally protected. In its constitutional interpretation, the High Court has recognised that certain fundamental rights are a necessary element in the functioning of the Australian democratic system. For instance, in *Australian Capital Television Pty Ltd & New South Wales v Commonwealth*, it was held that freedom of political communication was implied by the Constitution's provision for a system of representative democracy.¹²

In *Mulholland v Australian Electoral Commission*¹³, Justices McHugh and Kirby clarified the High Court's position on the implied right of freedom of association to date. Similarly to the recognition of freedom of political communication as an essential element of the constitutionally prescribed democratic system, McHugh J recognised that representative democracy implied a limited right to freedom of association.¹⁴ Kirby J elaborated, arguing that:

“There is implied in sections 7 and 24 of the Constitution a freedom of association and a freedom to participate in federal elections extending to the formation of political parties, community debate about their policies and programmes, the selection of party candidates and the substantially unconstrained right of association enjoyed by electors to associate with

⁷ *South Australia v Totani* [2010] HCA 39, [31] (Hayne J); see also *Wainohu v New South Wales* [2011] HCA 24, [112] (Gummow, Hayne, Crennan and Bell JJ).

⁸ George Williams, Sean Brennan & Andrew Lynch, *Blackshield & Williams Australian Constitutional Law & Theory: Commentary & Materials* (6th edition, Federation Press, 2014) 6.

⁹ Adam Tomkins, *Public Law* (Oxford University Press, 2003) 18.

¹⁰ *Ibid*, 19.

¹¹ Stephen Gardbaum, ‘The place of constitutional law in the legal system,’ in Michael Rosenfeld and Andras Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law*, (Oxford University Press, 2012) 169, 175.

¹² *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45, [16]-[17] (Brennan J).

¹³ [2004] HCA 41

¹⁴ *Mulholland v Australian Electoral Commission* [2004] HCA 41, [116] (McHugh J).

political parties and communicate about such matters with other electors.”¹⁵

Kirby J’s formulation of the implied freedom of association reflects the predominantly structural character of the Constitution. Rather than countenancing a freedom to associate in all instances, the Constitution as interpreted by the High Court only recognises a right that is limited to the operation of the democratic and electoral system. In Australia, only a freedom of political association is constitutionally protected.

More recently, the High Court has recognised that a vague freedom of association may exist as a corollary of the implied right to freedom of political communication.¹⁶ This tentative recognition of the right reflects a trend in the jurisprudence of the High Court towards reluctance to countenance the freedom of association in constitutional litigation. In the most recent litigation to deal with the implied freedom of association, the majority of the Court decided to leave the question pertaining to the freedom unanswered, deciding the case under other issues.¹⁷

In the absence of proper codification, and given the taciturn jurisprudence of the High Court on the issue, it ultimately falls to our elected representatives to ensure that these rights are being properly protected. This political constitutionalism reflects Australia’s subscription to the British doctrines of parliamentary sovereignty and responsible government.¹⁸ Rather than being a liberal constitution primarily concerned with the rights of the individual, the Australian constitution is fundamentally democratic: seeking to privilege the will of the majority as expressed through their elected representatives in the State and Federal Parliaments.

The entrusting of integral human rights and freedoms to legislatures is potentially problematic for minority groups. Australia’s system of representative government and the modified plurality voting through which it operates is majoritarian; favouring popular political parties who attempt to represent the interests of broad sectors of society.¹⁹ This reduces the ability for minorities to effectively advocate their interests and policy priorities within elected legislatures.²⁰ The majoritarian tendencies of the democratic system on which minority groups depend for their fundamental rights and freedoms ensure that the voices of minorities are excluded from our legislatures. Without this voice, the claims of minority groups for their rights can be easily ignored or forgotten.

Consorting laws and the freedom of association

¹⁵ *Ibid*, [286] (Kirby J).

¹⁶ *Wainohu v New South Wales* [2011] HCA 24, [112] (Gummow, Hayne, Crennan and Bell JJ).

¹⁷ *Unions NSW v New South Wales* [2013] HCA 58, [66] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

¹⁸ *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45, [31] (Mason CJ).

¹⁹ Arend Lijphart, ‘Australian Democracy: modifying majoritarianism,’ (1999) 34 (3) *Australian Journal of Political Science* 313, 318.

²⁰ *Ibid*, 318.

The consorting provisions in Part 3A, Division 7 of the *Crimes Act 1900* (NSW) (“the Act”) are an example of the inadequate protection of the fundamental rights of individuals from minority groups by a majoritarian legislature. Under the Act, consorting is defined as the habitual communication between an individual and convicted offenders after receiving an official warning.²¹ This “modernisation” of the consorting offence changed the summary offence into a criminal offence with the maximum sentence becoming three years of imprisonment.²² In addition, the definition of consorting was expanded to include electronic means in order to adapt to the advancement in technology.²³ The provisions constitute an undue limitation on the human right to the freedom of association,²⁴ as well as a violation of the presumption of innocence.²⁵

In this respect, the consorting provisions constitute a series of breaches of Australia’s human rights obligations under the International Covenant on Civil and Political Rights (ICCPR). Importantly, article 2 of the ICCPR stipulates that the State parties must undertake “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, without distinction of any kind.”²⁶ This provision makes it incumbent on contracting parties, such as Australia, to ensure that these fundamental rights extend to minority groups such as ex-prisoners and other social groups overrepresented in the criminal justice system. Ultimately, the consorting laws disproportionately burden such disadvantaged and vulnerable groups.

While international human rights instruments do not recognise the freedom of association as an absolutely unlimited right, it is difficult to reconcile the consorting laws with any of the accepted limitations on the freedom. Articles 21 and 22(2) of the ICCPR, for instance, provide that the right may be limited to protect the interests of national security or public safety; public order; the protection of public health or morals; or the protection of the rights and freedoms of others.²⁷ By proscribing consorting without criminal intent, the Act limits the freedom of association in a fashion that does not comply with the requirement for a threat to any of the aforementioned rights and interests. They are an illegal derogation from Australia’s responsibilities under international law.

III. The Freedom of Association in its Sociological Context: consorting and ‘gang culture’

²¹ *Crimes Act 1900* (NSW) s 93X (1)-(3).

²² New South Wales, *Parliamentary Debates*, Legislative Council, 7 March 2012, 9093 (David Clarke).

²³ *Crimes Act 1900* (NSW) s 93W.

²⁴ ICCPR art. 22.

²⁵ ICCPR, art 14 (2); S 93Y of the Act undermines the presumption of innocence by making it incumbent on the defendant to satisfy the court that their association with an ex-prisoner was “reasonable in all the circumstances.” In this respect, the defendant is subject to a rebuttable presumption of guilt.

²⁶ ICCPR, art 2.

²⁷ ICCPR, art 21; 22(2).

The consorting provisions view congregations of individuals from unpopular minority groups as a threat to public order. The idea of a “criminal milieu,” which the Act aims to disperse,²⁸ is characteristic of the majority fear of associations of disenfranchised minorities. While an individual may be manageable, a congregation of individuals is seen as inherently dangerous. Such a congregation becomes stereotyped as a ‘gang.’

Ultimately, however, it is the patent social exclusion that these individuals face which compel them to form associations amongst similarly disenfranchised individuals. Social exclusion can be situated on a number of intersecting axes, with sociologists pointing to its educational, economic, spatial, relational and socio-political dimensions.²⁹ These intersecting exclusions combine to create an experience of isolation that, in turn, compels disadvantaged individuals to seek support. Being denied types of relationships that are seen as positive and productive by majority society, these individuals often seek a fulfilling social network amongst the similarly disadvantaged. Such groups are often branded as gangs: promoting further exclusion from majority society and thereby solidifying the group.

The idea that social exclusion facilitates the creation of purportedly “dangerous” gangs has been corroborated by analysis of the United Kingdom’s gang culture, which culminated in the 2011 London riots.³⁰ Consorting laws create another form of exclusion by denying disadvantaged groups such as ex-prisoners their human right to form associations.

The consorting laws fail to perceive the origins of ‘gang culture,’ stereotyping necessary social networks as organised criminal activity. Moreover, they pose a solution that, through further exclusion and isolation, is likely to exacerbate the problem.

IV. Freedom of Association in its Sociocultural Context: consorting and social networks

An analysis of the consorting laws within the social and cultural context in which they operate reveals a patent neglect for the fundamental social networks of various minority groups. The ensuing analysis will highlight how the relevant provisions of the Act have the potential to exclude ex-prisoners, Aboriginal Australians and religious individuals from their most basic social interests.

The operation of consorting laws under this principle of ‘guilt by association’ serves to discriminatorily deny ex-prisoners their right to free association. As a particularly vulnerable minority group, the denial of this right can have particularly negative effects: obstructing the reintegration of ex-prisoners into the community.

²⁸ New South Wales, *Parliamentary Debates*, Legislative Council, 7 March 2012, 9093 (David Clarke).

²⁹ Katrine Fangen, ‘Social exclusion and inclusion of young immigrants,’ (2010) 18 (2) *Nordic Journal of Youth Research* 133

³⁰ Judith Aldrige & Juanjo Medina, ‘Youth Gangs in an English City: Social Exclusion, Drugs and Violence,’ (Full research report, No. RES-000-23-0615, University of Manchester, 16 January 2008); Chris Arnot, ‘Academics Seek New Understanding of Rioters,’ *The Guardian* (London) 29 November 2011.

As Dr Martin Bibby has contended:

“The proposed consorting law...leaves it open to a vindictive police officer to make a reformed criminal’s life intolerable, to prevent him from receiving assistance by social workers or clergy or almost anyone else, and to deprive him of all friendship.”³¹

In this respect, the provisions socially isolate ex-prisoners, serving to exclude them from the social support networks that will most readily aid their reintegration into the community. This social alienation will be keenly felt by individuals who have previously served long prison sentences; given that most of their social contacts and support networks will be comprised of fellow ex-prisoners. The consorting laws have the potential to deny important social supports to a minority group with a particular need for mutual support, constructive friendships and positive social interests.

Moreover, the consorting laws have the function of punishing vulnerable ex-prisoners anew for crimes for which they have already served their sentence. As Alex Steel explains, the proscription of consorting is:

“Inconsistent with the principle of justice and fair punishment that a person who has served and completed for a crime imposed by a court should then be subject to further punishment. In this case the person with a conviction is not committing the offence of consorting, but the effect is to punish that person by forbidding others from being in their company.”³²

While the consorting laws unjustly deny ex-prisoners their freedom of association, the defences codified in s 93Y of the Act neglect to recognise various forms of social and cultural associations which constitute the basis of intragroup relations in various minority groups. In this respect, the Act not only obstructs the freedom of association for all ex-prisoners, but does so in a way which further restricts the freedom of association of ex-prisoners from minority groups.

Section 93Y provides a defence through which certain forms of consorting are to be excluded from the operation of the Act. These include consorting with family members; consorting in the course of lawful employment or in the lawful operation of a business; and consorting which occurs in the course of the provision of educational, legal, or health services.

While the placing of the burden of proof on the defendant to satisfy the court that these forms of consorting were “reasonable in the circumstances”³³ is problematic in itself, it appears that the criterion of reasonableness extends only to the specified types of relationship. The inclusion of only six exempted relationships displays a profound neglect for the plethora of relationships that exist within the social context in which the laws operate.

For instance, the provisions offer no relief for neighbours or flatmates who may need

³¹ Martin Bibby, ‘New Laws Restrict Liberties,’ (2012) 228 *Civil Liberty* 11, 11.

³² Alex Steel, ‘Consorting in New South Wales: Substantive Offence or Police Power?’ (2003) 26(3) *University of New South Wales Law Journal* 567, 579.

³³ *Crimes Act 1900* (NSW) s 93Y (a)-(f).

to habitually associate in the course of their daily lives. They display equal disregard for important social support organisations, failing to allow for peer support and mentoring initiatives operated by welfare organisations such as Justice Action and the Women in Prison Advocacy Network (WIPAN).

Similarly, the provisions display a patent neglect for the social context of Aboriginal Australians by failing to countenance kinship bonds, which form the fundamental base of their social relations. The Ombudsman's Report pays particular attention to the potential for the exclusion of consorting with "family members" from the Act³⁴ to fail to encompass Aboriginal kinship bonds which "are far broader than lineal or blood relations."³⁵

The failure of the Act to pay proper attention to the social context of Aboriginal Australians constitutes a breach of Australia's obligations under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Article 9 of the Declaration provides that:

"Indigenous peoples have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned."³⁶

By creating barriers between previously convicted individuals and their community, the consorting laws interfere with the right of Indigenous persons to belong to their kinship group in accordance with their own customs. This is a particularly important issue given the overrepresentation of Aboriginal Australians in official consorting warnings. The Ombudsman found that 38% of all people given an official warning for consorting in their select group were Aboriginal; including 62% of all women and 8 of the 12 children aged 10 to 15.³⁷

Another group which the defences contained in s 93Y fails to exclude are religious groups. This, again, constitutes a breach of Australia's obligations under the ICCPR. Article 18 (1) of the ICCPR provides that the human right to freedom of religion includes the;

"Freedom, either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching."³⁸

The consorting laws have the potential to exclude religious persons from their religious community, thereby interfering with their human right to collectively participate in religious activities. This is, again, an important issue given the popular

³⁴ *Crimes Act 1900* (NSW) s 93Y (a).

³⁵ 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) ("Consorting Issues Paper") 28.

³⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/RES/61/295 (13 September 2007), ("UNDRIP") Art. 9.

³⁷ New South Wales Ombudsman, *Consorting Issues Paper*, 29.

³⁸ *ICCPR*, Art. 18 (1).

perception of criminal activity occurring within Islamic communities in the post 9/11 era.³⁹

In this respect, the Act's unjustified limitation of the freedom of association has the potential to exclude vulnerable individuals from the positive social networks through which they derive most of their support.

V. Freedom of association in the Australian political context: enfranchisement through congregation

The forgoing analysis demonstrates the extent to which the consorting laws unjustifiably discriminate against vulnerable minority groups by denying them their human right to free association. Realistically, the discriminatory nature of the laws creates an affinity between the unpopular minority groups who have been disadvantaged by the provisions.

Rather than being immediately typecast as a 'gang,' these intergroup relations should be seen as a means by which disadvantaged minorities can participate in the democratic system. This intergroup dialogue allows for the sharing of experiences and the mobilisation of resources through which the respective groups can, collectively, promote community cohesion and social integration. The interaction between vulnerable minority groups also allows for a greater lobbying power, which is essential for the participation of these groups in democratic policymaking processes. Without such collective activism, it is doubtful whether individual minority groups can access the highly majoritarian legislative process. To deny ex-prisoners the right to associate with other marginalised groups is to deny them a political voice.

By privileging the supposed tension between public order and the congregation of vulnerable or unpopular minority groups, the consorting legislation prevents these groups from creating important social networks and accessing policymaking processes. In the attempt, as David Clarke put it, to frustrate criminal activity by preventing individuals from operating within a "criminal milieu"⁴⁰, the consorting laws have served to deny unpopular minority groups one of their most important mechanisms for collective social reintegration. The freedom of association is imperative for an equitable and inclusive democratic system.

VI. Presumption of Innocence

The freedom of association is not the only fundamental human right that the consorting provisions unjustifiably limit. It is equally inhibitive of the presumption of innocence.

Article 14(2) of the ICCPR provides that "everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law."⁴¹ The right to the presumption of innocence is recognised throughout international and common law jurisprudence as one of the fundamental elements of the due process of

³⁹ Jock Collins, 'Ethnic Minorities and Crime in Australia: Moral Panic or Meaningful Policy Response?' (Paper to public seminar, Office of Multicultural Interest, 8 November 2005) 6.

⁴⁰ New South Wales, *Parliamentary Debates*, Legislative Council, 7 March 2012, 9093 (David Clarke).

⁴¹ ICCPR art. 14 (2).

the law, and has recently been emphasised by the High Court in *Momcilovic v The Queen*.⁴²

S 93Y of the Act undermines the presumption of innocence by making it incumbent on the defendant to satisfy the court that their association with an ex-prisoner was “reasonable in all the circumstances.” In this respect, the defendant is subject to a rebuttable presumption of guilt. It should ultimately be the responsibility of the prosecution to prove the unreasonableness of the defendant’s consorting.

At a more abstract level, consorting laws place an undue social stigma on innocent social groups by typecasting them as criminal organisations. Support networks, friendship groups, cultural associations, and clubs become gangs to be targeted and dispersed.

John Lang expressed one of the earliest concerns as to the effects of the consorting provisions in 1929, arguing in the Legislative Assembly that “it might be possible for some grave injustice to be done under it to persons who are effectively innocent” by legislating “too rapidly and making criminals of persons who, though they mix with these particular people, are with them not for a bad purpose but probably for a very good one”.⁴³ This logic was endorsed by the High Court in *Johnson v Dixon*, in which Murphy J held that the purpose of the habitual association was irrelevant for the offence of consorting.⁴⁴ This blindness as to the purpose of the association allows for benevolent and positive relationships to be proscribed as consorting. It eschews the presumption of innocence by conceiving of all associations as potential criminal groups without any evidence of actual or planned wrongdoing.

People in themselves are not illegal. The offence of consorting is based on the principle of guilt by association, which is contradictory to the freedom of association. It unjustifiably discriminates against ex-prisoners by denying them the right to unobstructed peaceful assembly with others, and does so in a fashion which disregards the presumption of innocence.

VII. Justification for the consorting provisions

Parliamentary Secretary David Clarke argued that the extension of the offence constituted an attempt to frustrate organised criminal activity by preventing the habitual communication of past offenders.⁴⁵ Particularly, the provisions constituted a response to a spate of shootings amongst “bikie gangs” in South Western Sydney.⁴⁶

One of the more significant problems arising out of the consorting laws, as has been elaborated above, is the creation of the tension between the right of free association for vulnerable minority groups and the State’s concern for public protection. However, as David Clarke informed Parliament, “the goal of the offence is not to

⁴² *Momcilovic v The Queen* [2011] HCA 34, [44] (French CJ).

⁴³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 October 1929, 683-4 (John Lang).

⁴⁴ (1979) 143 CLR 376, 392-3 (Murphy J)

⁴⁵ New South Wales, *Parliamentary Debates*, Legislative Council, 7 March 2012, 9092 (David Clarke).

⁴⁶ Anna Patty, ‘O’Farrell’s consorting law slammed as ‘easy politics’’, *Sydney Morning Herald*, (Sydney), 14 February 2012.

criminalise individual relationships, but to deter people from associating with a criminal milieu.”⁴⁷ This goal has not been achieved.

Ultimately, the State should explore the adoption of alternative solutions to the problem posed by organised criminal activities that are less inhibitive of the fundamental rights and freedoms of vulnerable minority groups. In this way, the State could better frustrate organised criminal activity without unjustifiably criminalising innocent groups of disadvantaged individuals.

VIII. Alternative approaches

Public order should never be protected at the cost of the human rights of the disadvantaged. The individual’s human right to the freedom of association should be protected in all instances with minimal limitation.

Furthermore, the unjustified limitation of the freedom of association inherent in the consorting provisions, and its discrimination against vulnerable minority groups, both collectively and individually, necessitates an alternative approach to the frustration of organised criminal activity. Conspiracy laws should be explored as alternate approach to the achievement of the aims of the consorting provisions.

Through the codification of the freedom of association, and a replacement of consorting laws with the common law offence of conspiracy, the State would be better placed to combat organised crime in a manner which is not likely to interfere with the positive social interests and human rights of disenfranchised minorities.

1. The protection of the freedom of association through a charter of rights

The Australian Constitution inadequately protects the human rights of the individual. As was mentioned previously, the freedom of association is only vaguely countenanced as a corollary of an implied freedom of political communication.⁴⁸ This lack of codification makes departures from the freedom of association, such as those that are seen in the consorting provisions, far too easy.

The Victorian *Charter of Human Rights and Responsibilities Act 2006* (“the Charter”) codifies the freedom of association in Victorian jurisdictions.⁴⁹ While the freedom of association has not yet been successfully litigated by virtue of the Charter, individuals have successfully used the Charter to protect their right to a fair trial,⁵⁰ and their right to freedom of movement.⁵¹ The requirement in s 7 (2) that any derogation from the protection of the included rights be “demonstrably justified”

⁴⁷ New South Wales, *Parliamentary Debates*, Legislative Council, 7 March 2012, 9093 (David Clarke).

⁴⁸ *Wainohu v New South Wales* [2011] HCA 24, [112] (Gummow, Hayne, Crennan and Bell JJ)

⁴⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic.) s 16 (2).

⁵⁰ *Taha v Broadmeadows Magistrates’ Court* [2011] VSC 642

⁵¹ *Watson v Kaba* (Unreported, Melbourne Magistrates’ Court, 20 June 2013, Reynolds).

promotes transparency by ensuring that the Executive is held to account for any deviation from fundamental rights.⁵²

The protection of the freedom of association through a similar bill of rights either at the State or federal would give affected individuals recourse to challenge unjust consorting laws, while also ensuring that the rights and freedoms of all individuals form a significant part of the legislative decision making process.⁵³ This reduces the likelihood of similar abrogations of the rights of the individual happening in the future. More broadly, the codification of the freedom of association will allow for unpopular minorities, such as ex-prisoners, to cultivate a collective voice through which they can participate in the democratic system.

2. The use of conspiracy laws as an alternative to consorting laws

The common law offence of conspiracy constitutes a legal mechanism for the frustration of criminal activity that does not involve the disruption of innocent groups or associations.

The offence of conspiracy involves agreement between two or more persons to commit an unlawful act with the intention of carrying it out.⁵⁴ Were the offence of conspiracy to be used as a substitute for the statutory offence of consorting, the ability for the State to disrupt allegedly criminal associations would depend on their ability to prove an intention to commit a crime; the *mens rea* of the offence.⁵⁵ The insistence on criminal intent would ensure that innocent organisations involving ex-prisoners would be free to operate without the possibility of having their freedom limited by consorting laws.

IX. Methods to mitigate adverse effects

While the consorting provisions should be repealed, and replaced with the offence of conspiracy, the mitigation of some of the adverse effects of the provisions through their amendment should also be explored.

1. A requirement of ‘reasonable suspicion’ that the person is involved in criminal activity

One of the major problems with the consorting provisions as they exist currently is the wide discretion which is afforded to police officers with regards to the type of associations they target in their attempt to frustrate organised criminal activity. As the Ombudsman explains, the failure of the laws to require police officers to present evidence linking the targeted association with actual criminal activity allows for

⁵² *Charter of Human Rights and Responsibilities Act 2006* (Vic.) s 7 (2); George Williams, ‘The Victorian Charter of Human Rights and Responsibilities: Origins and Scope,’ (2006) 30 *Melbourne University Law Review* 880, 900.

⁵³ George Williams, ‘The Victorian Charter of Human Rights and Responsibilities: Origins and Scope,’ (2006) 30 *Melbourne University Law Review* 880, 903.

⁵⁴ *Yip Chiu-Cheung v R* (1994) 99 Cr App R 406, 410 (Griffiths LJ).

⁵⁵ *Yip Chiu-Cheung v R* (1994) 99 Cr App R 406, 410 (Griffiths LJ).

innocent groups to be caught up in the criminal justice system's net for no other reason than the prior convictions of its members.⁵⁶

This broad discretion could be limited by requiring police officers to hold a "reasonable suspicion" of intent to commit criminal activity before subjecting an association to consorting laws. This is a milder approach to the complete repeal of consorting laws and their replacement with the existing offence of conspiracy. For example, the *Summary Offences Act 1923* (NT) requires the commissioner of police to provide evidence for their reasonable belief that issuing a warning to refrain from consorting with a certain organisation will likely prevent the commission of a prescribed offence involving "substantial planning and organisation."⁵⁷ This would ensure that innocent organisations are not subject to unjustified warnings.

Ultimately, the adoption of a standard of "reasonable suspicion" would allow the police to better fulfil the purpose of the consorting provisions as outlined in the second reading speech.⁵⁸ The use of such a standard will ensure that individual relationships are not criminalised, while continuing to promote the frustration of organised criminal activity.

2. A redefinition and extension of the exempted relationships

Such an approach would have to be coupled with a redefinition of the defences in s 93Y of the Act to better encompass the numerous types of relationships and groups which exist within the social context in which the laws operate. This would be in line with the ombudsman's recommendation of an extension of the "reasonable excuse" defence.⁵⁹

Specifically, the definition of "family" in s 93Y (a) should be extended to encompass relationships of indigenous kinship. Consideration should also be given to relationships of cohabitation, friendship and common religion. Without such an extension and redefinition of the exempted relationships, ex-prisoners and their associates will continue to be liable to exclusion from their fundamental social support networks.

Similarly, support groups such as Justice Action and the Women in Prison Advocacy Network (WIPAN) should be exempted from the Act. The failure to account for peer support, mentoring, and post-release social support programs in s 93Y creates a barrier that restricts ex-prisoners from accessing important services which aid their reintegration into the community. This indispensable social support network also comprises of the clergy, social groups, sporting clubs, charities and other community organizations that may assist their integration back into the community: all organisations which should be considered for inclusion in s 93Y.

3. A reversal of the onus of proof

S 93Y currently places a rebuttable presumption of guilt on the defendant, requiring them to prove that their alleged consorting fulfils one of the exempted relationships

⁵⁶ New South Wales Ombudsman, *Consorting Issues Paper*, 21.

⁵⁷ *Summary Offences Act 1923* (NT) s 55A (4).

⁵⁸ New South Wales, *Parliamentary Debates*, Legislative Council, 7 March 2012, 9093 (David Clarke).

⁵⁹ New South Wales Ombudsman, *Consorting Issues Paper*, 45.

and was “reasonable in the circumstances.” In order to preserve the defendant’s right to be presumed innocent until proven guilty, the onus of proof should be placed on the prosecution.

4. *The exclusion of minors*

Minors who have been convicted of indictable offences constitute a particularly vulnerable group in need of significant social support in order to readjust to life in the community. To deny minors the ability to make use of all available social support services would be to reduce their ability to effectively reintegrate into society. Such a denial would comprise a derogation of Australia’s obligations under the *United Nations Convention on the Rights of the Child*, which makes it incumbent on parties to ensure “the best interests of the child” are being respected by the criminal justice system.⁶⁰

The criminal justice system in New South Wales recognises that minors are especially vulnerable, affording them specific protections through dedicated juvenile justice legislation enforced by a separately constituted Children’s Court. This allows the specific interests of juveniles to be better protected where they may not be under criminal statutes aimed at adult offenders. In this spirit, the particular vulnerabilities of juveniles mandates their exclusion from the Act in order to sure that their best interests, protected under international law, are better served.

5. *Limitation of the definition of ‘convicted offender’*

S 93W of the Act defines ‘convicted offender’ as an individual “who has been convicted of an indictable offence.” While the ombudsman points out that the NSW Police force have made a policy decision to limit this to individuals who have been convicted of indictable offences in he previous 10 years,⁶¹ there are grounds to restrict the definition even further in order to ensure that fewer ex-prisoners have their freedom of association unjustifiably denied.

That said, it is ultimately recently released ex-prisoners who are most in need of social support and mentoring in the initial stages of their social reintegration. As the ombudsman highlights, recidivism rates are highest among recently released ex-prisoners, with 21% of adult offenders reoffending within a year and 10% reoffending within two years.⁶² These statistics indicate that recently released ex-prisoners are the most in need of the social supports which are potentially denied to them by consorting provisions. Without such supports, the cycle of recidivism is all the more easy to fall in to.

For this reason, a move to restrict the definition of “convicted offender” to an individual convicted of an indictable offence within a limited timeframe, a possibility

⁶⁰ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1557 UNTS 3, (entered into force 2 September 1990) (“CROC”) art. 3.

⁶¹ New South Wales Ombudsman, *Consorting Issues Paper*, 25.

⁶² New South Wales Ombudsman, *Consorting Issues Paper*, 25; Jessie Holmes, ‘Reoffending in NSW,’ *Crime and Justice Statistics: Bureau Brief*, Issue paper 56, NSW Bureau of Crime Statistics and Research, Sydney, January 2012 p.15.

that was raised by the ombudsman in its review,⁶³ should be criticised. A limitation of the definition of “convicted offender” in accordance with the seriousness of the offence may be more appropriate. This would allow for individuals convicted of minor indictable offences, such as illicit drug use and shoplifting, to be excluded from the operation of the Act. If the purpose of the legislation is to combat organised criminal activity, ex-prisoners who have been convicted for minor, individual crimes should not be included in the definition.

X. Conclusion

The freedom of association is a fundamental human right. It is particularly important for disadvantaged and marginalised minority groups: providing them with significant social support networks and allowing for their participation in Australia’s majoritarian political system. Ultimately, this majoritarian tendency often sees the rights of minorities overlooked in order to safeguard the interests of the majority.

The consorting provisions under the *Crimes Act 1900* (NSW) are one such example, with the freedom of association for disadvantaged ex-prisoners being unjustly undermined in order to promote public safety through the reduction of organised crime. They are ignorant of the forces that compel the formation of the groups they seek to disperse, and neglect to recognise their social and political value. These provisions should be replaced by the common law offence of conspiracy, or at least significantly revised such that their adverse effects can be mitigated.

While the revision of consorting laws would ensure that the freedom of association held by minority groups would be better protected, the scope of the issues in this paper extend beyond the sections of the Act it has addressed. 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.

⁶³ New South Wales Ombudsman, *Consorting Issues Paper*, 26.

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