



Our ref: HumanRights:JD:VK:656741

26 October 2012

The Hon. Greg Smith SC MP
Attorney General NSW
Parliament House
Macquarie Street
Sydney NSW 2000

By email: office@smith.minister.nsw.gov.au

Dear Attorney General,

Sections 93X and 93Y of the *Crimes Act 1900* (NSW)

I am writing to express the Law Society's ongoing concern about the consorting offence and associated defences established by the *Crimes Amendment (Consorting and Organised Crime) Act 2012* ("amending Act").

For the reasons set out below, the Law Society respectfully requests that the Government take action to either:

- a) Repeal ss.93X and 93Y; or
- b) Amend s.93Y to provide that it is for the prosecution to prove that consorting was not reasonable in the circumstances set out in subsections 93Y(a)-(f).

As you are aware, the Law Society did not support the passage of the amending Act. I attach for your reference a copy of the Criminal Law Committee's submission dated 20 February 2012 which stated that that "[o]ffences should be based on conduct worthy of punishment; merely associating with people should not be a crime." The Society reiterates this position, noting that the consorting offences undermine freedom of expression and freedom of association. Further, as the defendant has to bear the onus of proving that his or her "consorting" conduct is reasonable in the circumstances, the Society's view is that changes made by the amending Act may amount to a breach of the presumption of innocence, under which the prosecution is to have the onus of proving every element beyond reasonable doubt.¹

Since the Criminal Law Committee made its submission, Charlie Foster, a 21 year old intellectually disabled man was convicted of consorting (with three friends and housemates).² The Law Society respectfully submits that this outcome strongly indicates that the consorting provisions as they stand are not appropriate, and this can undermine the community's faith in, and respect for, the criminal justice system and the rule of law.

The Law Society is also concerned about the application of the legislation to legal practitioners in the normal course of providing legal services. As noted by the Criminal

¹ Article 14(2) of the *International Covenant on Civil and Political Rights*

² The Law Society notes that the conviction has since been overturned and has been sent back to Armidale Local Court for rehearing on fresh evidence.

Law Committee, there is no automatic exemption available under the amending Act; not even for a parent, spouse or child. In particular there is no automatic exemption available to legal or medical practitioners and none at all for religious advisors.

Under the new consorting provisions, any solicitor who "habitually" takes instructions from a client who is a convicted offender may be exposed to the risk of prosecution and imprisonment for three years if they are unable to show that the consorting was reasonable in the course of the provision of legal advice.

"Habitual" is very widely defined to include for example two text messages to each of two different people who have been convicted of indictable offences, which include relatively minor matters which are dealt with summarily but are still indictable (such as obstructing a police officer). The offence might have been committed 50 years ago.

Although sub-section 93Y(e) provides specifically for the circumstance of consorting that occurs in the course of the provision of legal advice, the effect of the changes made by the amending Act is that it is still possible for legal practitioners to be arrested and charged for activities undertaken in the normal course of providing legal services, obliging them to prove their innocence in Court. As noted previously, the penalty is severe – three years imprisonment.

In addition to the untenable position of legal practitioners, the Society's view is that hampering a legal practitioner's ability to take instructions from a client or a witness who has been convicted of any indictable offence may have serious rule of law implications, and may interfere with the right to "communicate with counsel of his own choosing"³ and the obtaining of legal advice and therefore the right to a fair hearing (in further breach of Article 14 of the *International Covenant on Civil and Political Rights*).

The Law Society's view also is that the consorting amendments undermine the principle of independent Courts as their officers (solicitors and barristers) can potentially be charged for merely undertaking the usual activities involved in the provision of legal services.

For the reasons both set out above and in the earlier submission of the Criminal Law Committee, the Law Society seeks the repeal of ss.93X and 93Y.

If the Government decides to retain s.93X, the Law Society would strongly urge the Government to amend s.93Y to provide that it is for the prosecution to prove that consorting was not reasonable in the circumstances set out in subsections 93Y(a)-(f).

Yours sincerely



Justin Dowd
President

³ Article 14(3)(b) of the *International Covenant on Civil and Political Rights*



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: RBG586908

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20 February 2012

The Hon. Greg Smith SC MP
Attorney General and Minister for Justice
Level 31
Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Attorney General,

Crimes Amendment (Consorting and Organised Crime) Bill 2012

The Law Society's Criminal Law Committee (Committee) has reviewed the *Crimes Amendment (Consorting and Organised Crime) Bill 2012* and makes the following comments for your consideration.

The Committee is particularly concerned about the proposed amendments to the offence of consorting. The proposed consorting offence makes it a crime for otherwise innocent people to associate with people who have been convicted of an indictable offence and imposes a sentence of up to three years imprisonment if they do so. The Committee agrees with Associate Professor Steel, that "In a modern-day society there should not be an offence of speaking to anybody unless the nature of a conversation is a conspiracy."¹ The proposed offence undermines the freedom of expression and freedom of association. Offences should be based on conduct worthy of punishment; merely associating with people should not be a crime.

The proposed offence is extremely broad, and confers too much discretionary power on the police. The offence essentially restricts a person who is convicted of an indictable offence from consorting with anybody other than co-workers, their family, legal and health providers, and the people they might undertake an educational program with, subject to the discretion of the police. The discretion lies with the police, as it is the police who are required to "officially warn" the putative offender as a precondition of the offence.

Associate Professor Steel accurately observes that:

"... it is inconsistent with the principle of justice and fair punishment that a person who has served and completed the punishment 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. Such indirect

¹ 'O'Farrell's consorting laws slammed as 'easy politics'', SMH article, February 2012.

punishment is unjust. This is particularly as the punishment could be lifelong, that is, once convicted of an indictable offence, a person will always be a 'convicted person' for the purposes of consorting."²

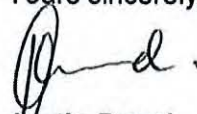
The official warning, which can be given orally, is required to indicate that a convicted offender in fact has a conviction. This is a serious invasion into the privacy of the convicted person, given that the person with whom they are "consorting" has no other legal entitlement to know whether or not the person they are speaking to is a convicted person. The following example illustrates this problem: Two people meet socially and have no knowledge about each other. Police approach one of the people and "officially warn" them that the other person has a conviction, although they may never meet the convicted person again. That person now knows that the other person is has a conviction, for no apparent reason other than the fact that police want to discourage them from speaking to that person.

The NSW Police Force already have adequate tools and wide powers to deal with organised crime. For the reasons discussed above, the Committee is of the view that the offence of consorting is unnecessary and should be removed from the Bill. If the offence is to remain, then the Committee suggests that the following amendments are required:

- Amend the definition of "convicted person" to require that a person has been convicted of a serious indictable offence rather than an indictable offence.
- Insert a pre-condition in the "official warning" provisions that require it to be "reasonably necessary for a law enforcement purpose to disclose that a person is a convicted person."
- Insert a provision that provides that the convicted person must be an adult and that the offence does not apply to people under the age of 18.

Please do not hesitate to contact me if you would like to discuss the content of this submission further.

Yours sincerely,



Justin Dowd
President

² Steel, Alex "Consorting in New South Wales: Substantive Offence or Police Power?" [2003] UNSWLawJl 40; (2003) 26(3) University of New South Wales Law Journal 567