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Précis Paper

Consorting Laws in NSW - Protecting the Public or Infringing Civil Liberties?

This is the first Benchmark production shot in the NSW Parliament – where both of our speakers are well known. Peter Anderson is a strong advocate for the law of consorting while David Shoebridge strongly opposes the laws. By the conclusion of the lively debate they achieve some degree of agreement. This is a dynamic and informative discussion and worth the time to sit down and watch.

Discussion Includes

- History of consorting laws in NSW
- Concerns about infringement of freedom of association
- Threshold tests in new consorting provisions
- Defences available under the new laws – application to commonplace scenarios and gaps in current legislation
- Police discretion in issuing warnings and bringing charges under new laws
- Mechanisms to regulate consorting laws – police procedure or legislative change
- Impact of laws on Indigenous community

Précis Paper

Consorting Laws in NSW - Protecting the Public or Infringing Civil Liberties?

1. In this edition of BenchTV, The Honourable Peter Anderson AM (former politician) and David Shoebridge (Greens MP) discuss the issues raised by the NSW consorting laws. Their engaging debate delves into very real issues such as concerns about freedom of association, defences available under the new laws, the use of police discretion and the impact of laws on Indigenous community

History of consorting laws in NSW

2. Consorting laws have a very complex history NSW. The crime of consorting came from English law, and was consolidated in the *Vagrancy Act* 1902 (NSW). However, they were rarely used until 1929, when the Act was amended to deal with the razor gangs in Paddington. The *Vagrancy (Amendment) Act 1929* (NSW) introduced the term 'habitually consorts', which is used in the current provision.

3. Consorting laws were updated in the amendment of the *Summary Offences Act 1970* (NSW) under the Wran government. This is where the practical difficulty arose in terms of the utilisation of the consorting provision. One of the reasons the *Summary Offences Act* was initially amended was because the discretionary powers it conferred had been seen as a corrupting influence inside the police force, as raised in the 1995 Royal Commission into the NSW Police Service).

4. The current consorting provisions were introduced in 2012, through the *Crimes Amendment (Consorting and Organised Crime) Act* 2012 (NSW), which inserted, among others, ss 93X and 93Y into the *Crimes Act 1900.* Section 93X outlines the offence of consorting, while s 93Y codifies 6 statutory defences.

5. Under the current law, if you meet with at least 2 convicted offenders, after having been warned by the police, and have met with them on at least 2 occasions each, then s 93X kicks in and you can find yourself the subject of a prosecution, with the maximum penalty being 3 years gaol time.

6. Contact that is considered 'associating' includes meeting with, emailing, phoning, and Facebook messaging.

Concerns about infringement of freedom of association

7. Mr Shoebridge argued that one of the biggest problems with consorting is that is criminalises association, which is essentially an infringement of our basic human rights. Practical problems arise when the person subject to a consorting warning does not have to be a criminal, and there does not have to be any criminal intent.

8. On Mr Anderson's view, criminals don't have a right to be associating if they are associating for an illegal purpose. He also contended that consorting warnings can be very effective in protecting youth. In his experience as a local Member of Parliament, he was approached by parents, on various occasions, requesting that their child would receive a warning after becoming associated with people who have criminal records. These warnings would protect youth by deterring them from being associated with 'the wrong crowd'.

9. Like many other areas of the law, consorting provisions are not black and white,

10. In the first year after the 2012 amendments, there were 9000 warnings and 46 charges of consorting. The purpose was to prevent criminal association, not to criminalise personal association and make it difficult for people to go about their business, such as catching the train, being involved in sporting teams or using emergency home shelters. However, with three quarters of warnings being issued by general duties police, the reality is that people may be hindered from taking part in these every day activities.

11. In 2014, the laws were challenged in the High Court, in the case of *Tajjour v New South Wales* (2014) 254 CLR 508. It was argued that the laws infringed the right to freedom of association, rendering them constitutionally invalid, and also went against Australia's international obligations.

12. According to Mr Shoebridge, police were not charging people until the HC decision was handed down, which provided a distorted image of the operation of consorting laws, and then there was a surge of charges at the beginning of 2015.

Threshold tests in new consorting provisions

13. When Mr Anderson first became a police officer, the procedure for successfully securing a consorting charge included sufficiently the events in the Police notebook and submitting a form to the Modus Operandi section. A member of the consorting squad would then review the number of bookings made against a person and make a recommendation to the Siperintended of the CIB, who would then consider whether a warrant should issue. The police instructions set out clearly when not to use them, such as on someone with a criminal history who has made a real attempt to reform.

14. When the *Summary Offences Act* came in, it introduced a knowledge requirement, where the person subject to the consorting charge had to be aware that the person with whom they were consorting had been convicted of an indictable offence. This created practical problems. Members of the public, and even members of Parliament and the Police force, did not understand the difference between a summary and indictable offence. The problem was not whether the original offender was convicted with a summary or indictable offence, but that the person interacting with the offender had to understand that they had been convicted. It was very hard for police to prove the knowledge requirement.

15. The purpose of having this threshold was that people convicted with lesser, or summary, offences should have more freedom than those with indictable offences. Sections 93X and 93Y are broad enabling powers and it seems that Parliament hoped that the discretions would be adequately used and not abused.

<u>Gaps in current legislation relating to commonplace scenarios</u>

16. Mr Shoebridge noted that problems of infringement of freedom of association might arise if you are in the same sporting team as an offender and you have received a warning for consorting. This would not fall within any of the prescribed codified defences in s 93X and raises a clear problem for members of a sporting team.

17. Mr Anderson contended that this is not a reasonable use of consorting laws, however it is also not a reason to not have consorting laws at all. There should be a review of the exemptions.

18. One of the cases that troubles the Ombudsman is that of people seeking emergency accommodation – homeless people going in and out of shelters. There have been cases where police have issued consorting warnings, knowing this would hinder the person's ability to seek accommodation in a homeless shelter, Mr Anderson argued that common sense has to be applied in situations where people are seeking assistance, depending on the circumstances. Therefore, it needs to be made clear that consorting laws are not an instrument to be used in unreasonable circumstances.

19. Another issue arises with attendance at AA meetings. One of the statutory defences for consorting is health services, however it is unlikely that attending counselling sessions or AA meetings would fall within this defence.

Mechanisms to regulate consorting laws – police procedure or legislative change

20. When the law was first introduced through parliament in 2012, it had been argued that it was designed to break up gangs in Sydney and prevent serious criminal conduct. In practice, three quarters of the people who have been subject to a consorting direction were not caught up in organised crime. This raises questions as to whether the intention of Parliament is being carried out through the practical application of the laws.

21. The definition for consorting in the oxford dictionary is about providing a level of control and protection to the public. However the statutory definition is constructed as 'habitually consorts'. This raises issues as to the definition of 'habitual'. Mr Shoebridge raises the example that if you attend a gym twice, that does not make you a habitual gym-user, however under the law, if you meet with a criminal twice, which is considered habitual consorting.

22. The role of parliament is to craft laws that have adequate protection for freedom of association.

23. Given the competing arguments, it can be suggested that a Police Minister and an Attorney General will have discussions and monitor what is happening and if there is evidence that the real intent of the legislation is not being complied with, instructions to police should be changed, or the law should be changed.

Impact of laws on Indigenous community

24. The Aboriginal community is hugely overrepresented within our criminal justice system. Mr Shoebridge raises the question as to whether Parliament has a responsibility to ensure that new laws do not perpetuate this over-representation.

25. While aboriginal people make up only 2.5% of the NSW population, they were subject to 37% of warnings under the 2012 consorting laws (2013 NSW Ombudsman Consorting Issues Paper – Review of the Use of the Consorting Provisions by the NSW Police Force). Mr Shoebridge argues that this raises serious questions about the use of police discretion, particularly in light of the troubled history between NSW Police and the aboriginal community in NSW. Conversely,

26. One of the defences in s 93Y is consorting with family members, however there is no clear definition of what family members are. In the Aboriginal community, there is a very extended family kinship structure. Both presenters in this discussion agree that a definition is required for the term 'family members'. They also agree that in order to effectively remedy Aboriginal disadvantage, the police are not the right starting point.

27. The way forward is philosophical and well-intentioned conversation aimed at bridging the gaps in the law. If police need laws to deliver certain protections to the community, they should make that argument, which then needs to be balanced against our civil liberties and our tradition as a tolerant liberal society. Modifications are required, and in the meantime there is plenty of work for lawyers to work their way through the various defences.

BIOGRAPHY

David Shoebridge

Greens MP, NSW Legislative Council

David Shoebridge has been a Greens member of the NSW Legislative Council since September 2010. His portfolio responsibilities include Justice, Police, Planning, Industrial Relations, Gun Control and Local Government. Prior to his appointment to NSW Parliament, Mr. Shoebridge worked as a solicitor for Taylor and Scott, and as a barrister at Denman Chambers with a focus on employment, discrimination, industrial and tort law.

The Hon. Peter Anderson AM

Former Politician, New South Wales Legislative Assembly

Peter Anderson, was a member of the New South Wales Legislative Assembly between 1978 and 1995. During his parliamentary career, Mr. Anderson held a range of portfolios including Minister for Health, Minister for Aboriginal Affairs, Minister for Youth and Community Services, Minister for Local Government, Minister for Corrective Services, Minister for Police and Emergency Services between 1981 and 1988. Before entering in to politics, Mr. Anderson was also a member of the NSW Police Force and a Police Prosecutor.

BIBLIOGRAPHY

Benchmark Link

https://benchtv.com.au/cletv/consorting-laws-in-nsw-protecting-the-public-or-infringing-civil-liberties/

Cases

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Legislation

Crimes Act 1900 (NSW)

Crimes Amendment (Consorting and Organised Crime) Act 2012 (NSW)

Summary Offences Act 1970 (NSW)

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Vagrancy (Amendment) Act 1929 (NSW)