IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S36 of 2014

BETWEEN:

SLEIMAN SIMON TAJJOUR
Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

PLAINTIFF'S REPLY

Part I: Certification

1.1. This document is in a form suitable for publication on the Internet.

Part II: Reply

2.1. The defendant contends that the implied freedom is not effectively burdened by the impugned provision. Firstly, the defendant argues that the effect upon the implied freedom is "so slight as to be inconsequential", *see* defendant's submissions at [29], *quoting Monis v. The Queen* (2013) 249 CLR 92 at 212 [343] *per* Crenann, Kiefel and Bell JJ.; *see also* submissions for Victoria at [8]. The view expressed by their Honours, rejected by the other member of the Court (at [64] *per* French CJ; at [118] *per* Hayne J.; at [236] *per* Heydon J.), and not expressed as a conclusion ("it may be accepted that…"), must be seen against the backdrop of this Court's reasoning in *Unions NSW v. NSW* (2013) 88 ALJR 227 at 236 [40] *per* French CJ, Hayne, Crennan, Kiefel and Bell JJ.: "Questions as to the extent of the burden and whether it is proportionate to the legitimate purpose of a statutory provision arise later in connection with the second limb enquiries. The question at this point is simply whether the freedom is in fact burdened." It is submitted that whether a burden is "inconsequential" or not is a question of extent and is to be dealt with at the second stage of the *Lange*-test.

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2.2. Next, the defendant, proceeding on the assumption that the extent of the burden is relevant to the so-called first limb, argues that there is no effective burden, because any burden which arises is limited, given the sphere of application of s. 93X (*see* defendant's submissions at [30]; *see also* submissions for Victoria at [13]). The defendant's submission impliedly acknowledges that there is a burden, but seeks to diminish the extent of that burden.

2.3. Taking each matter in turn, it will be seen that none of the matters, to which reference has been made, undermine the submission that there is an effective burden upon the implied freedom. It is argued that the burden only applies where there has been a "deliberate seeking out or accepting an association". While the plaintiff accepts that a person cannot be said to be consorting with a "convicted offender", where he chances upon the "convicted offender", that hardly limits the burden. With the exception of broadcasts made to the public at large[1], any communication must be the result of a deliberate interaction between two individuals. Given the breadth of the expression "consorting", such an element also does little to restrict the application of the legislation.

2.4. True it is that s. 93X can have application only where there has been a consorting with at least two "convicted offenders". In this context, the submissions of the Australian Human Rights Commission (at [39(a)]) and Victoria (at [13(d)]) should be mentioned. Both submissions appear to be based on the assumption that the expression "convicted person", within the meaning of s. 93W *Crimes Act 1900* is limited to persons convicted "on indictment". However, that is not the case. Section 93W speaks of an "indictable offence", and therefore does not draw the distinction between an indictable offence, which has been prosecuted on indictment, and one which has been prosecuted summarily, *compare* s. 3 *Criminal Procedure Act 1986* ("'indictable offence' means an offence (including a common law offence) that may be prosecuted on indictment"). Therefore, there is no link between a person's status as a "convicted offender" and his culpability, which might be anywhere on a long continuum (*see* AHRC submissions at [41]-[43]).

2.5. This also undermines the submission advanced by South Australia (at [38]) that, "[t]he nexus to criminal conduct is no mere supposition on the part of the legislature", and that "[t]he risk of criminal offending is identified by reference to past, and proven, conduct on the part of the individuals involved". Other than supposition, there is no reason to believe that associating with 2 or more persons on 2 or more occasions will render a person more likely to engage in criminal activity.

[1] Indeed, especially in this age of social media, it is questionable whether large-scale broadcasts might not also be caught by s. 93X. For example, a politician who maintains a Facebook page, on which he publishes statements, may be liable under this section, if he accepts "friend requests" from "convicted offenders", and continues to post such statements on his own page, even after being warned.

2.6. Indeed, the nexus between the restriction of communication and association, and the curtailment of future offending conduct, is far more nebulous than any stand-alone freedom of association might be. The legislation is not at all adapted to achieve its particular end. The definition of "convicted offender" includes all persons, no matter how long ago their offences were committed, no matter where in the world their offences were committed, and no matter what was the nature of the offence (as long as it was an indictable offence). The ambit of the prohibition is not reasonably appropriate and adapted.

10 2.7. More importantly, however, as Western Australia submits (at [73]), "[t]he extent of the burden is not determined by the number of people who might be affected by a prohibition". In any event, it is quite simply impossible to quantify a burden based on, say, the number of persons affected, and any invitation to the Court to consider that ought to be rejected.

2.8. Nor does the imposition of a requirement that there be a warning provide much by way of limitation. Such a requirement provides a person in danger of committing the offence with notice. However, in the absence of any limitations upon when a warning might be given, it is no more than a procedural
20 prerequisite to prosecution. The unfettered discretion given to police officers is incapable of confining the broad application of the legislation. Accordingly, the submission advanced by Queensland (at [15]) that a warning can be withdrawn – presumably as the result of an internal review mechanism – does not change this conclusion. If a warning has been properly given, there is no reason why such a warning would need to be withdrawn, particularly where there are no criteria by which the appropriateness of the warning is to be measured. As is acknowledged by South Australia (at [39]), the insertion of a warning requirement cannot save the scheme from invalidity.

30 2.9. Furthermore, as argued in the original submission, and supported by the submission advanced by the Australian Human Rights Commission (at [45]), the exceptions in s. 93Y apply narrowly, especially when one considers the superimposition of the requirement that any exempted association be "reasonable".

2.10. It is further submitted that contrary to the defendant's submissions at [31], the statute is not capable of being read down by the application of s. 31 *Interpretation Act 1987 (NSW)*. The process of reading down is "a process of construction, which is limited by the language and purposes of the statute."
40 *Monis v. The Queen* (2013) 249 CLR 92 at 210 [334] *per* Crennan, Kiefel and Bell JJ. If, as is argued, a person is more likely to become enticed to crime by even innocent association with convicted offenders, then it must also be accepted that the content of the communication or association is irrelevant. Accordingly, the very purpose of the statute necessarily restricts any communication, even of a legitimate, political nature. In those circumstances, the purpose of the legislation demonstrates that it should not be read down.

2.11. In arguing that the legislation is reasonably appropriate and adapted, the defendant points to counter-terrorism legislation found in Part 5.3 *Criminal Code (C'th)* (*see* defendant's submission at [60]) to demonstrate that the legislature may choose to criminalise even preparatory acts. However, it is notable that, even though such legislation was said to be "special" and "in many ways unique", the legislation was still premised on the act being connected with a terrorist act (*Lodhi v. R* (2006) 199 FLR 303 at 316 [61] *per* Spigelman CJ, *quoting with approval R v. Lodhi* [2006] NSWSC 584 at [69] *per* Whealy J.) and therefore being, in and of itself, harmful to society. The flaw in this legislation is that there is no such tether.

2.12. In relation to what might be called stand-alone right to freedom of association, the defendant advances the submission that such a right would be "nebulous" and "would cut down many laws" (defendant's submission at [57]). It is submitted that such an argument cannot answer the question of whether there is such a right implied in the *Constitution* or not. Moreover, to suggest that such a right would be nebulous, and therefore, presumably, unworkable (if that is what is meant) is contrary to the experience of other countries, which expressly provide such a freedom. On the contrary, in the United Kingdom, it has been said that *inter alia* the freedom of association, as guaranteed by Art. 10 of the *European Convention of Human Rights* and incorporated by virtue of the *Human Rights Act 1998 (UK)*, is "essential to the proper functioning of a modern democracy." *R (Countryside Alliance) v. Attorney-General* [2008] 1 A.C. 719 at 759 [56] *per* Lord Hope.

2.13. In relation to the question of how the treaty-making power of the Commonwealth executive might affect the ability of the States to fashion legislation, the defendant states that the plaintiff's argument is contrary to longstanding authority (*see* defendant's submissions at [58]). However, in none of the prior cases has this relationship between the Commonwealth and the States been addressed.

2.14. There are some values, which are fundamental to democratic constitutions, and are recognised as such internationally by instruments, such as the ICCPR. The conventions, international instruments and treaties recognising those fundamental values rightly express them and enable domestic recognition of their implication with the framework of a democratic constitution. This process occurs not merely by the requirement that domestic legislation be construed so as to conform to such instruments, but also by the assistance they provide in identifying fundamental values implied in a constitution. Whereas in Australia the Constitution provides for a Federation, wherein both the Commonwealth and the States play their respective roles, and both the Commonwealth and the States' legislatures are democratically elected, such Conventions provide a guidepost to determine the fundamental values underlying both.

2.15. Finally, the argument advanced on behalf of South Australia (at [61]) that acceptance of the plaintiff's submission would "dramatically change the constitutional division of power between the Commonwealth executive and State Parliaments" does not answer the question posed. An argument in that nature is in many respects reminiscent of what was argued on behalf of the States and rejected by this Court in *Commonwealth v. Tasmania* (1983) 158 CLR 1.

10 Dated: 12 May 2014

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