

**2019**

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**CRIMES (ANTI-CONSORTING) AMENDMENT BILL 2019**

**EXPLANATORY STATEMENT**

Presented by

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## **CRIMES (ANTI-CONSORTING) AMENDMENT BILL 2019**

This explanatory statement relates to the Crimes (Anti-Consorting) Amendment Bill 2019 (the Bill) as presented to the Legislative Assembly. It has been prepared to assist the reader of the Bill to understand the policy rationale and the scope of the amendments and to help inform debate. It does not form part of the Bill and has not been endorsed by the Legislative Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

### **Background**

In 2009, NSW started a process of introducing anti-consorting legislation aimed at Outlaw Motorcycle Gang (OMCG) activity.

At that time, Shadow Attorney-General Jeremy Hanson warned that, without similar legislation in the ACT, the disparity would create an ‘oasis’ effect which would attract OMCG members and see an increase in associated criminal activity.

That is precisely what has occurred. Where there was once a single OMCG operating in the ACT, there are now at least four, including the internationally notorious Satudarah gang, an organisation completely outlawed in their home country.

Many reports have appeared proving an increase in both frequency and severity of criminal incidents. These included “Outlaw bikie gangs heading to Canberra because of the ACT’s soft laws on consorting”, “Bikies drawn to Canberra due to lack of anti-gang laws”, “Calls for anti-consorting laws after Comancheros’ Canberra run”, and “ACT needs anti-consorting laws now before someone dies”.

Canberra was described as a ‘war zone’ after a shooting and firebombing in a suburban residence, and the latest incident included shots being fired into a home where children were present.

Since NSW introduced their laws, bikie gangs in the ACT have increased from one to at least four, and police reports of assaults related to OMCGs have increased from 1 in 2014 to 20 in 2018.

In late 2018 the NSW laws were modified to provide protections for young people and Aboriginal and Torres Strait Islander people following a NSW Ombudsman’s Report. Canberra remains an oasis for OMCG activity due to the differences in the laws between the two jurisdictions.

## Overview of the legislation

The *Crimes (Anti-Consorting) Amendment Bill 2019* (the Bill) responds to community concerns about intimidating, harassing and violent conduct. The Bill mirrors the NSW laws as they were modified following the Ombudsman's report.

The Bill seeks to protect the public's right, particularly the right to life and security of person. It is designed to allow people to enjoy security in their homes and streets free from the intimidating and violent conduct of others. It has strict limitations and specific exclusions.

The Bill will prevent certain 'habitual' consorting between defined persons. This will only affect consorting with persons already convicted of criminal behaviour, only apply once an official warning has been issued, only apply outside legitimate purposes, and only for a limited time.

Once an official warning is received, it will be an offence to consort, by any means, with the convicted offender. The intention is to prevent and de-escalate the acts of violence and retribution currently being seen in the community, and to ensure the community can enjoy peace and freedom from violence and free from intimidating conduct.

## Human rights

The Bill creates a limitation on a person's right to association protected by section 15 of the *Human Rights Act 2004* (HRA), and consequently the right to freedom of expression (s16) and the right to equality and non-discrimination (s8).

Given these limitations are imposed in order to protect the rights of the community seeking to exist peacefully in their streets and homes, the limitations are reasonable and demonstrably justified in consistent with requirements of section 28 of the HRA.

### *The nature of the right affected*

The right to free association is a fundamental part of Australian society. Within and connected to this right is also the right to a freedom of expression by that association (s16) and the right to equality and non-discrimination by exercising a choice of association (s8). These rights are limited by the Bill.

### *The importance of the purpose of the limitation*

The purpose of the limitation is to provide protection and security for all members of the community.

The limitation is intended to ensure that any person can exist safe in their homes, streets or businesses, and not be subject to random, violent attacks, or to be 'caught in the crossfire'; rights our society also recognize as a fundamental part of Australian society.

At least two attacks have involved children, including one in which children were in a home that was subject to firearm and arson attacks. Others involved people in neighbouring properties narrowly avoiding bullet strikes in their homes.

It is a vital and fundamental responsibility of government to protect the safety of citizens. It is also a fundamental responsibility to prevent crimes and violent behaviour where possible. The purpose of the limitations in this Bill are to achieve those ends.

### *The nature and extent of the limitation*

The nature of the limitation is that, once warned, certain people will be unable to 'habitually consort' with identified criminal individuals.

The extent of the limitation created by the Bill is narrow, as it relates to specific people, who must have an existing criminal record, and other identified persons who are given an official warning before any offence is committed. It does not interfere with a person's right to associate with any other people for any other reasons.

There are express exclusions against the limit being applied to young persons, and there is an automatic time limit. There is also a list of exceptions, and the consorting must be 'habitual', not coincidental.

As defined in the Act, this will mean a person must meet with at least two identified convicted criminals on at least two different occasions, to do so after being given an official warning in relation to each of those offenders, and to do so in a way not listed as a legitimate form of contact.

The list of exceptions is extensive, and includes associations such as meeting family members, accessing health or welfare services including housing, employment, rental or financial services and extends to rehabilitation, counselling, drug and alcohol welfare services. It also provides a general exemption for contact which is, in the view of the court, 'reasonable in the circumstances.'

In addition, the operation of the entire Act will be subject to Ombudsman's oversight.

This results in a defined restriction in the nature of the limit, and reasonable and proportional limits to the extent of the limitation, all for the purpose of keeping the community of the ACT safe from violence and intimidation.

*The relationship between the limitation and its purpose*

Everyone has the right to feel safe in their community and it is reasonable and proportionate for the community to take measures to ensure that right is protected. With the evidence of increased occurrence and severity of criminal violence, all linked by a common core element of association, there is a clear link between the limit and its purpose.

*Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve*

The Bill is designed to protect members of the community in a manner that limits rights of some individuals to the minimum extent possible to achieve its purpose.

In this instance, that recognises the fact that NSW, a jurisdiction which completely surrounds the ACT, has identical laws in place which were re-affirmed with tri-party support late in 2018.

It is the disparity in protections between the jurisdictions that has caused the attraction of more criminal gangs to the ACT and the escalation in violence. It follows that nothing less than parity with NSW will address this problem.

There have been calls for nationally consistent laws to deal with organised criminal gang activity for some time. However, in the absence of those laws, the very minimum standard that will be effective in achieving the stated purpose of community safety is to mimic as closely as possible the laws in NSW.

The Bill also only limits behaviour to ‘habitually consorting’, which is actively and repeatedly seeking out convicted criminal offenders they have been warned to avoid.

The Bill does not apply to young persons at all, provides as noted an extensive list of exclusions and makes a careful consideration for circumstances related to Aboriginal and Torres Strait Islander people.

## The High Court Case

The legislation that this Bill was modelled on was examined by the *High Court Tadjour v NSW*.<sup>1</sup>

While the NSW legislation exists under a different jurisdictional framework, there are some pertinent parallels.

In that case, the High Court considered whether the restriction was for a legitimate purpose. It was found it was, as follows:

“New South Wales submitted that the legitimate object or end of s 93X is to prevent or impede criminal conduct by deterring non-criminals from consorting in a criminal milieu and deterring criminals from establishing or building up a criminal network. That submission should be accepted.”

The High Court also considered the NSW laws under the International Covenant on Civil and Political Rights, an international Human Rights covenant analogous in some ways to the HRA, and held as follows:

“...it was submitted that the Parliament of New South Wales could not enact a law infringing upon the "right to freedom of association with others" set out in Art 22 of the ICCPR, to which Australia is a party. There is no authority which would support such a proposition.”

They considered whether there were any other lesser means by which the same ends could be met. They found:

“No reasonable and equally practicable alternatives having a lesser effect on the freedom have been identified. A conclusion that s 93X goes no further than is reasonably necessary in order to achieve its objective is therefore open.”

As stated, even though there are distinctions, the case shows that the laws upon which this Bill was drafted was found to be valid and effective by the High Court.

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<sup>1</sup> *Tadjour v New South Wales* [2014] HCA 35 8 October 2014

## CLAUSE NOTES

### **Clause 1                      Name of Act**

This Act is the *Crimes (Anti-Consorting) Amendment Act 2019*.

### **Clause 2                      Commencement**

This Act commences on the day after its notification day.

### **Clause 3                      Legislation Amended**

This Act amends the *Crimes Act 1900*.

### **Clause 4                      Offences against Act – application of Criminal Code etc**

Section 7A, note 1, new bullet point, to insert ‘s84 (Consorting).’

### **Clause 5                      New Part 5A**

s83 defines that ‘consort’, for the purposes of this part, means to ‘consort in person or by any means, including electronic or other forms of communication.’

s84 contains the elements of the offence. It holds that a person commits an offence only if they are 14 years or older, who then habitually consorts with convicted offenders after being given an official warning in relation to each of those offenders.

‘Habitually consort’ is defined in this section as consorting with at least two convicted offenders on at least two occasions. It also details when an official warning ceases to have effect, and various other definitions for this section.

s85 details certain consorting which is to be disregarded when applying s84, these include legitimate associations such as meeting family members, accessing health or welfare services including housing, employment, rental or financial services including rehabilitation, counselling, drug and alcohol welfare services. It also provides a general exemption for contact which is, in the view of the court, ‘reasonable in the circumstances.’

It also specifically recognises that, for a defendant who is an Aboriginal or Torres Strait Islander, the exception includes contact with that person's extended family kin according to the indigenous kinship system of the defendant's culture.

s86 provides for a review of the operation of this Act by the Ombudsman as soon as practicable after the end of the 2<sup>nd</sup> year of operation.

## **Clause 6                      Dictionary**

This section includes the new definition of 'consort' for part 5A (Consorting).