



**RULE OF LAW**  
INSTITUTE OF AUSTRALIA

# Legal Responses to Criminal Organisations in NSW and QLD

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The Rule of Law Institute of Australia (RoLIA) is an independent, politically non-partisan, not-for-profit organisation which promotes and protects the rule of law in Australia. RoLIA's primary focus is delivering education programs in schools and universities, and making submissions to Government about rule of law issues.

For further information visit our website: [www.ruleoflaw.org.au](http://www.ruleoflaw.org.au)

Have a question about this resource or a rule of law issue?

Ask us on Facebook or Twitter: 'Rule of Law Institute of Australia' / @RoLAustralia

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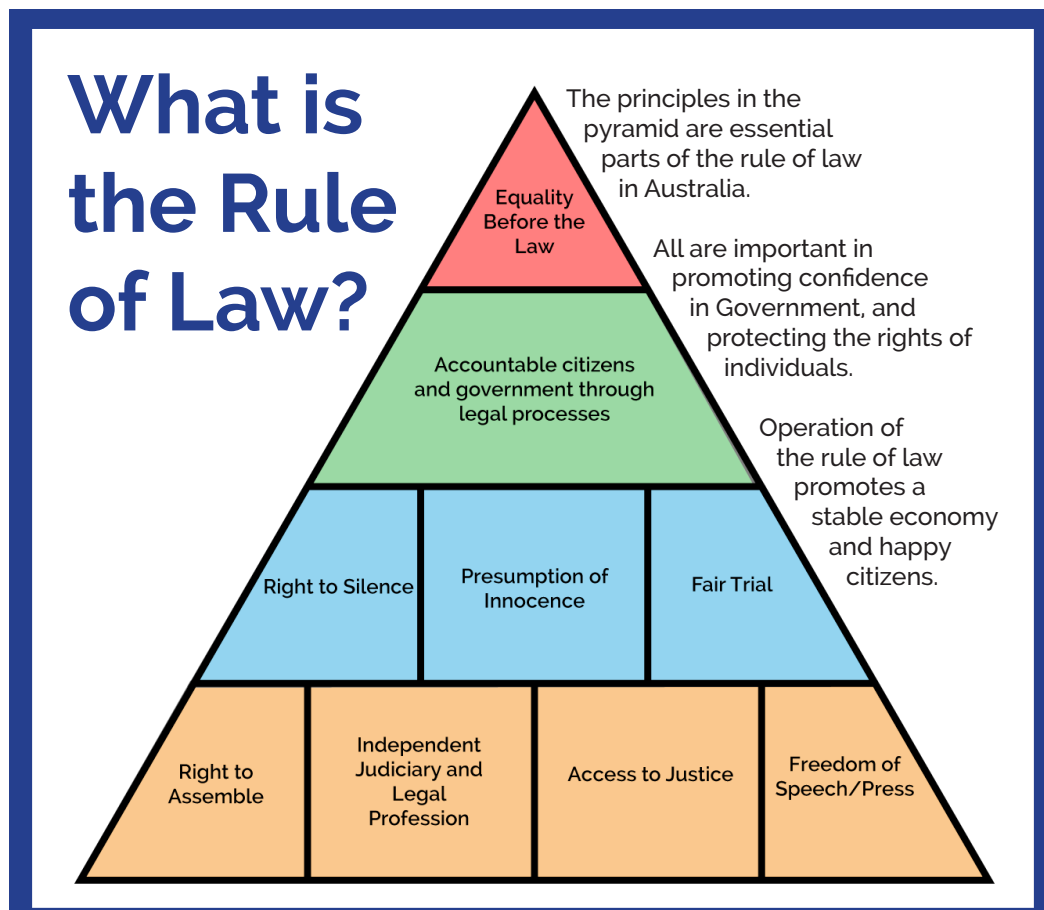
# What is the Rule of Law?

The central principles of the rule of law are that **power must be used according to law**, and that everyone should be equal before the law.

The **presumption of innocence** has developed from equality before the law to prevent a person from being punished unless they are proven guilty according to a legal process. That **legal process must treat all people equally** according to the rights and freedoms they are entitled to under law.

The **right to silence** allows someone accused of a crime to avoid incriminating themselves. This is a fundamental principle of criminal law in Australia. The right to silence is also instrumental in ensuring the **onus of proof remains with the prosecution**, and that an accused does not have to prove their innocence.

A fundamental of the rule of law is **fairness in legal processes and proceedings**. People should have the right to see the evidence which is held against them, and have the ability to have their defence heard and considered by an **independent and impartial court**.



# What is Organised Crime?

Organised crime involves criminal activity conducted by a group of people who are looking to make money from crime.

People in organised crime groups may share attributes such as a similar cultural or ethnic backgrounds, or shared interests such as riding motorcycles.

Organised crime can involve illegal activities such as:

- the making of, selling or importation of illegal drugs and firearms;
- fraudulent or otherwise illegal practices involving money laundering, gambling, prostitution, and
- committing violent offences to intimidate, or gain advantage over another group.

Motorcycle clubs are one of the most commonly recognisable groups in Australia. They are seen to have links or involvement with organised crime. It is widely accepted that there are criminal elements in some motorcycle clubs but this does not mean that all members of these clubs are criminals or are involved in organised crime.

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## Organised Crime Laws and the Rule of Law

Many of the laws passed to deal with organised crime across Australia limit or diminish equality before the law in the following ways:

- Mandatory sentences which reduce the independence of the courts to make sentencing decisions which fit the crime.
- Punishing people who remain silent or refuse to give information to law enforcement that will incriminate them.
- Shifting the onus of proof away from the prosecution, and removes an accused's presumption of innocence.

Criticisms of such laws in this booklet discuss how their operation reduces equality before the law.

Although the Queensland and New South Wales Governments have the power under their Constitutions to make such laws, the

The Australian Crime Commission, Australia's leading law enforcement and criminal intelligence organisation in the battle against organised crime, estimates that organised crime costs Australia \$15 billion annually.

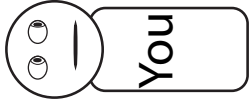
Isolating people involved in these groups has been difficult for law enforcement, and even with extensive surveillance powers, many criminal organisations have been able to effectively evade prosecution for their activities. The response by State and Territory Governments around Australia has been to implement laws which limit or remove traditional protections in the criminal law such as the right to silence, privilege against self-incrimination, and reversing the onus of proof which requires an accused to prove their innocence.

Discussion of the rule of law is at the centre of the balancing act between protecting individual rights and passing laws to deal with organised crime.

rule of law requires governments to be held accountable for the laws they pass. It is for this reason that freedom of speech and the media are important in a rule of law society.

Governments on both sides of politics in Australia have supported and passed laws which diminish equality before the law. However, credit must be given to politicians, government and law enforcement agencies as they grapple with difficult legal and social problems in the ways they think best. Their roles as authority figures are essential in maintaining the rule of law in Australia.

The rule of law, however, is not concerned with political justifications or the popularity of the laws in the eyes of the public. **It is concerned with equality before the law being maintained.**

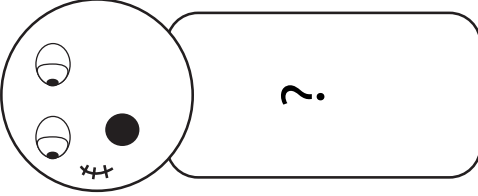
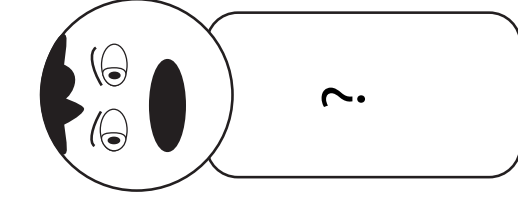
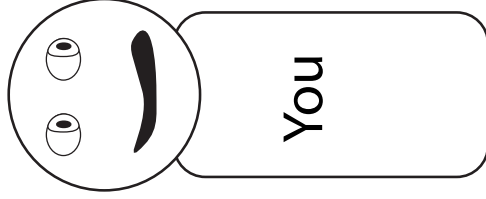


**CONSORTING &**  
(to be in company with)

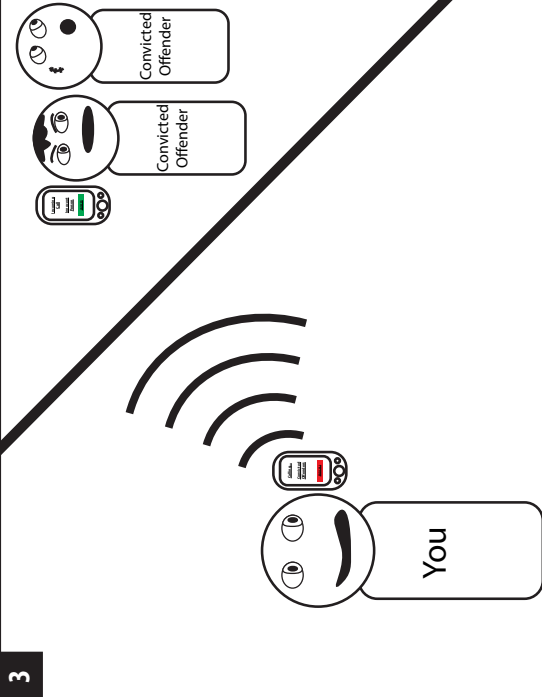
**HOW TO AVOID CONSORTING WITH CRIMINAL OFFENDERS IN NSW**

**A guide from the Rule of Law Institute of Australia**

To help police in the fight against organised crime, you can now be charged for **conorting with convicted offenders**. **Be on your guard:** a convicted offender is someone who has been found guilty of an **indictable offence**!



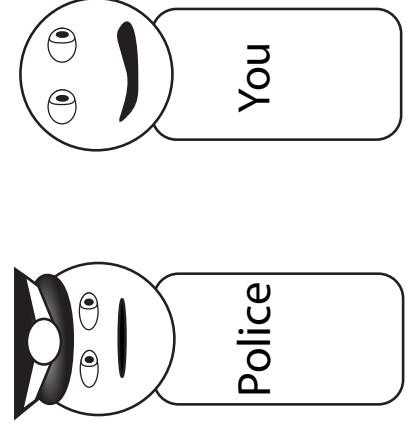
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After you have been warned you still need to consort with the convicted offenders on at least two separate occasions. **Beware:** this includes over electronic forms of communication like SMS, email, or telephone.

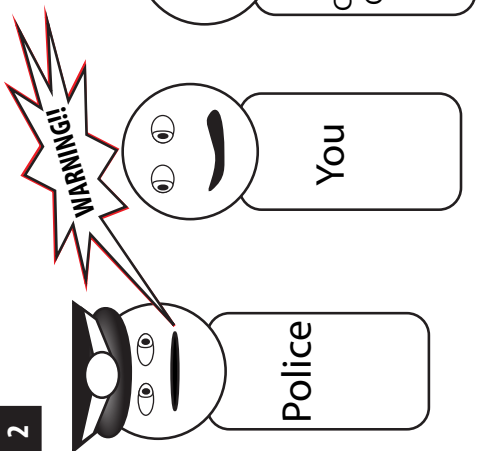
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If you are caught consorting police may charge you. If proven in court you could go to jail for up to 3 years. There are defences you can use if you have been consorting with certain people, but you must satisfy the court it was reasonable provided: a family member, a coworker, a teacher or fellow student, a doctor or a lawyer.



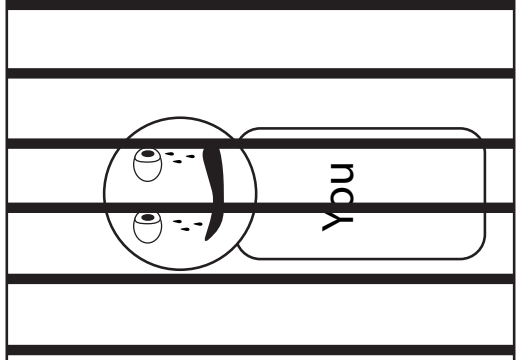
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To be found guilty of consorting it must be proven you consorted with at least 2 convicted offenders. Before you can be charged, police must warn you in writing or in person that the people you are consorting with are convicted offenders!

Conorting with criminal offenders is serious business. You might end up in prison and become a convicted offender yourself.



**Be careful not to associate with convicted offenders!**

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# The Consorting Law in NSW

## What is consorting?

Consorting with criminal offenders is an offence under the **Crimes Act 1900 (NSW)**. It allows the police to prosecute a person who has 'consorted' with at least two convicted offenders on two separate occasions.

Police must give an oral or written warning to a person to inform them that the people they are associating with are convicted offenders.

## Purpose of Law Reform

The consorting offence was introduced to target criminal organisations such as outlaw motorcycle gangs, and prevent their members from associating.

## Defences to Consorting

A person must prove to the court that the consorting was reasonable. Circumstances such as consorting with a family member, in the course of lawful employment, training or education, and during the provision of health

care or legal advice are the defences to consorting included in the **Crimes Act 1900 (NSW)**

## Legal terminology involved in defining the consorting charge:

**consort** - to associate with a person, including by electronic or other form of communication.

**convicted offender** - a person who has been found guilty of an indictable offence.

**habitually consort** - to consort with at least 2 convicted offenders, on two separate occasions.

**official warning** - a oral or written warning from a police officer given to inform a person that a convicted offender is a convicted offender, and that consorting with them is an offence.

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### Rewrite the following sentence into a paragraph to include the terminology used in the consorting offence:

A person must **habitually consort** with **convicted offenders** after receiving an **official warning** from NSW Police.

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### Case: R v Foster [2012] Local Court NSW

Charles Foster was the first person to be found guilty of consorting with convicted offenders in July 2012.

Foster had 'consorted' with convicted offenders who were long time friends, one of which he was living with at the time. He had no links with criminal organisations despite having served time in jail for other offences.

He received a sentence of 12 months with a non-parole period of 9 months. He appealed his conviction in the District Court of NSW and was allowed a retrial.

High ranking members of the Nomads Motorcycle Club were also charged with consorting in late 2012.

Foster, along with the members of the Nomads have been granted special leave to appeal the consorting offence in the High Court. The hearing for the case will be on 10 June 2014.

One of the arguments against the consorting law is that it interferes with the freedom of political communication that has been found in the Australian Constitution.

## Rule of Law Concerns with Consorting

The **Rule of Law Institute of Australia** has the following concerns about the consorting offence:

- A person found guilty is charged with the act of associating which is of itself not a criminal act.
- The amount of people in the community who are convicted offenders makes the possible application of this offence very broad.
- The offence was introduced to target members of criminal organisations, however, it is defined broadly and can be used widely at the Police's discretion to target people not involved with criminal organisations.
- Punishing someone with imprisonment for associating with convicted offenders is not productive given they will spend more time with convicted offenders in jail
- The convicted offenders involved in proving the offence are being indirectly punished for who they are, not what they have done.

The Rule of Law Institute of Australia is an independent not-for-profit, politically non-partisan organisation which promotes discussion of rule of law issues in Australia. It seeks to uphold transparency and accountability in government and strongly supports the presumption of innocence, independence of the judiciary and procedural fairness in the Australian legal system.

## Balancing the Needs of Society with the Rights of the Individual

**Organised crime and violence should not be tolerated in Australian society.** The courts and police should be able to prosecute criminal organisations to protect the public from violence and criminal activities; however, there is a delicate balance between protecting the public and trampling on rights and freedoms.

### Limits to Individual Rights

- The presumption of innocence is eroded because a person can be imprisoned simply for the act of associating
- If evidence exists of individuals being involved in serious criminal activity, they should be charged with existing criminal offences, not for just associating with others. This entitles them to the protections of the criminal trial process.
- Equality before the law is diminished by using a person's status as a 'convicted offender' to decide whether another person is guilty of a criminal offence.

- Consorting has been shown to disproportionately target vulnerable and disadvantaged communities. The NSW Ombudsman's issues paper on the NSW consorting offence released in November 2013 noted that: 496 out of a total of 1247 people who were subject to the offence were Indigenous Australians. Subject to the offence means either warned or charged.

### Possible Solutions

- Law reform and government should focus on ways to support the police prosecuting members of criminal organisations for criminal offences, not an offence which relies on criminalising association.
- Law enforcement agencies already have extensive powers allowing surveillance, search and seizure of goods, as well as compelling people to answer questions. Are anti-association laws necessary when such extensive powers are already available to law enforcement agencies?



# Law Reform Issue: Changes to the Right to Silence in NSW

## What changed?

The **Evidence Act 1995 (NSW)** was amended to allow a judge to **direct a jury** to draw an '**unfavourable inference**' if the accused does not mention something when questioned by police.

The person must be given the special caution by police in the presence of their lawyer which can only be used if the person is charged with an offence carrying a penalty of 5 years or more imprisonment.

The special caution and unfavourable inference cannot be used in the trial of a person who is under 18 years of age.

### Old Caution

*"I am going to ask you some questions. You do not have to say or do anything unless you wish to do so but anything you do say will be used in evidence."*

### New Special Caution

*"You are under arrest for \_\_\_\_\_. You do not have to say or do anything unless you wish to do so, anything you do say will be used in evidence. It may harm your defence if you do not mention when questioned something you later rely on in court."*

## What is an 'unfavourable inference'?

The judge can instruct the jury to use the accused's silence when questioned as evidence of guilt or that their evidence is unreliable.

An unfavourable inference cannot be the only factor in deciding guilt, other evidence must be provided by the prosecution.

## What is a 'jury direction'?

At the end of a trial the judge directs the jury on what it must consider when deliberating. See the Judicial Commission of NSW's Bench

Book on instructing juries about the right to silence:

[http://www.judcom.nsw.gov.au/publications/benchbks/criminal/silence-evidence\\_of.html](http://www.judcom.nsw.gov.au/publications/benchbks/criminal/silence-evidence_of.html)

## Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013 (NSW)

Makes the defence and prosecution provide details of their case to each other before the trial. Previously, the defence only had to reveal specific aspects of their case pre-trial such as alibis and if they intended to offer the defence of mental impairment.

**Police have stated that these laws will allow them to deal more effectively with the 'wall of silence' they encounter when prosecuting criminal organisations.**

### Benefits

**To the prosecution** - silence of the accused can form evidence of guilt. This places pressure on a defendant to answer questions pre-trial, and anything new they do say during the trial is subject to an '**unfavourable inference**'.

May reduce the length and complexity of some trials by discouraging a defendant from raising new evidence.

The defence cannot 'surprise' the prosecution with new evidence in the middle of the trial

## Evaluate and Discuss

### Limitations

Damages the presumption of innocence and limits the right to silence

Defendants who are in a vulnerable state, confused, stressed, or have poor English, will not have the protection of the right to silence when questioned

Limits the advice lawyers can give their clients. Lawyers may be reluctant to attend police stations when an accused is questioned by police

Pre-trial disclosure of defence cases may increase costs for the defence

# Overview of Organised Crime Laws in Queensland

## 2009

The *Criminal Organisation Act 2009 (Qld)* or COA was introduced by the former Bligh Government. COA allowed for an organisation to be declared a 'criminal organisation' and for 'control orders' to be made against members of the organisation which made it a criminal offence for them to associate with other controlled members.

The Finks Motorcycle Club was the first organisation to be targeted under COA. It appealed to the High Court of Australia arguing that COA was invalid under the Australian Constitution.

## 2011

In 2011 the Queensland police asked the Queensland Supreme Court to declare the Finks Motorcycle Club as a criminal organisation under COA. The Finks challenged this move in court and the case was taken to High Court of Australia by Queensland Police.

## 2013

The Finks challenge to COA was rejected by the High Court in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd [2013] HCA 7*. The application to declare the Finks a criminal organisation was abandoned when the Newman Government passed the VLAD Act, CODA and CODOLA.

### How fast did Parliament pass these laws?

The Acts below amend many different Acts under the law of Queensland such as the *Criminal Code 1899*, *Corrective Services Act 2006*, the *Crime and Misconduct Commission Act 2001* among others.

The speed at which Parliament passed these laws raises serious questions about whether they received adequate scrutiny by the Parliament. A law that is not adequately scrutinised by

Parliament is more likely to contain errors, and have unintended effects which damage the certainty and predictability of the law. Certainty and predictability in law is especially important when laws affect individual rights and freedoms.

A system of committees reviews laws before Queensland Parliament. However, this system is only effective when it has adequate time to consider a law:

	VLAD	CODA	CODOLA
<b>Full Name</b>	<i>Vicious Lawless Association Disestablishment Act 2013</i>	<i>Criminal Law (Criminal Organisations Disruption) Amendment Act 2013</i>	<i>Criminal Law (Criminal Organisations Disruption) &amp; Other Legislation Amendment Act 2013</i>
<b>Number of Pages</b>	17	99	177
<b>Introduced to Parliament</b>	15/10/2013	15/10/2013	19/11/2013
<b>Passed by Parliament</b>	15/10/2013	15/10/2013	21/11/2013
<b>Considered by Committee?</b>	NO	NO	YES



## Organised Crime Laws & The Separation of Powers

The separation of powers is required at the Federal level by the Australian Constitution. That means the three arms of government: the parliament, the executive, and the judiciary perform separate functions, and power is balanced them with checks on the exercise of their powers. For example:

The judiciary is a check on the power of the Parliament because it can strike down laws which are unconstitutional.

The Constitution of Queensland does not provide for such a strict separation of powers as the Australian Constitution. However, the concept that each arm of government should not interfere with the role of the other is widely accepted, and well established in convention.

The CODA Act allows the Attorney-General of Queensland to add organisations to a list of "criminal organisations". Being on this list, members of these organisations are subject to an anti-association law, which makes them guilty of an offence for the act of being together.

The Queensland parliament has introduced mandatory sentences under the VLAD Act. Under the VLAD Act judges must hand down an additional mandatory sentence that is not

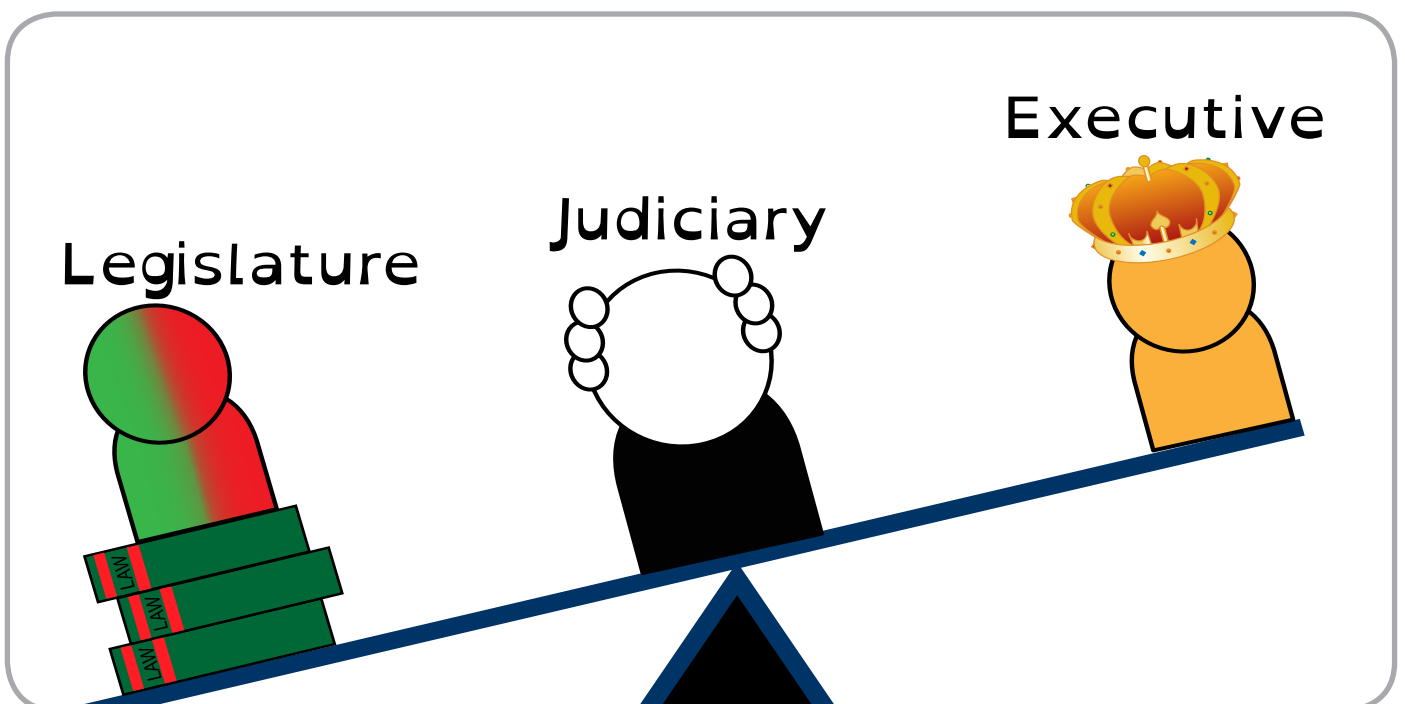
proportionate to the crime. This limits the role of judges in sentencing in a way which diminishes their role under the separation of powers.

This means that in Queensland the Attorney General, who is a member of the executive, and the parliament, which has passed the mandatory penalty, have targeted a group of people and effectively sentenced them for the act of associating.

This severely limits the role of the judiciary in its power to interpret the law based on the facts of the case.

The Queensland Government has implied that judges should apply the laws according to the policy objectives of the parliament. However, if they did so this would be another breach of the separation of powers because courts are required to be independent and impartial, even if this means interpreting the law in a way that does not agree with Government policy.

**People who are the subject of these laws do not receive equality before the law.**



**What is a Vicious Lawless Associate?** The *Vicious Lawless Association Disestablishment Act 2013 (VLAD Act)* allows for a person to be given the legal status of a 'vicious lawless associate' (VLA) for the purpose of sentencing them for a declared offence.

Their status as a VLA means that they will receive a **mandatory sentence** of imprisonment in addition to the penalty for the crime committed.

**How do you become a Vicious Lawless Associate (VLA)?** A person becomes a VLA when that person does all of the following:

1. commits a declared offence (see list on opposite page)
2. participates in the activities of a group or organisation
3. committed the declared offence while participating in the activities of the association.

**If the offender can prove that the purpose of the organisation they belong to is not to engage in committing a declared offence they will not be made a VLA.**

**What is a group/organisation?** The VLA must commit the offence as part of the activities of a group or organisation in which they participate or are a member. The definition of a group in the Act is very broad and includes the following:

- a) a corporation
- b) an incorporated or unincorporated association, club or league
- c) or any other group of 3 or more persons whether associated formally or informally, whether or not the group is legal or illegal.

**Punishment for being a VLA** After deciding on an appropriate sentence for the declared offence the judge must do the following if a person is found to be a VLA:

- sentence a person to **15 years** imprisonment without parole
- sentence a person to an additional **10 years** imprisonment if the person is an office-bearer or authority figure of the group/organisation

If the person does not receive a sentence of imprisonment for the declared offence, that person must still serve the mandatory sentence for being a VLA. The sentence can be reduced if the person agrees to cooperate with law enforcement authorities.

# Why is the VLAD Act Against the Rule of Law?

A key aspect of equality before the law is proportionality in sentencing - this is the idea that judges impose sentences that fit the facts of the particular case, and also look at similar cases as a guide to consistent sentencing.

Mandatory sentences lead to injustices as the judge is not free to impose a sentence which fits the crime. They also lead to inconsistency because all offenders receive the same sentence regardless of the seriousness of the crime committed.

The VLAD Act imposes a mandatory sentence for being a member of a group, not because of the seriousness of the offence or other sentencing considerations. In this way it imposes personal responsibility on an individual for the actions of a group of which they are a member, even if they are not involved in criminal activity.

Mandatory sentences are a breach of the separation of powers principle as the Parliament is effectively sentencing a person based on their membership of a group. In

doing so they provides no reasons for specific cases. Sentencing in criminal matters is the role of judges, not the parliament.

Judges provide written reasons for their sentences. This is what makes their decisions just and allows their decisions to be appealed if they are in error. A mandatory sentence imposed by legislation leaves very little room for appeal.

Equality before the law is damaged by mandatory sentencing because the punishment may not fit the crime, and judges are less able to perform the function of interpreting the law according to the facts of a particular case.

## Reversal of the onus of proof

The only defence against VLAD is to prove that the organisation they are a part of is not involved in committing declared criminal offences. This means the onus of proof shifts to the accused which denies them the presumption of innocence.

### Glossary

**Association** - any incorporated or unincorporated association, club or league, or any other group of 3 or more persons whether associated formally or informally, whether or not the group is legal or illegal.

**Office bearer** - a person who is the president, vice-president, sergeant-at-arms, treasurer or secretary, etc... of the association or a person recognised to have authority in the association by words or actions.

**Mandatory sentence** - a fixed sentence which must be imposed by a court.

**Maximum sentence** - the maximum sentence a judge can issue for a criminal offence. Judges only issue the maximum sentence for the most extreme cases of an offence.

**Onus of proof** - in a criminal proceeding the prosecution bears the onus of proof. When this is reversed the accused loses the presumption of innocence because an accused must prove they are innocent.

## List of Declared Offences Under VLAD

- Criminal Code 1899 (QLD)**
  - Riot
  - Affray
  - Retaliation against or intimidation of a judicial officer, juror or witness
  - Attempting to pervert justice
  - Aiding persons to escape from lawful custody
  - Unlawful sodomy
  - Indecent treatment of children under 16
  - Owner etc. permitting abuse of children on premises
  - Carnal knowledge with or of children under 16
  - Abuse of persons with an impairment of the mind
  - Procuring young person etc. for carnal knowledge
  - Procuring sexual acts by coercion
  - Taking child for immoral purposes
  - Incest
  - Obscene publications and exhibitions involving children under the age of 16
  - Making child exploitation material
  - Distributing child exploitation material
  - Possessing child exploitation material
  - Maintaining a sexual relationship with a child
  - Procuring engagement in prostitution
  - Knowingly participating in provision of prostitution
  - Carrying on business of providing unlawful prostitution
  - Having an interest in premises used for prostitution
  - Permitting young person etc. to be at place used for prostitution
  - Murder
  - Manslaughter
  - Attempt to murder
  - Accessory after the fact to murder
  - Threats to murder in document
  - Conspiring to murder
  - Disabling in order to commit indictable offence
  - Stupefying in order to commit indictable offence
  - Grievous bodily harm
  - Torture
  - Attempting to injure by explosive or noxious substances
- Bomb hoaxes
- Administering poison with intent to harm
- Wounding
- Setting mantraps
- Dangerous operation of a vehicle
- Assaults occasioning bodily harm
- Serious assaults
- Assaults in interference with freedom of trade or work
- Rape
- Attempt to commit rape
- Assault with intent to commit rape
- Sexual assaults
- Kidnapping
- Kidnapping for ransom
- Unlawful stalking
- Stealing
- Stealing firearm for use in another indictable offence
- Stealing firearm or ammunition
- Robbery
- Attempted robbery
- Extortion
- Burglary
- Receiving tainted property

- Corrective Services Act 2006**
  - Unlawful assembly, riot and mutiny

- Criminal Proceeds Confiscation Act 2002**
  - Money laundering

- Drug Misuse Act 1986**
  - Trafficking in dangerous drugs
  - Supplying dangerous drugs
  - Receiving or possessing property obtained from trafficking or supplying
  - Producing dangerous drugs
  - Possessing dangerous drugs

- Weapons Act 1990**
  - Possession of weapons (if liable to imprisonment for 7 years or more)
  - Unlawful supply of weapons (if liable to imprisonment for 7 years or more)
  - Unlawful trafficking in weapons

CODA introduced a new criminal offence: **Participants in criminal organisation being knowingly present in public places**. This new offence relies on a list created by CODA, which is a part of the *Criminal Code 1899 (Qld)*. This list is decided upon by the Attorney General on the advice of the Queensland Police and contains the names of criminal organisations and their addresses.

**Rule of Law Concerns**

A **participant** means someone involved with the criminal organisation. The definition of participation is very broad, see page 13 for the full definition.

**Criminal organisations** are declared by the Attorney General (AG). The list currently contains 26 criminal organisations and is called the *Criminal Code (Criminal Organisations) Regulation 2013*.

A **minimum penalty** is another type of **mandatory sentencing**. See page 7 for the issues with mandatory sentencing.

**Reversal of the onus of proof** - the accused must prove the organisation is not a criminal organisation.

**Guilt by association** - The person charged is guilty of this offence because of the criminality of others, not necessarily their own criminal acts.

60A Criminal Code 1899(Qld)

**Participants in criminal organisation being knowingly present in public places**

(1) Any person who is a participant in a **criminal organisation** and is knowingly present in a public place with 2 or more other persons who are participants in a criminal organisation commits an offence.

**Minimum penalty** — 6 months imprisonment served wholly in a corrective services facility.

**Maximum penalty** — 3 years imprisonment.

(2) It is a defence to a charge of an offence against subsection (1) to prove that the criminal organisation is not an organisation whose participants have as their purpose, or 1 of their purposes, engaging in, or conspiring to engage in, criminal activity.

CODOLA, much like CODA, amends many different laws in Queensland. It provides additional sanctions against members of criminal organisations:

- A person identified as a participant in a criminal organisation is declared a prohibited person.
- Prohibited persons can be refused licenses to be electricians, builders, liquor industry, tattoo artists and other trade licences.
- The Police Commissioner can publicly disclose the criminal history of a person 'who at any time in the past' has been a participant in a criminal organisation

## Case Study : Sally Kuether, 'Life and Death'

Sally Kuether, a librarian from Brisbane, her partner, Phillip "Crow" Palmer, and Roland Germain were seen, on CCTV footage, by police drinking at a pub in Dayboro on the 19 December 2013.

Ms Kuether was wearing a jacket given to her by Mr Palmer with a patch displaying the insignia of the 'Life and Death' motorcycle club and the words 'Property of Crow' on it.

Mr Palmer is said to be a patched member, and Mr Germain an associate of the 'Life and Death' motorcycle club. Life and Death are currently on the list of criminal organisations contained in the regulations of the *Criminal Code Act 1899*.

The three accused were arrested on 24 January 2014 by the Queensland Police for being **participants in a criminal organisation being knowingly present in public places**, and for **remaining in a licensed premises while wearing a prohibited item**.

Ms Kuether was remanded in custody at the Pine Rivers Watch House for a week until her bail hearing in the Brisbane Magistrates Court on 30 January 2014.

At the bail hearing Ms Kuether acknowledged that she knew Mr Palmer was a member of a motorcycle gang, but had never sought to be a member of one herself.

Evidence presented in relation to Ms Kuether character at her bail hearing included the fact that she had no criminal history and that she had won an award from the Brisbane Lord Mayor for volunteering during the Queensland Floods in 2011.

She was released on bail, but faces a 6 month mandatory sentence for being a participant in a criminal organisation and a penalty for wearing a prohibited item.

"I can't see what I've done wrong, all I did was have a beer with my partner and my mate," she said."

'Librarian and accused bikie Sally Louise Kuether freed on bail', *News.com.au*, <<http://www.news.com.au/national/queensland/librarian-and-accused-bikie-sally-louise-kuether-freed-on-bail/story-fnii5v6w-1226814188558>>

The media has reported that as a result of those charges a number of searches were conducted at the houses of the two accused. During a search, police found Mr Palmer was allegedly in possession of a small cannabis plant. This could mean he will be subject to a 15 year mandatory sentence for possession of a dangerous drug under the VLAD Act, although this has not yet been confirmed.

A further hearing regarding these cases is scheduled to be heard in April.

*Information regarding the full circumstances and charges laid in this case is incomplete and it is not yet possible to corroborate media reports with court records.*

Media articles were used to construct the details of this summary. This will be updated in the future when a court transcript of proceedings is available. This information is the best available as of 06/03/2014, *see page 13 for links to media articles about this case.*

Check [www.ruleoflaw.org.au/education](http://www.ruleoflaw.org.au/education) in late April 2014 for the updated version of this booklet.



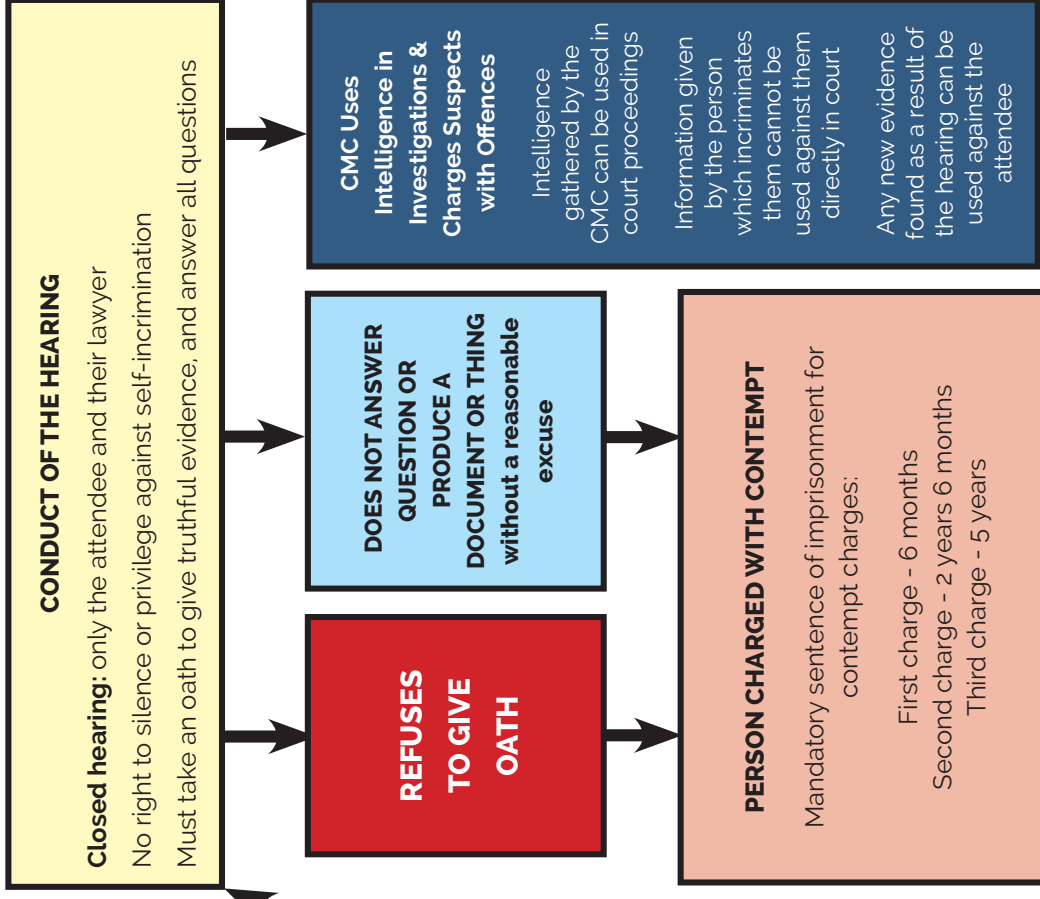
## Crime and Misconduct Commission Hearings

The Crime and Misconduct Commission (CMC) is an independent law enforcement agency in Queensland which gets its powers from the *Crime and Misconduct Act 2001*. In 2013, CODOLA gave the CMC additional powers to conduct hearings and compel people to give information.

- The CMC conducts **closed hearings** which means that the public cannot attend.
- The attendee is not allowed to say they have attended a hearing, or talk about information they have provided at the hearing, except to their lawyer.
- The CMC can hold a hearing with no notice to the participants and require immediate attendance if there is a threat to public safety, subject to the approval of the Supreme Court.

- The **fear of retribution against a person or property can no longer be used as a reasonable excuse** for not attending a hearing, refusing to answer a question, or producing a document or thing when requested at a hearing.

According to the CMC's website in March 2014, 72 people have been issued attendance notices that are related to Criminal Motorcycle Gangs.



### Glossary

**Right to silence** - that a person is not required to say anything when interviewed by law enforcement. In a criminal trial this ensures the onus of proof is carried by the prosecution to prove guilt. An accused does not have to prove their innocence.

**Privilege against Self-Incrimination** - The legal right to not answer questions or provide documents when questioned by law enforcement or charged with an offence if they may be used to show that the person has committed a criminal offence.

**Contempt** - an offence of refusing to comply with a legal order, or for showing disrespect for legal authority.  
**Open justice** - The principle that trials and court proceedings should be open to the public and the media so justice can be seen to be done.

## In Contempt of the CMC

### *Callanan v Attendee X [2013] QFC 340*

Attendee X was issued an attendance notice to attend a CMC hearing on 27 November 2013. He attended the hearing with his lawyer. When the presiding CMC officer required him to take an oath, he refused.

Attendee X was charged with contempt under s199(1) of the *Crime and Misconduct Act 2001 (Qld)*. Justice Applegarth found that Attendee X was guilty of contempt for refusing to take an oath.

In the judgment, Justice Applegarth discusses the negative effects of solitary confinement on the health of prisoners and whether the mandatory sentence of 6 months for the offence was appropriate, given that solitary confinement is a much harsher penalty than being imprisoned under normal conditions.

Applegarth J sentenced X to 28 days because of the likelihood that he would spend this time in solitary confinement, even though there is a mandatory sentence of 6 months required for the charge of contempt.

It was noted in the reasons that while the contempt was not a criminal offence, that it was a very serious matter, and a significant motivation for X not to be found guilty of contempt of the CMC a second time because the punishment would be 2 years and 6 months imprisonment.

Applegarth J noted that if X was remaining silent because of a fear of retribution, then he would deserve less punishment than someone who has no such fear. Since X refused to take an oath and gave no information about his reasons for doing so, this was not taken into account.

## CODA: Pink Jumpsuits and Solitary Confinement

A person who is a member of a criminal organisation on the list in the *Criminal Code 1899 (Qld)* if imprisoned is subject to different conditions than ordinary prisoners.

Changes to the *Corrective Services Act 2006 (Qld)* in CODA require that members of criminal organisations must have a **criminal organisation segregation order (COSO)** made for them when they enter prison. The COSO requires the prisoner to be segregated from other prisoners - which means that they are to be placed in what is commonly referred to as **solitary confinement**. Members of the Government and the media have stated that some prisoners have been required to wear pink jumpsuits.

In *Callanan v Attendee X [2013]* Justice Applegarth quoted from the **Queensland Corrective Services Departmental Policy** for the management of **Criminal Motorcycle Gang (CMG)** Prisoners:

"All identified CMG prisoners (remand, sentenced and protection) will be managed in accordance with the following Restricted Management Regime:

- Out of cell time restricted to at least two daylight hours a day
- No visits from other CMG members or affiliates (this also includes family members)
- CMG prisoners will ONLY be entitled to a 1 hour non-contact personal visit with family members per week
- The wearing of the CMG prisoner uniform
- No TVs in cells
- No access to gymnasium facilities/oval
- Canteen expenditure strictly limited"

# Organised Crime Legislation by State/Territory

## South Australia

- The *Serious Organised Crime (Control) Act 2008* (SA) came into force on the 15 May 2008.
- The Finks Motorcycle Club was declared under the Act on 14 May 2009.
- The High Court struck down provisions of the Act making it unusable in *South Australia v Totani* [2010] HCA 39.
- Addressing aspects of *South Australia v Totani* [2010] and *Wainohu v NSW* [2011] the *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* came into force on 10 May 2012 and fixed the provisions struck down by the High Court.

## NSW

- The *Crimes (Criminal Organisations Control) Act 2009* (NSW) came into force in March 2009.
- The Hells Angels Motorcycle Club was declared under the Act in July 2010.
- The High Court strikes down the Act in *Wainohu v NSW* [2011] HCA 24 (23 June 2011).
- The *Crimes (Criminal Organisations Control) Act 2012* (NSW) addressed the issues raised in *Wainohu v NSW* [2011] and came into force on 21 March 2012.
- The *Crimes (Criminal Organisations Control) Amendment Act 2013* (NSW) came into force on 3 April 2013 and added provisions to the Act similar to the QLD Act upheld in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 (14 March 2013).

## Queensland

- The *Criminal Organisation Act 2009 (Qld)* came into force on 3 December 2009.
- The Finks Motorcycle club was declared under the Act on 1 June 2012.
- The High Court upholds the Act in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 (14 March 2013).
- The *Vicious Lawless Association Disestablishment Act 2013*, *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013*, were passed on the 17 October 2013.
- *Criminal Law (Criminal Organisations Disruption) & Other Legislation Amendment Act 2013* was passed on the 21 November 2014.

## Western Australia

- The *Criminal Organisations Control Act 2011* (WA) came into force on 29 November 2013.

## Victoria

- The *Criminal Organisations Control Act 2012* (Vic) came into force on 3 November 2012.

## Northern Territory

- The *Serious Crime Control Act 2009 (NT)* came into force on 11 November 2009.

## Further Reading

Definition of a Participant in a Criminal Organisation

**Section 60A(3)** - *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013*

"participant, in a criminal organisation, means—

(a) if the organisation is a body corporate—a director or officer of the body corporate; or [s 42]

(b) a person who (whether by words or conduct, or in any other way) asserts, declares or advertises his or her membership of, or association with, the organisation; or

(c) a person who (whether by words or conduct, or in any other way) seeks to be a member of, or to be associated with, the organisation; or

(d) a person who attends more than 1 meeting or gathering of persons who participate in the affairs of the organisation in any way; or

(e) a person who takes part in the affairs of the organisation in any other way; but does not include a lawyer acting in a professional capacity."

Media Articles on Sally Kuether/Phillip Palmer Case

Elise Worthington and Staff, 'Anti-bikie laws: Library worker Sally Kuether is first woman charged under Queensland legislation', *ABC News*, 25/01/2014 <<http://www.abc.net.au/news/2014-01-24/librarian-is-first-woman-charged-under-anti-bikie-laws/5218212>>.

Rebecca Ananian-Welsh, 'Knowing the case against you: secrecy is eroding fair process', *The Conversation*, 12/02/2014

<<https://theconversation.com/knowning-the-case-against-you-secrecy-is-eroding-fair-process-22686>>.

'Librarian and accused bikie Sally Louise Kuether freed on bail', *News.com.au*, <<http://www.news.com.au/national/queensland/librarian-and-accused-bikie-sally-louise-kuether-freed-on-bail/story-fnii5v6w-1226814188558>>



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