Consorting with Convicted Offenders in NSW

Consorting with Criminal Offenders is a criminal offence in NSW found in the **Crimes Act 1900 (NSW)** Sections 93X and 93Y. Consorting was introduced in 2012 to prevent the members of organised crime groups from associating. It was prompted due to a number of drive-by-shootings linked to 'outlaw motorcycle gangs' (OMCGs).

A person may be charged with consorting if:

- the police have given an **official warning**
- the police have evidence that a person has consorted with **TWO convicted offenders** on at least **TWO separate occasions**

Punishment for Consorting:
3 years imprisonment and/or $16,500 fine.

Glossary

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.

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.

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

Defences to Consorting

A person charged with consorting can attempt to make out a defence in court. They must convince the court that the consorting was "reasonable" and that the alleged consorting was:

- with a family member
- in the course of lawful employment, training or education
- during the provision of healthcare
- while giving legal advice

Rule of Law Issue:

Requiring a person to show that their consorting was "reasonable" is a reversal of the burden of proof in a criminal proceeding.

Case Study: R v Forster [2012] - NSW's First Habitual Consorter

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

Forster 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.

In 2014, the High Court heard a challenge brought by Forster and the Nomads to have the consorting law struck off on the basis it affected the implied freedom of political communication found in the Australian Constitution.

In October 2014, a majority (6-1) of the High Court found the consorting offence was valid. The Court also found there is no free-standing right to association in the Australian Constitution.

See: **Tajjour v State of New South Wales; Hawthorne v State of New South Wales; Forster v State of New South Wales [2014] HCA 35**, http://www.austlii.edu.au/au/cases/cth/HCA/2014/35.html

Unintended Consequences of Broadly Defined Laws

The **Second Reading speech** in the NSW Parliament for the consorting laws said the following about the aims of the consorting offence:

> *The Government is determined to ensure that the NSW Police Force has adequate tools to deal with organised crime, and this bill represents part of a suite of reforms aimed at achieving that. The bill introduces a new aggravated form of drive-by shooting, introduces new offences relating to criminal groups, and modernises the offence of consorting, as well as extending and clarifying its application.*

The Parliament required that the **NSW Ombudsman** review the operation of the law every three years.

The review was released in April 2016 and covered a period from 9 April 2012 to the 8 April 2015. The review found:

- NSW Police issued 9000 warnings for consorting to 2800 people.
- 42 people were charged with consorting
- 33 of the 42 charged were said to be from or associated with OMCGs (25 belonged to the Nomads OMCG)
- Overall, 44% of people targeted by general duties officers were Aboriginal
- a total of 186 young people between the ages of 13 and 17 years were warned for consorting, 112 (60%) of these were Aboriginal

OMCG = Outlaw motorcycle gang

Quotes from the NSW Ombudsman's review:

> *"We found that although the NSW Police Force has used the consorting law to disrupt serious and organised crime and criminal gangs as intended by Parliament, it has also used the consorting law in a manner that, to some extent, illustrated public concerns about its operation." p.iii*

Some of the Ombudsman's recommendations were:

- change NSW Police policy so the consorting offence only focussed on serious offending, and a prohibition of it being used to address minor nuisance offending
- making the offence apply only to adults
- add additional defences to the offence such as a broader definition of family members (Aboriginal kinship)

> *"Unless these changes are made it is likely that the consorting law will continue to be used to address policing issues not connected to serious and organised crime and criminal gangs and in a manner that may impact unfairly on disadvantaged and vulnerable people in our community." p.iii*

Rule of Law Issue:

Law has unintended consequences which affect people the Parliament did not intend because the law is too broadly defined.

All page references above refer to the following:

NSW Ombudsman, 'The Consorting law - Report on the operation of Part 3A, Division 7 of the Crimes Act 1900', April 2016.

Available at: https://www.ombo.nsw.gov.au/what-we-do/our-work/police/legislative-reviews accessed 14/02/2017

RULE OF LAW
INSTITUTE OF AUSTRALIA
WWW.RULEOFLAW.ORG.AU

Consorting and the Homeless

Case: *R v O'Brien (unreported, Manly Local Court, Magistrate Brydon, 7 November 2012)*

"B is a homeless man with terminal and chronic pancreatitis. He had been warned by police for consorting with three people while sitting and talking with them on park benches, at Manly Oval and at the beachfront. At his sentencing hearing, the locations were described by his lawyer as 'areas where homeless people hang out'.

His lawyer advised the court:

"He is ostensibly a homeless man. I have got some material to hand up to your Honour about him suffering chronic pancreatitis which is terminal. So he is a homeless man with significant medical problems. He's not the person that this legislation is designed to be targeting. Technically [the prosecution] have all the elements there and that's why we've entered the plea."

The magistrate noted that the criminal histories of the three people B had been warned about consorting with did not contain serious indictable offences. B received a 12 month bond to be 'of good behaviour' under section 9 of the Crimes (Sentencing Procedure) Act 1999.

In an interview with us following his sentencing hearing, B said that one of the people he was warned about consorting with had offered him a room to stay in, as he was so unwell, at a time when he was sleeping in a park. B also said this person was one of the few friends he had in Sydney. B normally lived in northern NSW but needed to be in Sydney to attend a pain management clinic at a major hospital."

- NSW Ombudsman, 'The Consorting law - Report on the operation of Part 3A, Division 7 of the Crimes Act 1900', April 2016, p.68. *Some formatting changed for readability.

Consorting and Aboriginal Kinship

"Case Study 17. Issuing consorting warnings in relation to family members

Police approached three Aboriginal men and spoke to them about consorting. They told police that their mothers were cousins and that they were therefore related. In this incident, police were also told: 'You people are different to us black people. We are all family' and 'your people don't understand that our people are different. We are all related to each other'.

Police told the three men that their relationship did not count as family and issued consorting warnings to each man in relation to the others."

- NSW Ombudsman, 'The Consorting law - Report on the operation of Part 3A, Division 7 of the Crimes Act 1900', April 2016, p.107. *Formatting changed for readability.

RULE OF LAW
INSTITUTE OF AUSTRALIA
WWW.RULEOFLAW.ORG.AU

Organised Crime in Australia

Organised crime is criminal activity conducted by a group of people who are most often looking to make money from crime. People in organised crime groups may share attributes such a a similar cultural or ethnic backgrounds, or shared interests such as riding motorcycles.

The **Australian Criminal Intelligence Commission** (formerly the Australian Crime Commission), Australia's leading law enforcement and criminal intelligence organisation responsible for leading efforts against organised crime estimates that organised crime costs Australia $15 billion annually.

Due to the **transnational nature** of organised crime, law enforcement are faced with the difficult task of pursuing criminal syndicates globally. Governments are also keen to demonstrate their commitment to tough policies to stop organised crime, however, these policies have led to laws which present problems for the rule of law in Australia.

Law Reform 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 may incriminate them.
- **Reversing the onus of proof which requires the accused to prove their innocence,** this diminishes the presumption of innocence.
- **Broadly defined laws** which have unintended effects and consequences for individuals.

Governments must take action to deal with organised crime, however, often the law reform which occurs has serious rule of law problems.

The rule of law as a principle 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 so we have a criminal justice system which is fair and just.

The activities of organised crime groups in Australia involve:

making, selling or **importation** of illegal **drugs** and **firearms**

fraud or illegal practices involving **money laundering, gambling, prostitution**

committing **violent offences** to **intimidate,** or **gain advantage** over another group

the creation and distribution of **child-abuse material** or **pornography**

What is the Rule of Law?

The Presumption of Innocence

Maintaining the presumption of innocence, the **safety of the community** and the **effectiveness of the criminal law** is very important in ensuring fairness, consistency and equality before the law.

The **presumption of innocence** ensures that people are not punished without being found guilty of a crime and is an important **check on the power of government** because it limits the government's ability to punish and imprison people.

The **burden of proof** in the criminal trial process is on the prosecution, which means that a person must be proven guilty, and that they are not required to prove they are innocent.

The **presumption of innocence** is not the only important **ideal** in criminal law and must be balanced with other important objectives such as the **safety of the community** and the **enforcement of the criminal law**.

Assuming the Accused is Guilty or Worthy of Punishment

For the criminal justice system to provide equality before the law the judge making a decision cannot make the assumption that an accused is guilty or worthy of imprisonment because they have a:

- reputation for being involved with crime,
- have a criminal record; or
- are charged with a serious crime

The idea that a person accused of a crime should be considered to be guilty because they are charged with a serious crime, or because they have a certain criminal background is in direct opposition to the presumption of innocence and the way in which the criminal trial process determines guilt.

The Independence of the Judiciary

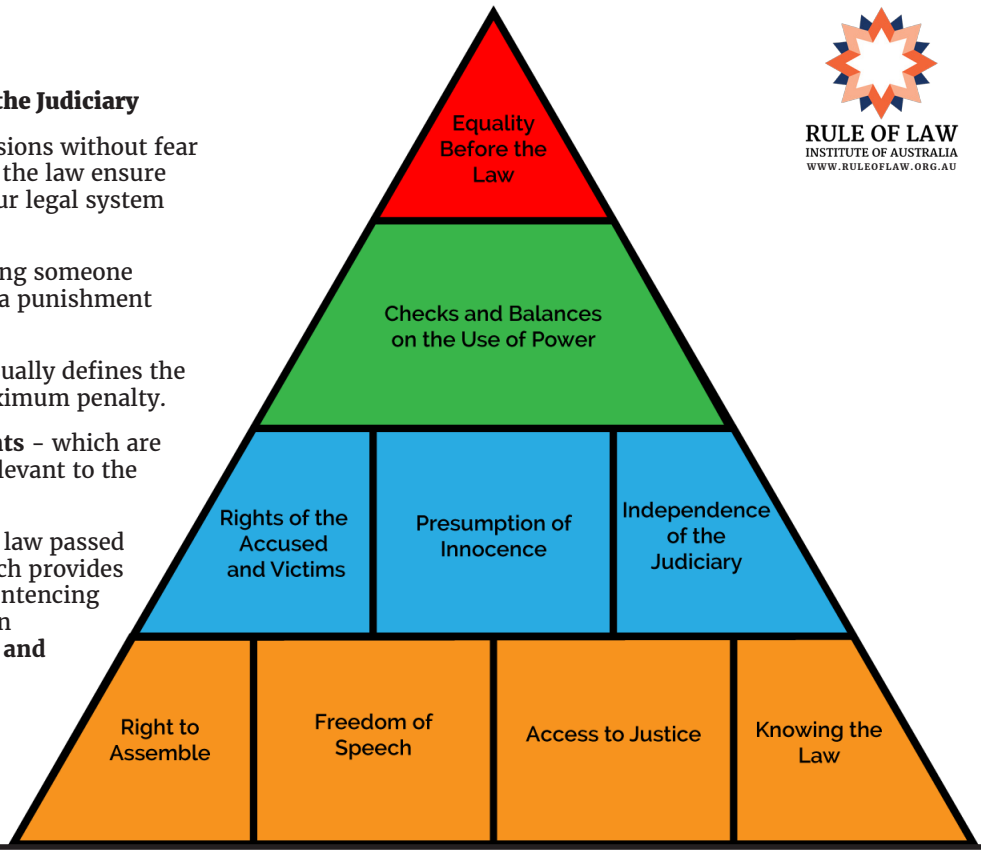
Judges who make decisions without fear or favour according to the law ensure that disputes within our legal system can be resolve fairly.

Judges, when sentencing someone for a crime, decide on a punishment according to the law:

statute law - which usually defines the offence and sets a maximum penalty.

common law precedents - which are other cases that are relevant to the matter

the sentencing act - a law passed by the parliament which provides for the principles of sentencing judges must refer to, in Queensland: **Penalties and Sentences Act 1992**



RULE OF LAW INSTITUTE OF AUSTRALIA
WWW.RULEOFLAW.ORG.AU

Case Study: Anti-Association Laws and Mandatory Sentencing in QLD

In 2013, motivated by a number of violent public acts by outlaw motorcycle gang members, the Newman Government rapidly passed three Acts that fundamentally changed the law regarding organised crime in Queensland. The Vicious Lawless Association Disestablishment Act 2013, known as the VLAD Act became the centrepiece of the Newman Government's organised crime policy.

The Bigger Picture in Queensland

Two of the Acts passed by the Queensland Parliament in October 2013 amended a range of Queensland law including the **Criminal Code 1899**, the **Bail Act 1980**, the **Corrective Services Act**, and the **Crime and Corruption Act 2001**, among others.

The VLAD Act was introduced and passed by the Queensland Parliament in one day and was part of 293 pages of organised crime legislation passed.

This left little time for the Parliament to consider the laws in detail and led to alarm in the legal profession who feared that the laws were ill-considered, rushed, and would have negative and unintended consequences as a result.

Debate About Organised Crime Laws

The Attorney General of Queensland, the Hon Jarrod Bleijie MP, fiercely defended the laws in Parliament and the media, and emphasised that they were tough and necessary to deal with Queensland's organised crime problem.

Many legal academics and members of the legal profession, and organisations including the Rule of Law Institute of Australia, spoke out against the laws for a variety of reasons: that there was little scrutiny of the laws by the Parliament, that broad anti-association laws and mandatory sentences could lead to unfair outcomes, the human rights issues with solitary confinement, the lack of transparency in decision making under the new laws, and the potential for unintended consequences and groups in society to be adversely affected by the laws.

The Rule of Law Institute objected to the VLAD Act in particular because it contained anti-association laws on which:

diminished the presumption of innocence by targeting people based on who they associated with rather than criminal acts they were alleged to have committed,

reversed the onus of proof by requiring a person to prove they are not part of a "group" participating in organised crime and, that the

lengthy mandatory sentences introduced was an attack on the independence of the judiciary and the important role they play in deciding on a punishment that is proportionate (fits) to the crime.

How did VLAD work?

The following steps outline how the VLAD Act declared an offender to be a vicious lawless associate.

The offender is:

1. **Refused to cooperate** with police in investigating a declared offence.
2. Convicted/guilty of a **declared offence.**
3. Part of a **group**.
4. Declared a **Vicious Lawless Associate** and receives 15 year mandatory sentence in addition to sentence for crime (+10 more years if an office bearer of the group)

Declared Offences

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 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 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 to be at place used for prostitution
- Murder, Manslaughter
- Threats to murder in document
- Conspiring to and attempting 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 and serious assaults
- Assaults in interference with freedom of trade or work
- Rape and attempted rape
- Assault with intent to commit rape
- Sexual assaults
- Kidnapping
- Unlawful stalking
- Stealing
- Stealing firearm for use in another indictable offence
- Stealing firearm or ammunition
- 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, supplying, receiving, producing or 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

Definition of a group under VLAD

- a corporation
- an 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.

What's in a Name?

The Chief Justice of the High Court, in a case which unsuccessfully challenged the validity of the VLAD Act, commented on the term "vicious lawless associate" and said It is a piece of rhetoric which is at best meaningless and at worst misleads as to the scope and substance of the law."*

The Rule of Law Institute's submission to the Taskforce on Organised Crime said that the title of the VLAD Act was ridiculous and trivialised the serious matters it concerned.

The Queensland Bar Association in its submission to the Taskforce on Organised Crime stated that the title was ambiguous, misleading and potentially prejudicial to a fair trial.

For some, the acronym VLAD reminded them of a historical figure, Vlad the Impaler, a 13th Century prince known for his cruelty and dining among the impaled corpses of his victims. This unfortunate linkage was not flattering given there were many who argued that the excessive sentences possible under the VLAD Act were potentially cruel and disproportionate.

*French CJ at 14 in Kuczborski v Queensland [2014] HCA 46 (14 November 2014)

Did VLAD Achieve its Objectives?

No, VLAD did not lead to organised crime groups being "disestablished", or to significant numbers of organised crime gang members divulging information.

Between October 2013 and December 2015 there were 202 people charged with a view to declaring them vicious lawless associates, however, the Taskforce on Organised Crime noted that use of VLAD had been dropped for many prosecutions post-charge, and that many prosecutions intending on using VLAD were adjourned in January 2015 pending the findings of the **Taskforce on Organised Crime**.

In the three years it operated, two offenders were subject to VLAD - both cooperated with police to avoid an additional 15 year sentence of imprisonment. Neither of the two offenders had any connections with outlaw motorcycle gangs.

Did VLAD Reduce Crime in QLD?

Despite claims in July 2014 by the Premier and the Attorney General that the combination of VLAD and the other organised crime laws had reduced crime rates in Queensland a criminologist at Bond University, Associate Professor Terry Goldsworthy, found this was not the case.

Associate Professor Goldsworthy found in data provided by the Queensland Government and Police that:

- crime rates had been steadily declining for the past 12 years prior to the introduction of the 2013 organised crime laws[2]
- the main targets of organised crime laws, members of OMCGs, were involved in 0.6% of overall crimes in Queensland, and were not involved in the types of offences where the Government claimed there was a reduction in the crime rate[2]
- that the politicisation of the organised crime laws led the Queensland Police Commissioner to make unsustainable claims that the organised crime laws had led to a decrease in crime in Queensland when they had not[3]
- that the Newman Government employing an extra 800 police combined with the long-term downward trend in crime rates was more likely the reason for continued downward trend in the crime rate.[3]

Goldsworthy cautioned that:

> *"Politicians of all stripes will always try to take credit for falling crime rates. But the media and voters need to look beyond the official spin and give credit where it's really due for the long-term decline in Queensland crime: in particular, to the many unheralded police officers doing their jobs."*[3]

Goldsworthy and McGillivray* argue in an academic paper about the effectiveness of anti-association laws that:

> *"...the VLAD (2013) laws do not allow for more expedient policing of these problems. Most criminal elements of the OMCGs have now gone underground and are much harder to detect. In addition to this the vast amount of time and money used, for matters that have ultimately failed in court, calls into question the cost versus the benefits of such ventures."*[4]

VLAD Reviewed and Repealed

Following the election of the Palaszczuk Government in Queensland in early 2015, former Queensland Supreme Court judge Alan Wilson was appointed to lead a taskforce to review the 2013 organised crime laws, including the VLAD Act. The taskforce delivered its final recommendations on 31 March 2016.

The explanatory note to the now passed the **Serious and Organised Crime Legislation Amendment Bill 2016** states:

> *"The Bill repeals the VLAD Act in its entirety as unanimously recommended by the Taskforce (recommendation 29). The Taskforce considered that the criticisms of the VLAD Act by the High Court of Australia (Kuczborski v Queensland (2014) 89 ALJR 59) could not be overcome. The Taskforce considered there to be genuine concern over its constitutional vulnerability, in particular that the effect of the discretion vested in the Commissioner of Police in assessing the calibre of cooperation by an offender may be a usurpation of judicial power.*
>
> *In addition to the constitutional concerns, the Taskforce considered other matters to present significant problems for the continued existence of the VLAD Act, including: the misleading and prejudicial nature of its title, its location outside of Queensland's ordinary sentencing framework, the tension between the Act's objects and the fundamental sentencing principle of proportionality, and a lack of transparency and fairness in the operation of its section 9 ... In its place, the Bill creates the new Serious Organised Crime circumstance of aggravation with its targeted sentencing regime."*

See the following for more on the debate on the effectiveness of the organised crime laws in Queensland:

[1] Reinder Bruinsma, 'Newman says Bleijie has been standout A-G of 20 years', **Sunshine Coast Daily**, 23/06/2014.

[2] Goldsworthy, 'Crime stats provide reality check in Queensland's bikie crackdown', **The Conversation**, 01/09/2014.

[3] Goldsworthy, 'The revealing facts on bikie laws and crime in Queensland', **The Conversation**, 20/01/2015.

[4] Goldsworthy and McGillivray, 'An examination of outlaw motorcycle gangs and their involvement in the illicit drug market and the effectiveness of anti-association legislative responses', **International Journal of Drug Policy**, January 18 2017.