

ON THE ORIGINS OF CONSORTING LAWS

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Consorting laws have piqued the attention of Australian legislatures. In the last year alone, two states have re-enacted these offences, which criminalise repeated association with criminals. Such measures, though, have a pedigree stretching over seven centuries. This article offers an historical analysis of consorting offences, placing them in the context of a long line of statutes that criminalised the act of associating with undesirable classes of people. It traces their emergence from the beginnings of English vagrancy legislation in the late-mediaeval period, to early attempts in the Australasian colonies to suppress inchoate criminality, and then to 20th century efforts to tackle organised criminal activities. What emerges is that consorting offences are neither a modern phenomenon nor one restricted to the antipodes.

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I INTRODUCTION

Australian parliaments have recently shown renewed interest in offences that punish individuals for habitually consorting with criminals. Since 2004, all but two jurisdictions have re-enacted or amended these offences.¹ The latest to do so are South Australia and New South Wales, where consorting offences were reformed last year.² Much of this legislative activity is attributable to increased public debate about the conduct and workings of organised criminal groups, particularly motorcycle gangs, and the most appropriate measures to suppress them. Two Commonwealth parliamentary inquiries have investigated the issue.³ The Standing Committee of Attorneys-General has deliberated on the topic.⁴ And the High Court has declared two pieces of legislation directed towards the mischief constitutionally invalid.⁵

Consorting offences are not a new phenomenon, though. They are creatures of statute that emerged early last century in legislation regulating vagrancy. Their primary object was (and remains) to punish and thereby discourage inchoate criminality, and the means by which they sought to achieve this was the imposition of criminal liability for keeping company with disreputable individuals. Such considerations also motivated vagrancy legislation; but these statutes possess a much older lineage, having their roots

¹ *Criminal Law Amendment (Simple Offences) Act 2004* (WA) ss 33, 57; *Vagrancy (Repeal) and Summary Offences (Amendment) Act 2005* (Vic) s 5; *Justice Legislation Amendment (Group Criminal Activities) Act 2006* (NT) s 23; *Police Offences Amendment (Clamping) Act 2009* (Tas) s 4; *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW) sch 1 item 10; *Statutes Amendment (Serious and Organised Crime) Act 2012* (SA) s 46.

² In New South Wales, ss 93W–93Y were inserted into the *Crimes Act 1900* (NSW) by the *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW) sch 1 item 9. In South Australia, s 46 of the *Statutes Amendment (Serious and Organised Crime) Act 2012* (SA) reinserted s 13 into the *Summary Offences Act 1953* (SA).

³ Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the Future Impact of Serious and Organised Crime on Australian Society* (2007); Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups* (2009). For a useful summary of recent state and territory legislation enacted in response to concerns about organised crime, see Lorana Bartels, 'The Status of Laws on Outlaw Motorcycle Gangs in Australia' (Research in Practice Report No 2, Australian Institute of Criminology, 2010).

⁴ See, eg, Standing Committee of Attorneys-General, *Communiqué* (16–17 April 2009) 8. The Standing Committee became the Standing Council on Law and Justice on 17 September 2011.

⁵ *South Australia v Totani* (2010) 242 CLR 1, holding invalid s 14(1) of the *Serious and Organised Crime (Control) Act 2008* (SA); *Wainohu v New South Wales* (2011) 243 CLR 181, holding the *Crimes (Criminal Organisations Control) Act 2009* (NSW) invalid in its entirety.

in the 1300s. Following a peripatetic course shaped as much by economic concerns as social ones, they came to frame a classification system comprising three classes of people. These classes escalated in the degree of nuisance and danger they were thought to pose to society — from idle and disorderly persons, to rogues and vagabonds, to incorrigible rogues. Each class was defined by reference to multifarious categories of conduct or occupation. Generally, however, there were only three offences, one for each class of person. Without exception, conduct that amounted to consorting brought a person within the class of idle and disorderly persons.

It has become axiomatic to describe consorting laws as an Australian and New Zealand phenomenon.⁶ The traditional analysis begins with colonial statutes relating to vagrants and traces the emergence of consorting laws to legislation from the early 20th century amending those statutes. But this analysis overlooks a rich lode of doctrine and discourse stretching back to mediaeval England. Though the offence of habitually consorting with reputed criminals did, in terms, appear for the first time in an antipodean statute, such laws — and the concept of conditioning criminal liability on the company a person keeps — are not so modern.⁷ Parliaments have for centuries experimented with legislation to reform or suppress those classes of people considered in their time to be detestable, disreputable and dangerous.

The study presented here attempts to draw together a longer and more comprehensive outline of how consorting offences developed. Part II traces the evolution of vagrancy laws from the late-mediaeval period to the 19th century in what became Great Britain, highlighting how the perception of vagrants as proto-criminals shaped the terms of these statutes and their enforcement. Part III examines the way in which English vagrancy laws were

⁶ Alex Steel, 'Consorting in New South Wales: Substantive Offence or Police Power?' (2003) 26 *University of New South Wales Law Journal* 567, 568, 581; *Johanson v Dixon* (1979) 143 CLR 376, 382–3 (Mason J); Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, revised ed, 1973) 135–6. Cf David Fellman, 'Association with "Bad" People' (1960) 22 *Journal of Politics* 620, 621.

⁷ An equally rich body of authority exists concerning efforts to criminalise membership of organisations deemed dangerous or undesirable: see *South Australia v Totani* (2010) 242 CLR 1, 92 [235] (Hayne J). These too are of contemporary relevance: see *Criminal Code* (Cth) div 102 sub-div A, as inserted by *Security Legislation Amendment (Terrorism) Act 2002* (Cth) s 3, sch 1 item 4. The topic is outside the scope of this article, but a significant distinction should nevertheless be noted here. A law that criminalises membership differs from a consorting offence in the criterion of criminal liability employed. In the case of membership offences, the fact of membership is the principal element of the offence; for consorting offences, it is the act of associating with particular individuals. See also Note, 'Guilt by Association — Three Words in Search of a Meaning' (1949) 17 *University of Chicago Law Review* 148.

applied and then adapted in the Australasian colonies and considers early colonial attempts to criminalise the act of association. Part IV investigates the emergence of consorting offences during the 20th century within the local vagrancy Acts of New Zealand and the Australian jurisdictions and explores the rationales offered for their introduction. Part V considers developments up to the present day and places the re-emergence of consorting offences within the context of broader concerns about organised crime — concerns not dissimilar to those that prompted the original enactment of the offences.

II THE REGULATION OF VAGRANTS IN GREAT BRITAIN

Vagrancy laws stem from attempts in England, beginning with the Statutes of Labourers of the 14th century,⁸ to address fundamental shifts in social and economic norms.⁹ The Black Death pandemic of 1348–50 and the rapid disintegration of the feudal system that followed saw the emergence of a class of free labourers able to demand whatever payment they wished.¹⁰ Legislation passed in response sought to prevent idleness within this class and to keep them and all others who were without interest in land under the yoke of the pre-existing feudal hierarchy.¹¹ The Statutes of Labourers embodied the principle that '[a] refusal to work for [a] reasonable wage by those who were able to do so was a criminal offence'.¹² All those able to work were required to serve at pre-pandemic wages; and they were forbidden from wandering

⁸ 23 Edw 3 (1349); 25 Edw 3 stat 2 (1351). The earlier statute is more accurately referred to as the Ordinance of Labourers, on account of its enactment by the King's Council rather than Parliament, which did not convene after the Black Death until 1351: L R Poos, 'The Social Context of Statute of Labourers Enforcement' (1983) 1 *Law and History Review* 27, 29.

⁹ Sir William Holdsworth, *A History of English Law* (Methuen & Co and Sweet & Maxwell, 4th ed, 1936) vol 2, 459. It is possible to track back a millennium and trace 'vagrancy' through Anglo-Saxon and Norman England, as Mr Ribton-Turner does in his extensive work on the topic: C J Ribton-Turner, *A History of Vagrants and Vagrancy and Beggars and Begging* (Chapman and Hall, 1887). To do so, though, is to risk an anachronism, for 'vagrancy' (properly understood) refers to the condition of the able-bodied poor who refused to work, a concept that did not emerge until the 14th century, on account of the social and economic reasons explained above: A L Beier, *Masterless Men: The Vagrancy Problem in England 1560–1640* (Methuen & Co, 1985) 9.

¹⁰ Sidney Webb and Beatrice Webb, *English Local Government* (Longmans, Green & Co, 1927) vol 7, 24–5; Ribton-Turner, above n 9, 42–3; Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan and Co, 1883) vol 3, 204; Holdsworth, *A History of English Law* vol 2, above n 9, 459–60.

¹¹ Webb and Webb, above n 10, 397; Holdsworth, *A History of English Law* vol 2, above n 9, 460.

¹² Holdsworth, *A History of English Law* vol 2, above n 9, 460. Scott LJ provides a compendious history of the Vagrancy Acts in *Ledwith v Roberts* [1937] 1 KB 232, 270–5.

outside their parish, in search of higher pay.¹³ At the same time, they were prohibited from receiving any alms, to which only the impotent poor were entitled.¹⁴

These were the beginnings of the Poor Laws.¹⁵ But they were also the germ from which vagrancy laws sprouted, premised on the proposition that the able-bodied vagrant 'must be suppressed by the machinery of the criminal law'.¹⁶ Idleness came to be viewed as a social evil to be eradicated using the legal apparatus of the state.¹⁷ Progressively more repressive legislation was passed over the course of the 16th century, each enactment seeking to best its predecessor in the severity with which it punished vagrancy but achieving little of its object to suppress vagrants.¹⁸ Rather, the incidence of vagrancy increased alarmingly from 1560 due to population growth, landlessness and the economic insecurity that accompanied wage labour.¹⁹

At the root of the inefficacy of these measures was a failure to address the economic forces that underlay the vagrancy problem. It was not until the end of the 16th century that recognition of this began to influence legislative action.²⁰ Two Elizabethan statutes, passed in parallel in 1597, together provided a comprehensive legislative code for regulating the impotent and the able-bodied poor.²¹ One Act concerned poor relief.²² The other presented the first thorough attempt to address vagrancy, establishing the categories of rogues, vagabonds, and sturdy beggars, and the forms of conduct that would bring people within their definitions.²³ What benefits this new regime may have brought were offset by deteriorating economic and social conditions. Increases in population, rents and food prices and a decline in real wages

¹³ Webb and Webb, above n 10, 26.

¹⁴ Sir William Holdsworth, *A History of English Law* (Methuen & Co and Sweet & Maxwell, 3rd ed, 1945) vol 4, 390.

¹⁵ Stephen, above n 10, 205–6; Holdsworth, *A History of English Law* vol 4, above n 14, 392–401; Sir William Holdsworth, *A History of English Law* (Methuen & Co and Sweet & Maxwell, 2nd ed, 1937) vol 6, 349–54.

¹⁶ Holdsworth, *A History of English Law* vol 4, above n 14, 394. See also Beier, above n 9, 3, 9.

¹⁷ Sir John Baker, *The Oxford History of the Laws of England* (Oxford University Press, 2003) vol 6, 97.

¹⁸ Webb and Webb, above n 10, 23–4, 28, 396–7; *ibid.*

¹⁹ Beier, above n 9, 14.

²⁰ Baker, above n 17, 98; Webb and Webb, above n 10, 350.

²¹ Webb and Webb, above n 10, 351.

²² 39 Eliz 1, c 3 (1597).

²³ 39 Eliz 1, c 4 (1597).

exacerbated the vagrancy problem through the first half of the 17th century.²⁴ Though contemporary estimates of the vagrant population are difficult to verify, records indicate an annual average of almost 4500 convictions for vagrancy offences between 1631 and 1639.²⁵ By the close of the century, the best approximation placed the number of vagrants at no fewer than 60 000 families.²⁶

The Elizabethan consolidation was replaced (and the law recodified) in 1713,²⁷ but the taxonomy that formed the basis for modern vagrancy offences seems to appear first in a statute of 1740.²⁸ Pursuant to this classification system, vagrants were divided into idle and disorderly persons, vagabonds and rogues, and incorrigible rogues. Each subsequent class was considered more detested and dangerous than the last. But the scheme in its intricate glory — with each class more precisely defined — emerged only in 1743.²⁹ These reforms were likely a partial response to increased begging and vagrancy that accompanied the period between the end of the War of Spanish Succession in 1713 and the start of Great Britain's war against Spain in 1739.³⁰ Despite the comprehensive nature of the measures, popular complaints about the growth in numbers of vagrants persisted throughout the 18th century.³¹ There is circumstantial evidence from this period of swarms of vagrants moving through the country, a trend that systematic purges between 1786 and 1788 failed to stem.³² Aggravating the situation was what began as a tendency but ossified as policy to issue passes to vagrants allowing them to return to their parishes instead of receiving prescribed punishments.³³ In part, this was an attempt by magistrates to tailor punishment to the vast diversity of defendants that were brought before them on vagrancy charges.³⁴ Whatever

²⁴ Beier, above n 9, 16.

²⁵ Ibid 14–15.

²⁶ Webb and Webb, above n 10, 356.

²⁷ 13 Anne, c 26 (1713).

²⁸ 13 Geo 2, c 24 (1740).

²⁹ *Justices Commitment Act 1743*, 17 Geo 2, c 5.

³⁰ J M Beattie, *Policing and Punishment in London, 1660–1750: Urban Crime and the Limits of Terror* (Oxford University Press, 2001) 187–8.

³¹ Webb and Webb, above n 10, 357–9; *ibid* 154.

³² Webb and Webb, above n 10, 357, 366.

³³ *Ibid* 378–91; Nicholas Rogers, 'Policing the Poor in Eighteenth-Century London: The Vagrancy Laws and Their Administration' (1991) 24 *Histoire Sociale — Social History* 127, 131, 137–8.

³⁴ Rogers, above n 33, 137.

the motive, the practice placed a significant burden on the system of administration for vagrancy laws.

These were the prevailing conditions at the start of the 19th century, when the prevalence of discharged soldiers and economic migrants accompanying the end of the Napoleonic Wars triggered a further surge in the numbers of the homeless and the unemployed.³⁵ The resulting increase in the poor rate and, with it, expenditures on poor relief stirred Parliament to act:³⁶ it instituted a series of inquiries stretching from 1815 to 1821.³⁷ These resulted in a major consolidation of the legislative scheme governing vagrants in 1824; and it is upon this later statute, the *Vagrancy Act 1824*,³⁸ that Australian and New Zealand vagrancy legislation was based.

Woven through this history is the repeated association of vagrancy with inchoate criminality. From the earliest attempts at suppression, in Tudor times, vagrants were viewed as responsible for a wide range of crimes, as serious as sedition and as petty as theft.³⁹ The terms of later legislation came to reflect this explicitly by imposing punishment on the basis of suspicion rather than proof. In 1752, justices of the peace were authorised to examine a person charged, absent any direct proof, with suspicion of a felony and if the person failed to give a satisfactory account of how they made a living they were liable to imprisonment.⁴⁰ Four decades later, reputed thieves, persons of evil fame, and all ill-disposed or suspected persons were deemed vagabonds and rogues if they appeared to a justice of the peace to have been in public with felonious intent and failed to give a satisfactory account of themselves and their way of living.⁴¹ This measure remained in force well into the 19th century.⁴² The

³⁵ Webb and Webb, above n 10, 361.

³⁶ Rogers, above n 33, 142–3.

³⁷ Committee on the State of Mendicity in the Metropolis, *Report*, House of Commons Paper No 473, Session 1814–15 (1815); Select Committee on the State of Mendicity in the Metropolis, *Report*, House of Commons Paper No 396, Session 1816 (1816); Select Committee on the Existing Laws Relating to Vagrants, *Report*, House of Commons Paper No 543, Session 1821 (1821). See also Webb and Webb, above n 10, 361; Rogers, above n 33, 142.

³⁸ 5 Geo 4, c 83.

³⁹ Beier, above n 9, 6, 10. The preamble to 1 Edw 6, c 3 (1547) begins: ‘Forasmuche as Idleness and Vagabundrye is the mother and roote of all theftes Robberyes and all evill actes and other mischiefs’.

⁴⁰ *Disorderly Houses Act 1751*, 25 Geo 2, c 36.

⁴¹ 32 Geo 3, c 53 (1792).

⁴² 39 & 40 Geo 3, c 87 (1800), s 12; 42 Geo 3, c 76 (1802), s 18; 51 Geo 3, c 119 (1811), s 18; 54 Geo 3, c 37 (1813), s 18; 1 & 2 Geo 4, c 118 (1821), s 21. This last statute (1 & 2 Geo 4, c 118 (1821)) was repealed in 1822 by a new codification (3 Geo 4, c 40 (1822), s 1), which also made provision in s 13 for justices of the peace to authorise any person to enter any

efforts of Parliament were a manifestation of the popular conception of vagrants, which placed them within a highly organised criminal underground that planned and carried out nefarious acts.⁴³ This was, in turn, part of a broader narrative, persisting through to the 19th century and beyond, that linked moral weakness and criminal conduct in a progression from minor acts of disobedience to serious crimes.⁴⁴ The *Vagrancy Act 1824*⁴⁵ epitomised the notion, being the first vagrancy statute not to include relief of the poor in addition to punishment of the idle.⁴⁶ Modern empirical research has cast doubt on the accuracy of the supposed connection, but there is no question that belief in it was genuinely (and strongly) held.⁴⁷ When a North American judge stated, in 1947, that '[a] vagrant is a probable criminal; and the purpose of the [vagrancy] statute is to prevent crimes which may likely flow from his mode of life',⁴⁸ he could easily have been writing at any time in the preceding four centuries on the other side of the Atlantic.

The perceived nexus between vagrancy and criminality helps to explain the concerted attention given to enforcement of vagrancy laws between the 17th and 19th centuries.⁴⁹ Parliament strained in its efforts during this time to have the laws properly implemented, authorising summary apprehension by constables, rewards to parish officers responsible for enforcement, and regular

lodging house and apprehend persons suspected of being a vagrant. The 1824 consolidation preserved this: *Vagrancy Act 1824*, 5 Geo 4, c 83, s 7.

⁴³ Beier, above n 9, 8.

⁴⁴ Keith Smith, 'Part One — Criminal Law' in William Cornish et al, *The Oxford History of the Laws of England* (Oxford University Press, 2010) vol 13, 176, 353; Beattie, above n 30, 51, 56–7.

⁴⁵ 5 Geo 4, c 83.

⁴⁶ *Ledwith v Roberts* [1937] 1 KB 232, 275 (Scott LJ).

⁴⁷ Beier, above n 9, 124–39.

⁴⁸ *District of Columbia v Hunt*, 163 F 2d 833, 835 (DC Cir, 1947) (Stephens J).

⁴⁹ Though beyond the scope of this article, the manner in which vagrants came to be the focus of such sustained public attention merits further analysis through the lens of moral panic theory. The phenomenon bears many of the hallmarks of moral panic: see generally Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (Routledge, 3rd ed, 2002); Erich Goode and Nachman Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (Blackwell, 1994). It also tracks remarkably closely to the way in which colonial vagrancy laws and consorting offences emerged: see below Part III. See also Steel, above n 6, 587; George Morgan and Selda Dagistanli, 'Global Fears, Local Anxiety: Policing Counterterrorism and Moral Panic Over "Bikie Gang Wars" in New South Wales' (2010) 43 *Australian and New Zealand Journal of Criminology* 580; Karen Katz, 'The Enemy Within: The Outlaw Motorcycle Gang Moral Panic' (2011) 36 *American Journal of Criminal Justice* 231; Julie Ayling, 'Pre-emptive Strike: How Australia is Tackling Outlaw Motorcycle Gangs' (2011) 36 *American Journal of Criminal Justice* 250, 254.

purges of whole county divisions to flush out wanderers and other suspicious persons.⁵⁰ At a local level, a provost marshal was created in each county in 1589 — and, later, in the City of London too — specifically to deal with the growing threat vagrants were perceived to pose.⁵¹ Grand juries in the City of London implored City authorities not to tolerate — to any degree — vagrancy, begging or prostitution in the streets.⁵² And when indictments fell dramatically during the early 1700s, they ascribed the reduction to the removal of vagrants from public spaces.⁵³ During the 18th century, it became established policy in the City of London to pay a monetary reward to constables for each vagrant taken before a magistrate.⁵⁴ Contemporaneously, the suppression of vagrancy became closely tied to the emergence of a professional police force in Scotland. A concern to suppress vagrancy, and thereby reduce crime, formed one plank of the justification for intense policing of the countryside.⁵⁵ The need to protect the material and financial security of those who held property justified the establishment and expansion of police forces in Edinburgh and the Scottish burghs.⁵⁶ While not the only impetus, the desire to pre-empt the commission of criminal acts strongly motivated the enforcement of vagrancy laws well into the 19th century.

Appreciating this perception of vagrants as putative criminals also adds depth to the frequent assertion that vagrancy was a crime of status. Status criminality (or situational liability) connotes an offence that proscribes what a person is rather than defining some blameworthy act or omission.⁵⁷ The

⁵⁰ Webb and Webb, above n 10, 356, 361–7, 369–70. Privy searches for vagrants had received statutory imprimatur in 1495: 11 Hen 7, c 2. The *Justices Commitment Act 1743* required justices of the peace to conduct general privy searches four times a year (17 Geo 2, c 5, s 6), but ensuring this in fact occurred was no doubt difficult.

⁵¹ Ribton-Turner, above n 9, 158.

⁵² Beattie, above n 30, 56–7.

⁵³ Ibid 57–9.

⁵⁴ Ibid 154; Rogers, above n 33, 129–30.

⁵⁵ Kit Carson and Hilary Idzikowska, 'The Social Production of Scottish Policing 1795–1900' in Douglas Hay and Francis Snyder (eds), *Policing and Prosecution in Britain 1750–1850* (Clarendon Press, 1989) 268.

⁵⁶ Ibid 290–1.

⁵⁷ Douglas Husak, 'Does Criminal Liability Require an Act?', in Antony Duff (ed), *Philosophy and the Criminal Law: Principle and Critique* (Cambridge University Press, 1998) 60, 61; J R Spencer, 'Strict Liability and the European Convention' (2004) 63 *Cambridge Law Journal* 10, 10. See also P R Glazebrook, 'Situational Liability' in P R Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (Stevens & Sons, 1978) 108; Michael S Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law* (Clarendon Press, 1993). The terminological distinction between 'status criminality' and 'situa-

criterion for liability is a state of affairs that confronts a defendant.⁵⁸ Several scholars have characterised English vagrancy laws, especially during the period 1547–1824, as exemplars of this type of offence.⁵⁹ If the contention is that vagrancy offences imposed liability merely for what a person was, it does not stand up to scrutiny. The repeated recasting of vagrancy laws and the consequent variation in their terms confound attempts to reach any such general conclusion on the nature of the liability they imposed. But even if a generalised view were ascertainable, significant enactments — especially during the period posited — stand as evidence against the contention. For instance, s 1 of 1 Edw 6, c 3 (1547) rendered the able-bodied poor liable to punishment but only if found loitering or idly wandering in public or private and not seeking work for three days or more. Offences created as part of the great Elizabethan reform of 1597 required proof of specified conduct to bring a person within its terms.⁶⁰ And the same may also be said for later legislation.⁶¹ The point, then, is not that vagrancy offences were never crimes of status,⁶² but rather that they are unsusceptible of a uniform characterisation as such.⁶³ While status was not the legal criterion for conviction, it did play an important role in enforcement of vagrancy laws. Professor Beier describes

tional liability' is one of geography — British scholars seem to prefer the latter, and their American counterparts, the former: see Glazebrook, above n 57, 109.

⁵⁸ Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 6th ed, 2009) 95.

⁵⁹ Gary V Dubin and Richard H Robinson 'The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality' (1962) 37 *New York University Law Review* 102, 105–6; P Michael Lahan, 'Trends in the Law of Vagrancy' (1968) 1 *Connecticut Law Review* 350, 351–2; William F Maher and William E Williams, 'Vagrancy — A Study in Constitutional Absolence' (1970) 22 *University of Florida Law Review* 384, 390; Robert D Gatton, 'Constitutional Law: The Belated Demise of a Vagrancy Statute' (1972) 25 *University of Florida Law Review* 227, 228; Juliette Smith, 'Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine' (1995) 29 *Columbia Journal of Law and Social Problems* 293, 301.

⁶⁰ 39 Eliz 1, c 4 (1597).

⁶¹ Sections 1 and 2 of the 1743 consolidation imposed liability as often for types of conduct (eg, 'wandering abroad') as for what a person was (eg, 'common Players of Interludes', 'Minstrels, Jugglers'): *Justices Commitment Act 1743*, 17 Geo 2, c 5. But even these instances are a weaker form of status offence, for they are reducible to one or more acts of the agent: Husak, above n 57, 83.

⁶² Were evidence required, s 1 of 19 Hen 7, c 12 (1503) and the examples provided by Mr Ribton-Turner of orders made by authorities in the City of London in the late 16th century offer good reasons for why such an absolute position is untenable: Ribton-Turner, above n 9, 104–5.

⁶³ Sir James Fitzjames Stephen's gloss on the operation of this Act may be the source of the confusion: see Stephen, above n 10, 272.

vagrancy as ‘perhaps the classic crime of status’⁶⁴ because of the manner in which vagrancy offences were used to target a class of individual: ‘Offenders were arrested not because of their actions, but because of their position in society.’⁶⁵ The strong perception of vagrants as proto-criminals lay behind this focused approach to enforcement.⁶⁶ In this respect, vagrancy offences share much in common with the consorting offences that later sprung from them.

Though vagrancy laws were the principal means by which disagreeable and putatively dangerous individuals were apprehended between the 14th and 19th centuries, it would be inaccurate to suggest they were the only approach taken. In parallel, there had been intermittent attempts lying outside vagrancy legislation to excoriate especially undesirable groups, often identified on the basis of ethnicity. Some of these enactments took the form that consorting offences would later adopt: they criminalised the act of associating with people considered undesirable. The earliest example of this seems to be a statute enacted in 1562.⁶⁷ Building on previous Acts that provided for the banishment of gypsies and the execution of those who disobeyed,⁶⁸ this statute extended punishment to those found in the company of gypsies. Section 2 of the Act⁶⁹ deemed to be a felon any person who was seen or found, over the course of a month, in the company or fellowship of vagabonds ‘cōmonly called or calling themselves Egiptians’, a common contemporaneous term for gypsies. The punishment was death and the benefit of clergy was not available. The statute was still in force when Sir William Blackstone wrote his *Commentaries*,⁷⁰ and it was referred to in argument in a case heard in 1838 as ‘the felony of consorting with the Egyptians’,⁷¹ though it had been repealed almost a half-century earlier.⁷²

⁶⁴ Beier, above n 9, xxii.

⁶⁵ Ibid.

⁶⁶ Rogers, above n 33, 131.

⁶⁷ 5 Eliz 1, c 20 (1562).

⁶⁸ 22 Hen 8, c 10 (1530); 1 & 2 Ph & M, c 4 (1554).

⁶⁹ 5 Eliz 1, c 20 (1562).

⁷⁰ Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1769) bk 4, 165–6.

⁷¹ *R v Cruse* (1838) 8 Car & P 541, 557; 173 ER 610, 616 (Carrington) (during argument).

⁷² *Egyptians Act 1783*, 23 Geo 3, c 51.

III VAGRANCY LAWS IN AUSTRALIA AND NEW ZEALAND

A Early Colonial Approaches to Vagrancy

The history of Australasian vagrancy laws emerges from early colonial concerns about the activities of former convicts. These individuals were no longer under direct compulsion to work, on account of expired sentences, pardons, tickets of leave or successful escapes. As time passed, their number swelled. The fear of colonial administrators was that they would become idle or criminal, or both.⁷³

To address this concern, two approaches were taken. The first was modelled on the English system of regulating vagrants. Upon arrival in the colony in 1810, Governor Macquarie sought to reform the police in Sydney and made regulations governing its organisation and conduct, which came into effect on 1 January 1811.⁷⁴ These stipulated that ordinary constables were to apprehend any 'suspicious person' who was in public after 9pm.⁷⁵ Constables were provided a discretionary power to call at any suspicious house at any time during the night to ascertain whether any suspicious characters were within.⁷⁶ The regulations also imposed an obligation on the chief constable to detain any drunken, idle or disorderly person, and all those who lacked apparent means of obtaining a livelihood, and bring them before the superintendent of police.⁷⁷ This power was confirmed in the first statute regulating police in the colony.⁷⁸ Without forbidding vagrancy in terms, these measures visited serious consequences upon those found exhibiting its features.

⁷³ Paula J Byrne, *Criminal Law and Colonial Subject: New South Wales, 1810–1830* (Cambridge University Press, 1993) 163.

⁷⁴ Despatch from Governor Macquarie to Earl of Liverpool, 18 October 1811, reproduced in *Historical Records of Australia: Series I — Governors' Despatches to and from England* (Library Committee of the Commonwealth Parliament, 1916) vol 7, 385, 406–13.

⁷⁵ *Police Regulations* (NSW) s 4(4), reproduced in *Historical Records of Australia: Series I — Governors' Despatches to and from England* (Library Committee of the Commonwealth Parliament, 1916) vol 7, 408. Dating these regulations is difficult; the most reliable evidence suggests they were enacted on or before 22 December 1810: 'Government and General Orders', *Sydney Gazette and New South Wales Advertiser* (Sydney), 29 December 1810, 1–2.

⁷⁶ *Police Regulations* (NSW) s 4(5), reproduced in *Historical Records of Australia: Series I — Governors' Despatches to and from England* (Library Committee of the Commonwealth Parliament, 1916) vol 7, 408.

⁷⁷ *Police Regulations* (NSW) s 5(4), reproduced in *Historical Records of Australia: Series I — Governors' Despatches to and from England* (Library Committee of the Commonwealth Parliament, 1916) vol 7, 409.

⁷⁸ *Sydney Police Act 1833* (NSW) (4 Will 4 No 7) s 6.

Vagrancy was nevertheless treated as a criminal offence during this time. Reports of cases from the first decade of settlement evidence a number of successful prosecutions for vagrancy offences; the defendants were mostly escaped convicts.⁷⁹ In her comprehensive analysis of early colonial criminal records in New South Wales, Dr Byrne identifies numerous instances of arrests and prosecutions for vagrancy or behaviour amounting to vagrancy,⁸⁰ the earliest example dating from 1812. Though there is evidence of a number of free men apprehended,⁸¹ the enforcement of vagrancy offences was felt disproportionately by women, whose night-time street activities were the subject of close surveillance.⁸² This shifted over the next decade. By the mid-1820s, the idle and disorderly former convict had become the focus of much of colonial law enforcement in New South Wales.⁸³ Captain Francis Rossi, who assumed the superintendency of police in 1825, described Sydney streets as full of people who were 'generally of loose, dissolute, and frequently of a desperate description of Character, abandoned to Idleness and Profligacy' and proposed that a local vagrancy statute be passed.⁸⁴ At around the same time, Governor Macquarie's successor, Sir Thomas Brisbane, floated the view in a despatch to Whitehall that 'a vagrant law of great rigor' might be needed to reduce the high incidence of crime in the colony.⁸⁵ But the risk of 'destroying a principle of the British Constitution,' according to Sir Thomas, defeated the general utility of such a measure,⁸⁶ and no law was passed.

The second approach sought to address the more dangerous portion of former convicts. In October 1799, Governor Hunter issued a proclamation reciting the number of convicts that had escaped, taken to the bush and 'do of

⁷⁹ *R v Wilson* [1797] NSWKR 1; *R v Williams* [1797] NSWKR 2; *R v Hewitt* [1799] NSWKR 2.

⁸⁰ Byrne, above n 73, 159, 161–2, 174.

⁸¹ Ibid 159. See also *The Sydney Monitor* (Sydney), 8 December 1828, 8 ('Two freemen, under the Vagrant Act, were severally sentenced'); *The Sydney Monitor* (Sydney), 17 February 1829, 8 ('free individuals are convicted as vagrants') (emphasis in original).

⁸² Byrne, above n 73, 161–2. This mirrors patterns of prosecution for vagabondage in 18th century London: Rogers, above n 33, 133–4.

⁸³ Byrne, above n 73, 163.

⁸⁴ Despatch from Governor Darling to Earl Bathurst, 15 November 1826, Enclosure No 1 (Report on the Police from Captain Rossi to Colonial Secretary McLeay, 7 October 1826), reproduced in *Historical Records of Australia: Series I — Governors' Despatches to and from England* (Library Committee of the Commonwealth Parliament, 1919) vol 12, 679.

⁸⁵ Despatch from Sir Thomas Brisbane to Earl Bathurst, 23 May 1825, reproduced in *Historical Records of Australia: Series I — Despatches to and from Sir Thomas Brisbane* (Library Committee of the Commonwealth Parliament, 1917) vol 11, 612.

⁸⁶ Ibid.

course mean to live by robbery'.⁸⁷ This marks one of the earliest references to activities that came to be described collectively as bushranging. The Van Diemen's Land colony suffered from this phenomenon from as early as the start of British settlement in 1803, but its onset in New South Wales was not acutely felt until the 1820s.⁸⁸ An escalation in the frequency of attacks during that decade prompted the enactment of the first statute to address the matter specifically.⁸⁹ It is this enactment that holds most interest for the present study. Reciting the 'emergency of the occasion', the *Robbers and Housebreakers Act 1830* (NSW) authorised any person to apprehend any other person whom the apprehender had reasonable cause to suspect and believe was a transported felon unlawfully at large.⁹⁰ All those so apprehended could be detained until they proved to the reasonable satisfaction of a justice of the peace that they were not a transported felon.⁹¹ The Act also targeted those who harboured robbers and housebreakers. All persons found in or near a house during a police search and suspected of harbouring robbers or housebreakers risked being apprehended and brought before a justice of the peace.⁹² Although the Act was designed as a short-term measure intended to expire after two years,⁹³ its operation was renewed several times.⁹⁴ Its perceived criticality eventually passed, and the Act was allowed to lapse upon expiry in 1853.⁹⁵ But, in reversing the onus of proof and conditioning liability on mere suspicion, it foreshadowed an approach to organised criminal activity that would develop more fully in the 20th century.

⁸⁷ Public Notice of 9 October 1799, reproduced in 'General Standing Orders, Issued by Governors Phillip and Hunter', *New South Wales General Standing Orders* (Government Press, 1802) 10.

⁸⁸ Bruce Kercher, *An Unruly Child — A History of Law in Australia* (Allen & Unwin, 1995) 103–5; G D Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788–1900* (Federation Press, 2002) 77.

⁸⁹ *Robbers and Housebreakers Act 1830* (NSW) (11 Geo 4 No 10).

⁹⁰ *Ibid* s 1. A similar power had been granted in 1743 with respect to vagrancy offences in England: *Justices Commitment Act 1743*, 17 Geo 2, c 5, s 5.

⁹¹ *Robbers and Housebreakers Act 1830* (NSW) (11 Geo 4 No 10) s 2.

⁹² *Ibid* s 5.

⁹³ *Ibid* s 10.

⁹⁴ *Offenders at Large Act 1838* (NSW) (8 Will 4 No 2); *Offenders Illegally at Large Act 1840* (NSW) (3 Vict No 26); *Offenders Unlawfully at Large Act 1844* (NSW) (8 Vict No 5); *Offenders Illegally at Large Act 1846* (NSW) (9 Vict No 31).

⁹⁵ Woods, above n 88, 78.

B *Local Vagrancy Statutes*

The clear inference from the foregoing evidence of early police practice in New South Wales is that the colonists acted on the English law. There is good authority to support this approach. An imperial statute passed in 1787 had authorised the Governor of the colony, once appointed, to convene a court

for the Trial and Punishment of all such Outrages and Misbehaviours as, if committed within this Realm [scilicet England], would be deemed and taken, according to the Laws of this Realm, to be Treason or Misprision thereof, Felony or Misdemeanor ...⁹⁶

Reciting this Act, the first Charter of Justice for the colony, granted shortly after passage of the imperial Act, established the Court of Criminal Judicature and empowered it to

[e]nquire of, hear, determine and punish all Treasons or Misprision thereof, Murders, Felonies, Forgeries, Perjuries, Trespasses and other Crimes whatsoever, ... such punishment so to be inflicted being according to the Laws of that part of Our Kingdom of Great Britain called England, as nearly as may be, considering and allowing for the Circumstances and Situation of the place and Settlement aforesaid and the Inhabitants thereof.⁹⁷

English criminal law was thereby received into the colony from first settlement.⁹⁸ English vagrancy laws⁹⁹ — creating, as they did, misdemeanour offences — would *prima facie* have formed part of this body of law.

The issue is muddled somewhat by the enactment in 1828 of the *Australian Courts Act 1828* (Imp).¹⁰⁰ Section 24 of that Act set 25 July 1828 as the reference point by which to ascertain the laws and statutes that were received in colonies of New South Wales and Van Diemen's Land. All statutes in force in England as at that date that were applicable to the situation and condition of the colony were received as law.¹⁰¹ At the relevant date, the *Vagrancy Act*

⁹⁶ (Imp) 27 Geo 3, c 2, s 1.

⁹⁷ *Charter of Justice*, 2 April 1787, reproduced in *Historical Records of Australia: Series IV — Legal Papers* (Library Committee of the Commonwealth Parliament, 1922) vol 1, 10.

⁹⁸ Alex C Castles, 'The Reception and Status of English Law in Australia' (1963) 2 *Adelaide Law Review* 1, 2; J V Barry, G W Paton and G Sawyer, *An Introduction to the Criminal Law in Australia* (Macmillan, 1948) 2.

⁹⁹ *Justices Commitment Act 1743*, 17 Geo 2, c 5 (as extended and amended).

¹⁰⁰ 9 Geo 4, c 83.

¹⁰¹ *Anonymous* (1722) 2 P Wms 75, 75; 24 ER 646, 646 ('as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new found

1824¹⁰² was in force in England.¹⁰³ There seems not to have been an occasion for a court to consider the matter, but there was good reason to think this Act was not applicable. Vagrancy laws, as we have seen, were a tailored response to a particular set of social and economic circumstances prevailing in the United Kingdom. The able-bodied poor did not form an identifiable class in the colonies. The specific mischief that English vagrancy laws sought to address was not present. It seems plausible, then, that English vagrancy laws as they stood at the end of the 18th century were received in New South Wales with other English criminal laws, but the consolidation effected by the 1824 enactment was not. The same reasoning would apply with equal force to the position in Van Diemen's Land, which did not separate from New South Wales until 1825. In South Australia and Western Australia the reception of English vagrancy laws would have depended solely on a determination of their applicability as at 28 December 1836 (for South Australia)¹⁰⁴ or 1 June 1829 (for Western Australia).¹⁰⁵ But it is difficult to see why the same line of reasoning would not apply.

In practice, there seems not to have been a settled view as to whether English vagrancy laws applied in the Australian colonies.¹⁰⁶ Despite the long record of arrests and prosecutions, by 1835 the prevailing legal opinion in New South Wales was that the statutes were not in force there because they

country is to be governed by the laws of *England*'); Sir William Blackstone, *Commentaries on the Laws of England* (A Strahan, 15th ed, 1809) Introduction § 4, 107 ('Such colonists carry with them only so much of the English law, as is applicable to their own situation, and the condition of an infant colony'). See also Castles, above n 98, 17.

¹⁰² 5 Geo 4, c 83.

¹⁰³ The *Justices Commitment Act 1743*, 17 Geo 2, c 5, had been repealed by temporary legislation passed in 1822 (3 Geo 4, c 40 (1822), s 1), which was in turn repealed by the *Vagrancy Act 1824*, 5 Geo 4, c 83, s 1.

¹⁰⁴ *Adoption of Laws Act 1843* (SA) (6 & 7 Vict No 2) s 1.

¹⁰⁵ *Interpretation Act 1918* (WA) s 43.

¹⁰⁶ In New Zealand, there is evidence of numerous vagrancy charges pre-dating passage of a local Act: *The Daily Southern Cross* (Auckland), 15 July 1856, 2; *The Daily Southern Cross* (Auckland), 19 January 1865, 5–6; *The Nelson Examiner and New Zealand Chronicle* (Nelson), 2 December 1857, 2–3; *The Nelson Examiner and New Zealand Chronicle* (Nelson), 26 October 1865, 2; *The Otago Daily Times* (Dunedin), 14 January 1864, 4; *The Otago Daily Times* (Dunedin), 31 May 1864, 5; *The Otago Daily Times* (Dunedin), 24 March 1865, 4; *The Otago Daily Times* (Dunedin), 11 July 1865, 4. However, as New Zealand had received the laws and statutes of New South Wales as at 16 June 1840 (*Extension of New South Wales Laws to New Zealand Act 1840* (NSW) (3 Vict No 28)), the *Vagrancy Act 1835* (NSW) (6 Will 4 No 7), passed by the New South Wales Legislative Council, applied to the colony. It is pursuant to this that the charges must have been laid.

were inapplicable to the condition of the colony.¹⁰⁷ The opposite view prevailed in Van Diemen's Land, where there is contemporaneous evidence that the magistrates acted on the English law.¹⁰⁸

Disagreement on this issue and the ventilation in newspapers of arguments about the need for an enactment tailored to local conditions appear to have catalysed the introduction of a local Act. Such confusion as there had existed was removed by the passage, first in New South Wales (in 1835)¹⁰⁹ and then in other colonies,¹¹⁰ of vagrancy statutes. The New South Wales enactment was strongly advocated by *The Sydney Herald*, the forerunner to *The Sydney Morning Herald*, which had expressed opprobrious lament at the absence of a law regulating vagrancy from the statute book.¹¹¹ *The Sydney Monitor* and *The Colonist* were similarly disposed.¹¹² Support was not universal, though.

¹⁰⁷ *The Sydney Herald* (Sydney), 15 June 1835, 2 ('It has been held by the legal dignitaries, that the Vagrant Acts are not in force'). At least one magistrate, however, held a different view. In evidence to a committee of the Legislative Council conducting an inquiry on police, Colonel Wilson, First Police Magistrate from Mount Elrington (75 miles or so from Goulburn), said that 'magistrates never interfere with vagrants unless caught in some overt act of delinquency; but I conceive we are authorised by the English *Vagrant Act* to deal with all idle and disorderly persons, rogues, and vagabonds, and incorrigible rogues, according to the provisions of that Act': 'Minutes of Evidence Taken before the Committee on Police', *The Sydney Herald* (Sydney), 3 September 1835, 2.

¹⁰⁸ Evidence of William Gunn, Justice of the Peace for the Colony of Van Diemen's Land and Superintendent of the Prisoners' Barracks in Hobart Town, to the Committee on Police of the Legislative Council of New South Wales given on 27 May 1835: 'Minutes of Evidence Taken before the Committee on Police', *The Sydney Herald* (Sydney), 27 July 1835, 2.

¹⁰⁹ *Vagrancy Act 1835* (NSW) (6 Will 4 No 7).

¹¹⁰ *Regulation of Police and Preservation of Peace Act 1838* (Tas) (2 Vict No 22); *Police Act 1844* (SA) (7 & 8 Vict No 19); *Police Ordinance 1861* (WA) (25 Vict No 15); *Police Offences Statute 1865* (Vic) (28 Vict No 265); *Vagrant Act 1866* (NZ) (30 Vict No 40). The New South Wales statute, of course, applied in the Port Phillip and Moreton Bay colonies and continued to apply in the colonies of Victoria and Queensland until the enactment of local vagrancy statutes.

¹¹¹ *The Sydney Herald* (Sydney), 15 June 1835, 2:

It is a subject of wonder, that with a population composed largely of men who are at liberty merely from the expiration of their sentences, or emancipated by the beneficence of former Governors, we should at this period be compelled to appeal to the understandings of our Legislators, for the enactment of so necessary a protection to the honest and industrious.

There had been some earlier commentary on a vagrancy measure in southern Africa: 'Cape of Good Hope', *Sydney Gazette and New South Wales Advertiser* (Sydney), 23 December 1834, 2.

¹¹² 'Bushrangers Act', *The Sydney Monitor* (Sydney) 21 June 1834, 2; 'Depredations of the Aborigines', *The Colonist* (Sydney) 11 June 1835, 4 ('There ought surely to be a Vagrant Act passed to enable the Executive to seize and punish all [ticket-of-leave and free men] at large

Another major newspaper in the colony, the *Sydney Gazette*, opposed the proposed law generally. Its stance, however, appeared somewhat nuanced:

A vagrant law, as suggested by a contemporary, is too contracted a measure for the control of the lower orders in this colony — and its exercise might lead to frequent oppressions even of reputable persons, in a limited community; but we are by no means averse to a law which would, on the spot, warrant any body of men, headed by a magistrate, to massacre every vagabond when *discovered in arms and offering resistance*.¹¹³

The tone may have been intentionally hyperbolic, for the newspaper had been engaged over the past year in a dispute with *The Sydney Monitor* over the importance of personal liberty. The *Sydney Gazette*'s position was that the vague and undefined qualities of the term 'vagrant' stood against the British constitutional tradition of protecting the freedom of the subject.¹¹⁴

The Sydney Herald had sought a statute that 'embodied the better part of the various British Acts now existing'.¹¹⁵ This duly occurred, with the vagrancy statutes introduced across Australia and New Zealand drawing heavily on the comprehensive *Vagrancy Act 1824*.¹¹⁶ In common with that statute, the early colonial enactments employed the classification system comprising idle and disorderly persons, vagabonds and rogues, and incorrigible rogues. Within each class, the colonial Acts, like the English statute, set out descriptions of conduct that would constitute an offence. There remained, however, only three offences: those of being an idle and disorderly person, a vagabond or rogue, and an incorrigible rogue. The exception to this pattern was Tasmania, whose *Police Act 1865*¹¹⁷ harked back to the earlier English enactments of the 17th century. A consolidation in 1905 removed entirely the taxonomy of vagrants in that State but retained most of the proscribed conduct simply as 'offences'.¹¹⁸

in this way [scil allowed to wander at large beyond the stations of settlers in the distant parts of the colony]').

¹¹³ 'Bushrangers', *Sydney Gazette and New South Wales Advertiser* (Sydney) 16 June 1835, 2 (emphasis in original).

¹¹⁴ *Sydney Gazette and New South Wales Advertiser* (Sydney) 24 June 1834, 2; 'Danger of "Olives and Particular"', *The Sydney Monitor* (Sydney) 28 June 1834, 2.

¹¹⁵ *The Sydney Herald* (Sydney), 18 June 1835, 2.

¹¹⁶ 5 Geo 4, c 83.

¹¹⁷ 29 Vict No 10.

¹¹⁸ *Police Act 1905* (Tas).

C Colonial Precursors to Consorting Offences

Two categories of conduct in colonial vagrancy statutes imposed criminal liability by association. Both the categories described conduct sufficient to bring a person within the class of idle and disorderly persons. Though precise terms varied between enactments, the first category generally made it an offence to be the occupier or holder of, or to be found in, a house frequented by thieves (reputed or convicted), prostitutes and persons without visible lawful means of support; the second punished non-Aboriginal persons for lodging or wandering in the company of Aborigines.

The origin of the occupier offence can be traced at least as far back as early 19th century United Kingdom laws applying to Scotland. By a statute of 1833,¹¹⁹ Scottish burghs were empowered to establish police forces.¹²⁰ Section 81 of the Act enabled magistrates to require persons who kept public houses ‘resorted to by riotous or disorderly People’ to find security of between 10 and 50 pounds for their good behaviour. This provision formed the basis of a later offence, still limited in application to Scotland, which made criminally liable

every Person keeping any House, Shop, Room, or other Place of public Resort within the Burgh for the Sale or Consumption of Refreshments of any Kind, who knowingly suffers common Prostitutes or reputed Thieves to assemble at and continue in his Premises ...¹²¹

Two years before this, a new statute governing the police force and other municipal services in Edinburgh had been enacted. By s 135 of the *Edinburgh Police Act 1848*,¹²² any person licensed to sell ale, beer or excisable liquors was required to comply with certain restrictions on how they conducted the premises they occupied. Any such licensee risked the imposition of a penalty and the loss of their licence if, among other things, they

shall, within any Shop, House, Office, or other Premises occupied by him, suffer riotous or disorderly Conduct, or shall harbour Thieves, Prostitutes, or disor-

¹¹⁹ 3 & 4 Wm 4, c 46 (1833).

¹²⁰ A later amendment (10 & 11 Vict, c 39 (1847)) cemented the basis for the first general police force in Scotland. For a detailed history of the evolution of policing in Scotland, see W G Carson, ‘Policing the Periphery: The Development of Scottish Policing 1795–1900, Part I’ (1984) 17 *Australian and New Zealand Journal of Criminology* 207; W G Carson, ‘Policing the Periphery: The Development of Scottish Policing 1795–1900, Part II — Policing and the Production of Social Order’ (1985) 18 *Australian and New Zealand Journal of Criminology* 3.

¹²¹ 13 & 14 Vict, c 33 (1850) s 103.

¹²² 11 & 12 Vict, c 113.

derly Persons, or shall suffer Men or Women of notoriously bad Fame, or dissolute Boys or Girls, to meet and assemble therein ...¹²³

Some similarities can be discerned between these provisions and 18th century measures imposing penalties on persons harbouring any rogue, vagabond, or incorrigible rogue.¹²⁴

Around the same time, measures were put in place — starting with an 1846 Act¹²⁵ and continuing with two statutes passed shortly after¹²⁶ — to improve sanitation in towns across the United Kingdom and to prevent the spread of contagious and epidemic diseases. Parts of the measures dealt with lodging houses and common dwelling houses.¹²⁷ A subsequent enactment, limited in operation to Scotland, sought to make more effectual provision ‘for the Supervision and Regulation of Common Lodging Houses and for the Health of Towns’.¹²⁸ Section 37 of the Act authorised local authorities to request a report from the keeper of any common lodging house in which beggars or vagrants were received.¹²⁹ The local authority would provide the keeper with forms on which to supply the details of all persons who had lodged at the house.¹³⁰

The regulatory requirement contained in the public health statutes merged with the offences created in the police statutes to form a new offence provision in the *General Police and Improvement (Scotland) Act 1862*.¹³¹ Criminal liability was imposed on any person occupying or keeping a house or various other premises who, among other things, knowingly harboured prostitutes, permitted men and women ‘of notoriously bad Fame, or dissolute Boys and Girls’ to meet or assemble in the premises, or knowingly lodged, entertained or harboured any prostitute or idle rogue or vagabond.¹³²

¹²³ Ibid s 135.

¹²⁴ See, eg, 13 Geo 2, c 24 (1740).

¹²⁵ 9 & 10 Vict, c 96 (1846).

¹²⁶ *Nuisances Removal and Diseases Prevention Act 1848*, 11 & 12 Vict, c 123; *Nuisances Removal and Diseases Prevention Amendment Act 1849*, 12 & 13 Vict, c 111.

¹²⁷ 9 & 10 Vict, c 96 (1846), ss 1–2; 11 & 12 Vict, c 123, ss 1–3, 10.

¹²⁸ *Nuisances Removal (Scotland) Act 1856*, 19 & 20 Vict, c 103.

¹²⁹ Ibid s 37.

¹³⁰ Ibid.

¹³¹ 25 & 26 Vict, c 101.

¹³² Ibid s 337.

The *General Police and Improvement (Scotland) Act 1862* was explicitly drawn upon in drafting the *Habitual Criminals Act 1869*.¹³³ Section 10 of this Act provided for the criminal conviction and punishment of any person who

occupies or keeps any lodging-house, beerhouse, public house, or other place where exciseable liquors are sold, or place of public entertainment or public resort, and knowingly lodges or harbours thieves or reputed thieves, or knowingly permits or suffers them to meet or assemble therein ...

It was subsequently re-enacted as s 10 of the *Prevention of Crimes Act 1871*.¹³⁴

It seems likely that this line of statutes informed the terms of colonial Australian offences concerning the occupiers of houses frequented by reputed thieves and other people considered undesirable.¹³⁵ The offence was included in the first antipodean vagrancy statute, enacted by the Governor of New South Wales in 1835. One of the categories of persons deemed idle and disorderly was

the holder of every house which shall be frequented by reputed thieves or persons who have no visible lawful means of support and every person found in any such house in company with such reputed thieves or persons who shall not being thereto required by any Justice give a good account to the satisfaction of such Justice of his or her lawful means of support and also of being in such house upon some lawful occasion ...¹³⁶

This was really two offences: the first rendered criminally liable the holder of a house frequented by reputed thieves or persons without visible lawful means of support; the second applied to a person found in such a house. Not every colony enacted both offences and each varied slightly the scope of the offence(s) created. South Australia and Western Australia initially

¹³³ 32 & 33 Vict, c 99.

¹³⁴ 34 & 35 Vict, c 112.

¹³⁵ The inference is supported both by a comparison of the text of the statutes and by commentaries on the Western Australian and Queensland provisions: see P W Nichols, *Police Offences of Western Australia* (Butterworths, 1979) 81; William Kennedy Abbott Allen, *Police Offences of Queensland* (Law Book Co of Australasia, 1936) 23. Clearly, the direct influence of the British legislation on the enactment of the offence in New South Wales could not have been great — the *Vagrancy Act 1835* (NSW) (6 Will No 7) was, after all, enacted only two years after the earliest British statute identified here. But the textual similarities suggest that the prevailing concerns in both jurisdictions were alike. *Contra* Campbell and Whitmore, above n 6, 135.

¹³⁶ *Vagrancy Act 1835* (NSW) (6 Will No 7) s 2. Both offences were re-enacted several times: *Vagrancy Act 1849* (NSW) (13 Vict No 46) s 2; *Vagrancy Act 1851* (NSW) (15 Vict No 4) s 2; *Vagrancy Act 1901* (NSW) ss 4(e)–(f); *Vagrancy Act 1902* (NSW) ss 4(e)–(f).

introduced — in 1863 and 1892, respectively — the first offence alone but broadened it so that the occupier of a house frequented by prostitutes would also be deemed idle and disorderly.¹³⁷ The second offence was later introduced in South Australia, at the same time as a consorting offence was created.¹³⁸ In their first vagrancy statutes, Victoria (in 1865)¹³⁹ and New Zealand (in 1884)¹⁴⁰ enacted both offences in terms relevantly identical to the New South Wales provision, while Queensland introduced them as separate offences in 1931.¹⁴¹

Unlike the occupier offence, the provisions prohibiting mingling between indigenous and non-indigenous peoples appear to be novel. Mr Nichols contends that they derived from s 4 of the *Vagrancy Act 1824*,¹⁴² upon which the colonial enactments were based.¹⁴³ That provision made it an offence for any person already convicted once for vagrancy to be found

wandering abroad and lodging in any Barn or Outhouse, or in any deserted or unoccupied Building, or in the open Air, or under a Tent, or in any Cart or Waggon, not having any visible Means of Subsistence, and not giving a Good Account of himself or herself ...¹⁴⁴

While s 4 shares some commonality in structure and terms with the Australian and New Zealand provisions, the notion of being in the company of a class of person is absent. Mr Nichols' contention therefore seems tenuous. Rather, the pedigree of the offence is better traced to regulations made during the first ten years following settlement that prohibited association and cohabitation with Aborigines.¹⁴⁵ The prohibition was later confirmed in the

¹³⁷ *Police Act 1863* (SA) (26 & 27 Vict No 10) s 56(7); *Police Act 1892* (WA) (55 Vict No 27) s 65(7). In South Australia, the provision was re-enacted twice: *Police Act 1869* (SA) (33 Vict No 15) s 62(7); *Police Act 1916* (SA) s 66(g).

¹³⁸ *Police Act Amendment Act 1928* (SA) s 5.

¹³⁹ *Police Offences Statute 1865* (Vic) (28 Vict No 265) s 35(iv). The offence was re-enacted multiple times: *Police Offences Act 1890* (Vic) (54 Vict No 1126) s 40(iv); *Police Offences Act 1912* (Vic) s 69(3); *Police Offences Act 1915* (Vic) s 69(3); *Police Offences Act 1928* (Vic) s 69(3).

¹⁴⁰ *Police Offences Act 1884* (NZ) (48 Vict No 24) s 26(2).

¹⁴¹ *Vagrants, Gaming, and Other Offences Act 1931* (Qld) ss 4(1)(iii)–(vi).

¹⁴² 5 Geo 4, c 83.

¹⁴³ Nichols, above n 135, 70.

¹⁴⁴ *Vagrancy Act 1824*, 5 Geo 4, c 83, s 4.

¹⁴⁵ *R v Hewitt* [1799] NSWKR 2. The regulations referred to appear not to have been included in the *New South Wales General Standing Orders*, above n 88, published in 1802. See also *R v Williams* [1797] NSWKR 2.

Vagrancy Act 1835 (NSW), the first of the colonial statutes containing the Aboriginal offence. It is from this that the other colonies seem to have taken their offences. The element of association lacking in the English statute but present in the colonial ones was advocated by *The Sydney Herald*. One of the matters compelling the introduction of vagrancy legislation, in the newspaper's opinion, was '[t]he mode in which free men as well as Convicts are found to join the blacks'.¹⁴⁶ Given this, it made a suggestion about the terms of any future enactment:

Certain clauses should also be introduced to suit [the proposed Act] for this Colony. Thus persons in company with the native blacks, or furnishing them with arms, gunpowder, or spirituous liquors, should be subject to prompt punishment.¹⁴⁷

As enacted, s 2 of the *Vagrancy Act 1835* (NSW) included as a category of idle and disorderly persons:

every person not being a black native or the child of any black native who being found lodging or wandering in company with any of the black natives of this Colony shall not being thereto required by any Justice of the Peace give a good account to the satisfaction of such Justice that he or she hath a lawful fixed place of residence in this Colony and lawful means of support and that such lodging or wandering hath been for some temporary and lawful occasion only and hath not continued beyond such occasion ...¹⁴⁸

This provision was later enacted, with minor amendments, in South Australia (1863),¹⁴⁹ Victoria (1865),¹⁵⁰ New Zealand (1866)¹⁵¹ and Western Australia

¹⁴⁶ *The Sydney Herald* (Sydney), 11 June 1835, 2.

¹⁴⁷ *The Sydney Herald* (Sydney), 18 June 1835, 2. See also 'Depredations of the Aborigines', *The Colonist* (Sydney), 11 June 1835, 4.

¹⁴⁸ The offence was re-enacted as s 3 of the *Vagrancy Act 1849* (NSW) (13 Vict No 46) and, later, as s 2 of the *Vagrancy Act 1851* (NSW) (15 Vict No 4). It formed s 4(1)(b) of the consolidations effected by the *Vagrancy Act 1901* (NSW) and the *Vagrancy Act 1902* (NSW) before being repealed in 1909 and re-enacted as s 10 of the *Aborigines Protection Act 1909* (NSW).

¹⁴⁹ *Police Act 1863* (SA) (26 & 27 Vict No 10) s 56(2), re-enacted as s 62(2) of the *Police Act 1869* (SA) (33 Vict No 15) and as s 66(b) of the *Police Act 1916* (SA). Earlier police statutes lacked any similar provision: *Police Act 1839* (SA) (3 Vict No 6); *Police Act 1841* (SA) (5 Vict No 3); *Police Act 1844* (SA) (7 & 8 Vict No 19).

¹⁵⁰ *Police Offences Statute 1865* (Vic) (28 Vict No 265) s 35(ii). The offence survived several consolidations: *Police Offences Act 1890* (Vic) (54 Vict No 1126) s 40(ii); *Police Offences Act 1912* (Vic) s 69(1); *Police Offences Act 1915* (Vic) s 69(1); *Police Offences Act 1928* (Vic) s 69(1).

(1892).¹⁵² In Queensland, after the colony separated from New South Wales in 1859,¹⁵³ the *Vagrancy Act 1851* (NSW) (as at 10 December 1859)¹⁵⁴ remained in operation until 1931, at which point provision was made for the offence in a Queensland statute.¹⁵⁵

IV CONSORTING OFFENCES

The first jurisdiction to create, in terms, an offence of consorting appears to have been New Zealand.¹⁵⁶ By legislative amendment passed in 1901, a person who habitually consorted with reputed thieves, prostitutes or persons without visible means of support was deemed an idle and disorderly person and, hence, guilty of an offence.¹⁵⁷ This formed the model for all the consorting offences introduced subsequently in Australian jurisdictions. The impetus for the enactment remains elusive. Most of the parliamentary debate on the Bill for the Act was concerned with amendments to the *Police Offences Act 1884* (NZ) other than the creation of the consorting offence. Members who addressed the offence-creating clause of the Bill generally spoke in support of it, principally on the grounds that the public required protection from a ‘most dangerous class of the community’ comprising persons of ‘notoriously bad character’ who associate with ‘rogues and prostitutes’.¹⁵⁸ The Minister for Justice, who introduced the Bill, had explained on an earlier occasion that the offence would reach disreputable individuals who could not be charged with vagrancy because they invariably had enough money on them to demonstrate

¹⁵¹ *Vagrant Act 1866* (NZ) (30 Vict No 10) s 2(2), as repealed by *Police Offences Act 1884* (NZ) (48 Vict No 24) s 48, sch.

¹⁵² *Police Act 1892* (WA) (55 Vict No 27) s 65(2).

¹⁵³ Letters Patent erecting the Colony of Queensland, 6 June 1859, reproduced in Ratcliffe Pring, *Statutes in Force in the Colony of Queensland* (Government Printer, 1862) vol 1, 233.

¹⁵⁴ At which date, the Letters Patent establishing the colony had been published in the Government Gazettes of both New South Wales and Queensland: Order in Council, 6 June 1859 cls 20, 24, reproduced in Pring, above n 153, 238.

¹⁵⁵ *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 4(1)(ii).

¹⁵⁶ *Police Offences Amendment Act 1901* (NZ) s 4, inserting s 26(4) into the *Police Offences Act 1884* (NZ) (48 Vict No 24).

¹⁵⁷ *Police Offences Amendment Act 1901* (NZ) s 4.

¹⁵⁸ New Zealand, *Parliamentary Debates*, House of Representatives, 10 July 1901, vol 116, 272 (G W Russell), 274 (George Laursen). See also New Zealand, *Parliamentary Debates*, Legislative Council, 26 July 1901, vol 116, 672 (T Kelly): ‘That is a very desirable amendment’.

visible means of support.¹⁵⁹ But the archival record and contemporaneous newspaper accounts, to the extent of present research, shed no further light on the matter.

Only one Member spoke in opposition to the new offence. Mr Herries, the Member for the Bay of Plenty, argued on libertarian grounds:

almost anybody could be arrested. ... No man should be called a reputed thief, and no man should be called a thief until he is convicted of that offence. ... It is putting the liberty of perhaps an innocent man under the control of a policeman.¹⁶⁰

This argument foreshadowed the contours of opposition to the offence mounted in other jurisdictions. The New Zealand legislature remained unpersuaded: the Bill passed the House of Representatives 36 votes to 5.¹⁶¹ Mr Herries' argument must have held some force in the Legislative Council as the Statutes Revision Committee proposed an altered form of the offence that would have narrowed its scope to persons who habitually consorted with convicted thieves or prostitutes.¹⁶² The proposal was, however, unsuccessful.

While the influence of the New Zealand offence on later legislation is unquestionable, its novelty is open to doubt. There is evidence from as many as 30 years earlier of deliberative bodies in the United States creating strikingly similar offences. During the 1870s, at least two municipal authorities criminalised the act of associating with undesirable classes of individual. The City of St Louis, in Missouri, passed an ordinance making it an offence to 'knowingly associate[] with persons having the reputation of being thieves, burglars, pick-pockets, pigeon-droppers, bawds, prostitutes or lewd women, or

¹⁵⁹ New Zealand, *Parliamentary Debates*, House of Representatives, 24 August 1900, vol 113, 237 (James McGowan). The Minister's remarks are drawn from debate on an earlier Bill that was subsequently withdrawn. Copies of the text of the Bill appear not to have survived, but in the debate on the Police Offences Bill 1901 (NZ), the Minister indicated that there was 'no real difference' between the two and that little needed to be said in regard to the new Bill: New Zealand, *Parliamentary Debates*, House of Representatives, 10 July 1901, vol 116, 268 (James McGowan). That suggestion is supported by comments from a government backbencher during debate in 1901 reciting the Minister's earlier statement: New Zealand, *Parliamentary Debates*, House of Representatives, 10 July 1901, vol 116, 272 (G W Russell).

¹⁶⁰ New Zealand, *Parliamentary Debates*, House of Representatives, 10 July 1901, vol 116, 271 (William Herbert Herries).

¹⁶¹ New Zealand, *Parliamentary Debates*, House of Representatives, 11 July 1901, vol 116, 276.

¹⁶² Police Offences Amendment Bill 1901 (NZ) cl 4 (as reported from the Statutes Revision Committee on 1 August 1901).

gamblers'.¹⁶³ The requirement of knowledge distinguishes it, on its face, from the New Zealand offence. But New Zealand courts implied a knowledge requirement from an early point in their construction of the offence.¹⁶⁴ In practice, the St Louis ordinance would therefore have operated identically. In 1878, a village in Ohio enacted a narrower offence, prohibiting any male from walking or riding in the company of lewd females or common prostitutes or standing or conversing with such persons in any public area.¹⁶⁵ Both laws were challenged and struck down by State Supreme Courts as unconstitutional,¹⁶⁶ exemplifying a broader trend across the United States that emerged over the subsequent decades.¹⁶⁷ Only a few such ordinances survived judicial scrutiny.¹⁶⁸

The first time consorting appeared as an offence in an Australian enactment was in 1918. Section 53 of the *Aboriginals Ordinance 1918* (NT) created the offence of habitually consorting with a female Aborigine or half-caste. In this context, though, consorting most likely referred to a form of intimate relations, rather than mere association, between indigenous and non-indigenous people.¹⁶⁹ Visiting this type of conduct with criminal consequences was no novelty: there is United States authority from the turn of the century holding that, in the absence of proof of the act of unlawful sexual

¹⁶³ *An Ordinance Concerning Misdemeanors*, St Louis, Mis, Ord 7221 (1870). The enactment appeared in the consolidated ordinances of the City the next year: St Louis, Rev Ordinances, ch 20, art 4, § 1(9) (1871).

¹⁶⁴ *Stevens v Andrews* (1909) 28 NZLR 773, 774 (Chapman J). Professor Steel notes that the need for the consorting to be habitual under the antipodean statutes rendered tenuous a defendant's argument that he or she lacked the requisite knowledge: Steel, above n 6, 577, referring to *Reardon v O'Sullivan* [1950] SASR 77, 81 (Ligertwood J).

¹⁶⁵ See *Cady v Village of Barnesville*, 4 Ohio Dec Rep 396 (Ct Com Pl, 1878).

¹⁶⁶ *City of St Louis v Fitz*, 53 Mo 582 (1873); *Cady v Village of Barnesville*, 4 Ohio Dec Rep 396 (Ct Com Pl, 1878).

¹⁶⁷ *Ex parte Smith*, 36 SW 628 (Mo, 1896); *City of St Louis v Roche*, 31 SW 915 (Mo, 1895); *Hechinger v City of Maysville*, 57 SW 619 (Ky Ct App, 1900); *City of Watertown v Christnacht*, 164 NW 62 (SD, 1917); *City of Lancaster v Reed*, 207 SW 868 (Mo Ct App, 1919); *Ex parte Cannon*, 250 SW 429 (Tex Ct Crim App, 1923); *Coker v City of Fort Smith*, 258 SW 388 (Ark, 1924).

¹⁶⁸ *State v McCormick*, 77 So 288 (La, 1917); *City of New Orleans v Postek*, 158 So 553 (La, 1934); *Re McCue*, 96 P 110 (Cal App 2 Dist, 1908); *Morgan v Commonwealth of Virginia*, 191 SE 791 (Va, 1937).

¹⁶⁹ See Jennifer Clarke, 'Cubillo v Commonwealth' (2001) 25 *Melbourne University Law Review* 218, 224. See also s 30 of the *Aborigines Act Amendment Act 1939* (SA), which inserted a similar offence (as s 34a(a)) into the *Aborigines Act 1934* (SA).

intercourse, consorting with unchaste women was proof of the crime of adultery.¹⁷⁰

In 1928, South Australia¹⁷¹ and, less than a year later, New South Wales¹⁷² introduced habitual consorting offences that drew upon the notion of guilt by mere association.¹⁷³ It was no coincidence that both states passed legislation in such close proximity as it is clear that there were high level discussions on the subject between the police forces of the two jurisdictions. However, there are a couple of reasons, based on correspondence between the Commissioners of Police in South Australia and New South Wales, to suggest that the first fully developed proposal for a consorting offence originated in the latter jurisdiction. First, the South Australian Commissioner forwarded the terms of the proposed New South Wales offence to South Australia's Chief Secretary for consideration before the Bill had been introduced into the New South Wales Parliament.¹⁷⁴ Secondly, a telegram from the New South Wales Commissioner in July or August of 1928 indicated that a special sub-committee of Cabinet was considering amendments to the *Vagrancy Act 1916* (NSW) 'to easier reach persons consorting with criminals'.¹⁷⁵ In October, *The Sydney Morning Herald* reported that Cabinet consideration of a Bill on the subject

¹⁷⁰ *Musick v Musick*, 18 SE 302, 303 (Va, 1891).

¹⁷¹ *Police Act Amendment Act 1928* (SA) s 5, inserting s 66(g2) into the *Police Act 1916* (SA).

¹⁷² *Vagrancy (Amendment) Act 1929* (NSW) s 2(b), inserting s 4(j) into the *Vagrancy Act 1902* (NSW).

¹⁷³ Within five years, four United States jurisdictions had created offences that included consorting with known or reputed thieves or criminals as an element: NY Laws 1931, c 793 (extended by NY Laws 1932, c 58); *Michigan Penal Code*, Mich Pub Acts 1931, No 328, §§ 167–8; Ill Laws 1933, 489; NJ Laws 1933, c 280. In most cases, the opportunity for these laws to have effect was short-lived. The offences in Michigan, Illinois and New Jersey were held unconstitutional, generally on due process grounds: *People v Licavoli*, 250 NW 520 (Mich, 1934); *People v Belcastro*, NE 301 (Ill, 1934); *People v Alterie*, 190 NE 305 (Ill, 1934); *Lanzetta v New Jersey*, 306 US 451 (1939). In New York, the Court of Appeals held the offence (which had been supplemented in 1935: NY Laws 1935, c 921) valid but placed a restrictive interpretation on the elements required for its proof, thereby narrowing its potential scope significantly: *People v Pieri*, 199 NE 495 (NY, 1936). See also Herbert J Adlerberg and Arnold Chekow, 'Disorderly Conduct in New York Penal Law § 722' (1958) 25 *Brooklyn Law Review* 46, 63–4. Despite these setbacks, offences of associating with defined classes of undesirable people remained on the statute books of most states into the 1960s: see Fellman, above n 6, 621 and legislation cited therein at nn 3–4.

¹⁷⁴ State Records of South Australia, GR5/2 Unit 159, South Australian Police Department, Correspondence files ('PCO' files) — Police Commissioner's Office, file no 1496 of 1928, Letter from Commissioner of Police to Chief Secretary (dated 1 August 1928).

¹⁷⁵ State Records of South Australia, GR5/2 Unit 159, South Australian Police Department, Correspondence files ('PCO' files) — Police Commissioner's Office, file no 1541 of 1928.

was imminent.¹⁷⁶ It seems, from that report and a later one,¹⁷⁷ that the offence was to cover unemployed persons who associate or consort with convicted criminals. At some point this must have changed because the final terms of the offence were relevantly identical to the New Zealand Act.¹⁷⁸

In both States, the new offence was introduced at the request of the police. A report from the South Australian Parliamentary Draftsman on the proposed clause stated that '[t]he police ask for these provisions to enable them to break up gangs and coteries of swindlers, thieves and persons living on immorality'.¹⁷⁹ The South Australian Commissioner made repeated requests for the offence; the earliest seems to date from March 1926.¹⁸⁰ The same appears to be true of the position in New South Wales,¹⁸¹ though Professor Steel persuasively argues that significant media pressure also played an important role.¹⁸²

In South Australia, the new offence was considered uncontroversial.¹⁸³ Most discussion focused on the procedural elements of other clauses of the Bill and how the effect of these was to deem a person guilty by imputation without any offence having been proved.¹⁸⁴ It is not without irony that the possibility of the proposed consorting offence having the same effect was apparently overlooked. The clauses passed both Houses without amendment.¹⁸⁵

¹⁷⁶ 'Vagrancy Act: Proposed Amendment', *The Sydney Morning Herald* (Sydney) 1 October 1928, 8.

¹⁷⁷ 'Strengthening the Police', *The Sydney Morning Herald* (Sydney) 16 July 1929, 11.

¹⁷⁸ *Police Offences Amendment Act 1901* (NZ) s 4.

¹⁷⁹ State Records of South Australia, GR5/2 Unit 159, South Australian Police Department, Correspondence files ('PCO' files) — Police Commissioner's Office, file no 1541 of 1928, Police Act Amendment Bill, 1928: Report. See also South Australia, *Parliamentary Debates*, Legislative Assembly, 2 August 1928, 432 (Hermann Homburg, Attorney-General).

¹⁸⁰ State Records of South Australia, GR5/2 Unit 159, South Australian Police Department, Correspondence files ('PCO' files) — Police Commissioner's Office, file no 1496 of 1928, Letter from Commissioner of Police to Chief Secretary (dated 7 September 1926).

¹⁸¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 October 1929, 682 (Captain Chaffey, Colonial Secretary).

¹⁸² Steel, above n 6, 580–8.

¹⁸³ South Australia, *Parliamentary Debates*, Legislative Assembly, 21 August 1928, 612 (Robert Stanley Richards). 'Clauses 5 and 6 are in the public interests and are essential': at 614 (Robert Stanley Richards).

¹⁸⁴ See, eg, South Australia, *Parliamentary Debates*, Legislative Council, 26 September 1928, 1043–4.

¹⁸⁵ South Australia, *Parliamentary Debates*, Legislative Council, 3 October 1928, 1165.

The converse situation prevailed in New South Wales. The Labor Opposition trenchantly opposed the offence on the ground that it impermissibly interfered with the liberty of the subject.¹⁸⁶ *The Sydney Morning Herald* concluded: 'This clause will be a contentious one'.¹⁸⁷ Nevertheless, this Bill also passed both Houses without amendment.

The passage of the consorting legislation in New South Wales and South Australia triggered concerns of criminal migrations to other jurisdictions. Some legislatures moved faster than others, but by 1955 all Australian jurisdictions had enacted a consorting offence. In the parliamentary debates on these statutes, a recurring theme is the need to prevent interstate criminals seeking safe harbour in a jurisdiction that lacked such an offence.¹⁸⁸ Victoria and Queensland passed legislation in 1931 that amended their vagrancy legislation to incorporate the offence.¹⁸⁹ Tasmania followed in 1935,¹⁹⁰ the Northern Territory in 1947,¹⁹¹ the Australian Capital Territory in 1948,¹⁹² and Western Australia in 1955.¹⁹³ The delay in Western Australia was explained on the basis that courts had, by 1955, stopped freely admitting evidence of consorting with criminals, prostitutes or vagrants in prosecutions for the 'idle and disorderly' offence.¹⁹⁴ The Victorian legislation, which Tasmania copied, was unique in including a proviso to the offence, pursuant to which an accused would not be guilty if he or she could provide a good account of his

¹⁸⁶ 'State Parliament: Financial Position', *The Sydney Morning Herald* (Sydney) 26 September 1929, 10.

¹⁸⁷ *Ibid.*

¹⁸⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 10 November 1931, 4092 (William Slater); Queensland, *Parliamentary Debates*, Legislative Assembly, 20 October 1931, 1417 (J C Peterson, Home Secretary); Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 August 1955, 328 (H H Styants).

¹⁸⁹ *Police Offences (Consorting) Act 1931* (Vic) s 2; *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s 4(1)(v).

¹⁹⁰ *Police Offences Act 1935* (Tas) s 6.

¹⁹¹ *Police and Police Offences Ordinance 1947* (NT) s 3(b), inserting s 56(1)(i) into the *Police and Police Offences Ordinance 1923* (NT).

¹⁹² *Police Offences Ordinance 1948* (ACT) s 2(b), inserting s 22(h) into the *Police Offences Ordinance 1930* (ACT).

¹⁹³ *Police Act Amendment Act 1955* (WA) s 2, inserting s 65(9) into the *Police Act 1892* (WA).

¹⁹⁴ Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 August 1955, 328 (H H Styants). This practice was not without precedent. There is mid-19th century authority from Scotland holding that evidence of consorting with vagabonds is sufficient to establish a vagrancy offence: *Scott v Linton* (1860) 32 Sc Jur 449, considering s 155 of the *Edinburgh Police Act 1848*, 11 & 12 Vict, c 113.

or her lawful means of support and of his or her consorting.¹⁹⁵ In all these jurisdictions, the Bill proposing the offence was touted by the government as a means to reduce crime and tackle criminal gangs.¹⁹⁶ Similarly, there was general recognition that the offence conditioned liability on proof of the reputation of the company an accused kept,¹⁹⁷ and it was on this that opposition to the offence was frequently founded. The proposition was most eloquently put by a Victorian Member of Parliament during debate on the second reading of the Police Offences (Consorting) Bill 1931 (Vic):

It provides that a person who has been previously innocent, a person who has no criminal record at all, a person against whom no suggestion of criminality has been made, may be arrested and convicted of the offence of consorting.¹⁹⁸

The argument invariably failed.

V RECENT DEVELOPMENTS IN AUSTRALIA AND NEW ZEALAND

The subsequent history of consorting laws has been mixed. From their emergence through to the early 1980s, consorting offences remained on the statute books of New Zealand and all the Australian states and territories, their terms almost entirely unchanged.¹⁹⁹ The exceptions were New South Wales and Victoria. Here, the nature of the company that exposed a person to criminal liability shifted. In New South Wales, this occurred twice: first, from reputed criminals, known prostitutes and convicted vagrants to reputed prostitutes, reputed drug offenders, other reputed criminals, and convicted vagrants;²⁰⁰ and then simply to persons convicted of indictable offences.²⁰¹

¹⁹⁵ *Police Offences (Consorting) Act 1931* (Vic) s 2.

¹⁹⁶ See, eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 20 October 1931, 1418 (J C Peterson, Home Secretary); Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 August 1955, 328–9 (H H Styants).

¹⁹⁷ See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 10 November 1931, 4091 (William Slater).

¹⁹⁸ *Ibid* 4097 (Maurice Blackburn).

¹⁹⁹ In some cases, though, the offence provisions were repealed and re-enacted. In South Australia and Victoria, this occurred twice: *Police Act 1936* (SA) ss 3, 85(1)(j); *Police Offences Act 1953* (SA) ss 3, 13; *Police Offences Act 1958* (Vic) ss 2(1), 69(1)(c)(i); *Vagrancy Act 1966* (Vic) ss 2(1), 6(1)(c).

²⁰⁰ *Summary Offences Act 1970* (NSW) ss 3(1), 25.

²⁰¹ *Crimes Act 1900* (NSW) s 546A, as inserted by *Crimes (Summary Offences) Amendment Act 1979* (NSW) s 4, sch 5 item 3. The consorting offence found in s 25 of the *Summary Offences Act 1970* (NSW) was repealed at the same time: *Summary Offences (Repeal) Act 1979* (NSW) s 3.

With this second amendment, it also became necessary to prove that an accused knew that the person had been so convicted. The previously prevailing characteristic of consorting offences — criminality based on reputation rather than conviction for an offence — was thereby removed. In Victoria, the shift was less dramatic. Convicted vagrants and known prostitutes were removed from the class of people with whom consorting was proscribed, with only reputed thieves retained.²⁰²

The trend set in New South Wales and Victoria towards narrowing the scope of the offence extended to New Zealand and the Australian Capital Territory during the 1980s. In 1981, New Zealand replaced its consorting offence with a measure targeted at preventing crimes involving dishonesty.²⁰³ The stated purpose of the change was to strike ‘a fair balance between the right of free association and the needs of crime prevention’.²⁰⁴ The new offence proscribed habitual association with a person convicted on at least three separate occasions of a crime involving dishonesty.²⁰⁵ Two significant limitations were imposed: (1) the circumstances in which the association occurred had to be such as to support a reasonable inference that the subsequent commission of a crime involving dishonesty was likely;²⁰⁶ and (2) the police must have warned the defendant on at least three separate occasions that further association with the convicted person could attract criminal charges.²⁰⁷ A later statute introduced analogous measures targeting violent crimes and serious drug offences.²⁰⁸ In the Australian Capital Territory, the offence was repealed in 1983.²⁰⁹ Though not made explicit, it seems that the view was reached that a consorting offence was no longer required.²¹⁰ It has not been reintroduced.

²⁰² *Social Welfare (Homeless Persons) Act 1977* (Vic) s 3(2)(c); *Prostitution Regulation Act 1986* (Vic) s 77(a).

²⁰³ *Summary Offences Act 1981* (NZ) s 51, sch 2.

²⁰⁴ New Zealand, *Parliamentary Debates*, House of Representatives, 15 October 1981, 4178 (D F Quigley).

²⁰⁵ *Summary Offences Act 1981* (NZ) ss 6(1), 6(3).

²⁰⁶ *Ibid* s 6(1).

²⁰⁷ *Ibid* s 6(2).

²⁰⁸ *Summary Offences Amendment Act 1997* (NZ) s 4, inserting ss 6A and 6B into the *Summary Offences Act 1981* (NZ).

²⁰⁹ *Police Offences (Amendment) Ordinance 1983* (ACT) s 6(2), sch.

²¹⁰ Explanatory Statement, *Police Offences (Amendment) Bill 1983* (ACT). The stated purpose of the ordinance was to amend the *Police Offences Ordinance 1930* (ACT) so that it concerned only prostitution and gambling, with repealed provisions that were required to be retained transferred to the *Crimes Act 1900* (NSW) in its application to the ACT. The

More recently, increasing concerns about organised criminal activity in Australia have motivated parliaments to turn again to consorting offences. Though organised crime was first recognised as a distinct problem for Australia during the 1970s and 1980s,²¹¹ government activity in this area has intensified over the last decade. In 2002, the Commonwealth Government convened a meeting of Australian heads of government at which all jurisdictions agreed to cooperate more closely in suppressing the activities of international and organised criminal groups in Australia.²¹² The agreement sought to replace the existing framework, established in the 1980s, with a stronger national strategy to combat serious and organised crime. The principal outcome was the replacement of the National Crime Authority and two other Commonwealth law enforcement bodies with a new agency, the Australian Crime Commission, that would become the focus of the new national approach.²¹³ This, together with the parliamentary oversight mechanisms that carried over from the National Crime Authority, provided a lens through which greater focus was brought to the issue over the years that followed. The increased domestic attention reflected a larger, international trend, a key milestone of which was the conclusion of a major multilateral treaty on the topic in 2000.²¹⁴

Over the last six years, the role that gangs — particularly motorcycle gangs — play across a panoply of criminality has become the focus of public

consorting provisions were not inserted into that Act: see *Crimes (Amendment) Ordinance (No 3) 1983* (ACT).

²¹¹ New South Wales, Royal Commission on Allegations of Organized Crime in Clubs (1973–74; chaired by Justice Athol Moffitt); New South Wales, Royal Commission into Drug Trafficking (1977–79; chaired by Justice Philip Woodward); Commonwealth, Queensland, Tasmania, Victoria, Western Australia, Royal Commission of Inquiry into Drugs (1977–79; chaired by Justice Edward Williams); New South Wales, Commission to Inquire into New South Wales Police Administration (1979–81; chaired by Justice Edwin Lusher); Commonwealth, Victoria, Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (1980–84; chaired by Frank Costigan QC); Commonwealth, New South Wales, New Zealand, Queensland, Victoria, Royal Commission of Inquiry into Drug Trafficking (1981–83; chaired by Justice Donald Stewart).

²¹² Council of Australian Governments, *Agreement on Terrorism and Multi-Jurisdictional Crime* (5 April 2002).

²¹³ For background to the establishment of the Commission and an explanation of the anticipated differences from the Authority, see Parliamentary Joint Committee on the National Crime Authority, Parliament of Australia, *Australian Crime Commission Establishment Bill 2002* (2002) 1–2 [1.2]–[1.5], ch 2.

²¹⁴ *United Nations Convention against Transnational Organized Crime and the Protocols thereto*, opened for signature 12 December 2000, 2225 UNTS 209 (entered into force 29 September 2003). See also Andreas Schloenhardt, 'Transnational Organised Crime and International Law: The Palermo Convention' (2005) 29 *Criminal Law Journal* 340.

attention. Evidence of the breadth, nature and impact of such groups' activities has come into the public domain partly through parliamentary and government inquiries. In particular, two inquiries conducted by the Commonwealth Parliamentary Joint Committee on the Australian Crime Commission between 2006 and 2009 showed that criminal gangs had diversified their activities across illicit drug trafficking, illegal firearms, money laundering, fraud, stock market manipulation, extortion and protection rackets, counterfeiting, and vehicle rebirthing;²¹⁵ that groups were working collaboratively, flexibly and across state borders;²¹⁶ and that the annual cost to the Australian economy was \$10 billion.²¹⁷ Motorcycle gangs were specifically labelled as being linked to most forms of serious organised crime.²¹⁸ The heightened consciousness of criminal gangs is also attributable to a series of increasingly violent clashes between rival gangs. These began to receive coverage in news media in early 2008, and they culminated with a brawl between two motorcycle gangs in the domestic arrivals hall of Sydney Airport in March 2009.²¹⁹ This was the proximate cause of a resolution by the Standing Committee of Attorneys-General in April 2009 that states and territories would consider introducing legislation to combat organised crime, including '[c]onsorting or similar provisions that prevent a person from associating with another person who is involved in organised criminal activity'.²²⁰ Law

²¹⁵ Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the Future Impact of Serious and Organised Crime on Australian Society* (2007) 10–12 [2.24]–[2.34]; Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups* (2009) 9–10 [2.11]–[2.17], 11–14 [2.20]–[2.29]. For international perspectives on this phenomenon, see Tony Thompson, *Outlaws: Inside the Violent World of Biker Gangs* (Hodder & Stoughton, 2011); Thomas Barker, *Biker Gangs and Organized Crime* (LexisNexis, 2007).

²¹⁶ Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Future Impact of Serious and Organised Crime*, above n 215, 7 [2.11]–[2.13]; Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups*, above n 215, 10 [2.17].

²¹⁷ Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups*, above n 215, 8 [2.8]. The estimated annual cost of these activities, as at 2011, was up to \$15 billion: Australian Crime Commission, *Organised Crime in Australia 2011* (2011) 3.

²¹⁸ Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Future Impact of Serious and Organised Crime*, above n 215, 9 [2.18]–[2.20].

²¹⁹ Morgan and Dagistanli, above n 49, 584–6.

²²⁰ Standing Committee of Attorneys-General, above n 4, 9.

enforcement agencies had for some time advocated the revival and modernisation of such laws.²²¹

The needs of law enforcement agencies have driven the choice of substantive legislative measures that Australian parliaments passed to address this mischief.²²² These measures fall into three categories. The first targeted the physical headquarters of motorcycle gangs. South Australia, Western Australia and Tasmania enacted legislation authorising the executive government to order alterations to heavy fortifications on premises suspected of being used by people involved in organised crime.²²³ Though this sort of measure survived constitutional scrutiny,²²⁴ the police in these states considered it ineffective.²²⁵ The second category comprised traditional offences created to punish participation in a criminal organisation or association among its membership.²²⁶ However, the collective nature of organised criminal activity made the criminal law, from the perspective of law enforcement agencies, an inflexible tool with which to respond.²²⁷ A new class of measure that employed less traditional methods was required. Drawing inspiration from consorting offences, this third category established schemes calculated to

²²¹ Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Future Impact of Serious and Organised Crime*, above n 215, 57–9 [6.64]–[6.71]; Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups*, above n 215, 56–7 [4.15]–[4.19].

²²² See Arlie Loughnan, ‘The Legislation We Had to Have?: The *Crimes (Criminal Organisations Control) Act 2009* (NSW)’ (2009) 20 *Current Issues in Criminal Justice* 457.

²²³ *Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002* (WA), later replaced by pt 4 div 6 of the *Corruption and Crime Commission Act 2003* (WA); *Summary Offences Act 1953* (SA) pt 16, as inserted by s 8 of the *Statutes Amendment (Anti-Fortification) Act 2003* (SA); *Police Offences Act 1935* (Tas) pt 2 div 3, as inserted by s 7 of the *Police Offences Amendment Act 2007* (Tas).

²²⁴ *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *Osenkowski v Magistrates Court of South Australia* (2006) 96 SASR 456.

²²⁵ Andreas Scholenhardt, ‘Mafias and Motorbikes: New Organised Crime Offences in Australia’ (2008) 19 *Current Issues in Criminal Justice* 259, 260.

²²⁶ *Crimes Act 1900* (NSW), pt 3A div 5 (previously pt 3E), as inserted by *Crimes Legislation Amendment (Gangs) Act 2006* (NSW) sch 1 item 11 and renumbered by the *Crimes Amendment Act 2007* (NSW) s 3, sch 2 item 12; *Criminal Code* (Cth) pt 9.9, as inserted by *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010* (Cth) s 3, sch 4. New Zealand introduced a similar offence in 1997: *Crimes Act 1961* (NZ) s 98A, as inserted by *Crimes Amendment Act (No 2) 1997* (NZ) s 2.

²²⁷ Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups*, above n 215, 56 [4.15]–[4.16]; Andreas Scholenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region* (Study Series No 1, United Nations Offices on Drugs and Crime, Regional Centre for East Asia and the Pacific, United Nations, 2009) 25.

restrict contact among identified persons suspected of involvement in organised crime through a combination of executive or quasi-executive orders and criminal offences. The schemes followed a common pattern.²²⁸ The Commissioner of Police was empowered to apply to a judge or the Attorney-General for a declaration in respect of a particular organisation. Once granted, the Commissioner could apply to a judge for a control order to restrict the freedom of movement and communication of particular members or suspected members of that organisation. Conduct in breach of the order attracted criminal liability. Police and other law enforcement bodies strongly advocated and supported measures employing this approach,²²⁹ but two High Court decisions holding much of the South Australian and all of the New South Wales schemes constitutionally invalid significantly constrained the scope of their operation.²³⁰ Both states recast their control order schemes in light of the decisions,²³¹ and Western Australia and Victoria introduced their own measures shortly after.²³²

But this type of legislation has remained under constitutional challenge. The latest skirmish centred on Queensland's *Criminal Organisations Act 2009* and the provisions under which the Supreme Court of Queensland could make a declaration in respect of a particular organisation.²³³ The Act authorised the Supreme Court, in considering an application for a declaration, to receive and act on material related to actual or suspected criminal activity.²³⁴ It also forbade disclosure of that material to a respondent to the application or

²²⁸ *Serious and Organised Crime (Control) Act 2008* (SA); *Crimes (Criminal Organisations Control) Act 2009* (NSW); *Serious Crime Control Act 2009* (NT); *Criminal Organisation Act 2009* (Qld). The *Justice Legislation Amendment (Group Criminal Activities) Act 2006* (NT), which inserted s 55A into the *Summary Offences Act* (NT) and s 97A into the *Sentencing Act* (NT), is thought to be the prototype for these measures: Bartels, above n 3, 7.

²²⁹ Morgan and Dagistanli, above n 49, 585; Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups*, above n 215, 57 [4.18]–[4.20]; Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Future Impact of Serious and Organised Crime*, above n 215, 57–9 [6.64]–[6.71].

²³⁰ *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181.

²³¹ *Serious and Organised Crime (Control) Act 2008* (SA), as amended by the *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA); *Crimes (Criminal Organisations Control) Act 2012* (NSW).

²³² *Criminal Organisations Control Act 2012* (WA); *Criminal Organisations Control Act 2012* (Vic). The operative provisions of the Western Australian statute are yet to come into effect: s 2.

²³³ *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638.

²³⁴ *Criminal Organisations Control Act 2009* (Qld) ss 10(2), 58, 81.

their representative.²³⁵ In issue, principally,²³⁶ was whether these procedures impaired the institutional integrity of the Supreme Court as a repository of federal jurisdiction. The challenge failed,²³⁷ which was perhaps unsurprising in light of earlier High Court authority examining similar provisions.²³⁸ Emboldened by the decision,²³⁹ New South Wales amended its Act to conform to the Queensland model,²⁴⁰ and other states may be expected to follow. But it ought be steadily borne in mind that there remain differences across the various state enactments and that, in the Queensland challenge, the Court was not called on to judge the constitutionality of the substantive provisions of the Act, governing membership of an organisation and control orders in respect of individuals. Further litigation seems likely.

The overwhelming majority of this legislative activity has emanated from state parliaments, but there are indications that the Commonwealth wishes to enter the field. A week before the High Court dismissed the challenge to the Queensland Act, the Commonwealth announced its intention to arrogate responsibility for national anti-gang laws. The Prime Minister foreshadowed requests to the states to refer powers to the Commonwealth under s 51(xxxvii) of the *Constitution* in order to create an 'efficient and seamless approach to controlling criminal organisations'.²⁴¹ This formed part of a range of measures addressed to reducing organised criminal activity, including the formation of a national intergovernmental taskforce to police gang-related crime and a federal body to coordinate investigations into the trafficking of contraband

²³⁵ Ibid ss 66, 70, 78.

²³⁶ The respondents had also impugned one of the criteria for the Supreme Court's exercise of the declaration-making power (*Criminal Organisations Act 2009* (Qld) s 10(1)(c)) and the limited time a respondent has to respond to an application for a declaration that it is a 'criminal organisation' (*Criminal Organisations Act 2009* (Qld) ss 9, 106), but these were subsidiary arguments: *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638, 668 [99] (Hayne, Crennan, Kiefel and Bell JJ).

²³⁷ *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638, 645–6 [21]–[25], 662 [78], 665–6 [87]–[89], 666–7 [92], 667 [94] (French CJ); 678–9 [143], 681 [155], 682–4 [160]–[169], 685 [172] (Hayne, Crennan, Kiefel and Bell JJ); 686 [175]–[178] (Gageler J).

²³⁸ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532.

²³⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 March 2013, 19104 (Barry O'Farrell, Premier).

²⁴⁰ *Crimes (Criminal Organisations Control) Amendment Act 2013* (NSW).

²⁴¹ Prime Minister, Attorney-General, Minister for Home Affairs, 'National Plan to Tackle Gangs, Organised Crime and the Illegal Firearms Market' (Press Release, 6 March 2013).

into Australia.²⁴² So far, the Commonwealth seems to have failed to persuade any state to refer its powers. The matter was discussed at the most recent meeting of the Council of Australian Governments but consensus reached only as far as the need to cooperate and the utility of further discussions among Attorneys-General and Ministers for Justice.²⁴³ The inclusion of mutual recognition provisions in states' control order schemes has, no doubt, undermined the Commonwealth's case for intervention.²⁴⁴

It is against this backdrop that recent developments in consorting offences must be viewed. Six Australian jurisdictions retain a consorting offence on their statute books. Several have recently refocused their offences to target organised crime more specifically. In 2005, amendments were passed by the Victorian Parliament so that it is now a crime to habitually consort with a person who has been found guilty of, or who is reasonably suspected of having committed, an organised crime offence.²⁴⁵ In a similar vein, South Australia repealed the offence in 2008 as part of the introduction of its control order scheme,²⁴⁶ but re-enacted it last year after the High Court held much of the scheme invalid in 2010.²⁴⁷ It is now an offence to habitually consort, without reasonable excuse, with a person who has been found guilty of a serious and organised crime offence or who is reasonably suspected of having committed such an offence.²⁴⁸ The decision to use consorting offences as a model for South Australia's revised scheme was said to be founded on a passage from the judgment of French CJ in *South Australia v Totani* referring

²⁴² Prime Minister, Minister for Home Affairs, 'National Anti-Gang Taskforce: Federal and State Agencies to Work Together to Tackle Gang Crime' (Press Release, 3 March 2013); Prime Minister, Minister for Home Affairs, 'National Border Targeting Centre to Target Organised Crime' (Press Release, 3 March 2013).

²⁴³ Council of Australian Governments, *Communiqué* (19 April 2013) 3.

²⁴⁴ *Criminal Organisation Act 2009* (Qld) pt 8; *Criminal Organisations Control Act 2012* (Vic) pt 5; *Criminal Organisations Control Act 2012* (WA) pt 7; *Crimes (Criminal Organisations Control) Act 2012* (NSW) pt 3A.

²⁴⁵ *Summary Offences Act 1966* (Vic) s 49F(1), as inserted by s 5 of the *Vagrancy (Repeal) and Summary Offences (Amendment) Act 2005* (Vic). An 'organised crime offence' is defined by s 49F(3) as an indictable offence punishable by up to 10 years imprisonment that satisfies four criteria: (i) involvement of two or more offenders; (ii) substantial planning and organisation; (iii) part of a systemic and continuing criminal activity; and (iv) a purpose of obtaining profit, gain, power or influence.

²⁴⁶ *Serious and Organised Crime (Control) Act 2008* (SA) sch 1 item 6.

²⁴⁷ *Statutes Amendment (Serious and Organised Crime) Act 2012* (SA) s 46, inserting s 13 into the *Summary Offences Act 1953* (SA).

²⁴⁸ *Summary Offences Act 1953* (SA) s 13.

briefly to consorting offences.²⁴⁹ In New South Wales, the offence was last year recast so as to 'modernise' it.²⁵⁰ The schema adopted bears strong resemblance to the New Zealand legislation introduced in 1981.²⁵¹ The new offence proscribes habitual consorting with a person convicted of an indictable offence, as before, but a defendant will not be guilty of the offence unless a police officer has warned the defendant officially, in relation to each person he or she has consorted with, that (i) the person has been convicted of an indictable offence, and (ii) consorting with a such an offender is an offence.²⁵² The Northern Territory has retained the original form of its consorting offence but introduced another that prohibits, upon notice given by the Commissioner of Police, certain convicted offenders from associating with each other.²⁵³

Developments in Queensland, Western Australia and Tasmania lie against this trend. In 2005, Queensland repealed its consorting offence.²⁵⁴ No specific reason was advanced, but the general objective of the amending Act was to replace 'archaic' vagrancy provisions with a 'modern and effective' Act governing community safety and public order.²⁵⁵ Western Australia has narrowed significantly the scope of its offence. A general offence of consorting ceased to exist in 2004, when amendments were passed that restricted the conduct punishable to communication between convicted child sex offenders and between certain convicted drug offenders.²⁵⁶ Tasmania is the only jurisdiction not to have made any major amendment to its consorting law. Since its creation, the offence has been altered only to restrict the class of persons with whom consorting is prohibited to reputed thieves.²⁵⁷

²⁴⁹ South Australia, *Parliamentary Debates*, House of Assembly, 15 February 2012, 80 (J R Rau, Attorney-General), quoting *South Australia v Totani* (2010) 242 CLR 1, 30–1 [33] (French CJ).

²⁵⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 February 2012, 8131 (Greg Smith, Attorney-General).

²⁵¹ *Summary Offences Act 1981* (NZ) ss 6–6C.

²⁵² *Crimes Act 1900* (NSW) ss 93W–93X. Certain forms of consorting are permitted pursuant to s 93Y.

²⁵³ *Summary Offences Act* (NT) s 55A, as inserted by s 23 of the *Justice Legislation Amendment (Group Criminal Activities) Act 2006* (NT).

²⁵⁴ *Summary Offences Act 2005* (Qld) s 30, sch 1.

²⁵⁵ Queensland, *Parliamentary Debates*, Legislative Assembly, 28 September 2004, 2396 (J C Spence).

²⁵⁶ *Criminal Code* (WA) ss 557J–557K, as inserted by s 33 of the *Criminal Law Amendment (Simple Offences) Act 2004* (WA).

²⁵⁷ *Police Offences Amendment (Clamping) Act 2009* (Tas) s 4.

VI CONCLUSION

Eight consorting offences remain on Australian statute books but the relative uniformity that once existed across their terms is no more.²⁵⁸ Some retain the feature characteristic of the offence when it was first enacted: they punish repeated association with people who need not have a criminal conviction but are reputed to be criminals.²⁵⁹ Others require a defendant's associates to have a conviction for some serious crime or be reasonably suspected of having committed one.²⁶⁰ Establishing a reasonable suspicion of criminal conduct will presumably be more difficult than proving a reputation for criminality, but the opportunity for a court to decide the issue appears not yet to have arisen. A further class imposes restrictions only on convicted offenders and only with respect to their dealings with other offenders.²⁶¹

Though their terms have diverged, other prominent features of consorting offences have remained constant. The explanation proffered for their continued existence is the same rationale relied on by the governments that introduced them. These offences, it is said, are intended as prophylactics, targeting activities that lie outside the reach of the traditional criminal law but that nevertheless conduce criminal conduct. In that sense, they form an important part of the ongoing narrative of the law's concern with inchoate criminality. The role that law enforcement bodies have played in their re-emergence is also familiar. As we have seen, senior police officers played a significant part in the early agitations for local vagrancy Acts and then afterwards in their amendment so as to insert consorting offences.

The parallels noted here underline the central thesis offered by this study: that consorting offences are part of a long, knotted strand of legal history that stretches from the 14th century to the present. They are but one of many legislative attempts to criminalise the act of associating with individuals considered, at one time or another, undesirable. The context in which they are now deployed may seem very different to the mediaeval environment from which they grew. But at base they express the simple and ageless sentiment of a society that detests or fears a particular class of individual. The present preoccupation with motorcycle gangs will likely pass, but the sort of measures

²⁵⁸ *Crimes Act 1900* (NSW) s 93X; *Police Offences Act 1935* (Tas) s 6; *Summary Offences Act 1953* (SA) s 13; *Summary Offences Act 1966* (Vic) s 49F; *Criminal Code* (WA) ss 557J–557K; *Summary Offences Act* (NT) ss 55A, 56(1)(i).

²⁵⁹ *Police Offences Act 1935* (Tas) s 6; *Summary Offences Act* (NT) s 56(1)(i).

²⁶⁰ *Crimes Act 1900* (NSW) s 93X; *Summary Offences Act 1953* (SA) s 13; *Summary Offences Act 1966* (Vic) s 49F.

²⁶¹ *Criminal Code* (WA) ss 557J–557K; *Summary Offences Act* (NT) s 55A.

addressed to the problem they have posed are unlikely to dip from view for long.