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### Careful who you chat with: it could turn you into a criminal

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## Careful who you chat with: it could turn you into a criminal

### Abstract

Next time you strike up a conversation at your local coffee shop, have a chat in the pub after work, or have a natter with fellow dog lovers as you follow your pooch around the park, you may want to get in early with a few key questions. Like, "Do you have a criminal record?" If yes, I suggest you ask a delicate follow-up: "How serious was your crime?"

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# Careful who you chat with: it could turn you into a criminal

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## Disclosure Statement

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NSW consorting laws mean a group of dog owners who regularly meet at Sydney's Leichhardt Pioneers Memorial Park might want to run criminal record checks on anyone joining their social gathering. AAP/Britt Smith

Next time you strike up a conversation at your local coffee shop, have a chat in the pub after work, or have a natter with fellow dog lovers as you follow your pooch around the park, you may want to get in early with a few key questions. Like, "Do you have a criminal record?" If yes, I suggest you ask a delicate follow-up: "How serious was your crime?"

Granted, questions like these are likely to kill the conversation buzz. They will probably cause your new friend to seek company elsewhere. But according to a [High Court decision](#) handed down last week, if you don't take these precautions, you might be placing yourself at risk of being charged with a serious criminal offence yourself.

You see, under [section 93X](#) of the *Crimes Act 1900* (NSW) it is an offence to "habitually consort" (i.e. communicate more than once) with convicted offenders. The penalty is three years' imprisonment or a \$16,500 fine, or both.

The legislation has a few "safeguards" that are meant to make us breathe a little easier.

The person must have been convicted of an *indictable* offence. But that is still a very long list. It includes everything from serious crimes such as murder to minor offences such as shoplifting.

You have to communicate with not just one, but *two* convicted offenders (though not necessarily at once and it doesn't have to be in person - the legislation covers phone, email

and social media communications too). The police have to give you a “warning”, so you can’t later claim that you didn’t know your coffee buddy or Facebook friend was a bad guy.

It gets worse. If the person you are chatting with has a criminal record, it doesn’t matter what you talk about. If you are charged with consorting, the police don’t have to prove that you were discussing anything naughty, let alone planning a crime.

Your mate could be explaining why he loves Manchester United, sharing the gory details of her mother’s hip replacement, grieving over the axing of your favourite TV show or making plans for a charity fun run next weekend. It doesn’t matter when it comes to consorting.

The rationale seems to be that people who have committed a crime in the past can never be trusted again, even after they have “done their time”. So much for punishing and stigmatising people only for what they do rather than who they are (or were).

## **It’s not just really bad people who’ve been charged**

Of course, if we take the government at its word, most of us have nothing to worry about. Surely it’s only bikies and terrorists and the like who are going to be on the receiving end of a consorting warning or charge?

Certainly, when the NSW government re-introduced and beefed up consorting laws back in 2012, [it indicated](#) that the laws, and the powers they gave police, were necessary to break up the criminal activities of outlaw motorcycle and other organised crime gangs.

There are two problems with this reassurance. First, nothing in the drafting of the legislation limits its operation to bikies and organised crime gangs, or to the planning of crimes. Second, others are getting caught up in the very wide web of consorting laws.

The first man charged with consorting after the 2012 revival in NSW, Charlie Forster, was not a bkie or a crime lord. As described in a [press report](#), he was “an intellectually disabled 21-year-old from Inverell, in northern NSW, who was charged with consorting while grocery shopping with his housemate”.

When the Office of NSW Ombudsman Bruce Barbour reviewed the first year of the new consorting laws, it found more than 100 cases of misuse. Office of NSW Ombudsman

When the Office of the NSW Ombudsman completed a [preliminary review](#) of the consorting law in 2013 (a final report is due later this year) it expressed concern that it was being used against vulnerable and disadvantaged groups, including Aboriginal people and the homeless. Police issued [warnings to more than 100 people](#) when they had no authority to do so.

## **Bad law puts our basic rights at risk**

Although it grabs the [headlines](#), constitutional litigation in the High Court of Australia is a seriously problematic way of challenging the fairness and legitimacy of even the most

outrageous parliamentary over-criminalisation. Why? Because the High Court is a conservative place and the judges will only work with the tools the Constitution gives them. When it come to rights and liberties, there are very few.

The NSW consorting laws (and [similar laws](#) in other parts of Australia) are patently inconsistent with the fundamental human right of freedom of association. This is enshrined in Article 22 of the UN [International Covenant on Civil and Political Rights \(ICCPR\)](#). The problem is that even though Australia has been a party to the ICCPR for decades, neither the Constitution nor any statute enacted by Parliament formally recognises this right.

There are further problems with relying on the High Court to be the voice of reason and praying that it will rein in bad law-making. If the law is found to be valid, the relevant state government can puff out its chest and boast that the law in question has the High Court's tick of approval. The reality is that the High Court only ever adjudicates on narrow technical constitutional issues when scrutinising legislation, rather than undertaking a holistic review of the merits of a law.

Tellingly, three of the judges that upheld the NSW consorting law said: "The desirability of consorting provisions ... is not relevant to the task before the Court." Sad but true.

Even when a constitutional challenge to zealous over-criminalisation "succeeds", the win is often short-lived. For example, when the High Court struck down the *Crimes (Criminal Organisations Control) Act 2009* (NSW) in [Wainohu v NSW \(2011\) 243 CLR 181](#) - another law that criminalised association by allowing police to seek court orders banning named bikies from having any contact with each other - how did the NSW government respond? Did it retreat in response to the High Court's chastisement?

Hardly. Its lawyers produced a slightly modified version of the legislation that addressed the flaws that the High Court had effectively marked up in red pen. We now have the new and improved *Crimes (Criminal Organisations Control) Act 2012* (NSW). It's another outrageous example of the criminalisation of who a person is rather than what they do, but this time "High Court-proof".

The upshot of this sorry tale is that we need to find better ways to discourage our legislators from passing bad laws in the first place. This is a daunting task when so many governments are willing to trash [principles in favour of pragmatism](#). The recent instance of [knee-jerk bail law "reform" in NSW](#) is another case in point.

But we need to find a way, not least if we want to socialise in peace without having to ask our friends and acquaintances intrusive questions about their past. No one should be exposed to the risk of police harassment or a stint in prison simply because of the so-called "bad character" of the person with whom they have decided to have a conversation.