SUPREME COURT OF QUEENSLAND

CITATION:	*R v Crowden and Lambert* [2021] QSC 252
PARTIES:	**THE QUEEN** (Respondent) **v** **IAN RONALD CROWDEN** (First Applicant) and **MATTHEW GRANT LAMBERT** (Second Applicant)
FILE NO/S:	Indictment No. 988 of 2021
DIVISION:	Trial Division
PROCEEDING:	Application pursuant to s 590AA of the Criminal Code
DELIVERED ON:	6 October 2021
DELIVERED AT:	Brisbane
HEARING DATE:	5 October 2021
JUDGE:	Bowskill SJA
ORDERS:	**The Court declares that in circumstances where the defendants were not charged with the offence the subject of count 5 until June 2019, by which time the *Vicious Lawless Association Disestablishment Act 2013* (VLAD Act) had been repealed in its entirety, s 11(1) of the *Criminal Code* operates to prevent the defendants being punished for doing the acts the subject of count 5, in the circumstances alleged by reference to the VLAD Act, under s 7 of the VLAD Act, because it is no longer in force.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – REPEAL – EFFECT – GENERALLY – where the defendants were charged with an offence of assault occasioning bodily harm, under s 339(1) and (3) of the *Criminal Code*, with allegations that they were both "vicious lawless associates" and one of them was an "office bearer of the relevant association", by reference to the *Vicious Lawless Association Disestablishment Act 2013* (Qld) (VLAD Act) in June 2019, after the repeal of the VLAD Act – whether the defendants can now be punished for doing the acts the subject of the relevant charge, in the circumstances alleged by reference to the VLAD Act, under s 7 of the VLAD Act, having regard to s 11 of the *Criminal Code* and s 20(2)(c) and (d) of the *Acts Interpretation Act 1954.* *Acts Interpretation Act 1954* (Qld), s 20(2)

Criminal Code 1899 (Qld), ss 1, 2, 11, 339
Vicious Lawless Association Disestablishment Act 2013 (Qld)

Commissioner of Taxation v Price [2006] 2 Qd R 316
Goli (Commissioner of State Revenue) v Thompson & Anor [2017] QDC 4
Kuczborski v Queensland (2014) 254 CLR 51
R v Barlow (1997) 188 CLR 1
R v Ellis [2002] QCA 402
R v Graham [2016] QCA 73
R v HXY & Ors [2017] QSC 108
R v JAA [2019] 3 Qd R 242
R v PAZ [2018] 3 Qd R 50
R v WAY; Ex parte Attorney-General (Qld) [2013] QCA 398

COUNSEL: M Longhurst for the first applicant
S Lynch for the second applicant
D Meredith for the respondent

SOLICITORS: Gatenby Criminal Lawyers for the first applicant
Dib & Associates for the second applicant
The Director of Public Prosecutions for the respondent

[1] On 17 October 2013, the Queensland Parliament enacted the *Vicious Lawless Association Disestablishment Act 2013* (VLAD Act). Just over three years later, on 9 December 2016, it was repealed,[1] following a recommendation from a Taskforce on Organised Crime Legislation established by the Government. The repeal of the VLAD Act, in its entirety, was in circumstances where, as observed in the explanatory notes to the relevant bill:

> "The Taskforce considered that the criticisms of the VLAD Act by the High Court of Australia (*Kuczborski v Queensland* (2014) 89 ALJR 59) could not be overcome. The Taskforce considered there to be genuine concern over its constitutional vulnerability, in particular that the effect of the discretion vested in the Commissioner of Police in assessing the calibre of cooperation by an offender may be a usurpation of judicial power.
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> In addition to the constitutional concerns, the Taskforce considered other matters to present significant problems for the continued existence of the VLAD Act, including: the misleading and prejudicial nature of its title, its location outside of Queensland's ordinary sentencing framework, the tension between the Act's objects and the fundamental sentencing principle of proportionality, and a lack of transparency and fairness in the operation of its section 9 (i.e. the scheme to encourage cooperation) …".[2]

[2] The only transitional provision made, following the repeal of the VLAD Act in December 2016, was to include part 14, division 16, subdivision 1 (ss 243-248) in the

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1 *Serious and Organised Crime Legislation Amendment Act 2016* (Act No 62 of 2016), s 492.
2 Explanatory notes to the Serious and Organised Crime Legislation Amendment Bill 2016, at p 26.

Penalties and Sentences Act 1992.[3] By s 244, that subdivision applies "if a court has in, or in connection with, a criminal proceeding, including, for example, a proceeding on appeal, sentenced a person as a vicious lawless associate for a declared offence under the repleaded VLAD Act, section 7". In that circumstance, s 245 enabled the person to apply to the Supreme Court to reopen the proceeding, to the extent the court had imposed on them one or more of the mandatory additional punishments provided for under s 7(1)(b) and (c). Section 245(2) imposed a time limit for the making of any such application of 3 months after the commencement of the subdivision (subject to the exercise of the court's discretion to extend that time). It is reasonable to infer, from the wording of s 244 and the time limit in s 245(2), that the provision was aimed at persons who had already been sentenced under the VLAD Act prior to its repeal.

[3] No transitional provision was made for persons to whom the VLAD Act may potentially have applied, prior to its repeal, but who had not been sentenced prior to its repeal (let alone persons who had not been charged). One might think that was because the objective intention was, as it was described in the explanatory notes, to repeal the legislation in its entirety, leaving no room for any further operation for this legislation.

[4] However, subsequent decisions have found room for the legislation to continue to operate in some capacity, by reference in particular to the application of s 20(2)(d) of the *Acts Interpretation Act 1954* (Qld). I will return to that section and those cases shortly.

[5] The present case, involving the defendants Crowden and Lambert is, it is to be hoped and, I understand from the Crown prosecutor, the last of the cases of potential application of the VLAD Act which may come before the court.

[6] It does so in quite unusual circumstances, which are distinguishable from the cases decided to date by this court and the Court of Appeal.

[7] For the reasons which follow, I have formed the view that the repealed VLAD Act cannot be relied upon as a basis to impose the additional punishment on the defendants presently before the court which was contemplated by s 7 of the VLAD Act. In light of that conclusion, I will invite the Director of Public Prosecutions to reconsider whether he regards it as appropriate to proceed with a prosecution which includes reliance upon the repealed legislation, in circumstances where the contemplated punishment cannot be imposed.

[8] The defendants are charged on indictment no. 988 of 2021 with the following offences:

(a) in respect of Crowden:

(i) Count 1 – assault occasioning bodily harm, in company;

(ii) Count 2 – assault occasioning bodily harm, while armed;

(iii) Counts 3 and 8 – burglary and stealing;

(iv) Count 4 – extortion;

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3 *Serious and Organised Crime Legislation Amendment Act 2016*, s 282.

(v) Count 5 – assault occasioning bodily harm, while armed, in company, as a vicious lawless associate, and an office bearer of the relevant association;

(vi) Count 6 – stealing; and

(vii) Count 7 – attempting to pervert justice, as a vicious lawless associate, and an office bearer of the relevant association; and

(b) in respect of Lambert:

(i) Count 5 – assault occasioning bodily harm, while armed, in company, as a vicious lawless associate, and an office bearer of the relevant association;

(ii) Count 6 – stealing; and

(iii) Count 7– attempting to pervert justice, as a vicious lawless associate, and an office bearer of the relevant association.

[9] On 23 September 2021, Crowden pleaded guilty to counts 1, 2, 3, 4, 6 and 8. The allocutus was administered.[4] In respect of count 5, he pleaded guilty to the offence *absent* the allegations that he was a "vicious lawless associate" and "an office bearer of the relevant association", within the meaning of the VLAD Act. The Crown did not accept the plea in satisfaction of count 5. Crowden pleaded not guilty to count 5 with those allegations.

[10] On 23 September 2021, Lambert also pleaded guilty to count 6. The allocutus was administered. In relation to count 5, he also pleaded guilty to the offence *absent* the allegation that he was a "vicious lawless associate" within the meaning of the VLAD Act. The Crown did not accept the plea in satisfaction of count 5. Lambert pleaded not guilty to count 5 with that allegations.

[11] The Crown prosecutor informed the court, by writing on the indictment, that the Crown will not proceed further upon count 7 of the indictment against Crowden and Lambert. The defendants were accordingly discharged in respect of that count.

[12] What remained for determination then, apart from sentencing in respect of the other counts, was the defendants' criminal liability for count 5 in terms of the allegations under the VLAD Act against each of them, and the determination of any consequent punishment for that count.

[13] Also on 23 September 2021, for reasons given *ex tempore*, I made a no jury order under s 615 of the *Criminal Code* in respect of the trial of count 5. In short, I was satisfied it was in the interests of justice to make the order on the basis that as a result of the defendants' pleas of guilty, the only issue left for determination was proof of the alleged VLAD circumstances (that each of them was a vicious lawless associate and that, in addition, Crowden was an office bearer); those issues involved interpretation and application of a difficult and complex (now repealed) statute, which would expose the defendants to mandatory imposition of very significant additional punishment if the circumstances were found to be proved; I accepted that in the circumstances determination of that issue by a judge without a jury was appropriate; there were no factual issues requiring the application of objective community standards; and the

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4 Section 648 of the *Criminal Code;* s 51 of the *Criminal Practice Rules 1999.*

evidence to be relied upon by the Crown in proof of those alleged VLAD circumstances was said to include evidence of the alleged commission of *other* serious offences, giving rise to a real risk of prejudice and potential unfair reasoning if a jury were to determine the issues. The misleading and prejudicial nature of the language used in the VLAD Act itself was the subject of comment by members of the High Court in *Kuzborski v Queensland* (2014) 254 CLR 51, for example, at [14] and [67].

[14] At the time of hearing the application for a no jury order, I raised with the parties the question whether the allegations under the VLAD Act are properly regarded as a constituent part of the offence itself, as a "circumstance of aggravation" as defined in the *Criminal Code* (whether a part of the offence or not), or whether they are matters to be dealt with in the course of a sentencing hearing only. As all parties wished to give further consideration to this, directions were made for the filing of submissions, with the issue to be further considered at the commencement of the proceedings on 5 October 2021.

[15] As I was satisfied, in any event, that the proceedings ought properly, in the interests of justice, be heard by a judge without a jury, I considered it appropriate to make the order under s 615, to give the parties and the court registry some certainty about how the matter would proceed on and from 5 October 2021. The fact that I had not then formed a concluded view about whether the proceeding should properly be a trial of count 5, or a contested sentencing hearing, did not matter in the circumstances.

[16] In the submissions which were then filed on behalf of Crowden, and adopted by Lambert, an additional issue was raised, having regard to the time when the defendants were in fact charged with the offence the subject of count 5. At the continuation of the proceedings on 5 October 2021, I heard further submissions from the parties about:

(a) the operation of s 11(1) of the *Criminal Code* in light of the relevant chronology in this particular case;

(b) the operation of s 20(2)(c) and (d) of the *Acts Interpretation Act* in the particular circumstances of this case; and

(c) the question whether the VLAD Act allegations are a constituent part of "the offence", or part of the sentencing procedure only.

[17] At the further hearing, it was accepted by the parties as appropriate to deal with the operation of s 11(1) of the *Criminal Code* first, including as it may be affected by s 20(2) of the *Acts Interpretation Act*, as a conclusion about this, favourable to the defendants' arguments, would resolve the matter.

[18] However, as can be seen from the discussion below, the issue posed by paragraph (c) above does have an impact on the determination of the questions posed by paragraph (a) and (b), so I propose to say something about that issue first. Suffice to say, the issues raised in this matter are complex, technical, difficult and to some extent circular.

[19] Count 5 is in the following terms:

> "that on the twentieth day of April, 2015 at Stapylton in the State of Queensland, IAN RONALD CROWDEN and MATTHEW GRANT LAMBERT unlawfully assaulted SHANNON DAVID ARNOLD and did him bodily harm.

> And IAN RONALD CROWDEN and MATTHEW GRANT LAMBERT was armed with an offensive weapon.
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> And IAN RONALD CROWDEN and MATTHEW GRANT LAMBERT was in company with other persons.
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> And IAN RONALD CROWDEN and MATTHEW GRANT LAMBERT was a vicious lawless associate.
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> And IAN RONALD CROWDEN was an office bearer of the relevant association."

[20] The indictment refers specifically to s 339(1) and (3) of the *Criminal Code* and the *Vicious Lawless Association Disestablishment Act 2013.*

[21] Section 339(1) and (3) of the *Criminal Code* provide:

> "**339 Assaults occasioning bodily harm**
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> (1) Any person who unlawfully assaults another and thereby does the other person bodily harm is guilty of a crime, and is liable to imprisonment for 7 years.
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> (3) If the offender does bodily harm, and is or pretends to be armed with any dangerous or offensive weapon or instrument or is in company with 1 or more other person or persons, the offender is liable to imprisonment for 10 years."

[22] The offence of assault occasioning bodily harm under s 339 of the *Code* is one of a number of "declared offences" which was referred to in schedule 1 to the VLAD act.

[23] The term "vicious lawless associate" was defined in s 5, and the concept of an "office bearer" was dealt with in s 6.

[24] The VLAD Act was enacted in 2013. It was described, in the explanatory notes to the bill which became the Act, as a "penalty regime", the purpose of which was "to cultivate informants within associations and to deny individual members the assistance and support usually provided by their grouping".

[25] The operative provision was s 7, with ss 5 and 6 containing definitions. Section 8 provided that a "vicious lawless associate" was not eligible for parole; and section 9 provided for cooperation with law enforcement authorities to be taken into account.

[26] Section 7(1) of the VLAD Act provided as follows:

> "**7 Sentencing**
>
> (1) A court sentencing a vicious lawless associate for a declared offence must impose all of the following sentences on the vicious lawless associate –
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> (a) a sentence for the offence under the law apart from this Act and without regard to any further punishment that may or will be imposed under this Act;

(b) a further sentence of 15 years imprisonment served wholly in a corrective services facility;

(c) if the vicious lawless associate was, at the time of the commission of the offence, or during the course of the commission of the offence, an office bearer of the relevant association – a further sentence of 10 years imprisonment served wholly in a corrective services facility which must be served cumulatively with the further sentence mentioned in paragraph (b)."

[27] The structure of the VLAD Act is consistent with its description in the explanatory notes as a "penalty regime". The VLAD Act did not purport to effect any amendments to the offence provisions of the *Criminal Code*, in terms of expressly creating "circumstances of aggravation" for the declared offences.[5]

[28] On the same day, the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Act No. 45 of 2013) was also assented to, and commenced operation (the Amendment Act). This Act, together with the VLAD Act and the *Tattoo Parlours Act 2013,* were part of a "package" of so-called legislative reforms introduced by the Queensland Parliament at the same time.[6] In fact, the explanatory notes to the bills which became the VLAD Act and the Amendment Act commenced with the same wording, referring to a violent incident at Broadbeach on 28 September 2013 involving criminal motorcycle gangs.

[29] The respective explanatory notes go on to outline the objectives of each of the proposed VLAD Act and the Amendment Act.

[30] In so far as the VLAD Act is concerned, those objectives were expressly set out in s 2(1) of the Act, which provides:

"**2 Objects**

(1) The objects of the Act are to –

(a) disestablish associations that encourage, foster or support persons who commit serious offences; and

(b) increase public safety and security by the disestablishment of the associations; and

(c) deny to persons who commit serious offences the assistance and support gained from association with other persons who participate in the affairs of the associations.

(2) The objects are to be achieved by –

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5 Cf the approach taken, following the repeal of the VLAD Act, by the amendments enacted by the *Serious and Organised Crime Legislation Amendment Act 2016* (Act No 62 of 2016) to a broad range of offences under the *Criminal Code* (including, for example, s 339) to expressly add reference to the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, s 161Q.

6 See generally *Kuczborski v Queensland* (2014) 254 CLR 51 and the explanatory notes to the bills which became the VLAD Act and the Amendment Act, respectively.

(a) imposing significant terms of imprisonment for vicious lawless associates who commit declared offences; and

(b) removing the possibility of parole for vicious lawless associates serving terms of imprisonment except in limited circumstances; and

(c) encouraging vicious lawless associates to cooperate with law enforcement agencies in the investigation and prosecution of serious criminal activity."

[31] The objectives of the Amendment Act are not reflected in a single "objects" provision of that Act. That is not surprising, given that it was an Act which amended a number of other Acts, including the *Criminal Code,* the *Bail Act 1980*, the *Penalties and Sentences Act 1992*, the *Crime and Misconduct Act 2001* and the *Police Powers and Responsibilities Act 2000*. However, what is apparent from the statement of the bill's objectives, and reflected in the amendments made, is that the objectives included the creation of new offences, and the creation of circumstances of aggravation for certain particular existing offences, by reference to participation in a "criminal organisation".

[32] The Amendment Act introduced the terms "criminal organisation" and "participant" in a criminal organisation into the *Criminal Code*. The definition of "criminal organisation" inserted by amendment to s 1 of the *Criminal Code* is quite different from the definition of "association" and "vicious lawless associate" in the VLAD Act.

[33] The Amendment Act also added new ss 60A to 60C into the *Criminal Code*, creating new offences relating to participation in a criminal organisation. In each case, a defence was provided for, if the person could prove the criminal organisation "is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity". There is some parallel between this defence, and the defence under s 5(2) of the VLAD Act.

[34] But in addition to creating those new offences, the Amendment Act also amended some of the existing *Criminal Code* offence provisions, to expressly add a circumstance of aggravation – where the person convicted of the offence is a participant in a criminal organisation. The sections amended in this way were s 72 (affray), s 92A (misconduct in relation to public office); s 320 (grievous bodily harm); s 340 (serious assault); and s 408D (obtaining or dealing with identification information). Higher penalties were prescribed, within the offence provision, where the circumstance of aggravation was present. A defence, in the same terms referred to above, was also provided for.

[35] There is no reference in the explanatory notes to the bill which became the VLAD Act or, for that matter, the VLAD Act itself, to circumstance(s) of aggravation attaching to any particular offence. The structure of the VLAD Act is in that respect very different from the Amendment Act, passed at the same time, as part of a "package".

[36] The term "circumstance of aggravation" is defined in s 1 of the *Criminal Code* to mean "any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance". Section 564(2) of the

Criminal Code provides that, if any circumstance of aggravation is intended to be relied upon, it must be charged on the indictment.

[37] In *R v Ellis* [2002] QCA 402 at [10] the Court of Appeal described a circumstance of aggravation as:

> "an additional fact ('circumstance') proof of which subjects an offender to a greater punishment than that to which he or she would be liable if the offence were committed without that additional fact. That is why it must be charged on the indictment."

[38] In *R v Ellis* the Court was concerned with the question whether the classification of a conviction as a conviction of a serious violent offence was a "circumstance of aggravation" required to be charged on the indictment. The Court held that it was not because, although it has the effect of increasing the time an offender will spend in prison before being eligible for release, it does this not by stating a fact, proof of which would make the offender liable to a greater punishment, but by defining the offences in respect of which that may occur. Whether that does occur then depends, relevantly, on the length of the sentence and, if the sentence is more than five but less than 10 years, on the discretion of the sentencing judge.

[39] Another similar example is *R v WAY; Ex parte Attorney-General (Qld)* [2013] QCA 398, in which the Court of Appeal determined that the matters in s 176(3)(b) of the *Youth Justice Act 1992* that enable a child to be sentenced to detention for life for an offence involving the commission of violence against a person, which the court considers to be a particularly heinous offence, are not circumstances of aggravation that must be charged on the indictment.

[40] Here, although the text and structure of the VLAD Act is very unusual, and the only operative provision is one concerned with "sentencing", it seems to me that the allegations that a person is a "vicious lawless associate" and an "office bearer" of a relevant association must be regarded as a circumstance of aggravation, within the meaning of s 1 of the *Criminal Code*, as additional fact(s) (circumstances), proof of which exposes an offender to a greater punishment than that to which he or she would be liable if the offence were committed without the additional fact(s).

[41] This conclusion means that the additional fact(s) must be charged on the indictment (as they were here) and in order to be relied upon to establish liability for the additional punishment, must be proved by the prosecution at trial beyond reasonable doubt.

[42] The alternative construction, that these matters are not "circumstances of aggravation" as defined, and that the determination of whether a person is a "vicious lawless associate" and an "office bearer" are matters to be determined by the sentencing judge, following a conviction of the person of a declared offence, is in my view left open by the unusual text and structure of the VLAD Act, especially in contrast to the Amendment Act, passed as part of the same package at the same time. If that were the proper construction, the determination of those matters would take place in accordance with s 132C of the *Evidence Act 1977.* It was uncontroversial that, given the very serious adverse consequence of finding the allegation to be true, applying the *Briginshaw* principle, the degree of satisfaction for the purposes of s 132C(3) would have to be very high, approaching the standard of beyond reasonable doubt.

[43] As a matter of substance, I consider the better view is that it is appropriate for these additional factual matters to be charged on the indictment and proved, at a trial, rather than as part of a sentencing procedure. As this is not likely to be a matter which arises in any other case (given that the legislation has been repealed, and the present defendants are said to be the last of the persons potentially affected by it), it is unnecessary to deal with this in any more detail.

[44] That is not to say, however, that the VLAD allegations form a constituent part of any declared offence. They do not. The VLAD Act provides for extra punishment, upon proof that an offence, not created by that Act, has been committed by a person meeting the description of "vicious lawless associate" and, if relevant, "office bearer".[7] In this regard, I adopt the analysis of McMurdo JA in *R v Graham* [2016] QCA 73 at [40]-[45], to conclude that although a circumstance of aggravation (such as, relevantly here, the VLAD allegations) may appear as an allegation in the indictment, the circumstance is distinct from the offence with which the defendants are charged (relevantly, here, assault occasioning bodily harm). However, the circumstances are appropriately taken into account when considering the meaning of "an offence", as "the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment".[8]

[45] Turning then to the application of s 11 of the *Criminal Code* and s 20(2) of the *Acts Interpretation Act,* in light of the particular facts of this case.

[46] Relevantly, the chronology in this case is as follows:

(a) 20 April 2015 – Arnold is assaulted and caused bodily harm by Crowden and Lambert [Crowden's and Lambert's pleas of guilty to count 5 (absent the VLAD allegations) is evidence of this].

(b) 14 May 2015 – Crowden and Lambert are charged with the offence of malicious act with intent, under s 317 of the *Criminal Code*, with the VLAD allegations, in respect of the assault on Arnold on 20 April 2015.

(c) 15 August 2015 – Crowden and Lambert are charged with further offences, none of which related to the assault of Arnold on 20 April 2015.

(d) 9 December 2016 – the VLAD Act is repealed in its entirety.

(e) mid-January 2019 – the committal hearing in respect of the charges against Crowden and Lambert concludes. No indictment was subsequently presented in respect of the malicious act with intent charge.[9]

(f) 28 June 2019 – indictment no. 951 of 2019 was presented charging Crowden and Lambert with 27 offences, including the offence now the subject of count 5 (then, count 20). This is the first time the defendants are charged with the assault occasioning bodily harm offence.

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7 *Kuczborski v Queensland* (2014) 254 CLR 51 at [167]-[168].

8 *R v Barlow* (1997) 188 CLR 1 at 9, referred to below.

9 See s 590(1) of the *Criminal Code*, requiring the indictment to be presented no later than 6 months after the date the person was committed for trial.

(g) 9 October 2020 – replacement indictment, no. 1374 of 2020, is presented charging Crowden and Lambert with 26 offences, including the offence now the subject of count 5 (then count 19).

(h) 30 July 2021 – the current indictment, no. 988 of 2021, is presented. This followed a successful application by the defendants to sever the 26 count indictment, and a decision on the part of the Crown to proceed with what may be called the Arnold offences first.

[47] Having regard to this chronology, the defendants submit that they were not charged with the offence which is presently before the court until after the repeal of the VLAD Act. By operation of s 11(1) of the *Criminal Code* the defendants submit they can not be punished for doing the acts the subject of count 5, including as it does the VLAD Act allegations, because "doing … the act under the same circumstances would [not] constitute an offence under the law in force at the time when" they were "charged with the offence".

[48] Section 11 of the *Criminal Code* provides as follows:

> "**11 Effect of changes in law**
>
> (1) A person can not be punished for doing or omitting to do an act unless the act or omission constituted an offence under the law in force when it occurred; nor unless doing or omitting to do the act under the same circumstances would constitute an offence under the law in force at the time when the person is charged with the offence.
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> (2) If the law in force when the act or omission occurred differs from that in force at the time of the conviction, the offender can not be punished to any greater extent than was authorised by the former law, or to any greater extent than is authorised by the latter law."

[49] The word "offence" is defined in s 2 of the *Criminal Code*, relevantly, to mean "an act … which renders the person doing the act … liable to punishment".

[50] As Brennan CJ, Dawson and Toohey JJ said in *R v* Barlow (1997) 188 CLR 1 at 9, this definition:

> "makes it clear that 'offence' is used in the Code to denote the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment."

[51] Here, the acts which render the defendants liable to punishment were done while the VLAD Act was in force. Assuming for present purposes the Crown's allegation of the *circumstances* in which those acts were done can be proved, those *circumstances* were also present while the VLAD Act was in force and rendered the defendants liable to additional punishment, if convicted of a "declared offence", which includes assault occasioning bodily harm.

[52] However, before the defendants were *charged* with the offence the substance of count 5, the VLAD Act was repealed.

[53] The defendants submit that, in construing s 11(1), it is necessary to pay attention to and give meaning to the differential use of the phrases "an offence" and "the offence" where they appear in that subsection. The defendants submit the reference to "the offence" in the last line of s 11(1) should be construed as a reference to the particular offence for which the defendant is before the court for punishment. On that basis, the defendants contend that the second part of s 11(1) operates to prevent them from being punished for doing the acts, in the circumstances of the VLAD allegations, because, by the time they were charged with "the offence" (that is, the offence the subject of count 5), doing the act(s), "under the same circumstances" (namely the VLAD circumstances) no longer constituted an offence, in the sense of something rendering them liable to the additional punishment under the VLAD Act (having regard to the definition of "offence", as explained in *Barlow*).

[54] The Crown submits that it is open to construe the last part of s 11(1), where it refers to "the offence" not as a reference to the particular offence for which the defendant is before the court for punishment but as a reference to any offence, in the sense of an act or omission which renders the person doing the act liable to punishment, which may arise from the "act(s)" referred to in the first part of s 11(1). On this construction, the fact that the defendants were charged with malicious act with intent, in May 2015, arising out of the acts done by the defendants on 20 April 2015, would be sufficient, the Crown submits, to defeat the defendants' argument.

[55] I reject the Crown's contention in this respect. It fails to give any meaning to the definite article "the" in the last part of s 11(1). Moreover, it fails to recognise that the occasion for the operation of s 11(1) can only be where a defendant is before the court for determination of liability and, if so determined, punishment for the offence then before the court – that is, "the offence" referred to at the end of s 11(1). Self-evidently, and quite apart from s 11(1), the defendants cannot be punished for an offence which is not before the court. They can only, potentially, be punished for the offence which is before the court, relevantly, the offence the subject of count 5.

[56] The question posed by s 11(1) is whether, at the time the defendants were charged with "the offence", that is the offence the subject of count 5 (including the VLAD allegation), doing the act(s) which are said to render them liable to punishment, in the same circumstances, would constitute an offence, in the sense described in *Barlow*.

[57] In my view, the answer to that question is no. The defendants were charged with the offence the subject of count 5 no earlier than 28 June 2019. By this time, the VLAD Act had been repealed for some two and a half years.

[58] The earlier charge, in May 2015, of a different offence – malicious act with intent – cannot be relied upon by the Crown as the time "when the person is charged with the offence" now before the court.

[59] It is not necessary, for this conclusion, to embark on any particular consideration of the meaning of the word "charged". That was discussed by Douglas J in *R v HXY* [2017] QSC 108 at [30]-[31] and by the Court of Appeal (Morrison JA, Philippides JA and Boddice J agreeing) in *R v PAZ* [2018] 3 Qd R 50 at [114]-[129] and [150]-[152]. In

both of those cases, the offence the person was charged with by the police at the time of their arrest was the same as the offence later before the court the subject of the indictment.

[60] There is no controversy here as to when the defendants were charged with the offence the subject of count 5 – it was not earlier than June 2019. And apart from its submission, discussed above, as to the meaning to be given to the word "offence" at the end of s 11(1), which I have rejected, the Crown does not contend that the words "the person is charged with the offence" are met in circumstances where the defendants were charged, in May 2015, with malicious act with intent, but are now before the court on a different charge, of assault occasioning bodily harm.

[61] It should be noted that the particular facts of this case are in contrast with the previous decisions which have been made, since the repeal of the VLAD Act, because of this important distinguishing factor, that the defendants had not been charged with the offence presently before the court before the repeal of the VLAD Act.

[62] If the circumstances of the VLAD allegations were not considered to fall within "an offence" in s 11(1) – that is, if s 11(1) is constrained in its operation to a consideration of the substantive offence itself (assault occasioning bodily arm), s 11(1) may not have any room to operate. However, s 11(2) would become relevant, preventing the defendants from being punished to any greater extent than is authorised by the law in force at the time of the conviction – that is now. As the imposition of the additional punishment contemplated by s 7 of the VLAD Act is no longer authorised by any law in force, such punishment cannot be imposed on the defendants.

[63] Before reaching a final conclusion in relation to that, though, it is necessary to address the operation of s 20(2) of the *Acts Interpretation Act* in the particular circumstances of this case.

[64] Section 20(2) of the *Acts Interpretation Act* relevantly provides as follows:

> "**20 Saving of operation of repealed Act etc.**
>
> (1) In this section –
>
> *Act* includes a provision of an Act.
>
> *repeal* includes expiry.
>
> (2) The repeal or amendment of an Act does not –
>
> (a) revive anything not in force or existing at the time the repeal or amendment takes effect; or
>
> (b) affect the previous operation of the Act or anything suffered, done or begun under the Act; or
>
> (c) affect a right, privilege or liability acquired, accrued or incurred under the Act; or
>
> (d) affect a penalty incurred in relation to an offence arising under the Act; or

> (e) affect an investigation, proceeding or remedy in relation to a right, privilege, liability or penalty mentioned in paragraph (c) or (d).
>
> (3) The investigation, proceeding or remedy may be started, continued or completed, and the right, privilege or liability may be enforced and the penalty imposed, as if the repeal or amendment had not happened. …"

[65] In *R v HXY & Ors* [2017] QSC 108, the defendants had been charged with trafficking and, variously, doing so as vicious lawless associates, or vicious lawless associates and office bearers. They were charged with the relevant offences *before* the repeal of the VLAD Act, although the indictments were not presented until after the repeal (see at [3], [5]-[9]). At [22] Douglas J found that s 20(2)(c), (d) and (e) of the *Acts Interpretation Act*:

> "allowed the liabilities and penalties allegedly incurred under the *Drugs Misuse Act* 1986 and the VLAD Act to continue to be the subject of a proceeding in relation to a liability or a penalty as if the repeal of the VLAD Act had not happened. That is on the basis that the liability or penalty is incurred at the time at which the offence takes place. That conclusion, namely that a penalty is incurred at the time at which the offence takes place, was put in issue for the applicants but my view is that the decision in *Commissioner of Taxation v Price*[10] applies and binds me and that the liability incurred includes one to the increased penalties under the VLAD Act.[11]"

[66] His Honour further found that, regardless of whether the "offence" included as a circumstance of aggravation the VLAD allegations, a penalty relevant to that circumstance (ie the VLAD allegations) will have been incurred "in relation to" an offence for the purposes of s 20(2)(d) of the *Acts Interpretation Act* if the person is found guilty of the substantive offence with a relevant circumstance of aggravation (at [27]). The effect of that conclusion was that "the law in force at the time of conviction", for the purposes of s 11(2) of the *Criminal Code*, was found to include the potential liability saved by operation of s 20(2)(d) – that is, the additional punishment provided for under the repealed VLAD Act (at [34]-[35]). This construction of s 20(2)(d) and s 11(2) was also applied by the Court of Appeal in *R v PAZ* [2018] 3 Qd R 50 at [178], but this was in the context of a different legislative provision (s 208 of the *Criminal Code*).

[67] I respectfully disagree with this interpretation and application of s 20(2)(d) of the *Acts Interpretation Act*, in the context of the repealed VLAD Act.

[68] Section 20(2)(d) provides that the repeal of an Act does not "affect a penalty incurred in relation to an offence arising under the Act". The reference to "the Act" is a reference to the repealed Act – here, the VLAD Act. The VLAD Act did not create any offence(s). It provided for a regime of additional punishment in respect of existing offences created under the *Criminal Code*. As described by the plurality (Crennan,

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10 *Commissioner of Taxation v Price* [2006] 2 Qd R 316, 337-338 at [58].

11 Referring to *R v Brancourt* (2013) 280 FLR 356, 359 at [16]-[17]; and *Mansray v Rigby* (2014) 292 FLR 404, 407-408 at [13]-[19].

Kiefel, Gageler and Keane JJ) in *Kuczborski v Queensland* (2014) 254 CLR 51 at [159]:

> "[159] The VLAD Act seeks to achieve its 'objects' by establishing a sentencing regime, involving mandatory minimum sentencing, which targets offenders connected to a relevant association. It has no operation where an offence has not been committed under existing law."

[69] And, further, at [167]-[168]:

> "[167] In addressing the question of the plaintiff's standing to challenge the validity of the VLAD Act, it is to be noted that a defendant will be liable to the additional penalty provided by s 7(1)(b) of the VLAD Act only if each of the following elements is proved by the prosecution:
>
> (a) the defendant has committed an offence listed in Sched 1 (that is, an offence already known to the law);
>
> (b) the defendant was a participant in the affairs of an association either when the declared offence was committed or during the course of the commission of the declared offence; and
>
> (c) the defendant intentionally, knowingly or recklessly committed the declared offence for the purposes of the association or in the course of participating in the affairs of the association.
>
> [168] The important point in relation to the plaintiff's standing is that the exposure of any individual to additional penalty under the VLAD Act depends upon proof that an offence, not created by the impugned provisions, has been committed. No challenge is made to the validity of the laws which create those offences; and, unsurprisingly, the plaintiff does not assert that he is at liberty to choose whether or not to commit any one of these offences. It is sufficient, for present purposes, to note that the plaintiff's freedom of action is not affected in any way by the extra punishment for which the VLAD Act provides."[12]

[70] Notwithstanding that a penalty may be said to be incurred at the time at which the (acts constituting the) offence takes place, rather than at the time of conviction,[13] in my view, s 20(2)(d) of the *Acts Interpretation Act* does not apply to save the additional punishment provided for under the VLAD Act, following its repeal, because it is not a penalty incurred in relation to an offence arising under that Act.[14]

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12 Underlining added.

13 *Commissioner of Taxation v Price* [2006] 2 Qd R 316 at 338.

14 This conclusion is consistent with the conclusion reached by Kelly J in *R v Brancourt* (2013) 280 FLR 356 at [7].

[71] The reasoning in *PAZ* does not compel a different conclusion, given the very different legislative context the subject of that decision, compared with the one I am concerned with here. In *PAZ* it was the case that the penalty was incurred in relation to an offence arising under the [repealed provision of the] Act. Nor, in my view, does the later decision in *R v JAA* [2019] 3 Qd R 242 (a case which did concern the VLAD Act) compel a different conclusion. Although the Court of Appeal in that case also endorsed the conclusion reached by Douglas J in *HXY,* the issue I have addressed above, as to the proper construction of s 20(1)(d) in the context of the VLAD Act, does not appear to have been argued before the Court, nor considered by it. A further distinguishing feature, between the present case and *JAA,* is that in *JAA* the defendant had been charged with the relevant offences, and the indictments had been presented, *before* the repeal of the VLAD Act (see at [71]).

[72] The question then is whether s 20(2)(c) of the *Acts Interpretation Act* operates to save the additional punishment provided for under the VLAD Act, following its repeal, on the basis that it could be said to be a "liability … accrued or incurred under the [repealed VLAD] Act".

[73] It may be accepted that, in the context of this provision, "liability" is apt to embrace criminal responsibility as well as civil responsibility.[15] But there is a question as to what liability is saved by s 20(2)(c)? It is relevant that the subject matter of sub-s 20(2)(d) is a *penalty* incurred. The word "penalty" is defined schedule 1 to the *Acts Interpretation Act* to include "punishment". It is reasonable to approach construction of s 20(2)(c) on the basis that the "liability" that sub-section refers to is separate to the liability for a *penalty* incurred which is dealt with in sub-s 20(2)(d). The distinction is referred to by Morrison JA in *PAZ* at [137], where his Honour said, after referring to s 20(2)(c), (d) and (e):

> "At the time when the acts the subject of counts 12-16 were committed they were offences under s 208 *Criminal Code* 1899. That meant that the appellant was then subject to a liability accrued or incurred under the *Criminal Code* 1899, namely that he could be charged with, and prosecuted for, those offences. The appellant was also subject to a penalty incurred, in that the penalty was incurred at the time the offence was committed. A prosecution was commenced in relation to the offences, before the repeal of s 208. In my view that was a proceeding in relation to a liability or penalty mentioned in s 20(2)(c).[16] Therefore, under s 20 *Acts Interpretation Act* 1954 the repeal of s 208 does not mean that the prosecution can no longer be maintained, nor that the penalty cannot be imposed."[17]

[74] The liability referred to in s 20(2)(c) is a liability to be charged with and prosecuted for an offence. In terms of s 20(2), this is separate from [the liability to] a penalty incurred which is the subject of s 20(2)(d). That distinction is reflected in s 20(2)(e), which refers, relevantly, to a proceeding in relation to a liability or penalty mentioned in paragraph (c) or (d).

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15 *Byrne v Garrisson* [1965] VR 523 at 528; *R v Brancourt* (2013) 280 FLR 356 at [13]; *Mansray v Rigby* (2014) 292 FLR 404 at [17].

16 Having regard to the wording of s 20(2)(e), it may be that the reference here to s 20(2)(c) was intended to be a reference to s 20(2)(c) or (d).

17 Underlining added.

[75] In a case like *PAZ*, the distinction I am presently concerned with did not arise, because the relevant liability (to charge and prosecution) and penalty incurred, arose under the same legislation, and all three subsections of s 20(2)(c), (d) and (e) applied. [18] But the distinction does matter here, because s 20(2)(d) does not apply.

[76] There is arguably a further distinction here, in terms of *when* the liability for the additional punishment under the VLAD Act can be said to be accrued or incurred. As explained by the plurality in *Kuczborski v Queensland* at [167] and [168], the exposure of an individual to the additional penalty under the VLAD Act depends upon proof that an offence, not created by the VLAD Act itself, has been committed. Arguably, there is no liability until the commission of a declared offence is proved. This may be contrasted with the general principle, articulated in *Commissioner of Taxation v Price,* that a penalty is incurred at the time at which the offence takes place. The unusual structure of the VLAD Act, in contrast, for example, to the offence provisions of the *Criminal Code,* may tend support this alternative construction. I have not found it necessary to form a concluded view about this, however, as I have based my conclusions on the construction of s 20(2)(c) of the *Acts Interpretation Act* as referring to a liability to charge and/or prosecution, in contrast to a liability to penalty (or punishment), which is the subject of s 20(2)(d).

[77] The saving of the liability to charge and prosecution in respect of the VLAD allegations, despite the repeal of that Act, is not inconsistent with the operation of s 11 of the *Criminal Code*. That section is concerned with punishment, not conviction, a distinction articulately explained by Smith DCJA in *Goli (Commissioner of State Revenue) v Thompson & Anor* [2017] QDC 4 at [36]-[44]. Counsel for the defendants accept that in this case the liability to prosecution remains; whilst contending that the effect of s 11 is that the punishment provided for under the repealed VLAD Act can no longer be imposed.

[78] The arguable anomaly of that situation – that there could be a conviction of an offence, including by reference to the VLAD allegations, but without the additional punishment for that[19] – is in my view a product of the anomalous, to say the least, nature of the VLAD Act, and the unusual device chosen by the Parliament for the imposition of an additional mandatory punishment regime in respect of offences otherwise lawfully created under separate legislation. The outcome in this case, in contrast to the previous decisions discussed above, is also the product of the fact – not present in those cases – that the defendants here were not charged until well after the VLAD Act was repealed.

[79] For those reasons, my primary conclusion is that in circumstances where the defendants were not charged with the offence the subject of count 5 until June 2019, by which time the VLAD Act had been repealed in its entirety, s 11(1) of the *Criminal Code* operates to prevent the defendants being punished for doing the acts the subject of count 5, in the circumstances alleged by reference to the VLAD Act, under s 7 of the VLAD Act, because it is no longer in force. In my respectful view, s 20(2)(d) of the

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18 Similarly, in *Wilson v Director of Public Prosecutions (NSW)* (2017) 94 NSWLR 450, cited in *PAZ*, there was no need to differentiate between the subparagraphs of the relevant equivalent of s 20 because they all applied, with the result that the defendant's "liability to being prosecuted convicted and punished" was preserved (see at [47]-[48]).

19 Cf *R v Pritchard* (1999) 107 A Crim R 88 at [55]-[56] referred to in *PAZ* at [185].

Acts Interpretation Act does not apply to preserve the additional punishment; and s 20(2)(c) applies only to preserve the liability to charge and prosecution, not punishment, and is therefore not inconsistent with the operation of s 11(1).

[80] If a different view should be taken about the interpretation of s 11(1), such that the words "an offence" in that section are not properly construed to include the acts (circumstances) alleged to give rise to the VLAD circumstances, then in my view s 11(2) applies in any event to prevent the defendants being exposed to the additional punishment under VLAD Act, on the basis that VLAD Act is no longer in force, and on the basis of the same analysis in respect of s 20(2)(c) and (d) of the *Acts Interpretation Act.*

[81] In light of that conclusion, I will invite the Direct of Public Prosecutions to reconsider whether he regards it as appropriate to proceed with a prosecution which includes reliance upon the repealed legislation, in circumstances where the contemplated additional punishment cannot be imposed.