Constitutionality of criminal organisation legislation

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The Queensland and New South Wales Parliaments have recently passed legislation criminalising association of individuals in relation to "declared organisations". Such legislation raises important constitutional and human rights issues. In September 2009, a majority of the Supreme Court of South Australia found aspects of that State's version of such laws to be unconstitutional. The High Court granted South Australia leave to appeal against that decision. In this article, the Queensland and New South Wales models are outlined. While there are important differences between these Acts on the one hand and the South Australian legislation on the other, it is submitted that there are grounds on which the Queensland/New South Wales models can be constitutionally challenged. They also interfere with an individual's freedom of association, right to natural justice, a court's power over the exercise of its jurisdiction, and arguably provide for a form of double punishment.

INTRODUCTION

Various State governments have moved in recent years to legislate to criminalise membership of a group thought to have connections with criminal activity. It is argued that this legislation is necessary to respond to community concerns about "outlaw" activity, particularly in relation to groups that might conveniently be labelled "bikie gangs", although the legislation is not confined to such groups, and the word "gang" can sometimes have pejorative overtones which may not reflect reality.

In this article, the constitutionality of recent Queensland and New South Wales legislation is considered. They raise some similar issues to the South Australian version that was successfully challenged in *Totani v South Australia* (2009) 105 SASR 244; 231 FLR 422 however, there are important differences between, on the one hand, the Queensland and New South Wales laws, and the South Australian equivalent, as well as some differences between the Queensland and New South Wales versions. I have already written about the South Australian laws, so I will not dwell on them here.[1] The focus of this article will be on the constitutionality of the Queensland and New South Wales versions. Of course, at least some of the important reasoning in *Totani* and other decisions impacts on the model adopted by Queensland and New South Wales. In essence, it will be argued that while the Queensland and New South Wales versions represent an "improvement" over the South Australian version, these versions still raise constitutional objections. First, the Queensland legislation and its New South Wales counterpart (where different) will be outlined in some detail. Comparisons with the South Australian law will be noted, before a consideration of arguments about the constitutionality of the Queensland/ New South Wales version of such laws.

SUMMARY OF THE QUEENSLAND/NEW SOUTH WALES LEGISLATION

The stated intention of the *Criminal Organisation Act 2009* (Qld) is to disrupt and restrict the activities of organisations involved in "serious criminal activity",[2] and members and associates of such organisations. Section 8 allows the Police Commissioner to apply for a declaration that a particular

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[1] Gray A, "Due Process, Kable, Natural Justice and Organisational Control Legislation" (2009) 20 PLR 290; Gray A, "Australian Bikie Legislation in the Absence of an Express Bill of Rights" (2009) JICLT 274.

[2] This is defined to mean a serious criminal offence (cl 6), which is in turn defined to mean an indictable offence punishable by at least seven years' gaol, or an offence against this Bill.

organisation is a criminal organisation. The application must identify the organisation, describe its nature and features, the grounds on which the declaration is sought and supporting documentation, and details of any previous application in respect of that organisation (s 8).[3] The application must be served on the respondent personally within seven business days, or if not practicable, or the respondent is an unincorporated association, by public notice within 10 days of filing (s 8(5)(c)(i), (ii)).[4] Section 9 allows the respondent to respond to the application. Section 10 allows the court to make a declaration about an organisation. It may do so if the court is satisfied that:

(a) the respondent is an organisation;

(b) members of the organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity;[5] and

(c) the organisation is an unacceptable risk to the safety, welfare or order of the community.[6]

Relevant information is stated to include information before the court:

(a) suggesting a link exists between the organisation and serious criminal activity;

(b) any conviction for current or former members of the organisation;

(c) information suggesting current or former members of the organisation have been, or are, involved in serious criminal activity, whether directly or indirectly and whether or not the involvement resulted in convictions;

(d) information suggesting members of an interstate or overseas chapter or branch of the organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity; and

(e) anything else the court considers relevant (s 10(2)(a), (b)).[7]

Section 10(3) states that that a declaration may be made whether or not the respondent is present or makes submissions.[8] If a declaration is made, it must be published in the newspaper and government gazette.[9] The declaration remains in force for five years after it was made, unless earlier revoked[10] or renewed (s 12). Section 16 allows the Police Commissioner to apply for a control order against a person. The application must include:

(a) details sufficient to identify the person;

(b) the grounds upon which the order is sought;

(c) the information supporting the grounds;

(d) details of any previous application for an order for the respondent and the outcome of that application;

(e) that the person may respond to the application;

(f) that an interim order may be made against the person.[11]

The application must be served on the person personally within seven business days, or if this is not practical, by public notice within 10 days (s 16(4)(c)). The person may respond to the application. Section 18 allows a court[12] to make a control order. It may do so if the court is satisfied that the person:

[3] The wording is very similar to *Crimes (Criminal Organisations Control) Act 2009* (NSW), s 6.

[4] In contrast, the NSW Act does not provide for service of the application; rather the Commissioner must publicise that an application has been made in the *Gazette* and in a newspaper circulating in the State (s 7).

[5] It does not matter whether it is all or only some of the members are found to associate for such a purpose (provided the "some" is a significant group within the organisation in terms of numbers or influence (s 10(5)), whether they associate for the purpose of the same serious criminal activities or different ones, or whether or not the members also associate for other purposes (s 10(4)).

[6] This is similar to the grounds in s 9(1) of the NSW Act.

[7] Section 9(2) of the NSW Act is in virtually identical terms.

[8] An identical provision appears in the NSW Act (s 9(3)).

[9] The same provision appears in s 10 of the NSW Act. In Queensland, the declaration will also apply to a group into which members of the declared organisation substantially reform themselves (s 12(3)). A change in name does not affect the validity of the declaration either (s 12(2)).

(a) is or has been a member of a criminal organisation;[13]

(b) engages in, or has engaged in, serious criminal activity; and

(c) associates with any person for the purpose of engaging in, or conspiring to engage in, serious criminal activity.[14]

If the person is not a member of a criminal organisation, a control order may be made against them if the court is satisfied they engage in or have engaged in serious criminal activity, and associate with members of a criminal organisation for the purpose of engaging in, or conspiring to engage in, serious criminal activity (s 18(2)). In considering whether or not to make an order, the court must take into account the following information before the court:

(a) the respondent's criminal history;

(b) the criminal history of a person whose association with the respondent is relied on in the application to support the making of the order;

(c) any activity or behaviour of the respondent at any time that tends to prove a matter of which the court must be satisfied under (a) or (b)(ie their membership of the criminal organisation, that they are or have been engaged in serious criminal behaviour, and associate with another member of a criminal organisation for the purpose of engaging in or conspiring to commit serious criminal behaviour); and

(d) any other relevant matter.

The control order may be made whether or not the respondent is present or makes submissions (s 18(4)).[15] The control order may include conditions the court thinks are appropriate. Section 19 provides these may include prohibiting the person from:

(a) associating with any person who is a member of a criminal organisation;[16]

(b) associating with any other controlled person;[17]

(c) possessing something which requires a licence or authority under weapons or explosives legislation;

[10] Either the Police Commissioner or criminal organisation may seek revocation under s 13. The criminal organisation may only seek revocation after the declaration has been in force for at least three years (s 15(1)), and a maximum of two applications may be made within five years of the making of the declaration (s 15(2)).

[11] Section 21 provides that an interim order may be made until the court finally decides the application, if the court believes there are reasonable grounds for believing the final order may be made. An interim control order may be made whether or not the respondent is present or makes submissions. It can be sought once the application for a control order has been served on the person. The New South Wales provisions regarding interim orders differ in that s 14 there allows the court to make an interim control order, although notice of the application has not been served on the applicant (merely notice that a judge has declared an organisation under the Act). The application for an interim order may be made without notice to and in the absence of the person in relation to whom the application is made or their representatives. It is to be made on the same grounds as are relevant to the question of making a control order generally (s 14). Within 28 days of an interim order being made, notice must be given to the person to whom it relates (s 16) or alternative measures if necessary (s 16A).

[12] In the New South Wales legislation, there is a reference to an "eligible judge" who will hear the matter. This raises fears that the Attorney-General will select, and de-select, judges who are to hear matters arising under the Act. This could create an adverse perception of the independence of such decision making: see Loughnan A, "The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)" (2009) 20 *Current Issues in Criminal Justice* 457 at 460.

[13] "Member" is defined broadly to include a person who identifies themselves in some way as belonging to the organisation, a person treated as if they are a member, a person who associates with a member for criminal purposes (Sch 2).

[14] The New South Wales provision is broader, allowing a control order to be made against a member of a particular declared organisation without proof that that particular member engages in or has engaged in serious criminal activity or associates with others for that purpose. These requirements do not appear in the relevant provision, s 19 of the Act.

[15] NSW Act, s 19(4). Reasons must be given for the making of the order in New South Wales (s 21), unless it relates to criminal intelligence.

[16] This is whether the person was a member of a criminal organisation when the order is made or joins later, and whether the organisation was declared at the time the order is made or is declared later (s 19(3)).

[17] Again, it is irrelevant whether the person was a controlled person at the time of the association or becomes a controlled person at a later time (s 19(4)).

(d) carrying on a "prescribed activity";[18]

(e) recruiting or attempting to recruit anyone to become a member of or associate with a member of a criminal organisation;

(f) associating with a stated person or person of a stated class;

(g) entering or being in the vicinity of a stated place or place of a stated class;

(h) applying for or undertaking stated employment.

Section 19(5) states that if the control order is made under s 18(1),[19] the conditions imposed *must* include the conditions mentioned in (a), (b), (c), (d) and (e) above.[20] A control order remains in place until revoked (s 20(3)).[21] It is an offence to knowingly[22] contravene a control order, punishable by three years' gaol for a first offence, and up to five years' gaol for a later offence (s 24(1)).[23] In relation to contravention of a non-contact requirement, the reason for the association, and whether it relates to the commission or a crime or not, is irrelevant (s 24(5)). If a control order is made that prohibits the person from possessing weapons or explosives for which legislation requires a licence or permit, the police may immediately enter premises occupied by the "controlled person" and search for and seize anything they are prohibited from having (s 25). This entry can occur without the person's consent. Police must give the person an opportunity to allow the police officer to enter the premises without using force.

PUBLIC SAFETY ORDERS

The Police Commissioner may also apply for a public safety order for a person or group of persons. The application must state the grounds on which the order is sought and supporting documentation (s 32(3)). It must be served on the respondent personally within seven business days, or if this is not practicable or the respondent is a group, by public notice within 10 days of filing (s 32(5)). Section 28 allows the court to make a public safety order for a person or group of persons if the court is satisfied that the presence of the respondent at premises or an event, or within an area, poses a serious risk to public safety or security, and that the making of an order is appropriate in the circumstances.[24] Relevant factors include:

(a) the respondent's criminal history and any previous behaviour of the respondent that poses a serious risk to public safety or security;

[18] Defined to include working in a casino, security provider, pawnbroker, second hand dealer, a dealer under weapons legislation, operating a tow truck, motor dealer, seller of liquor, work in the racing industry that requires a licence, prostitution activities requiring a licence, or other occupations that may be prescribed by regulation (Sch 2); s 27 of the NSW Act contains a similar list.

[19] In other words, the court is satisfied the person is or has been a member of a criminal organisation, engages in, or has engaged in, serious criminal activity, and associates with any person for the purpose of engaging in or conspiring to engage in serious criminal activity.

[20] Excluding cases in which the "associate" has a personal relationship with the person (s 19(5)(b)(i)). In such cases, the order *may* include a condition prohibiting the person from associating with another person with whom the person has a personal relationship (ss 19(5)(b)(ii), 19(7)). A personal relationship is defined to include spouse situations, intimate sexual relationships, parents, grandparents, siblings, in-laws, and carers (Sch 2); s 26(5) of the NSW Act includes a similar exemption, including associations between close family members, between individuals in the course of a business, in the course of training, in the course of therapy or counselling, or in the course of lawful custody or compliance with a court order.

[21] Refer to s 22 for the variation procedure and s 23 for the revocation procedure.

[22] This is defined as something or fails to do something the person knows, or ought reasonably to know, is a contravention of the order.

[23] Similarly in New South Wales, a controlled member of a declared organisation who associates with another controlled member is guilty of an offence punishable by a maximum penalty of two years for a first offence, and five years for a later offence (s 26). A controlled person who associates on at least three occasions with another member within a three month period can be gaoled for three years (s 25(1)). NSW Act also makes it an offence to recruit members to a declared organisation (s 26A).

[24] If the respondent is a group, it is the extent to which the group members, rather than individual members, safisfy the test (s 28(3)).

(b) whether the respondent is or has been a member of a criminal organisation, or has been a member of a criminal organisation, or has been the subject of a control order, or associates or has associated with a member of a criminal organisation or a person who has been the subject of a control order;
(c) if advocacy, protest, dissent or industrial action is the likely reason for the person's presence at the relevant premises or event, the public interest in maintaining freedom to participate in those activities;
(d) whether the degree of risk involved justifies the conditions imposed bearing in mind any legitimate reason the respondent may have for being present at the premises or event;
(e) the extent to which making the order will reduce the risk to public safety or security or effective traffic management; and
(f) any other relevant matter.

The court has broad discretion in imposing conditions in a public safety order. They may include prohibiting a person from entering or remaining on premises or an area or at an event, or a prohibition on doing a certain thing (s 29). An order cannot stop the respondent from entering their principal place of residence (s 29(6)). An order may be made regardless of whether the respondent is present or makes submissions (s 33(2)). The order remains in place for the stated duration of the order, with a maximum of six months, unless earlier revoked (s 34(3)). In "urgent circumstances", the Act allows the Police Commissioner to apply for, or seek an extension of an existing, public safety order without notice to the respondent (s 35(1)). Once a public safety order has been made, the respondent must be notified, if they did not have representation at the hearing (s 34).

The Act grants police the authority to enter a public safety place to search for a person about whom a public safety order has been made. The officer may, without warrant, stop, detain and search a vehicle approaching, in or leaving a public safety place to search for a person for whom a public safety order has been made, or to serve a copy of the public safety order on a person for whom it has been made (s 37(2), (3)). Section 38 creates an offence of knowingly contravening a public safety order, with a maximum penalty of one year's gaol.[25]

CRIMINAL INTELLIGENCE

Criminal intelligence is defined in s 59 as information relating to actual or suspected criminal activity, the disclosure of which could reasonably be expected to:
(a) prejudice a criminal investigation;
(b) enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement; or
(c) endanger a person's life or physical safety.[26]

The Police Commissioner may apply to the court for a declaration that particular information is criminal intelligence, including the grounds on which the declaration is sought (s 63). If the information upon which the application is based includes information from an informant, the police officer who "handles" the informant must file an affidavit disclosing the informant's full criminal history and pending charges, any allegations of professional misconduct against the informant, and any inducements or rewards offered or provided to the informant in return for assistance, and why the officer believes the information relied upon is credible. The respondent who would be affected by the application is not to be given notice of it (s 66) and the hearing of the application is closed except to the applicant, applicant's legal representative, any witnesses, and Public Interest Monitor (cl 70). The application and documentation supporting it can only be seen by the registrar, presiding judge, Public Interest Monitor and Reviewer (cl 65(3)). The court is to consider whether factors such as the prejudice caused to criminal investigations, possibility that the confidentiality of sources may be breached and danger to anyone's life or safety outweigh any unfairness to the respondent (cl 72(2)).

[25] Section 38 provides that a person knowingly contravenes a public safety order if they do an act or make an omission they know, or ought reasonably to know, is a contravention of the public safety order.

[26] NSW Act, s 3 defines criminal intelligence in an identical way.

Section 110 of the Act makes clear that a question of fact in proceeding under this Act, other than proceedings for an offence, is to be decided on the balance of probabilities.[27]

IMPROVEMENTS COMPARED WITH SOUTH AUSTRALIAN REGIME

(a) Involvement of a government Minister and Police Commissioner

Readers will be aware that aspects of the South Australian legislation[28] dealing with similar issues were successfully challenged. An appeal to the High Court against the South Australian Supreme Court decision, *Totani*,[29] is currently pending. We should acknowledge the differences between, on the one hand, the South Australian legislation, and on the other hand, the regimes currently in place in Queensland and New South Wales, in order to judge the constitutionality of the latter regimes. In so doing, I take the Queensland and New South Wales legislation as being significantly similar for the purposes of discussing the constitutional issues that arise, although above I have pointed out some of the differences between them.

The first important aspect of the South Australian law was that it provided for the Police Commissioner to apply to the South Australian Attorney-General for an order that an organisation be declared (s 8). The Attorney was required to advertise that such an application had been made, but was not required to give specific notice to the organisation the subject of the application (s 9). The Attorney was empowered to make such a declaration if satisfied that members of the association associated for purposes that included organising or planning serious criminal activity, and represented a risk to public safety (s 10(3)). The Attorney was not required to provide reasons for the making of the declaration. The Attorney's finding could not be challenged in court.

This feature of ministerial involvement in the process of deciding whether or not an organisation should be proscribed does not appear in the Queensland and New South Wales legislation. In both cases, it is a judge that decides whether or not an organisation should be proscribed, based on the criteria contained in the legislation. This is a significant improvement in terms of separation of powers and the *Kable* principle (*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51), more fully discussed below.

In the case of the South Australian legislation, it was the Police Commissioner who was to judge whether evidence upon which the application relied met the definition of "criminal intelligence" within the Act. Information meeting this description would not need to be disclosed to the organisation about which the application was made.[30] This contrasts sharply with the Queensland and New South Wales legislation, where the court decides whether or not information is to be categorised as "criminal intelligence". The reviewability by a court of a decision by a member of the Executive was crucial in deciding the constitutionality of legislation in the recent High Court decisions in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 and *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532.

(b) Direction to the court

It was not the role of the Minister in South Australia per se that created the constitutional difficulties, but the interaction between that aspect and the role of the court. Once the Minister had made the relevant declaration about an organisation, s 14 of the Act stated that the court *must*, on application by

[27] NSW Act, s 32 is of similar effect.

[28] *Serious and Organised Crime (Control) Act 2008* (SA).

[29] *Totani v South Australia* (2009) 105 SASR 244; 231 FLR 422.

[30] See *Totani v South Australia* (2009) 105 SASR 244 at [165] per Bleby J (with whom Kelly J agreed): "common experience … suggests that criminal intelligence will form a substantial part of the Commissioner's application for a declaration. That is borne out by the Attorney's published reasons for the declaration in this case which exclude many paragraphs which are merely labelled 'criminal intelligence'. That is information which can be supplied to no-one. The decision to deem it so is exclusively that of the Commissioner of Police. Whether it properly amounts to criminal intelligence cannot be determined by a court. No-one can have any influence on how its confidentiality should be maintained. Its weight depends entirely on the view of the Attorney-General. The protections which preserved the legislation in *Gypsy Jokers* and *K-Generation* from the operation of the *Kable* principle are noticeably absent."

the Police Commissioner, make a control order against a defendant who was a member of the declared organisation. The control order *must* prohibit the defendant from dealing with or associating with other members of a declared organisation, as well as prohibiting the person from possessing dangerous articles or prohibited weapons. This kind of provision was offensive to the principle of separation of powers and the *Kable* principle. Examples of its expression include the High Court decision in *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1,[31] where the court invalidated a provision that the court was not to order the release from custody of a designated person, on the basis that it was an unacceptable infringement of the separation principle (at 36-37 per Brennan, Deane and Dawson JJ):

> It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the *Constitution*, including Ch III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates.[32]

In *Kable*, a majority of the court invalidated legislation characterised as making the court part of an executive plan to imprison a particular person, serving to undermine public confidence in the judiciary, and asking judges to exercise power that was not judicial in nature.[33] In *Grollo v Palmer* (1995) 184 CLR 348, the court expressed the principle in terms of "incompatibility"; in other words, that a court could not be invested with powers that were incompatible with Ch III of the *Constitution* and the separation of powers it envisaged.

Not surprisingly, in *Totani*, the South Australian Supreme Court found that aspects of the legislation challenged were not consistent with the above principles. As Bleby J (for the majority) noted:

> [154] … The Court must and can only act on the satisfaction of the Attorney-General as to those elements. …
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> [155] The effect of the Control Act is therefore that the Magistrates Court is required by the Act to act on what is, in effect, the certificate of the Attorney-General that elements (1) and (2) are proved, with no ability to go behind that certificate. The relatively much more significant and complex inquiry is removed from the Court to the Attorney-General. The Attorney-General is not subject to or bound by the rules of evidence or any standard of proof. He can act on whatever information he pleases and give it whatever weight he pleases. The Attorney-General's findings are unreviewable. They are, in effect, binding on the Court.
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> [156] That fact in itself would, in my opinion, be sufficient to undermine the institutional integrity of the Court, as the most significant and essential findings of fact are made not by a judicial officer but by a Minister of the Crown. …
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> [157] It is the integration of the administrative function with the judicial function to an unacceptable degree which compromises the institutional integrity of the Court … the exercise of the powers of the Attorney-General may well properly be classified as the exercise of judicial power in a manner held to be contrary to Ch III of the *Constitution* if this were a federal court. It is not merely a question of the separation of powers … It is the unacceptable grafting of non-judicial powers onto the judicial process in such a way that the outcome is controlled to a significant and unacceptable extent by an arm of the Executive Government which destroys the Court's integrity as a repository of Federal jurisdiction.

[31] Brennan, Deane, Dawson, Gaudron JJ; Mason CJ, Toohey and McHugh JJ dissenting.

[32] These comments were recently re-affirmed by the High Court in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532: "as a general proposition, it may be accepted that legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals". In *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, French CJ noted that the relevant legislation did not require the court to accept or act upon information submitted by the Police Commissioner, as did the joint judgment and that of Kirby J. The obvious counterpart to this observation is that if the court were being directed or ordered to do something, this would be offensive to the *Kable* principle, and serve to undermine public confidence in the court as being independent of other arms of government.

[33] Gaudron, McHugh, Toohey and Gummow JJ; Brennan CJ and Dawson J dissenting.

> [158]-[165] …
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> [166] … the process of depriving a person of their right to and freedom of association on pain of imprisonment for up to five years, although formally performed by a State court which exercises federal jurisdiction, is in fact performed to a large extent by a member of the Executive Government in a manner which gives the appearance of being done by the Court.[34]

At least some of the basis of the *Totani* decision described above is not applicable to the Queensland and New South Wales legislation. It is for the court to determine whether or not to make a control order in relation to an organisation. The court must be satisfied of the dangers posed by the organisation, rather than a member of the Executive in the case of the South Australian law. The outcome in the case of Queensland and New South Wales is not controlled by a member of the Executive, and the court retains discretion as to whether or not a control order should be made in particular circumstances. The question of whether evidence meets the definition of "criminal intelligence" and so not disclosed to the organisation is also a matter for the court.[35] In other words, the blatantly unconstitutional aspects of the South Australian legislation do not appear so readily in the Queensland and New South Wales legislation.

CONTINUING CONSTITUTIONAL DIFFICULTIES WITH THE LEGISLATION

(a) They criminalise association of individuals

At the heart of the continuing concerns over this kind of legislation is that they criminalise an act of one individual associating with another in relation to a declared organisation. The application of both Acts depends on a person's membership of a declared organisation. The New South Wales legislation is more extreme in that it allows the court to make a control order over such a person, possibly in the absence of proof that that individual is actually involved in planning criminal behaviour.[36] The Queensland legislation is arguably less insidious in that it requires that the court also be satisfied that this individual member engages in, or has engaged in, serious criminal activity and is associating for the purposes of engaging in, or conspiring to engage in, serious criminal activity. However, this need only be proven on the balance of probabilities rather than on the criminal standard. Further, once the control order is made (which must include prohibition on association), if this non-contact order is breached, an offence has been committed. The fact that this contact might have been entirely innocent (ie not for criminal purposes) is not relevant to the question whether the offence has been committed.

To what extent does Australian law protect freedom of association?

Although there is no express reference to this right in the Australian *Constitution*, such a right is recognised in international law materials.[37] Of course, international law is relevant in examining the requirements of the Australian *Constitution*.[38] The High Court has determined that the *Constitution* contains an implied freedom of political communication in ss 7 and 24, flowing from the idea of representative democracy implicit in our government structures. The court applies a two-stage test in considering the (negative) freedom: (a) whether the law effectively burdens freedom of communication about government or political matters in terms or effect; and (b) if so, whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. If

[34] White J dissented, however it is submitted that the dissent was not regarding the principles themselves, but their application. White J believed that the legislation could be read down so that the court did in fact have discretion as to whether to make the control order). The court noted that in the case of the South Australian legislation, the proceedings could take place without the knowledge of the organisation about which the application had been made. However, this did not render the legislation unconstitutional.

[35] This distinction was critical in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 and *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532.

[36] I say "possibly" because the court considering such an application must refer to the relevant evidence from the Police Commissioner, which may (or may not) include specific information in relation to the individual against whom the control order is sought.

[37] *International Covenant on Civil and Political Rights*, Art 22.

[38] *Roach v Electoral Commissioner* (2007) 233 CLR 162.

the answer to the first question is yes and the second no, the law is invalid.[39] The freedom apparently applies to discussion of both federal and state political matters, and has been used to challenge State legislation.[40]

Some judges have stated that freedom of political communication includes a right to political association. In *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106 at 212, Gaudron J claimed that representative democracy included freedom to associate. McHugh J also apparently accepted a right to associate, concluding that freedom of political communication included an individual's right to communicate their own arguments and opinions to others in the community (at 231-232). Mason CJ agreed that the freedom included freedom of communication between individuals, groups and bodies in society (at 139). Similarly in *Nationwide News v Willis* (1992) 177 CLR 1 at 349, Deane and Toohey JJ concluded that "the people of the Commonwealth would be unable responsibly to discharge and exercise the powers of government control which the *Constitution* reserves to them if each person was an island unable to communicate with any other person". These arguments are supported; individuals cannot communicate political ideas without being able to associate in order to discuss these (and no doubt other) issues.[41]

Later in *Kruger v Commonwealth* (1997) 190 CLR 1, some members of the High Court[42] again appeared to support a principle of freedom of association; moreover, this was not in the context of discussion of what may be termed "political issues", however defined, but in the broader context of questions concerning the *Stolen Generation*. Indeed, Gaudron J (dissenting) invalidated aspects of the law challenged in that case because she concluded the powers of the Chief Protector/Director unacceptably infringed freedom of movement and of association of those affected. Clearly, these individuals were not involved in communication that could be classified as being of "political" nature, if that term were applied in a narrow fashion. Hence, there is at least some support for viewing the nature of "political" speech in a broad sense.[43]

There is precedent in other countries[44] for considering legislation proscribing membership of declared organisations in terms of freedom of association. For example, the United States Court of Appeal (9th Circuit) has determined that the First Amendment protects the right of motorcycle club members to associate with one another and with the club.[45] It has been determined that guilt by association alone, contemplated in particular by the New South Wales legislation discussed in this article, is an unacceptable basis upon which to trample on First Amendment rights. The government must show a knowing affiliation with an organisation with unlawful aims and a specific intent to

[39] *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 567-568, as slightly re-worded in *Coleman v Power* (2004) 220 CLR 1 (McHugh, Gummow, Hayne and Kirby JJ).

[40] *Coleman v Power* (2004) 220 CLR 1 and *Levy v Victoria* (1997) 189 CLR 579 involved State legislation, for example.

[41] Some will argue it is a "stretch" to suggest that some organisations, such as "bikie" gangs, are involved with "political communication" or "political association". However, as this article goes on to suggest, there are precedents suggestive of a broad reading of such concepts, rather than a narrow interpretation. Clearly, in *Kruger v Commonwealth* (1997) 190 CLR 1, there is support for a broad interpretation of the concept quite separate from formal "politicking", election processes, candidates etc, and a broader view also appears in *Coleman v Power* (2004) 220 CLR 1. As will be seen, some American courts have upheld the right to association with a "bikie" gang in the context of the First Amendment.

[42] See *Kruger v Commonwealth* (1997) 190 CLR 1 at 91, Toohey J found that political association was an indispensable aspect of political communication; as did Gaudron J (at 115): "just as communication would be impossible if each person was an island, so too it is substantially impeded if citizens are held in enclaves; no matter how large the enclave or congenial its composition. Freedom of political communication depends on human contact and entails at least a significant measure of freedom to associate with others. And freedom of association necessarily entails freedom of movement"; McHugh J again accepted a freedom of association (at 116, 142).

[43] See also *Coleman v Power* (2004) 220 CLR 1 where a broad view was taken of the meaning of "political" speech.

[44] Of course, the different statutory context must be conceded. In Australia, the political freedom is a negative right, while the First Amendment right is a positive one. Further, the Australian freedom has been expressed to apply in the context of "political" communications (despite the *Kruger* context), while the American reference is to speech more broadly.

[45] *United States v Rubio* 727 F 2d 786 at 791 (1983); *Piscottano v Murphy* 511 F 3d 247 (2007); *Villegas v City of Gilroy* 484 F 3d 1136 (2007).

further such aims.[46] First Amendment rights are available to organisations, and members of organisations, that engage in "expressive association", which can include written objectives to communicate with others to achieve particular ends.[47]

Applying the two-stage *Lange* test then, it is submitted that members of declared organisations are engaged, at least from time to time, in discussion about government and political issues. Clearly, their conversations would include other issues as well. Surely, however, either members are engaged in political discussions or they are not. It would plainly be bizarre to suggest that their freedom of speech was limited only to those conversations touching on "political issues" (however defined), and did not include other conversations, such that the government could legally prevent those associations from occurring. Unless the government was taping every conversation between members of the association, realistically it is not going to be in a position to argue which conversations conveyed "political speech" (however defined) and which did not.

The second question would be whether the law was an appropriate and adapted means of securing a legitimate end in a manner compatible with maintenance of representative and responsible government. It is argued that in assessing this second limb, the question of less drastic means to achieve a legitimate objective is relevant. The test implies a balancing exercise involving different interests, and in this balancing exercise, the availability of alternative measures, particularly those less invasive of important human rights, is surely relevant. Support can be found in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568: "In *ACTV* for example, a majority of this Court held that a law seriously impeding discussion during the course of a federal election was invalid because there were other less drastic means by which the objectives of the law could be achieved."[48]

Logic might suggest that in examining whether laws are "appropriate and adapted" with respect to a particular power or to pursue legitimate ends, the question of the availability of less intrusive means, where the law does impact rights and freedoms, is relevant. Article 22 of the *International Covenant on Civil and Political Rights*, by recognising that the right to freedom of association but accepting it is not absolute, also calls for such a proportionality consideration by allowing laws infringing upon freedom of association if they are *necessary*.[49]

So, for example, in arguing against the Queensland/New South Wales legislation, it can be argued, as Joseph has argued in relation to the anti-terrorism proscription laws, that any legitimate concerns that the legislation does in fact represent can or are being addressed in other ways.[50] This can be asked in relation to criminalising association of declared organisations, arising from a fear that members may[51] be engaged in criminal behaviour (New South Wales) or on proof (on the civil standard) that they are or have been engaged in criminal behaviour. The Queensland *Criminal Code* already contains a chapter dealing with conspiracy offences. Why is this not sufficient to address the question of individuals (whether they are members of a declared organisation or not) conspiring to engage in criminal behaviour? Why is the common law offence of conspiracy not sufficient in relation to New

[46] *Healy v James* 408 US 169 at 186 (1972). This is similar to the approach taken in the *United Nations Convention against Transnational Organised Crime* (UNTOC). Section 5(1)(a)(i) requires criminalisation of conduct by a person who, with knowledge of either the aim and general criminal activity of an organised criminal group or its intention to commit the crimes in question, actively participates in criminal activities of the organised criminal group.

[47] For example, in one case to instil values in young people was held to amount to "expressive association"; as a result the organisation had the benefit of First Amendment rights: *Boy Scouts of America v Dale* 530 US 640 at 648 (2000).

[48] To like effect were the comments of McHugh J in *Coleman v Power* (2004) 220 CLR 1 at 52.

[49] Joseph S, "Australian Counter-Terrorism Legislation and the International Human Rights Framework" (2004) 27(2) UNSWLJ 428 at 437.

[50] Arlie Loughnan notes the willingness to borrow from the anti-terrorism model in the very different context of "bikie" legislation, and the "cavalier attitude" to the criminal law as a means of social control without adequate thought or research: Loughnan, n 12 at 458.

[51] There is, in the NSW Act, no requirement to prove that a particular person is engaged in or planning criminal behaviour before a control order can be made against them.

South Wales? As others have noted, governments introducing these laws have not presented empirical evidence as to how these laws will effectively reduce organised crime,[52] or how the current laws are inadequate to deal with the problem.

As indicated, there are serious consequences for individuals found to be members of a declared organisation, apart from criminalising association. They include bans on weapon ownership, and restrictions on the right to work in particular fields. However, weapons legislation already provides rules in terms of eligibility to possess weapons. Why is it necessary to provide, as the Queensland/New South Wales legislation does, that members of declared organisations then lose their right to carry out particular occupations that require a licence? It is expected that anyone wishing to obtain or renew such a licence would already be subject to particular rules and requirements in relation to behaviour, lack of criminal behaviour etc. The need to connect eligibility to engage in such activities to non-membership of a particular group has not been established. To the extent that groups are involved in criminal activity, where is the evidence that current laws regarding drugs, money laundering, proceeds of crime legislation, and criminal conspiracy are not sufficient to tackle the ends to which this legislation is said to be aimed? If there were published evidence that existing rules were for some reason not effective in curbing the types of behaviour to which this legislation is said to have been addressed, one would be more comfortable that the legislation was a reasonably appropriate and adapted method of achieving a legitimate end consistent with representative and responsible government. However, such evidence has not been provided by advocates of these regimes.

There are many possible examples of bizarre results flowing from the operation of the legislation. One is presented by Loughnan:

> It is foreseeable that under the Act, an individual who is gainfully employed in the security industry, and is a member of a "bikie" gang that becomes a "declared organisation", will not be able to associate with his or her colleagues nor be able to work, even though he may have had nothing to do with any "serious criminal activity". In this respect, the new laws expose a troublesome collapse of the individual into the organisation.[53]

Of course, when one considers legislation aimed at dissolving organisations thought to be a threat to public safety, it is natural to recall *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, where the Commonwealth's attempts foundered after a High Court challenge. Clearly, the reasoning used in the case, that the Act was not supported by the defence head of power and the Act impermissibly allowed a member of the Executive to determine facts, is not available in the current context. However, Dixon J spoke (at 187) of the need for vigilance in terms of overreach of power by members of the Executive, in terms considered broadly apposite to the legislation currently being considered:

> History, and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.

(b) Procedural fairness and natural justice

Both Acts being considered reflect, in the author's view, a cavalier attitude towards procedural fairness in relation to a person who may be affected by such proceedings. First, there is the question of providing notice to the organisation against which a control order is to be sought. Specifically, although s 16 of the Queensland legislation does state that notice of the application to have an organisation declared must be served on the applicant, it confirms that if this is not "practicable" (without setting out how this would be established or what steps need to be taken before personal service will be deemed to have become impractical), public notice of the application will be sufficient. Similarly, in relation to the application for a control order in relation to a person, the application must be served upon them, but this can be dispensed with in cases where it is not "practicable" (s 16(4)(c)).

[52] Schloenhardt S, "Contemporary legislation comment: Crimes (Criminal Organisations Control) Act 2009 (NSW)" (2009) 33 Crim LJ 281 at 285.

[53] Loughnan, n 12 at 463.

A control order can be made in the absence of submissions by or even presence of the person against whom it is made (s 18(4)), as it can in New South Wales (s 19(4)). The New South Wales regime is similar; once an interim order is made, it must be served personally on the person against whom it was made, but this can be dispensed with if not "practicable", in favour of some other means that the court orders. Presumably, such an order may include public notice of the application.

It is true that hearings without notice and without the presence of a party affected by them do occur,[54] and this, of itself, may not be inconsistent with the exercise of judicial power (*Totani* at [141]). On the other hand, in a case where legislation required a court to hear an application in the absence of the party affected, the Queensland Court of Appeal invalidated the legislation, on the basis it was "such an interference with the exercise of the judicial process as to be repugnant to or incompatible with the exercise of the judicial power of the Commonwealth".[55] This was part of the problem with the legislation invalidated by the majority in *Totani*, as expressed by Bleby J (with whom Kelly J agreed). Bleby J stated:

> [160] That is not the end of the difficulty for the respondent as far as the *Kable* principle is concerned … it is necessary to restate a fundamental proposition relating to the right of a person to a fair trial in a court of law. That is that a person is entitled to be informed of the case that is put against that person, of the evidence which, in forensic contests, will have to be met and answered, and that the person is to be afforded an opportunity to answer that case.

Comments by Lord Hope of Craighead in *Secretary of State for the Home Department v F* [2009] 3 WLR 74 at [83] are also apposite:

> The principle that the accused has a right to know what is being alleged against him has a long pedigree. As Lord Scott of Foscote observed in *A v Secretary of State for the Home Department*, a denunciation on grounds that are not disclosed is the stuff of nightmares. The rule of law in a democratic society does not tolerate such behaviour. The fundamental principle is that everyone is entitled to the disclosure of sufficient material to enable him to answer effectively the case that is made against him. The domestic and European authorities on which this proposition rests were referred to by Lord Bingham in *Roberts v Parole Board*. In *Secretary of State for the Home Department v MB* he drew attention to McLachlin J's observation for the Supreme Court of Canada in *Charkaoui v Canada (Minister for Citizenship and Immigration)* that a person whose liberty is in jeopardy must know the case he has to meet and to *Hamdi v Rumsfeld* where it was declared by O'Connor J for the majority in the US Supreme Court that for more than a century it has been clear that parties whose rights are to be affected are entitled to be heard and that in order that they may enjoy that right they must first be notified.[56]

There are at least two ways in which such comments are relevant to the legislation currently under consideration. First, they do in fact allow the possibility that the members of an organisation sought to be declared, or a member in respect of whom a control order is sought, may not have been personally notified about the application. While one can conceive of circumstances where personal service may not always be possible, it might be expected that it would be seen to be a very important aspect of the process by which a control order might be made against an individual, such that the authority seeking the control order would need to show that every practical measure has been taken in order to effect personal service. Perhaps in those limited cases, personal service might be able to be dispensed with. However, the legislation allows dispensation of personal service whenever it is "impractical", without defining what this is to be mean. The effect is likely to be a frail guarantee of the right to proper notice of proceedings which will impact directly on members of the organisation sought to be proscribed.

[54] *Thomas v Mowbray* (2007) 223 CLR 307 at [112] (Gummow and Crennan JJ).

[55] *Re Criminal Proceeds Confiscation Act 2002 (Qld)* [2004] 1 QdR 40 at [58] per Williams JA (with whom White and Wilson JJ agreed).

[56] See also *Nicholas v The Queen* (1998) 193 CLR 173 at 208-209 per Gaudron J: "consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law".

The second way in which the comments above are relevant is the provision of "criminal intelligence" to be used in relation to the making of a control order against an individual. If the court believes the material fits the definition, the person against whom the control order will be made does not have a right to be aware of the nature of this information, and does not have the right to challenge it or to cross-examine, if it is based on the evidence of an individual. I do not press this aspect of the challenge in extended detail here, because I must concede that such provisions were validated in the two recent High Court decisions, *K-Generation* and *Gypsy Jokers*, provided it was the court that decided whether the material met the definition, and provided the court could assess the weighting to be accorded to it.

However, were it not for those very recent High Court decisions, I would have challenged the making of a control order against a person, possibly based on evidence that the person has not seen or heard, and without an opportunity for their legal representative to cross-examine or otherwise test the evidence. Clearly, such provisions impact on an individual's right to natural justice. This has been recognised by various authorities. Justice Heydon, for example, concludes in his textbook that "[n]o evidence given by one party affecting another party in the same litigation can be made admissible against the other party, unless there is a right to cross-examine".[57] Yet the definition of criminal intelligence in this legislation does allow evidence to be used against a member of a proscribed organisation in assessing a control order against that member, without the member having a right to cross-examine.[58] Mason J referred to the requirement of natural justice in *Kioa v West* (1985) 159 CLR 550 at 582:

> It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest in the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[59]

In *Leeth v Commonwealth* (1992) 174 CLR 455 at 470, Mason CJ, Dawson and McHugh JJ observed that "Any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power".[60]

With respect, it is hard to see how allowing a court to make a control order based on evidence that the person affected may not have seen, and who may not have been personally notified of the application, is consistent with the requirements of natural justice.[61] However, realistically it is unlikely that the High Court is going to change its position in the near future on the constitutionality of the use of "criminal intelligence" in relation to these kinds of proceedings.

(c) Directing the court

As has been conceded above, the legislation being considered here is less objectionable than the South Australian legislation in this regard. While the latter law mandated that a court make a control order against a declared organisation, the Queensland and New South Wales legislation merely provide courts with the power to do so. This is a much better separation of powers between the judicial function and non-judicial functions. However, difficulties remain with the Queensland legislation in this regard. Where the conditions upon which a control order may be made exist, and the court, in its discretion decides to make the order, the legislation directs that the order *must* contain various

[57] Heydon JD, *Cross on Evidence* (7th Aust ed, 2004) p 548.

[58] Heydon J was a member of the joint judgment in both *K-Generation* and *Gypsy Jokers* which validated legislation authorising the use of "criminal intelligence" by the court without the ability of the person affected to see or hear the evidence, or to cross-examine any relevant witnesses.

[59] See also *Kioa v West* (1985) 159 CLR 550 at 628 (Brennan J), 633 (Deane J).

[60] Gaudron J has noted that the judicial process involves the application of the rules of natural justice: *Harris v Caladine* (1991) 172 CLR 84 at 150.

[61] See Barker I, "Human Rights in an Age of Counter Terrorism" (2005) 26 Aust Bar Rev 267: "the idea that information might be used by the prosecution without the accused seeing the information need only be stated for its offensiveness to basic notions of fairness and justice to be apparent".

provisions, including an order prohibiting association with other members of the group, with another controlled person, banning them from holding weapons/explosives for which a licence is required, banning them from working in specified industries, and from recruiting others to the proscribed organisation.

Courts are generally suspicious of legislation purporting to direct them in the exercise of their jurisdiction.[62] Understandably, they sometimes see such provisions as an unacceptable incursion into judicial decision making. For example, a majority of the High Court in *Chu Kheng Lim* struck out a provision of the *Migration Act* directing a court not to order the release of a designated person. The majority reasoning there distinguished Parliament's grant or withhold of jurisdiction (acceptable), from a law where Parliament purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The latter was said to constitute an impermissible intrusion into the judicial power of the courts.[63] These views were repeated recently in *Gypsy Jokers*.[64]

In *K-Generation*,[65] the joint reasons in validating the legislation gave as one reason that "the Liquor Licensing Court is not directed as to which particular steps may be taken" in relation to maintaining confidentiality of evidence. This could be taken to at least suggest that if the court were directed as to which steps were to be taken, the judges in the joint judgment may have had a different view of that aspect of the legislation.[66]

(d) Double punishment

There is arguably provision for double punishment in the way that the Queensland legislation is constructed. As indicated, s 18 allows a court to make a control order if a person is or has been a member of a criminal organisation, engages in or has engaged in serious criminal activity, and associates with a person for criminal purposes. In making this assessment, the court is required to consider two specific pieces of evidence – the criminal history of the respondent, and the criminal history of the person with whom they are relevantly associating, as well as other factors that might be relevant in proving the required elements in order to make a control order.

It is suggested that if one member of a criminal organisation who has a history of committing a serious crime in the past happens to be "associating" with another person with a history of committing a serious crime in the past, courts are being invited to make a control order against those individuals. The court is required to consider their respective criminal history as the only specific piece of evidence mentioned. Surely, the implication is that in such cases, the court should make a control order against these individuals, despite the fact that there may not be strong evidence that they are associating for the purposes of engaging in or conspiring to engage in serious criminal activity. It is true that a court must be satisfied (on the balance of probabilities) that one member associates with

[62] Compare the comments of Doyle CJ in *Director of Public Prosecutions v George* (2008) 102 SASR 246 at [112] that it is not uncommon for legislation to direct that if certain specified matters are established in court proceedings, a particular consequence follows or a particular order must be made.

[63] *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 36-37 (Brennan Deane and Dawson JJ), with whom Gaudron J agreed. Similar views were expressed in *Bodruddaza v Minister for Immigration & Multicultural Affairs* (2007) 228 CLR 651 at 669-670.

[64] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 560 per Gummow, Hayne, Heydon and Keifel JJ: "as a general proposition it may be accepted that legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals". These comments were alluded to in *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501 at 526 (Grench CJ).

[65] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 542-543 (Gummow, Hayne, Heydon, Crennan and Keifel JJ).

[66] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 577 (Kirby J also alluded to this issue, and was satisfied that read in context, the words used allowed flexibility in terms of what action was required, rather than rigid or prescriptive steps), 524 (French CJ seemed less committed to the *Lim* comments, concluding merely that "as a general rule, absent clear words, a statute should not be construed so as to confine the way in which a court exercises its jurisdiction, including the way in which it accords procedural fairness"); this suggests that if the words are sufficiently clear, French CJ might be more comfortable than the other judges with legislation directing a court to exercise its discretion in a particular way.

another member for these purposes in order that the control order can be made; however when the main considerations to which the court is directed are the criminal records of those associating, the temptation might be to assume that they are in fact associating for illicit purposes if they have such a record, regardless of whether in fact they are doing so. Of course, the law is rightly concerned with two related principles:

(a) that the mere fact someone has done something in the past is not evidence that they have done it on this occasion; and
(b) a person should not be punished twice for committing the same offence.

In relation to (b), Kirby J viewed preventative detention regimes, whereby a person, who in the past was convicted of sex crimes, could be detained under State legislation for a period beyond their initial term of imprisonment if there was a high degree of probability they would re-offend if released, as involving double punishment:

> A person should not be put in danger twice for the same crime … a person such as the appellant is liable … to further punishment. That punishment is based, in part at least, upon the criterion of his former conviction(s) … it is essential to the nature of the judicial power that, if a prisoner has served in full the sentence imposed by a court as final punishment it is not competent for the legislature to require another court later, to impose additional punishment by reference to previous, still less the same, offences. Such a requirement could not be imposed upon Ch III courts … Retrospective application of new criminal offences and of additional punishment is offensive to the fundamental tenets of our law … It is destructive of the human capacity for redemption. It debases the judiciary that is required to play a part in it.[67]

Such principles are similar to those used in the law of evidence. As Lord Herschell LC explained:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct, or character to have committed the offence for which he is being tried.[68]

The Australian courts have similarly been very wary of using propensity evidence to prove that an accused is guilty of a current charge. While generally such evidence is excluded because of its tendency to prejudice the fact finder's deliberations in relation to the current charge, it may be used if it conclusively proves the accused guilty beyond reasonable doubt.[69] The learned author of *Cross on Evidence* concludes that if the similar fact evidence is relevant to an issue before the court, it is generally excluded unless it has a high degree of probative force. Justice Heydon concludes that the degree of probative force required will depend on the prejudice the accused might incur by its reception. Justice Heydon concludes that "it will be inadmissible if there is a rational view of the evidence consistent with the innocence of the accused".[70]

It may be argued that the proceeding by which a control order is made is civil in nature, given the civil standard of proof chosen, rather than the criminal context, in which most of the discussion of the use of "similar fact evidence" arises, and the context in which some of the above quotes were made. However, the doctrine of similar fact evidence is also relevant to civil proceedings, certainly where there would be prejudice to the person against whom the evidence is to be led.[71] Certainly, a person who is judged to be associating with another for criminal purposes on this occasion, leading to the possibility of a control order being made against them, would suffer prejudice if the fact they had committed a crime in the past were utilised as evidence of their illegal purpose on this occasion. The

[67] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 643-644. *Criminal Code 1899* (Qld), s 16 confirms that a person cannot be punished twice for the same act or omission.

[68] *Makin v Attorney-General (NSW)* [1894] AC 57 at 65.

[69] *R v WRC* (2002) 130 A Crim R 89 at [27-29], [58] (Hodgson JA).

[70] Heydon, n 57, p 656. Further, *Evidence Act 1995* (Cth), s 97 provides that evidence of the conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency to act in a particular way if the court thinks the evidence does not have significant probative value (another exception is also provided, but it is not presently relevant).

[71] *McWilliams v Sir William Arrol & Co Ltd* [1962] 1 All ER 623 at 630-631.

consequences of a control order being made against an individual are quite serious, including in terms of restricting association and employment. So while the current situation is not identical to some other cases in which "double punishment" arguments have arisen, it is submitted there are clear parallels, and further grounds on which this legislation is open to challenge.

CONCLUSION

It is submitted with respect that the South Australian Supreme Court was correct in upholding a constitutional challenge to the South Australian criminal association legislation. While in some respects the Queensland/New South Wales provisions represent an improvement, it has been argued that there remain aspects of these laws that are amenable to constitutional. There are arguments that the legislation infringes the right to association of an individual, a right recognised by members of the High Court, and by some American courts in the specific context of "bikie" laws. In applying the *Lange* test, it is submitted that, to the extent that the laws reflect a legitimate public interest in public safety and the stifling of criminal activity by groups, the legislation goes further than is reasonably necessary to achieve the end, and no evidence has been provided as to why existing provisions dealing with criminal conspiracy and multiple-party type offences are not sufficient to deal with the actual problem. The laws are highly invasive of a fundamental human right. Further, while not as prescriptive as the South Australian law, these laws still do direct the court as to how to exercise its discretion, mandating that a control order include certain things. I have raised concerns about the use of evidence against a person in circumstances where the person may not know the detail of the evidence and may not have an opportunity to test its credibility, in terms of natural justice. The legislation, by requiring a court to consider past criminal behaviour of a person in order to judge the probability (on the civil standard) they are currently associating for criminal purposes, raises questions about double punishment and limits on the use of similar fact evidence.