Contemporary Comments

A Threat to the Rule of Law: The New South Wales Crimes (Criminal Organisations Control) Act *2009*

In an earlier issue of the journal (CICJ 20(3):457-464) we published a comment by Sydney Faculty of Law academic Dr Arlie Loughnan on the controversial legislation introduced in New South Wales to deal with the perceived threat from so called 'bikie gangs'. The comment contended, among other things, that the *Crimes (Criminal Organisations Control) Act* 2009 (NSW) (the Act) had to be understood in the broad context of penal populism and that it was symptomatic of the dominance of 'law and order' politics in the State.

In this issue we publish a further comment, on the same piece of legislation, by the NSW Director of Public Prosecutions, Nicholas Cowdery AM QC. As readers will see the comment is highly critical of the Act which in Cowdery's view 'is another giant leap backward for human rights and the separation of powers – in short, the rule of law in NSW'. It is not, of course, legislation unique to NSW and mirrors a broader trend across the nation to place an emphasis on risk management and prevention to protect security interests at the expense of individual rights. **– Professor Duncan Chappell, Issue Editor**

In South Australia and New South Wales (so far) legislation has been enacted described as laws against 'bikie gangs' and as 'gang laws'. However, the Acts are not confined in their terms to 'outlaw motorcycle gangs' and their potential reach is much broader. [I have expressed my personal views, as follow, on my Office's website with the qualification, of course, that if my Office is required to prosecute in accordance with this or any other law, that will be done.]

In NSW the *Crimes (Criminal Organisations Control) Act* 2009 ['the Act'] became law with insufficient community consultation and over the deep concerns and protests of the NSW Bar Association, the NSW Law Society, academics, the Council for Civil Liberties and many others. While both the State government and the opposition may be right that something more needs to be done about bikie gangs and criminal groups, especially when they involve themselves in an organised manner in drug manufacture and supply and crimes of violence, this very troubling legislation (which in NSW borrows from related legislation in South Australia) is another giant leap backward for human rights and the separation of powers – in short, the rule of law in NSW. One questions the need for further legislation in this area at all. There is already anti-criminal-group legislation in Division 5 of Part 3A of the *Crimes Act* 1900, enacted in 2007, under which successful prosecutions have been brought (including pleas of guilty). There may be more a need for better enforcement, than for new legal powers.

The Act introduces a system of control orders whereby members of declared organisations can be ordered not to associate with other members subjected to control orders. This is not legislation directed, in terms, at 'bikie gangs' – it can apply to any organisation, defined in a manner to include any formal or informal grouping of persons suspected of serious criminal activity, wherever it may be based and wherever those persons may reside.

The machinery of the Act works in two stages. First, the Police Commissioner may apply to have an organisation declared under the Act by an 'eligible' Supreme Court judge. That judge must be satisfied (s9(1)) that members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and the organisation represents a risk to public safety and order in NSW. 'Serious criminal activity' is defined to connect with 'serious indictable offences' which are offences punishable by imprisonment for 5 years or more.

Secondly, once a declaration is made against an organisation, any judge of the Supreme Court (and not just an 'eligible' judge) can, on application by the Police Commissioner, make an interim and then a final control order against a person, if the court is satisfied that the person is a member of a particular declared organisation and that 'sufficient grounds exist for making the control order'. (The Act gives no useful guidance as to what constitute 'sufficient grounds').

Section 26 of the Act makes it an offence for a controlled member of a declared organisation to associate (simpliciter) with another controlled member of the same organisation. The purpose of any such association is irrelevant to liability. A first offence is punishable with a maximum penalty of 2 years imprisonment; a second or subsequent offence is liable to a maximum penalty of 5 years imprisonment. Certain reasonable circumstances of association are exempted (for example, between 'close family members' or in the course of a lawful occupation, business or profession, during education courses, etc – including in lawful custody), but the onus is on the controlled person to prove that the association falls within such a reasonable exemption. The making of a final control order has the effect of revoking any authority or licence that the person had to carry on any prescribed activity (for example, operating a pawn broking business, a tow truck, selling or repairing motor vehicles, selling liquor, possessing a firearm, acting as a security agent, operating a casino).

The legislation has a number of troubling features, including the following.

- The legislation does not apply only to bikie gangs, but to any 'particular organisation' in respect of which the Police Commissioner chooses to make an application. Where will the line be drawn? This legislation could be applied to any, even small, informally organised group whose members the Commissioner alleges 'associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity'. These words cast a very wide net – far wider than the elements of conspiracy, one of the most broadly defined crimes in the criminal calendar.

  It is curious to note that the Act does not apply to organisations organising, planning, facilitating, supporting or engaging in criminal activity that does not satisfy the definition of 'serious criminal activity' – arguably for example, gangs of organised shoplifters or street drug dealers.

- Only an 'eligible' Supreme Court judge can declare an organisation under the Act. (Similar officers have been described in legislation relating to anti-terrorism, covert search warrants and surveillance devices.) To be eligible a judge must first consent to being declared eligible for this purpose and then be so declared by the Attorney General, who has the power to declare (or not to declare) him or her eligible. In the original Act the Attorney General could amend or revoke the declaration of eligibility at any time. In other words, if an Attorney General should so desire, he or she was to have unfettered power to 'stack' the hearing of applications for

declarations of organisations under the Act with judges willing to enforce it and to revoke or qualify the authority of a judge to determine applications for declarations if he or she does not perform to the government's satisfaction. This may not have been the intention of the present Attorney General, but a provision so drafted left on the statute books could have been extremely dangerous and potentially open to serious misuse. No doubt for that reason, the *Courts and Crimes Legislation Amendment Bill 2009*, which has been passed and will commence on assent, removes the power of the Attorney General to revoke the appointment of Supreme Court Judges as eligible Judges for the purposes of this and other legislation and makes it clear that the selection of the eligible Judge to exercise a function is not made by the Attorney General or other Minister and that the exercise of the function is not subject to the control and direction of the Attorney General or other Minister.

- Whereas s24 of the Act creates a right of appeal against the making of a control order against a person, s35 purports, in the widest possible terms, otherwise to oust any review by the Supreme Court or any other review body (excepting investigations or proceedings under the *Independent Commission Against Corruption Act*) of a declaration or order made against an organisation or a person and to deny any right of appeal or review even when there has been a breach of the rules of procedural fairness (natural justice).

- An 'eligible' judge (in the case of an application for a declaration against an organisation) or any Supreme Court judge (in the case of an application in respect of a control order against a member of a declared organisation) hearing an application, is by s28(3) 'to take steps to maintain the confidentiality of information that [they consider] to be properly classified by the Commissioner as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives and the public'. One can only wonder what 'argument' there can possibly be when affected parties and their legal representatives are excluded from the proceedings.

- Part 3 of the Act empowers any judge of the Supreme Court to make control orders against an individual member or former member of an organisation. The definition of 'member' of an organisation in s3 is alarmingly wide – for example, it includes a 'prospective member (however described)'. It also includes 'a person who is treated by the organisation or persons who belong to the organisation, in some way, as if he or she belonged to the organisation'. This is extraordinarily broad-reaching – this criterion could be fulfilled without the person himself having any intention of being part of the organisation and could be established without any evidence of that person's actual involvement with the organisation.

- Section 13 provides that the rules of evidence do not apply to hearings of applications for a declaration of an organisation. Are organisations to be declared on the basis of hearsay upon hearsay, or a police intelligence officer's 'hunch', or a report of an anonymous telephone call? No limits are set.

- Section 32 provides that 'Any question of fact to be decided in proceedings under this Act is to be decided on the balance of probabilities' (this does not apply to proceedings for offences under the Act). Such a standard is insufficiently rigorous for the removal of a right as fundamental as the right to freedom of association.

Indeed, the Act purports to remove the rights to freedom of association and expression in circumstances that do not come within the permissible exceptions described in the International Covenant on Civil and Political Rights – for national security, public order, etc.

- Section 13(2) of the Act provides that an 'eligible' judge is not required to provide any grounds or reasons for his or her decision in respect of a declaration against an organisation (except to the Ombudsman conducting a review under s39). This is entirely contrary to the general practice in modern jurisprudence that judges should give public reasons for their decisions.
- The placing of the burden of proof upon a controlled person to establish that an association with another controlled person falls within the exemptions under the Act (for example, close family members), is a draconian measure, reminiscent of reverse onus provisions that were in place for a time in Northern Ireland during the 'troubles'. This is highly unusual and almost always inappropriate in the context of legislation creating criminal consequences.
- The Act criminalises conduct other than by rules of general application in the community – another infringement of the rule of law.

Further legislation was passed targeting the recruitment of a person to be a member of a declared organisation, enabling the substitute service of notices on those subject to applications to be placed under control orders and authorising search warrants to be issued by 'eligible' judges upon reasonable suspicion (rather than reasonable belief). The *Courts and Crimes legislation Amendment Bill 2009* makes yet further amendments and additions.

The *APEC legislation [APEC Meeting (Police Powers) Act* 2007] was a recent example of a response to the perceived need for extraordinary measures for public control. The so-called World Youth Day was another. The V8 Supercars arrangements are another example of the compromise by government of the rights of sections of society. One must question the need for such action.

At a time when bail laws operate to swell prison numbers in both adult and juvenile prisons (some of which are privatised – to be run for profit to owners), when Aboriginal and Torres Strait Islander populations are disproportionately represented in those numbers, when punishment takes priority in public policy and expenditure over crime prevention and when small scale drug possession and use remain criminal – and much else is not well in criminal justice in the state – it cannot be said that there are not other things to think about.

Nicholas Cowdery AM QC

Director of Public Prosecutions, New South Wales

With acknowledgements to Associate Professor Dan Howard SC, University of Wollongong