Combatting serious and organised crime by attacking its associates: will it work?

By Rick Sarre

Four years ago the South Australian Labor government introduced into the state parliament legislation that later became the *Serious and Organised Crime (Control) Act* 2008 (SA). The purpose of the legislation was, ostensibly, to give the police greater powers to crack down on bikie gangs and their nefarious practices, principally drug crime and activities associated with that trade. The Act was designed to bolster the armoury of police powers that already existed (relating to drugs and firearms offences, and acts of violence and intimidation) to control these groups of people. While the preamble states that it is 'An Act to provide for the making of declarations and orders for the purpose of disrupting and restricting the activities of criminal organisations, their members and associates ...' there is little doubt that motorcycle gangs were principally in the legislators' sights.[1]

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A key plank of the legislation was the way in which police (in this case, South Australia Police or 'SAPOL') were given powers to watch, track and arrest people who appeared to have friendships and associations with gang members.[2] Part 5 of the Act makes it an offence for a person to associate with members of declared organisations, or 'control order' subjects, on more than six occasions over a 12-month period. The thinking behind this idea was (and still is) that if one snuffs out the oxygen that allows these associations to breathe, then the association will die. To use a military analogy, if one cannot directly attack a fortress, one can lay siege to it; eventually the occupants will run out of resources and surrender.

Under the original Act,[3] the magistrates court was required to make a 'control order' against a person if the court was satisfied that that person was a member of a 'declared organisation'.[4] The power to make such a declaration was placed in the hands of the attorney-general who was entitled to act upon secret police evidence gleaned and supplied for the purpose. The attorney-general, in moving in this way, was required to be satisfied that members of the declared organisation associate for a criminal purpose, and that they thus represent a risk to public safety and order. This material was not required to be disclosed to anyone, least of all the person under suspicion, if classified by the police commissioner as 'criminal intelligence'. In making this finding, the attorney-general was not subject to the rules of evidence and was not required to give reasons. The validity of a declaration was expressly protected from any challenge or review.

On 14 May 2009, the Finks Motorcycle Club in South Australia was made a 'declared organisation' by the attorney-general.[5] The attorney-general told the court that he was satisfied that members of the club associated for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity (as required by the legislation) and thus it represented a risk to public safety and order. Two members of the Finks, Sandro Totani and Donald Hudson, challenged the law.

In *Totani and Anor v The State of South Australia*, the SA Supreme Court, by a two to one majority, ruled that s14(1) of the Act was invalid.[6] Justices Bleby and Kelly were in the majority. Justice Bleby wrote the judgment. He found that the provisions of the Act, while innocuous if read separately, worked together to ensure that the most significant and essential findings of fact were made not by a judicial officer, but by a Minister of the Crown. That, he said, was unacceptable, as the court was merely required to rubber-stamp an executive decision without being able to review the grounds upon which the decision was made. The only question that the court was to decide was if the individual in question was a member of the organisation. If it answered 'yes', then it had no discretion but to make the control order. Justice Bleby ruled that the judicial power to issue such an order was 'unacceptably grafted' on to the findings of executive government. As such, the court's integrity was impaired, since the integration of executive power into the judicial process effectively pre-determined the outcome.

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The SA government appealed to the High Court. Its Solicitor-General, Martin Hinton QC, argued that the legislation included safeguards to protect civil liberties. He said people subject to control orders could apply to the Supreme Court to have the decision reviewed. But Bret Walker SC, for the Finks members, said that there was no guarantee that the attorney-general was not relying upon faulty criminal intelligence when moving to impose a control order. He submitted, morever, that in *Kable v Director of Public Prosecutions*[7] the High Court had determined that a state law that required one of its courts to fulfil a role incompatible with the nature of judicial power was invalid. That is, the High Court had affirmed that there are limits on the extent to which state courts can be conferred with non-judicial functions. Thus it was a surprise to no one that, on 11 November 2010, the High Court upheld the decision of the Supreme Court of South Australia.[8] The High Court said that s14(1) was unconstitutional in that it undermined the independence of judges because it required them to find guilt 'based on assumptions'. Six of the seven justices were critical of the provisions that had the effect of limiting a magistrate's discretion in imposing control orders.

The NSW attorney-general remained confident that his own legislation (albeit based on the South Australian model) was unaffected by the *Totani* decision, for in the NSW Act the power to make a declaration that an outlaw motorcycle gang is a 'declared organisation' was given to the judiciary.[9] His confidence was short-lived. In June 2011, in the case of *Wainohu v State of New South Wales*,[10] the High Court declared the NSW legislation invalid in its entirety. The Court found that a key section of the Act was invalid, namely the one that did not require a judge to give reasons for making a declaration. The High Court determined that the Act as a whole fell as a result. The High Court thus re-affirmed that it is an essential component of the judicial function, required by Chapter III of the Commonwealth Constitution, that a judge give reasons for his or her decision.[11]

A year later, on 18 June 2012, the South Australian government re-introduced its legislation into the state parliament, confident that the concerns expressed by both the SA Supreme Court and the High Court had been satisfied. Attorney-General, John Rau said, in a media

statement that day, that the legislation represented the 'most significant attack on organised crime in South Australian history'. He went on to assert that '[the laws] won't make crime gangs pack up overnight, but the government is confident that they will make the lives of organised criminals considerably harder'.[12]

Gone was any suggestion that a judicial officer was merely a rubber stamp for executive government. Other legislative changes, too, were included in the government's suite of amendments to the Act. For example, the *Bail Act 1985* (SA) was amended at the same time as the new legislation was introduced in order to include a presumption against bail for those charged with a 'serious and organised crime offence', and if the granting of bail might cause a witness to reasonably fear for his or her safety. However, if the applicant could show that he or she had not previously been convicted of a 'serious and organised crime offence', the presumption in favour of bail would remain in their favour.[13]

The provisions prohibiting persons from associating with members of declared organisations remained untouched in the new legislation. After all, they had not been the subject of appeal. Thus it is still an offence to consort with people who have committed, or are suspected to have committed, a serious and organised crime offence. It is to those provisions (found in s35) that we now turn.

Will s35 actually work to reduce the criminal activities of outlaw motor cycle gangs?

First of all, what does the legislation say?

'35 (1) A person who associates, on not less than 6 occasions during a period of 12 months, with a person who is – (a) a member of a declared organisation; or (b) the subject of a control order, is guilty of an offence. Maximum penalty: Imprisonment for 5 years.[14]

(2) A person does not commit an offence against subsection (1) unless, on each occasion on which it is alleged that the person associated with another, the person knew that the other was – (a) a member of a declared organisation; or (b) a person the subject of a control order, or was reckless as to that fact.

(3) A person who – (a) has a criminal conviction (against the law of this state or another jurisdiction) of a kind prescribed by regulation; and (b) associates, on not less than 6 occasions during a period of 12 months, with another person who has such a criminal conviction, is guilty of an offence. Maximum penalty: Imprisonment for 5 years.

(4) A person does not commit an offence against subsection (3) unless, on each occasion on which it is alleged that the person associated with another, the person knew that the other had the relevant criminal conviction or was reckless as to that fact.'[15]

I find it a little unnerving that the right all individuals should enjoy to associate freely with other persons has been so readily compromised in this Act. Disrupting the activities of criminal gangs is one thing; targeting and penalising those who would associate with them, through a combined effort by the police and executive arm of government, is quite another.[16] By the same token, I would have little difficulty with some abridgements to this right if there were strong evidence that creating this type of offence had been successful in curbing gang crime in a comparable jurisdiction in the modern world. But no such evidence has been offered.[17]

It is true that social conditions at any given time play no small part in determining levels of criminality. I am reminded of the study that tested the claim of 19th century Australian police that their tactics, intelligence and firepower had brought an end to the scourge of bushranging in the 1870s. Another (and in my opinion, more credible) view is that the frontier communities themselves changed considerably over time and it was these changes, not the efforts of police, that ushered in the demise of the bushranger. Frontier communities, made up of rural labourers and smallholders, initially saw in the bushrangers champions against injustice. After all, the bushrangers' 'primitive rebellion' was directed against their shared oppressors: large landholders, the banks, railway companies, and the police who upheld the laws of the rich and powerful. Later, when these communities became successful, and it was their savings in the banks that were being robbed by bushrangers, the succour that had previously been provided to the rebels began to evaporate.[18]

This legislation, however, does not tackle social conditions; rather it promotes guilt by association, a concept that is laced with danger.[19] Indeed, the early debates on the original South >>

The appeal courts did not question the challenges presented by the legislation to suspects' and associates' fundamental civil liberties (in relation to intelligence-gathering and freedom to associate, respectively).

Australian Bill in May 2008 were robust. As Ian Hunter, Labor MLC, pointed out in his parliamentary speech (incidentally, in support of the Bill), the 'association' provisions of Part 5 may have the unfortunate effect of deterring people who regularly, or occasionally, come forward to help police with their inquiries. There is the danger, he said, that these informants will lose confidence in the police, and the flow of information to police may then dry up. Therefore, it follows that police will need to use extra resources to find the information that formerly had flowed naturally from the trust relationships that they had encouraged in their informant networks. In other words, police harassment of the very individuals who were likely to inform upon those of their networks engaging in serious criminal activities would be counter-productive to the task at hand.[20] This would tend to contradict the very great role that governments place on informants as vital players in the task of combatting serious crime, an imperative that has as recently as August 2011 been reiterated by the state government. 'An important weapon against serious and organised crime is getting people with inside, secret knowledge to co-operate with the authorities. This intelligence has the power to fast track police investigations and needs to be encouraged.'[21]

The Law Society of South Australia and the Bar Council also criticised the Bill when the original legislation was first introduced into the parliament, and the then Victorian Police Commissioner, Christine Nixon, was reported to have told a federal parliamentary inquiry that the new laws will 'merely drive the visible appearance of organised motorcycle gangs underground, where the criminal activity will continue to function'.[22]

Others expressed the view that innocents could be caught up in the police 'net'. 'We need to be careful with this legislation, particularly, that entirely innocent citizens are not caught up with the net of the law being cast over what would otherwise be entirely innocent activities, leading to jail terms of up to five years, and there is a serious risk that this legislation does just that.'[23] Even those who are not entirely innocent but who engage in occasional low level crime (such as drunkenness or graffiti or brawling) should not be caught up in a crime control regime that is designed for the serious and repeat criminal.[24] Not only does enforcement overkill become a drain on police resources, it has the potential to turn the targets' families and friends away from assisting police when more serious crimes are committed.

Another unintended result is that 'targeting measures' have forced the more notorious criminal elements in the outlaw motorcycle gangs to go further underground and, according to Art Veno,[25] to behave more like members of Triads and criminal gangs of their ilk. While it is important, he says, that criminal elements in bikie gangs be pursued with the full force of the law, and that they face the consequences of their actions, the government (and the police they employ) need to proceed with caution so that their zeal, directed at containment, actually does what it is intended to do, and targets only those who are the ones needing the appropriate attention. In Canada, for example, where the clubs were banned under legislation, the street gangs and, in particular, the ethnic gangs took over. Indeed, drug use grew once the bikies left the picture, and the price for drugs went down.[26] As has been said repeatedly, be careful what you wish for.

In its fight against serious and organised crime, the South Australian government has also passed the *Statutes Amendment (Criminal Intelligence) Act* 2012 (SA) to give police additional powers to gather secret intelligence, and *inter alia* to prevent firearms or liquor licences being issued to known criminals or their associates.[27] Following some rigorous opposition from the Liberal Party, which pointed out (correctly) that society should not undermine the right of a person to know the case against them without very good reason, safeguards have now been placed in the Act to ensure that the zeal of police does not threaten the rights of citizens in a manner that is unfair and counter-productive.[28] Under the Act as amended, the commissioner of police is now required to establish guidelines for the assessment of information being considered for classification as 'criminal intelligence'. Moreover, the attorney-general will now be required to appoint a retired judge to investigate the use of criminal intelligence, to report on its use, and to ensure compliance with the police commissioner's guidelines. These safeguards give the appearance of being an appropriate means of balancing crime control imperatives with the rights expected to be enjoyed by those who live in modern civil society.

CONCLUSION

The South Australian legislation (and the NSW equivalent) had a number of constitutional problems that have now been ironed out. But what the appeal courts were not asked to do was question the challenges the legislation presented to the fundamental civil liberties of suspects (in relation to intelligence gathering) and their associates (in relation to their freedom to associate). Neither were they asked to consider the possibility that the strategy of targeting associates of reprobates may do little more than alienate those who might otherwise assist the police with intelligence-gathering. Nor were they asked to deal with the dearth of evidence of the effectiveness of such measures in the fight against organised crime elsewhere in the world. The fact

remains that the legislation is now on foot and has been deemed to be in accordance with the requirements of constitutional law. But will it work to reduce the scourge of gang-related violence, intimidation and drug running? I have my doubts. I would much prefer that state governments put greater faith in a broad national approach such as the one being developed by the Australian Crime Commission.[29] Moreover, every dollar spent chasing an associate of a serious criminal (whose association may be peripheral in any event) is probably far better spent on broader crime prevention measures targeting the very social ills that have been identified as firing up the desire of young men to form and join enclaves which openly encourage anti-social and destructive forces.[30] I would challenge governments to embrace these long-term goals with a clear and strategic national focus. Short-term barrages of local police power have a poor record in the history of crime control. Tackling the broader social agendas worked to eliminate bushranging; it can work for bikie gangs too. ■

Notes: **1** The word 'bikie' is not used in the legislation, however. Indeed, neither is the preferred lay term, 'outlaw motorcycle gangs' or OMCGs. **2** Attorney-General John Rau has revealed that some 45 criminal groups are currently being monitored by SAPOL, of which 15 are OMCGs. See *The Advertiser*, 28 April 2012, p11, by Bryan Littlely. **3** Then s14(1). **4** This would allow the court to impose restrictions upon the individual's freedom to associate with members of the 'declared organisation'. **5** At the time, the attorney-general was Michael Atkinson MP. In December 2009 he began the process of adding the Rebels Motorcycle Club to the list of 'declared' organisations. **6** (2009) 259 ALR 673. **7** (1996) 189 CLR 51.II **8** [2010] HCA 39. Greg Martin, 'Control Orders: Out of Control? High Court rules South Australian "bikie" legislation unconstitutional,' (2011) 35 *Crim LJ* 116. **9** Refer Andrew Lynch, 2 October 2009, AAP. **10** *Wainohu v State of New South Wales*, [2011] HCA 24. **11** The re-vamped *Crimes (Criminal Organisations Control) Act* 2012 (NSW) was assented to in March 2012. There are moves afoot to have the Hells Angels declared a criminal gang under the new legislation. There are also moves in Queensland to challenge the equivalent legislation in that state, the *Criminal Organisation Act* 2009 (Qld). **12** 'SA renews crime gang crackdown', *InDaily*, 18 June 2012. **13** South Australian Attorney-General's Department, *Combatting Serious and Organised Crime, Final Report*, August 2011, p3. **14** Notably, the grammar is poor; the phrase would be better expressed as 'on no fewer than six occasions'. **15** There are 12 subsections in the Act further refining and defining how a person can be charged, and the various defences to a charge. **16** Andreas Schloenhardt, 'Battling the Bikies: South Australia's Serious and Organised Crime (Control) Bill 2007,' *Law Society Bulletin* 30(3), 8-11, 2008. **17** There were suggestions made that this type of strategy had been effective in limiting Triad crime in Hong Kong, but no references were given and it can be argued that Triad activities are in a different league to bikie drug-trafficking and violence. Indeed, it is always problematic to infer that a solution to a particular crime in one country or culture can easily translate into another; see Susanne Karstedt, 'Comparing cultures, comparing crime: challenges, prospects and problems for a global criminology,' *Crime, Law and Social Change* 36(3), 285-308, 2001. **18** Pat O'Malley, 'Class Conflict, Land and Social Banditry: Bushranging in Nineteenth Century Australia' *Social Problems*, 26, 273, 1979. **19** 'The problem of sustaining a charge of guilt by association was most spectacularly highlighted ... by the recent case of Dr Mohamed Haneef. The attempt by former immigration minister, Kevin Andrews, to cancel Dr Haneef's visa was ultimately rejected by the Full Bench of the Federal Court, which declared it unlawful, in part, because the nature of the association which Dr Haneef had with his family members was not capable of supporting a reasonable suspicion that Dr Haneef knew of, or was sympathetic to, supported, or was involved in any way in criminal conduct undertaken by his cousins. In other words, mere association and admitted regular contact with those suspected of criminal activities was deemed insufficient evidence to target Haneef and, in fact, tar him with the same brush.' Per Ian Hunter MLC Legislative Council, 6 March 2008, p2118. **20** Ian Hunter MLC Legislative Council, 6 March 2008, p2118. **21** South Australian Attorney-General's Department, *Combatting Serious and Organised Crime, Final Report*, August 2011, p4. **22** 'Bikie Fear', *The Advertiser*, 26 June 2008, p1. **23** Kris Hanna MP, House of Assembly, Wednesday, 13 February 2008, p2074. Mr Hanna continued, '[a]lthough I can applaud the objective of the legislation, the real question with legislation such as this is whether it goes too far, whether it trades off the liberties of innocent citizens too much against the desire to curtail the activities of violent members of society...' **24** Gridneff, I, 'Bikies little threat to society – police study,' May 7, 2012, *Sydney Morning Herald*. **25** Professor at the Centre for Police and Justice Studies, Monash University. **26** Arthur Veno, Personal Blog, Thu 21 June 2007 (10:43am). **27** The Act was assented to on 24 May 2012. **28** 'In an effort to resolve the impasse, however, I have obtained support from SAPOL for an amendment to the Bill introduced by the government to include a robust record-keeping and annual review provision for criminal intelligence, which is similar to that moved by the Opposition.' Attorney-General John Rau in a letter to Shadow Attorney-General Stephen Wade, 14 May 2012. **29** *Organised Crime in Australia*, Australian Crime Commission, 2011. **30** See generally, Rick Sarre, 'Social Innovation, Law and Justice,' in Gerry Bloustien (ed), *Proceedings of the History and Future of Social Innovation Conference June 2008*, Magill: Hawke Research Institute for Sustainable Societies, 2009.

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