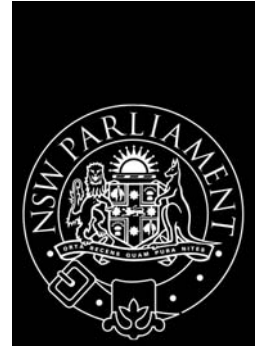


PARLIAMENT OF NEW SOUTH  
WALES



# Legislation Review Committee

## PUBLIC INTEREST AND THE RULE OF LAW

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Discussion Paper

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## FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

### 8A Functions with respect to bills

- (1) The functions of the Committee with respect to bills are:
  - (a) to consider any bill introduced into Parliament, and
  - (b) to report to both Houses of Parliament as to whether any such bill, by express words or otherwise:
    - (i) trespasses unduly on personal rights and liberties, or
    - (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
    - (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
    - (iv) inappropriately delegates legislative powers, or
    - (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- (2) A House of Parliament may pass a bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

### 9 Functions with respect to regulations:

- (1) The functions of the Committee with respect to regulations are:
  - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
  - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
    - (i) that the regulation trespasses unduly on personal rights and liberties,
    - (ii) that the regulation may have an adverse impact on the business community,
    - (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
    - (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
    - (v) that the objective of the regulation could have been achieved by alternative and more effective means,
    - (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
    - (vii) that the form or intention of the regulation calls for elucidation, or
    - (viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
  - (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- (2) Further functions of the Committee are:
  - (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
  - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.
- (3) The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

## EXECUTIVE SUMMARY

### Purpose Of The Discussion Paper

The Legislation Review Committee is seeking comment in relation to the principles it should apply when considering bills that trespass on personal rights and liberties in the context of issues which involve the public interest.

In commenting on bills, the Committee has applied the general principles from relevant international covenants and the common law, where a personal right or liberty should only be trespassed to the extent that is necessary to achieve a proportionate objective in the public interest.

The Committee is aware, however, that the scope of what constitutes an undue trespass on personal rights and liberties, is not clearly defined. There is no clear framework to which reference may be made in determining when it is acceptable for the right to be surrendered in the public interest.

Determining whether a trespass on the right is undue requires:

- identification of the degree of trespass to the right;
- evaluation of the right that is trespassed upon;
- the importance of the purpose of the trespass (such as involving public interest); and
- assessment of the necessity of trespassing on the right to achieve the intended legislative object, including a comparison of the result of trespassing on the right with the best alternative that leaves the right intact.

The term 'public interest' is quite broad. Accordingly, the analysis in this paper will be confined to discussion of legislation that illustrates the potential risk for incursion into personal rights and liberties. This is usually in the context of criminal law offences, criminal law process and enforcement rather than civil or administrative law. Therefore, the paper will focus on legislation in these areas relating to the criminal law enforcement process or that of involving offenders or suspected offenders, in order to examine the concept of public interest in context.

To better equip the Committee to assist the Parliament to perform the process of debating bills, the Committee is seeking comment on issues relating to the determination of whether a trespass on a right is undue in relation to the public interest. The Committee will then use these comments when suggesting principles to which the Parliament should have regard when considering bills that trespass on fundamental rights.

Given the broad nature and scope of human rights and public interests, the Committee is not seeking to resolve the issues in this process and does not intend to cover every right or liberty, nor identify every facet of public interest. However, by fostering discussion of these issues, the Committee aims to develop a better understanding of the relevant issues for Parliament's consideration of bills.

### Issues Arising From The Committee's Consideration Of Bills

#### Framework For Limits On Personal Rights And For The Assessment Of Undue Trespasses On Personal Rights And Liberties

Victoria and ACT contain provisions setting out the criteria for when a human right may be limited by law. The *Victorian Charter of Human Rights and Responsibilities Act 2006* provides that:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The NSW Legislation Review Committee seeks comment on whether the above provisions could be adapted as a possible guide or framework to assist the Committee in its deliberations on whether a personal right or liberty may be limited by law, such as under (b): where the importance of the purpose of the limitation may involve public interest concerns.

The Committee also seeks comment on which could be the most appropriate model or approach (as summarised in Chapter Six), when trying to strike a balance in assessing the weight to be given on personal rights and liberties when there are strong public interest concerns for ensuring that the best alternative (or least restrictive means) to achieving the legislative objective that could leave the particular right intact:

The Committee seeks comment on whether the presumptive and re-weighting approach (see Chapter Six) could be more preferable than the balancing test, proportionality or necessity model, by assigning more weight to rights and less weight to public interest concerns, particularly if the principles of the rule of law may be undermined. Personal rights and liberties will presumptively, but not conclusively, be given more weight than public interest considerations.

## Questions For Comment

To assist the Committee in addressing the issues above, the Committee also invites comment on the following questions:

### Questions 1 - 10

1. Are the rights of freedom of association and that of lawful assembly core rights when considering public interest?
2. What important sources or principles could provide guidance on evaluating the extent or degree of a trespass on a right?
3. What important sources could guide the assessment of whether the legislative measures are proportionate to the pursuit of the legislative purposes for ensuring that trespasses on personal rights are not undue?
4. What considerations or sources could assist in the assessment of whether there are less restrictive ways of achieving the intended legislative purpose without the Committee engaging in an evaluation of government policy?
5. Are the rights to fair trial and procedural fairness core rights when assessing public interest concerns?
6. Should matters of fundamental principles and rights be referred to Parliament for consideration over and above the weighing of the public interest?
7. What are the key principles that could assist in asking the Parliament or the government to demonstrate why a particular right could be reasonably limited?
8. Just as personal rights are not absolute, what are the principles that could inform the assessment of the boundaries or limits of public interest?
9. What are some of the key considerations for addressing the relationship between the confidential use of criminal intelligence and the right to procedural fairness and due process?
10. Where a principle of fundamental justice may be undermined, such as the requirement of mens rea (intent) for criminal liability, the requirement of the right to natural justice, or relevant standard of proof, what are the key considerations for striking a balance between public interest and the principle of fundamental justice, including what should constitute as an undue trespass on personal rights and liberties?



## Address For Submissions

Submissions should be sent to:

Chair  
Legislation Review Committee  
Parliament of New South Wales  
Macquarie Street  
Sydney NSW 2000

Alternatively, submissions can be made on-line by following the links at [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au)  
Or by email: [Legislation.Review@parliament.nsw.gov.au](mailto:Legislation.Review@parliament.nsw.gov.au)

The closing date for submissions is 4 June 2010.



## Chapter One – Introduction

1. The Legislation Review Committee of the Parliament of New South Wales (NSW) is seeking comment in relation to the principles it should apply when considering bills of public interest that may trespass on personal rights and liberties.<sup>1</sup>
2. The term ‘public interest’ is quite broad. Accordingly, the analysis in this paper will be confined to discussion of legislation that illustrates the potential risk for incursion into personal rights and liberties, which may result in serious penalties or punishment. This is usually in the context of criminal law offences and criminal law enforcement rather than civil areas. Therefore, the paper will predominately focus on legislation in these areas relating to criminal law enforcement process or that of involving offenders or suspected offenders, in order to examine the concept of public interest in context. Chapter Three will discuss the example of covert search warrant powers and the example of public housing for tenants who are registrable persons under the *NSW Child Protection (Offenders Registration) Act 2000*. Chapter Four will examine the case study of the NSW ‘bikies’ legislation in the context of recent High Court and Supreme Court decisions, Commonwealth inquiries and the development of a national framework.
3. ‘Public interest’ also arises in the area of freedom of information laws (FOI). However, given the extensive reviews and reforms in the area of FOI legislation<sup>2</sup>, this paper will not discuss public interest and personal rights and liberties in relation to the area of FOI laws.
4. The *Legislation Review Act 1987* (LRA) requires the Legislation Review Committee to consider the impact of bills and regulations on ‘personal rights and liberties’. It does not provide for an examination of bills and regulations on the ground of ‘public interest’. It also does not define ‘personal rights and liberties’. The Committee’s previous Information Paper on “Rights and Liberties” in 2005 / 2006 sets out the Committee’s understanding of the meaning of ‘personal rights and liberties’ in the Act.
5. The Committee’s functions are outlined on page iv. The Committee’s understanding of the term ‘personal rights and liberties’ is informed by the history of section 8A of the LRA, and the rationale for giving the Committee the function of reviewing bills introduced into Parliament.
6. Section 8A was introduced as the NSW Government’s response to the Legislative Council’s Law and Justice Committee’s inquiry into whether NSW should have a bill of rights. That Committee recommended that a parliamentary scrutiny of bills committee should be established instead of a bill of rights. The Parliament decided not to define what rights and liberties people in NSW should enjoy but instead, establish a committee to determine such issues within the context of each bill. The Legislation Review Committee was given the function to assess whether proposed legislation trespasses unduly on ‘personal rights and liberties’ and to report its views to the Parliament. The Parliament can then agree with the Committee’s assessment

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<sup>1</sup> The functions of the Legislation Review Committee with respect to bills also include considering and reporting to both Houses of Parliament on whether any bill: makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers or upon non-reviewable decisions; inappropriately delegates legislative powers; or insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

<sup>2</sup> Resulting in the new establishment of the Information Commissioner in NSW, along with the direct reporting to Parliament with an oversight by the Joint Committee on the Office of the Ombudsman and the Police Integrity Commission.

Introduction

of the impact of the proposed legislation and decide whether it should become law in NSW.

7. In the absence of any definition of personal rights and liberties under the law or Constitution of NSW, the Committee has regard to a range of sources in determining which rights and liberties the proposed legislation might impact on. The Committee considers Australian law and international law that recognise a range of personal rights.
8. International human rights instruments usually only allow State Parties to derogate from their obligations in limited situations while there are also specific fundamental rights which are non-derogable. The limited situations in which State Parties may derogate from their obligations include states of public emergency which threaten the life of the nation, the existence of which is officially proclaimed; in the circumstances of interests of national security, public safety, public order, public health or morals, or the protection of the rights and freedoms of others, consistent with the other recognised rights. Therefore, the following chapters and sections will examine in detail a specific type of legislation to illustrate and discuss public interest in the context of public order or safety. However, the international human rights instruments do not generally contain or refer to 'public interest' in their provisions or articles.
9. The *International Covenant on Civil and Political Rights* (ICCPR), unlike the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), provides no concession to the progressive realisation of rights. As a signatory to the ICCPR, Australia has committed to ensuring "all individuals within its territory and subject to its jurisdiction the rights recognized" in the ICCPR.<sup>3</sup> Six of those rights<sup>4</sup> are expressed in absolute terms ("No one shall be...") and as such, are non-derogable, which means the government cannot derogate from its obligation to protect those rights even in times of national emergency.<sup>5</sup> Those rights are considered to be so fundamental that they should never be limited or breached.
10. The right to fair trial is not included in the list of non-derogable rights agreed in the ICCPR from 40 years ago. However, the recent *National Human Rights Consultation* recommends that the right to fair trial should not be limited.<sup>6</sup> The right to a fair trial before an independent and impartial tribunal was discussed during the community roundtable consultations and had been identified as an important right by 92% of those surveyed by Colmar Brunton Social Research.<sup>7</sup>
11. Apart from non-derogable rights such as those stated in Article 4 (2) of the ICCPR, many human rights are subject to limitation.
12. The Committee is aware, however, that the scope of the right to personal rights and liberties is not clearly defined. There is no clear principle to which reference may be

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<sup>3</sup> *National Human Rights Consultation, Report*, September 2009, Commonwealth of Australia, at p 367.

<sup>4</sup> The six non-derogable civil and political rights are: the right to life; protection from torture and cruel, inhuman or degrading treatment; freedom from slavery or servitude; retrospective criminal laws; freedom from imprisonment for inability to fulfil a contractual obligation; and freedom from coercion or restraint in relation to religion and belief. These are summarised in the *National Human Rights Consultation, Report*, September 2009, Commonwealth of Australia, at pp 367 – 8.

<sup>5</sup> *National Human Rights Consultation, Report*, September 2009, Commonwealth of Australia, at p 367.

<sup>6</sup> As above, at p 368.

<sup>7</sup> Colmar Brunton Social Research, *National Human Rights Consultation – community research report*, 2009. Cited in the *National Human Rights Consultation, Report*, September 2009, Commonwealth of Australia, at p 368.

made in determining when it is acceptable for the right to be surrendered in the public interest. Different jurisdictions have taken different approaches to clarifying the nature, scope and application of a right in varying contexts.

13. In ideal circumstances, determining whether a trespass on a right is undue would generally require:
  - identification of the degree of trespass to the right;
  - evaluation of the right that is trespassed upon;
  - weighing the importance of the public interest purpose to be obtained by that trespass; and
  - assessment of the necessity of trespassing on the right to achieve the intended legislative objective, including a comparison of the result of trespassing on the right with the best alternative that leaves the right intact.
14. To better equip the Committee to assist the Parliament to perform this process, the Committee is seeking comment on issues relating to the determination of whether a trespass on a right is undue in relation to the weighing of public interest. The Committee will then use these comments when suggesting principles to which the Parliament should have regard when considering bills that may trespass on fundamental rights.
15. Given the broad nature and scope of human rights and public interests, the Committee is not seeking to resolve the issues in this process, and it is not intending to cover every right and liberty nor identify every facet of public interest. However, by fostering discussion of these issues, the Committee aims to develop a better understanding of the relevant issues for Parliament's consideration of bills, and to refine the focus of the Committee.

## Chapter Two – What Is Public Interest?

### Dictionary Meanings

1. The ordinary dictionary meaning of public interest includes the following:
  1. The well being of the general public.
  2. Values generally thought to be shared by the public at large. However, there is no one public interest. Rather, there are many public interests depending upon individual needs.
  3. Public interest is a common concern among citizens in the management and affairs of local, state, and national government. It does not mean mere curiosity but is a broad term that refers to the body politic and the public will.
  4. Refers to the 'common well-being' or 'general welfare'. The public interest is central to policy debates, politics, democracy and the nature of government itself. While nearly everyone claims that aiding the common well-being or general welfare is positive, there is little, if any, consensus on what exactly constitutes the public interest.
2. The legal dictionaries in the United States provide the following definitions of public interest:
  1. The general welfare of the public that warrants recognition and protection; and
  2. Something in which the public as a whole has a stake; especially an interest that justifies government regulation.<sup>8</sup>
  3. That which is best for society as a whole and is a subjective determination by an individual such as a judge or governor, or a group such as a...legislature of what is for the general good of all people.<sup>9</sup>

### Definitions And Conceptual Approaches

3. The political dictionary meaning refers to 'public interest' as:
  1. The common interest of persons in their capacity as members of the public;
  2. The aggregation of the individual interests of the persons affected by a policy or action under consideration.
4. A distinction lies between the two above formulations (the common interest approach and the aggregation of individual interests approach). A common interest is a shared interest. However, an aggregation of individual interests depends on a balancing assessment of the position of individuals considered in isolation.
5. The concept of 'public interest' has been the subject to criticism. First, there is no accepted coherent account on the meaning of the term. Second, even if such an

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<sup>8</sup> From Bryan A. Garner, ed., *Black's Dictionary*, 7<sup>th</sup> ed., St Paul, Minn.: West Publishing Com., 1979. Cited by Edwin Rekosh, *Who Defines The Public Interest? Public Interest Law Strategies in Central and Eastern Europe*, PILI Papers, Number 1, July 2005, Public Interest Law Initiative, Budapest, Moscow, New York; pp 5-6.

<sup>9</sup> From Steven H. Gifis, *Law Dictionary*, 4<sup>th</sup> ed., New York: Barron's Educational Services, 1996. Cited by Edwin Rekosh, *Who Defines The Public Interest? Public Interest Law Strategies in Central and Eastern Europe*, PILI Papers, Number 1, July 2005, Public Interest Law Initiative, Budapest, Moscow, New York; p 6.

account could be made, it is near impossible to identify where the public interest lies. Third, questions arise whether the public interest could be pursued through political practices and institutions if there are power imbalances.

6. The membership that constitutes the relevant 'public' where matters of public interest are raised is also dependent on context or a specific issue. It could be a minority group who is very vocal with access to the media or it could be a majority that may silence a minority.
7. The first formulation of the 'common interest' presupposes that persons could share an interest when they considered themselves as potential members of a non-specified group.<sup>10</sup>
8. The second formulation of aggregated individual interests is considered as the 'cost-benefit' approach to public interest. This denies the coherence or utility of the first formulation. The question of whether a policy is in the public interest is settled by assessing the potential gains and losses. It argues that the interest of the public could be no more than the sum of the interests of the relevant individuals considered in their specific circumstances.
9. There are different views on how many members of the public must benefit from an action before it could be defined as in the public interest.
10. In some cases, advancing public interest may hurt certain personal rights and interests. This raises the concerns of the 'tyranny of the majority' since minorities' interests may be overridden. On the other hand, individuals could also become part of a minority in different circumstances and capacity, so protection of minority rights then becomes part of the general public interest.
11. According to the NSW Ombudsman, "the concept of 'public interest' has been described as referring to considerations affecting the good order and functioning of the community and government affairs, for the well-being of citizens".<sup>11</sup> The phrase, 'for the common good' is also used. However, the NSW Ombudsman also explained that what is in the 'public interest' is incapable of a precise definition as there is no single and immutable public interest.<sup>12</sup> The public interest is distinguishable from a private interest as it goes beyond the interests of an individual or a group of individuals to the interests of the community. However, there could be circumstances where an individual's private interests, such as privacy and procedural fairness, are also regarded as being in the public interest.<sup>13</sup>
12. Therefore, public interest is often contrasted with the private or individual interest. Some would argue that this is a false dichotomy. There is wide ranging debate on whether the public interest requires or destroys human rights.
13. Others have said that "...public interest is an inescapably political concept that virtually dissolves under analysis"<sup>14</sup>, and that it is a value judgment.<sup>15</sup>
14. It has been said that public interest is:
 

...yet another site for political struggle: democratic pluralism, different views on the appropriate size and role of the state, competition for social and

<sup>10</sup> This relates to the political philosopher Rousseau's concept of the general will.

<sup>11</sup> NSW Ombudsman, *Public Interest*, Public Sector Agencies Fact Sheet no. 16, June 2005, p 1.

<sup>12</sup> As above.

<sup>13</sup> As above.

<sup>14</sup> Penny Martin, 'Defining and refining the concept of practising in "the public interest"', *Alternative Law Journal*, Vol. 28, no. 1, February 2003: pp 3 – 7, at p 3.

<sup>15</sup> As above at p 4.

What Is Public Interest?

economic goods and cross-cutting interests (which often conflict within apparently homogenous groups) mean that there can be no fundamental identity of interests.<sup>16</sup>

15. Concepts of the public interest can change over time and across State borders or political parties as in almost any claim made in the name of public interest, there could be those who may disagree.<sup>17</sup> Penny Martin explained this with an example to illustrate the changing concept of public interest over time with regard to past government policy of removing Indigenous children from their parents in the public interest.<sup>18</sup> This is contrasted with the emerging but also competing public interest supporting or opposing campaigns for a reparations tribunal for Indigenous communities affected by that policy, based on similar approaches debated or adopted by other nations concerning their communities, including South Africa to redress the consequences of the former Apartheid system.

### Some Judicial Considerations

16. In general, the Australian courts recognise a wide range of factors that may be taken into consideration in assessing the 'public interest'. For example, Kaye, Fullagar and Ormiston JJ in *Director of Public Prosecutions v Smith* (1991) 1 VR 63, described that:

The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of good government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members.

17. In *Deloitte Touche Tohmatsu v Australian Securities Commission* (1995) 128 ALR 319, Lindgren J stated that:

Clearly, the expression, 'the public interest', is one of wide import. It is an expression particularly apt to vest in a decision-maker a wide power to determine what considerations are to be taken into account and what weight is to be given to those which are taken into account.

18. According to Gaudron and Gummow JJ in *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 84 when referring to Tadgell J in the Full Court of the Supreme Court of Victoria in *South Melbourne City Council v Hallam (No 2)*(1994) 83 LGERA 307 at 311, public interest is:

'A nebulous concept', unless given...further content of a legally normative nature'.

19. In *Botany Bay City Council v Minister for Transport and Regional Development* (1996) 137 ALR 281, Lehane J showed that the courts may be unwilling to contest a Minister's assessment of the public interest:

[T]he court should be slow indeed to find reviewable error in a minister's decision as to what the public interest requires.

20. The courts recognise the political nature of public interest judgments and generally leave it for the elected politicians to make such judgments from a democratic

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<sup>16</sup> Penny Martin, 'Defining and refining the concept of practising in "the public interest"', *Alternative Law Journal*, Vol. 28, no. 1, February 2003: pp 3 – 7, at p 4

<sup>17</sup> As above.

<sup>18</sup> As above.



perspective.<sup>19</sup> This could similarly be said about the role of the NSW Legislation Review Committee. For example, Jeremy Gans has noted a particular problem for the Victorian Scrutiny of Acts and Regulations Committee (SARC) when it needs to assess what limits on rights are reasonable. This may involve the committee making inquiries about 'demonstrable justification' or whether there are 'less restrictive reasonably available' alternatives.<sup>20</sup> Gans explained that:

Reaching firm views on such matters risks turning SARC into a government policy scrutiny committee. In practice, what prevents this is SARC's lack of capacity to assess policy; rather, SARC's response to these sorts of issues is either to ask for further information from Ministers or refer contentious issues to Parliament.<sup>21</sup>

21. Penny Martin suggested:<sup>22</sup>

By foregrounding the aspirational (yet undeniably legal) aspects of human rights and demanding their implementation, we can more effectively advance the aspirational aspects of public interest law.

22. Therefore, public interest remains an important but ill-defined concept in political philosophy and policy development.

## Public Interest And The Rule Of Law

23. On 19 September 2008, the Chief Justice Robert French at the 75<sup>th</sup> Anniversary Dinner of the Law Council of Australia, stated that the public interest is often defined according to the perspectives and interests of the person doing the defining. However, Chief Justice French perceived it to be what serves the long term public interest as the maintenance of the rule of law and fairness and efficiency in access to justice.

24. The *Preamble to the Universal Declaration of Human Rights 1948* states that:

it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

25. In the 19<sup>th</sup> century, AV Dicey identified three main aspects of the rule of law:<sup>23</sup>

1. the supremacy of law over arbitrary power;
2. the equality of all before the law, and government under the law; and
3. there is no higher law than the rights of individuals as determined by the courts.

26. The rule of law may hold different meanings for different people but the rule of law does not mean:<sup>24</sup>

<sup>19</sup> Richard Mulgan, 'Perspectives on "the Public Interest"', *Canberra Bulletin of Public Administration*, No. 95, March 2000: pp. 5 – 12, at p 9.

<sup>20</sup> Cited from Chapter 7, *National Human Rights Consultation, Report*, September 2009, Commonwealth of Australia, at p 170.

<sup>21</sup> Jeremy Gans, 'Scrutiny of Bills under bills of rights: is Victoria's model the way forward?', Paper presented at the *Australia-New Zealand Scrutiny of Legislation Conference*, Canberra, 8 July 2009, at p 12.

<sup>22</sup> Penny Martin, 'Defining and refining the concept of practising in "the public interest"', *Alternative Law Journal*, Vol. 28, no. 1, February 2003: pp 3 – 7, at p 6.

<sup>23</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution*, 1885.

What Is Public Interest?

- so long as there is a law on the subject, the rule of law is operating;
  - the law of the ruler;
  - “law and order” or related notions of the exercise of authority;
  - rule of the lawyer.
27. Therefore, the rule of law is as concerned with both the process as it is with the content of laws. It includes principles to do with peace, freedom, democracy, human rights and fairness.<sup>25</sup>
28. Democratic legislatures have plenary power to make laws on any matter subject to constitutional limitations, and for those laws to be enforced. Sir Ninian Stephen identified three features to resolve conflict and provide balance between the plenary power and the rule of law:
- First the general, if not constant and unanimous, recognition of and respect for the principles of the rule of law by our legislatures. Secondly, judicial interpretation...Thirdly, it is aided by our constitution’s separation of powers doctrine and its distinction between legislative and judicial power.<sup>26</sup>
29. When she was President of the NSW Bar Association in 2001, Ruth McColl SC, now a Judge of the Court Appeal in NSW, wrote that:<sup>27</sup>
- Lawyers tend to take these core values [the rule of law and democratic principles] for granted. We work with the Rule of Law every day. We should not lose sight of the fact that the Rule of Law is not as concrete and ever-present a phenomenon to some members of the community as it is to us. At times, the transient, but regrettably politically significant influence of opinion polls can push the Rule of Law to one side and allow pragmatism to prevail over principle.

## Public Interest And Its Relationship To Personal Rights

30. “What is ‘in the public interest’ is different, of course, from what is ‘of interest to the public’.”<sup>28</sup>
31. NSW Legal Aid<sup>29</sup> provides the following guiding principles about the meaning of public interest:
1. Public interest is something of serious concern common to the public at large or a significant section of the public, such as disadvantaged or marginalised groups.
  2. For something to be of ‘public interest’ it must amount to more than a private right or individual interest, although the two may coincide.

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<sup>24</sup> Nicholas Cowdery AM OC, Director Public Prosecutions, NSW, *The Rule of Law: Its Substance And Reach*, Lecture notes, Foundations of Law, University of Sydney, 4 May 2009.

<sup>25</sup> As above.

<sup>26</sup> Sir Ninian Stephen (former Justice of the High Court, Governor-General and international jurist) in his 1999 Annual Lawyers’ Lecture for the St James Ethics Centre in Sydney. From lecture by Nicholas Cowdery AM QC, Director Public Prosecutions, NSW, *The Rule of Law: Its Substance And Reach*, Foundations of Law, University of Sydney, 4 May 2009.

<sup>27</sup> Cited by Nicholas Cowdery AM QC, Director Public Prosecutions, NSW, *The Rule of Law: Its Substance And Reach*, Lecture notes, Foundations of Law, University of Sydney, 4 May 2009.

<sup>28</sup> As above, at p 18.

<sup>29</sup> Legal Aid NSW Policy – Glossary of Terms.

3. For something to be of 'public interest' it must amount to more than something merely 'of interest to the public', although again, the two may coincide.
4. There may be competing public interests in any one case that have to be weighed against each other.
32. NSW Legal Aid Policy Guideline 3.4 also outlines public interest human rights matters. In determining the merit for the grant of legal aid in human rights matters, Legal Aid NSW must consider the following:<sup>30</sup>
- The community interests that may be affected including the economic, social, or cultural impact on the needs of the community.
  - When assessing the competing public interests, consider whether the greater public interest may override the particular interest being advanced by the application.
  - Whether the matter will assist the applicant alone or whether the matter has a broader community benefit.
  - The benefit to the public.
  - Whether the matter may raise an important novel issue in law or a question of law to which there are differing judicial opinions, and
  - Whether Legal Aid NSW or another legal body has granted legal aid in a similar matter.
33. For public interest human rights matters at State and Commonwealth level, legal aid is available where a case has a significant wider public interest, is of overwhelming importance to the client, or raises significant human rights issues.<sup>31</sup> This indicates that public interest and human rights are related matters that require further analysis and discussion.
34. The NSW Ombudsman's fact sheet on 'public interest' suggests that public officials must determine the public interest as it applies to them by referring to the purposes for which their organisation was established and the functions they are required to perform, including the consideration of any enabling legislation setting out their objectives, purposes or functions.<sup>32</sup> As such, under the LRA, the legislative functions of the Committee (as set out on page iv), do not refer to 'public interest' or the consideration of 'public interest'.
35. However, the role of the Parliament is broader than that of the Committee. One of the fundamental rationale for the parliamentary process of debate is to allow the community's elected representatives to assess competing interests and make informed decisions on the public interest.<sup>33</sup> The Committee has a legitimate role to play and contributes to the Parliament's informed decision-making by referring the identified concerns to Parliament for its consideration.
36. Chapter Three will discuss specific examples of legislation to illustrate the relationship between public interest and personal rights and liberties in the context of issues arising from the Committee's consideration of bills.

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<sup>30</sup> Legal Aid NSW Policy Online.

<sup>31</sup> Legal Aid Commission of NSW, *Legal Aid Policies*, Strategic Planning and Policy Division, Review and Reform Unit, May 2006, p 17.

<sup>32</sup> NSW Ombudsman, *Public Interest*, Public Sector Agencies Fact Sheet no. 16, June 2005, p 1.

<sup>33</sup> As above.

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37. Chapter Four examines the case study of outlaw motorcycle groups or 'bikies' legislation in NSW and similar other legislation from relevant jurisdictions for the following reasons:
- potential further developments in the particular area of law or legislation;
  - recent High Court and Supreme Court decisions or impending court decisions;
  - generated wide interest and debate;
  - public order or safety interests which are also recognised within international human rights instruments;
  - recent Commonwealth inquiries and national agreement to develop a national framework;
  - recent discussions of such legislation in the national human rights consultations and ensuing report;
  - relevant overseas or interstate comparisons or development; and
  - a potentially wide range of human rights concerns and issues associated with the rule of law.

## Chapter Three – Discussing Public Interest In Context Of Issues Arising From The Committee's Consideration Of Bills – Examples: Covert Search Warrant Powers; Adequate Housing For Registrable Persons

### Covert Search Warrant Powers:

1. Covert search warrants authorise eligible officers to covertly enter and search premises using such force as is necessary and to seize, substitute, copy, photograph and record things as well as covertly enter adjoining premises.
2. In 2005, the New South Wales Government introduced covert search warrant powers under the *Terrorism Legislation Amendment (Warrants) Act 2005*. The legislation enabled the covert entry and search of premises by authorised police officers or staff of the New South Wales Crime Commission under the authority of a special covert search warrant. Under section 27, a warrant can be issued by an eligible judge of the Supreme Court in instances where there are reasonable grounds to suspect that a terrorist act has been, is present, or is likely to be committed.
3. Article 17 of the *International Covenant on Civil and Political Rights* prohibits both unlawful and arbitrary interferences with a person's privacy and home. In its comments on the *Terrorism Legislation Amendment (Warrants) Bill 2005*, the Committee noted that its broad covert search powers significantly trespassed on the personal right to privacy, particularly in relation to persons who are not suspected of being involved in a terrorist act.<sup>34</sup>
4. However, the then Attorney General argued that the **public interest** over-rode such concerns in the second reading speech on the Bill:

The citizens of this State have a right to expect that their privacy will be protected from unjustified searches and interference from the State. Society recognises, however, that there are certain circumstances when an individual's right to privacy must be weighed against the greater public interest in order to allow law enforcement agencies to uphold the law and prevent criminal activity, especially when many lives are potentially at stake...The powers set out in this Bill are not designed or intended to be used for general policing...These powers are extraordinary and have only been permitted with the strictest of safeguards.<sup>35</sup>
5. However, on 4 March 2009, these covert search warrant powers were significantly extended with the introduction into Parliament of the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009*. This legislation amended the *Law Enforcement (Powers and Responsibilities) Act 2002* with respect to search powers and for other purposes. Under the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009*, covert search warrants are now available to investigate indictable crimes carrying a sentence of seven years imprisonment or more that involve certain offences such as the destruction of property, violence causing grievous bodily harm, child pornography, organised theft,

<sup>34</sup> *Legislation Review Digest No 8*, 20 June 2005, pp 33-45.

<sup>35</sup> The Hon R J Debus MP, Attorney General, Legislative Assembly Hansard, 9 June 2005.

or the possession, manufacture or cultivation of drugs or prohibited plants such as cannabis.<sup>36</sup>

6. The legislation was the first of its type to be introduced in Australia and drew strong criticism from civil rights interest groups, particularly due to the lack of prior community consultation.
7. The object of the legislation was to amend the principal Act to enable Supreme Court judges to issue search warrants (covert search warrants) that, in addition to authorising the exercise of powers currently able to be exercised under standard search warrants, also enabled certain authorised police officers and staff of the NSW Crime Commission and the Police Integrity Commission to enter and search premises covertly for the purposes of investigating serious criminal offences.
8. Service of occupier's notices in relation to covert search warrants may be deferred for up to 6 months (with possible extensions up to 3 years) after entry to the premises.
9. The Committee in its *Digest Report No 2 of 10 March 2009*, raised significant concerns about trespasses on personal rights and liberties for the following reasons:
  - The threshold for invoking the powers is suspicion on *reasonable grounds* which is not high enough to ensure that there will not be covert entry and search of premises of innocent people;
  - If a search warrant is not served upon the person at the time of entry there is no opportunity to check whether the occupier and address are correct;
  - It is not necessary that all or any occupiers of the premises be suspected of any criminal acts therefore potentially infringing on their rights;
  - The legislation specifically provides for the covert entry of adjoining premises occupied by people with no suspected criminal activity therefore infringing upon the rights of innocent persons;
  - An applicant is not required to disclose the identity of a person from whom information was obtained if the applicant is satisfied that to do so might jeopardise the safety of the person. This seems overly cautious as the identity of the person will presumably only be disclosed to a judge of the Supreme Court and its non-disclosure may make it difficult for the judge to decide how compelling the evidence is in regard to the need for a covert warrant.
10. The Committee raised concerns about the broadness of the covert search warrant powers and their ability to significantly trespass on personal rights and liberties. The Committee once again considered the broad powers of the covert search warrants especially their application to persons not suspected of serious criminal activity. The Committee also did not consider that the legislation contained significant safeguards to address these concerns.<sup>37</sup>
11. When the then Minister for Police announced the new covert search warrant powers, he argued that they were specifically aimed at organised crime such as motorcycle gangs:
  - These powers will allow police to attack the heart of criminal groups like outlaw motorcycle gangs to break down their criminal networks. Organised

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<sup>36</sup> Section 46A.

<sup>37</sup> *Legislation Review Digest No 2*, 10 March 2009, pp 36-41.

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Discussing Public Interest In Context Of Issues Arising From The Committee's Consideration Of Bills  
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crime syndicates and drug traffickers are also some of the criminal groups that can have their premises searched without their knowledge. These powers are another valuable tool to help police in their fight against bikies.<sup>38</sup>

12. Meanwhile, many interest groups argued that the powers were far too wide to only be aimed at criminal gangs. A coalition of lawyers and human rights advocates<sup>39</sup>, wrote to the then Premier arguing that the powers breach human rights, are too broad, are not necessary and are not subject to enough independent supervision. The Public Interest Advocacy Centre was of the view that:

Such offences do not fall within the government's stated intention to extend covert search warrants to only serious and organised crime. We are concerned that this Bill normalises what were only a short time ago considered to be extraordinary police powers, justified by reference to the extreme threat represented by global terrorism.<sup>40</sup>

13. The New South Wales Council for Civil Liberties argued that:

The concept of covert search warrants is contrary to the basic tenets of the rule of law...the potential for abuse without notice is extreme...It is very dangerous to make extraordinary powers which infringe basic liberties available to the police.<sup>41</sup>

### Adequate Housing For Registrable Persons:

14. The *Housing Amendment (Registrable Persons) Bill 2009* passed through both Houses of NSW Parliament on 23 September 2009 and was assented to on 24 September 2009. The legislation amended the *Housing Act 2001* with respect to the housing of "registrable persons" under the *Child Protection (Offenders Registration) Act 2000*. It also amended the *Housing Act 2001* to enable the Director-General of the Department of Human Services (or their delegate), on the recommendation of the Commissioner of Police, to terminate the lease of a tenant who is renting public housing, and who is a "registrable person" under the *Child Protection (Offenders Registration) Act 2000*.
15. The legislation enabled the Commissioner of Police to make a recommendation to relocate "registrable persons" to alternative residential premises where the tenant's presence creates a risk to people's safety in the area. It required Housing NSW to make available alternative accommodation, whether privately or within the social housing system, for the relocated "registrable person". As stated in the Agreement in Principle Speech:

In the case of Dennis Ferguson, who has been housed in a location that is, as I am advised, 500 metres from one school and 700 metres from another, no suitable provisions are applicable in the *Residential Tenancies Act 1987* to enable Housing New South Wales to seek an immediate eviction order to move him against his will to alternative accommodation...The current situation at this present dwelling is untenable for local residents who may

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<sup>38</sup> Media Release by the Hon Tony Kelly MLC, 24 March 2009.

<sup>39</sup> The coalition included a Commissioner of the International Commission of Jurists, the Public Interest Advocacy Centre, the NSW Council on Civil Liberties, the Combined Community Legal Centres' Group, Australian Lawyers for Human Rights and the Sydney Centre for International Law.

<sup>40</sup> Public Interest Advocacy Centre, Media Release, 20 March 2009.

<sup>41</sup> NSW Council for Civil Liberties, Media Release, 13 March 2009.

rally and threaten his safety and, indeed, the safety of other people within a housing complex or the rest of the local community. This has been evident over the past difficult week. With the heightened attention this case has brought to the community over the past week also comes safety considerations for the individual concerned, as well as the other tenants in the complex and the community at large...The New South Wales Government wants to ensure that everyone has a right to the quiet enjoyment of their home. It is intended that the operation of these provisions applies irrespective of the nature of the tenancy term—whether it is an existing fixed-term tenancy or a weekly or periodic tenancy.

16. The Agreement in Principle Speech also indicated that the new powers of the Director General were intended to be delegated to the Chief Executive of Housing NSW, and that the accommodation of registered or serious sex offenders in private housing or community housing was not intended to be affected by the amendments.

## The Right To Adequate Housing

17. The right to adequate housing is also relevant when considering this legislation. The right to adequate housing was discussed in the National Human Rights Consultation Report, in which the Human Rights Consultation Committee commented that the recognition of economic, social and cultural rights has been a matter of debate.<sup>42</sup> The right to adequate housing has been recognised under Article 11 of the *International Covenant on Economic, Social and Cultural Rights*, which states: "...the right of everyone to an adequate standard of living...including adequate food, clothing and housing". The Human Rights Consultation Committee also commented that the right to adequate housing is a right that a large number of Australians wished to be protected.<sup>43</sup> Accordingly, the legislation is a relevant case study to consider the role of the Legislation Review Committee, in particular, its role in approaching the public interest and personal rights and liberties.
18. In *Digest Report No 13 of 2009*, the Legislation Review Committee commented on this legislation. The Committee drew Parliament's attention to a number of issues, including the:
  - retrospective application to existing leases;
  - the potential exclusion of the right to procedural fairness; and
  - the exclusion of judicial review.

## Retrospectivity

19. In the Legislation Review Committee's *Digest Report No 13 of 2009*, the Committee expressed concerns that section 58B of Part 7A of the legislation extended to a lease that was entered into before the commencement of Part 7A and may trespass unduly on personal rights and liberties. Section 58B provided that the Director General may on the recommendation of the Commissioner of Police terminate the lease of a tenant who is renting public housing who is a "registrable person" under the *Child Protection (Offenders Registration) Act 2000*.
20. The Committee expressed concerns regarding circumstances when the law is changed retrospectively in a manner that may adversely affect any person. It noted that legislatively terminating a lease that had been duly made under the law at the

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<sup>42</sup> *National Human Rights Consultation, Report*, September 2009, Commonwealth of Australia, p 315.

<sup>43</sup> As above, at p 78.



time before the commencement of the new provision may trespass on a person's right to order his or her affairs in accordance with the law.

## Procedural Fairness

21. The Committee noted that under section 58E, Part 7A of the legislation, Part 5 of the *Residential Tenancies Act 1987* would not apply to or in respect of the termination of a lease under Part 7A of the legislation. The Committee in its *Digest Report No 13 of 2009*, expressed concerns that this may unduly trespass on personal rights and liberties, including the right to procedural fairness as Part 5 of the *Residential Tenancies Act 1987* provides for the provision of notice of termination within certain time periods and rights of review.
22. Part 5 of the *Residential Tenancies Act 1987* in respect of the termination of a lease provides for the following:
  - Notice of termination and relevant time periods;
  - Notice to be given before giving notice of termination of a social housing tenancy agreement to a tenant;
  - Right of review;
  - Time periods to be observed in giving notice of termination on the ground that the tenant is not eligible for social housing;
  - Review of decision to give notice on the ground that the tenant is offered alternative social housing premises;
  - Time periods to be observed in giving notice of termination on the ground that the tenant is offered alternative social housing premises.

## The Exclusion Of Judicial Review

23. The Committee also commented on section 58F, Part 7A, in particular that it excluded all reviews and appeals of the functions conferred on the Director General or Commissioner of Police (and their delegates). Section 58F also provided that section 58F(2) applies whether or not the rules of natural justice (procedural fairness) were complied with by the Director General or Commissioner of Police (and their delegates).
24. The Committee expressed its concerns whenever a Bill or legislation purports to oust the jurisdiction of the courts. The importance of judicial review for protecting individual rights against potentially oppressive administrative action and the importance of upholding the rule of law had been noted. The Committee was concerned that section 58F of Part 7A had the potential to deny a person natural justice by removing the opportunity for review of the exercise of functions (including the non-exercise or improper exercise of functions and the proposed or threatened exercise of functions), by the Director General or the Commissioner of Police (including that of their delegates).
25. In order for the Legislation Review Committee to assess whether a bill or its provisions contain an undue trespass on individual rights and liberties, the following questions are raised for comment to guide the Committee in its future approach when dealing with similar issues in other areas of proposed legislation.

Discussing Public Interest In Context Of Issues Arising From The Committee's Consideration Of Bills  
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**Questions For Comment:**

- What important sources could guide the assessment of whether the legislative measures are proportionate to the pursuit of the legislative purposes for ensuring that trespasses on personal rights are not undue?
- Just as personal rights are not absolute, what are the principles that could inform the assessment of the boundaries or limits of public interest?

## Chapter Four – Discussing Public Interest In Context Of Issues Arising From The Committee's Consideration Of Bills – Example: 'Bikies' Legislation

### 'Bikies' Legislation:

1. Recent amendments to the so-called 'bikies' or outlaw motorcycle gangs legislation in New South Wales (NSW) have gained wide attention. The interests appear to be divided amongst government, law enforcement agencies, lawyers, academics, human rights and civil libertarian groups and popular opinion.<sup>44</sup>
2. Submissions to the national human rights consultations commissioned by the Federal Government also raised concerns about the NSW 'bikie' legislation.<sup>45</sup> The recent *Report of the National Human Rights Consultation* commented that the *Crimes (Criminal Organisations Control) Bill 2009* was quickly passed through the NSW Parliament without sufficient debate.<sup>46</sup>
3. One of the reasons the amendments have attracted so much attention is because they raise a number of complex questions about basic principles of justice. Among these principles are the freedom of association and several principles concerning the rule of law (presumption of innocence, fair trial, procedural fairness and the separation of powers).
4. Because of the many issues it raises, the amending legislation provides a good case study for discussing public interest in context. Furthermore, this case study may prove useful as it is likely that there will be future developments in this area of legislation.
5. On 16 April 2009, the Standing Committee of Attorneys-General (SCAG) agreed to a national response to address outlaw motorcycle gangs and organised crime.<sup>47</sup> As a consequence, on 25 June 2009, the Commonwealth Senate referred the Commonwealth *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* to the Senate Legal and Constitutional Affairs Committee for inquiry and reporting. This Commonwealth Bill aims to amend several acts to implement the Commonwealth's commitment to the SCAG agreement. The Senate Legal and Constitutional Affairs Committee's report on the Bill came out on 17 September 2009.<sup>48</sup> Further amendments may take place in NSW with the commencement of the Commonwealth legislation.<sup>49</sup>

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<sup>44</sup> A survey conducted in March 2009 prior to the enactment of the new NSW legislation, found that 70% of respondents considered laws against bikie gangs to be insufficient and that Australia needed tougher legislation and with 43% supporting a toughening of the legislation even if it lessened civil liberties. From UMR Research, *Bikie gang wars – Australians want stronger laws*, March 2009, cited by Jason Arditi, *Gang Laws: An Update*, E-Brief 7/09, NSW Parliamentary Library Research Service, June 2009, p 6.

<sup>45</sup> *National Human Rights Consultation, Report*, September 2009, Commonwealth of Australia, at p 108.

<sup>46</sup> As above, at p 109.

<sup>47</sup> Standing Committee of Attorneys-General (SCAG), *Communique: organised crime*. 16-17 April, 2009.

<sup>48</sup> Senate Legal and Constitutional Affairs Committee, *Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, Parliament of Australia.

<sup>49</sup> The Commonwealth *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* was passed by both Houses on 4 February 2010 and assented to on 19 February 2010. It is now the

6. In the Senate Legal and Constitutional Affairs Committee's report<sup>50</sup> on the Commonwealth *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, submissions provided to the inquiry suggested that the joint commission of offences provisions<sup>51</sup> were drafted too broadly and that an element of participation in the criminal venture by the accused should be required before he or she is held liable. The Senate Committee also received submissions that supported the provisions as a useful tool for law enforcement. On balance, the Senate Committee considered the introduction of the joint commission of offences provisions as a proportionate response to the difficulties in addressing organised crime.<sup>52</sup>
7. However, the Senate Standing Committee shared the view of the Parliamentary Joint Committee<sup>53</sup> that the confiscation of criminal assets would be more of an effective way of addressing organised crime without some of the difficulties and costs of those laws targeting criminal organisations enacted at the state level in response to outlaw motorcycle gangs.<sup>54</sup>
8. In relation to the confiscation of criminal assets, there have been recent developments including a High Court decision in *International Finance Trust Company Ltd v Anor v New South Wales Crime Commission & Ors* [2009] HCA 49, that found section 10 of the NSW *Criminal Assets Recovery Act 1990* unconstitutional, on the ground that section 10 "directed the Supreme Court as to the manner in which it exercises its jurisdiction", which deprived the court of the characteristic of judicial power. Refer to the relevant judgment in the Appendix for further details. NSW Parliament passed the *Criminal Assets Recovery Amendment Bill 2009* on 24 November 2009 which was assented to on 26 November 2009 in response to the High Court decision.<sup>55</sup>
9. The Senate Standing Committee further recommended amending the definition of 'exempt proceeding' in section 5B of the Commonwealth *Telecommunications (Interception and Access) Act 1979* to allow the use of lawfully acquired telecommunications interception material in proceedings under state criminal organisation legislation, to obtain criminal organisation declarations and for proceedings to obtain interim control orders or control orders.<sup>56</sup> It also recommended including first time offences of association under section 26 of the NSW *Crimes (Criminal Organisations Control) Act 2009* within the definition of 'prescribed offence'

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*Crimes Legislation (Serious and Organised Crime) Act 2010 No 3*. The Commonwealth *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2010* was also assented to on 19 February 2010. It is now the *Crimes Legislation (Serious and Organised Crime) Act 2010 No 4*.

<sup>50</sup> Senate Legal and Constitutional Affairs Committee, *Report on the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, Parliament of Australia, 17 September 2009, at 6.30.

<sup>51</sup> Joint commission would apply when: a person and one other person enter into an agreement to commit an offence; and either an offence is committed in accordance with that agreement; or an offence is committed in the course of carrying out the agreement. The responsibility for criminal activity engaged in under the agreement by one member of the group is extended to all other members of the group.

<sup>52</sup> Senate Legal and Constitutional Affairs Committee, *Report on the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, Parliament of Australia, 17 September 2009, at 6.30.

<sup>53</sup> Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*. Parliament, Australia, 2009.

<sup>54</sup> Senate Legal and Constitutional Affairs Committee, *Report on the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, Parliament of Australia, 17 September 2009, at 6.33.

<sup>55</sup> Refer to the Appendix for details.

<sup>56</sup> Senate Legal and Constitutional Affairs Committee, *Report on the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, Parliament of Australia, 17 September 2009, at 6.37 – Recommendation 11.

in section 5 of the Commonwealth *Telecommunications (Interception and Access) Act 1979*.<sup>57</sup>

10. The Law Council argued that telecommunication interception powers should not be made available in relation to the NSW and the South Australian criminal organisation offences. They submitted that:<sup>58</sup>

Legislation adopted at the State level to outlaw certain groups and create related offences contains features that run counter to established criminal law principles, infringes human rights and relies on broad and ambiguous terms that give rise to the risk of arbitrary application. As a result the Law Council is of the view that these provisions should not be replicated at the federal level, nor should the Commonwealth's extensive investigative powers be amended so as to make these powers generally available to State and Territory law enforcement agencies to utilise in the investigation and prosecution of these draconian laws.

11. The Senate Standing Committee made the following remarks:<sup>59</sup>

The diversity of the views presented to the committee demonstrates the difficulty in appropriately balancing the need to provide law enforcement agencies with the tools to disrupt organised crime whilst not intruding unnecessarily on the rights of individuals. The committee has sought through its recommendations to balance these competing imperatives.

12. A recent poll of 1,000 Australian adults by research company UMR Research in late March 2009 showed that a majority of respondents (70%) believed that the existing laws are not sufficiently strong to deal with bikie gang violence, with 74% supporting uniform national legislation.<sup>60</sup>

13. However, many interviewed were also concerned with the impact that legislation may have on civil liberties in preventing members from associating with each other, with one in three respondents (31%) supporting these measures as compared with 46% opposing them.<sup>61</sup> The research found that Victorians were the least likely of all the respondents to support such laws if they impacted on the civil liberties of ordinary Australians, resulting in 49% of Victorians (contrasted with 45% nationally) opposing the laws that prevented bikie gang members from associating with each other.<sup>62</sup>

14. When looking at the broader terms of individual rights as compared to the greater good (or public interest), the recent *National Human Rights Consultation Report*<sup>63</sup>, found that more than half said an individual's rights should never be sacrificed even for the greater good. However, just under half of the proportion interviewed thought

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<sup>57</sup> Senate Legal and Constitutional Affairs Committee, *Report on the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, Parliament of Australia, 17 September 2009, at 6.38 – Recommendation 12.

<sup>58</sup> As above, at 5.8.

<sup>59</sup> As above, at 6.39.

<sup>60</sup> Tony Wright, 'Most want crackdown on bikies', *Age Online*, 1 April 2009. Cited from Nicolee Dixon, *Regulating Bikie Gangs*, Queensland Parliamentary Library, Research Brief No 2009/18, p. 59.

<sup>61</sup> Geesche Jacobsen and Andrew Clennell, 'Stop the violence, begs bikie mother', *Sydney Morning Herald Online*, 1 April 2009.

<sup>62</sup> Nicolee Dixon, *Regulating Bikie Gangs*, Queensland Parliamentary Library, Research Brief No 2009/18, p. 59.

<sup>63</sup> See Chapters 2 and 3 of the *National Human Rights Consultation, Report*, September 2009, Commonwealth of Australia.

the safety of the wider society was more important than the rights of individuals.<sup>64</sup> It found that around 2 in 5 people said an individual's right should be restricted if he or she abuses the wider community's rights.<sup>65</sup> Support for the right to associate was conditional on individuals meeting their responsibilities. By contrast, support for rights such as health care, basic amenities, justice, safety, education and freedom of speech was generally found to be unconditional.<sup>66</sup>

15. It is also timely to analyse the NSW legislation in relation to public interest and the general principles of the rule of law as recent decisions handed down by the Australian High Court, the South Australian Supreme Court, the United Kingdom's House of Lords and the European Court of Human Rights are of relevance to public interest in the development of law, and the engagement of personal rights and public interest. These decisions will be discussed below.

## Background And Summary Of The NSW Legislation

16. On 2 April 2009, the NSW Government introduced the *Crimes (Criminal Organisations Control) Bill 2009*. The Bill was passed and assented to on the next day and the legislation commenced on assent. The *Crimes (Criminal Organisations Control) Act 2009* is based primarily on the South Australian legislation.<sup>67</sup> On 13 May 2009, NSW also passed further legislation dealing with outlaw motorcycle gangs (*Criminal Organisations Legislation Amendment Act 2009*).
17. The NSW *Crimes (Criminal Organisations Control) Act 2009* provides for the making of declarations and orders for the purpose of disrupting and restricting the activities of criminal organisations and their members. It enables the NSW Commissioner of Police to seek a declaration from an eligible Supreme Court judge that a gang is a declared criminal organisation. The eligible judge may make a declaration if they are satisfied that an organisation's members associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and that the organisation represents a risk to public safety and order in NSW.
18. Once a declaration is made by an eligible NSW Supreme Court judge that an organisation is a criminal organisation, a control order may be granted by the Court. The control order then requires controlled members to refrain from associating with another controlled member. Otherwise, they risk two years' imprisonment for the first offence or five years' imprisonment for second or subsequent offences. The Act also amended the NSW *Bail Act 1978* so that there will be no presumption in favour of bail for this offence.
19. The legislation also amended the *Commercial Agents and Private Inquiry Agents Act 2004*, the *Liquor Act 2007*, the *Motor Dealers Act 1974*, the *Motor Vehicles Repairs Act 1980*, the *Pawnbrokers and Second-hand Dealers Act 1996* and the *Tow Truck Industry Act 1998*, to create a means for the NSW Commissioner of Police to make available to the respective regulators in these industries confidential criminal intelligence relating to associates of declared criminal organisations so as to prohibit their participation in these industries. In addition, criminal intelligence cannot be

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<sup>64</sup> Joel Gibson, "Bill of rights desirable but not urgent: voters", *Sydney Morning Herald*, 10 October 2009.

<sup>65</sup> As above.

<sup>66</sup> As above.

<sup>67</sup> *Serious and Organised Crime (Control) Act 2008*. In South Australia, after an organisation is proscribed as unlawful by the Attorney-General, police can then apply to the Magistrate's Court to have an individual declared as a member so that a control order could be issued to prohibit the declared member from associating with others in the organisation.

disclosed in any subsequent review by the Administrative Decisions Tribunal unless approved by the Commissioner of Police.

## Comparisons With Equivalent Australian Legislation

20. At this stage, the only other Australian jurisdictions that have comprehensive 'anti-bikies' legislation are South Australia and most recently, Queensland. The Northern Territory's *Serious Crime Control Act 2009* has been assented to on 11 November 2009 but at the time of writing, the legislation has yet to commence.
21. South Australia introduced its *Serious and Organised Crime (Control) Act 2008* before NSW. The South Australian legislation came into force on 4 September 2008 and was based on Australian anti-terrorism legislation. The NSW legislation has been modelled largely on the South Australian legislation. However, there are key differences between the two.
22. In NSW, declared organisations may only challenge their 'declared' status after it has been proscribed. In South Australia, the group may challenge a forthcoming declaration to the Attorney-General before it is proscribed.<sup>68</sup>
23. The South Australian legislation has adopted the proscription approach with the decision to be made by the Attorney-General. A number of factors are to be taken into account by the Attorney-General when making a decision to proscribe a group.<sup>69</sup> However, on 25 September 2009, the Supreme Court of South Australia held that section 14 (1) of the South Australian *Serious and Organised Crime (Control) Act 2008* was not constitutionally valid. In *Totani & Anor v The State of South Australia* [2009] SASC 301, by a majority of 2 to 1, the South Australian Supreme Court found that the provision that states that a court must make a control order if it is satisfied that a person is a member of a declared criminal organisation was not valid. The process was found to be legal to the stage of the Attorney-General's ruling on making the declaration that an organisation was criminal, but the process became constitutionally invalid if, on appeal to a court, the court was not allowed to review the criminal intelligence or the reason for the Attorney-General's administrative decision. The Supreme Court found a control order made against a member of the Finks motorcycle club was also void and of no effect.
24. In contrast to the South Australian proscription approach, the legislative test in NSW is conducted on a case by case approach where the court determines whether an organisation meets the criteria of 'criminal organisation'. Most international jurisdictions have taken the legislative test approach.<sup>70</sup> Unlike the South Australian approach, where the Attorney-General makes the decision to declare a group as a criminal organisation, the NSW legislation provides for an eligible Supreme Court judge to make a declaration that an organisation is a criminal organisation.
25. In response to the recent South Australian Supreme Court judgment, the NSW Attorney-General stated that NSW law differs from the South Australian legislation in key aspects. He explained that under the NSW law, control orders are left up to judicial discretion and applications are heard by Supreme Court justices, not

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<sup>68</sup> Jason Arditi, *Gang Laws: An Update*, E-Brief 7/09, NSW Parliamentary Library Research Service, June 2009, at p 5.

<sup>69</sup> See section 10, *Serious and Organised Crime (Control) Act 2008* (South Australia).

<sup>70</sup> Parliamentary Joint Committee on the Australian Crime Commission, *Report, Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliament House, Canberra, 17 August 2009, p 60.

magistrates and that the NSW Government had received constitutional legal advice when drafting its legislation, advising that the legislation is constitutionally valid.<sup>71</sup>

26. The South Australian legislation provides for the making of **public safety orders**, including an order to prevent a class of individuals from being in a certain area or at a specified event. It also requires intent by an individual who associates (knowingly or recklessly) with someone who is a member of a declared organisation or subject to a control order and does so at least 6 times in 12 months.<sup>72</sup> This contrasts with the NSW legislation, which only limits the associations between controlled members of a declared organisation but does not require intent for that association.
27. The Queensland Parliament has passed the *Criminal Organisation Act 2009* on 26 November 2009. Part 11, Division 2 of the Act came into force on 2 January 2010. The remaining provisions have now come into force on 15 April 2010 upon proclamation. As part of the newly passed legislation, a new **Criminal Organisation Public Interest Monitor** (COPIM) will be appointed. According to the Queensland Attorney-General Cameron Dick:

The Criminal Organisation Public Interest Monitor is a key safeguard in our regime to protect civil liberties while allowing police to dismantle and disrupt organised crime. They [COPIM] will monitor every application made to the Supreme Court by police for orders to be issued under the *Criminal Organisation Act 2009*. As an independent lawyer, the COPIM will represent the public interest and will help the court by testing applications, particularly where a respondent cannot be present due to the use of covert intelligence. Queensland is the only state to appoint a COPIM as part of its criminal organisation legislation and highlights the fact that our legislation is both balanced and constitutionally robust...applicants had to be eligible for appointment as a judge of the Supreme Court in Queensland or other Australian jurisdictions. The successful applicant will be chosen by a panel that will include representatives of the Queensland Law Society, the Bar Association of Queensland and the Queensland Council of Civil Liberties.<sup>73</sup>

28. According to the Explanatory Notes when the *Criminal Organisation Bill 2009* was introduced into the Queensland Parliament, the Bill provided for the use of secret criminal intelligence in civil proceedings which involved withholding admitted evidence from another party to a proceeding. The Explanatory Notes explained that safeguards have been included "to address the necessary abrogation of natural justice":

The Supreme Court determines whether certain information should be treated as 'criminal intelligence' and is afforded full discretion in making such a determination; in the event the court declares information to be 'criminal intelligence' and the evidence is admitted, it is a matter for the court as to the weight placed upon such evidence; the Criminal Organisation Public Interest Monitor (COPIM) will be present at all hearings under the Bill and has access to all the information before the court (except to the extent that the material discloses an informant's name, current location, where the informant resides or position held within an organisation). The COPIM's role is in the nature of

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<sup>71</sup> From AAP, "NSW bikie laws differ from struck-down SA laws: minister", 25 September 2009.

<sup>72</sup> Jason Arditi, *Gang Laws: An Update*, E-Brief 7/09, NSW Parliamentary Library Research Service, June 2009; p 5.

<sup>73</sup> The Hon Cameron Dick, Attorney-General, Media Statement, 22 January 2010.



*amicus curiae*<sup>74</sup> and will assist the court in making a decision as an independent and impartial tribunal.

29. On a civil application, the Queensland Supreme Court can declare an organisation to be a criminal organisation under the Queensland *Criminal Organisation Act 2009*. The court is assisted in its determination by the COPIM. The declaration can be appealed to the Court of Appeal. On a civil application, the Queensland Supreme Court can also impose a control order against a person, restricting activities of the controlled person. The court is assisted by the COPIM. Such control orders can be appealed to the Court of Appeal. The Queensland Supreme Court may also make a public safety order prohibiting an individual or group from entering specified premises, areas or events. The COPIM is present for the hearing of such applications (other than urgent phone applications). Such orders can be appealed to the Court of Appeal.
30. '**Public interest**' has not been defined under the Queensland *Criminal Organisation Act 2009*. Neither section 83 (appointment of COPIM) nor section 86 (COPIM's functions) included a definition of '**public interest**' when a person is being appointed as the **criminal organisation public interest monitor**. There is also no definition of 'public interest' for the public interest monitor under the Queensland *Police Powers and Responsibilities Act 2000* or the Queensland *Crime and Misconduct Act 2001*.
31. Western Australia<sup>75</sup> has discussed steps to introduce 'anti-bikies' legislation in the context of moves for a national approach to such legislation.
32. However, the Commonwealth Attorney-General's Department (the Department) has expressed some ambiguity about the appropriateness of using the anti-terrorism legislative model to deal with organised crime groups. In their evidence to the Parliamentary Joint Committee on the Australian Crime Commission's Inquiry, the Department stated:

Many people have said about the terrorism laws that these are exceptional circumstances. A lot of the critics at the time were saying, 'we hope there isn't going to be bracket creep on this.' Even amongst the people that talked in the debate about terrorism laws, there was a feeling that they were about exceptional powers.<sup>76</sup>

## Freedom Of Association

33. The Committee's *Digest Report No 5 of 2009* commented on the comparable context of the offence of consorting, and noted that the Victorian Scrutiny of Acts and Regulations Committee in 2002 and the Law Reform Commission of Western Australia in 1992 both recommended the offence of consorting to be repealed. The Victorian Scrutiny of Acts and Regulations Committee concluded that the offence of consorting was predicated on the principle of guilt by association, which would be in

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<sup>74</sup> *Amicus curiae* means a friend of the court. One who calls the attention of the court to some point of law or fact which would appear to have been overlooked; usually a member of the Bar.

<sup>75</sup> Rob Johnson, *New campaign to target WA's outlaw bikie gangs*, Media Statement, 7 June 2009.

<sup>76</sup> Mr McDonald, Commonwealth Attorney-General's Department, from *Committee Hansard*, 6 November 2008, p 46, cited in Parliamentary Joint Committee on the Australian Crime Commission, *Report, Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliament House, Canberra, 17 August 2009, p 79.

breach of **community belief** in the principle of freedom of association.<sup>77</sup> The Law Reform Commission of Western Australia stated that it was:<sup>78</sup>

...inconsistent with the principles of criminal law to make it an offence to associate with particular people. Offences should proscribe conduct thought of deserving of punishment. Merely associating with people, whether they are known to be in a particular category or are merely reputed to be in a particular category, should not be criminal.

34. The Committee reported in *Digest Report No 5 of 2009* that Part 3 of the *Crimes (Criminal Organisations Control) Act 2009*, which deals with the control of members of declared organisations, potentially criminalises a person's associations instead of a specific criminal conduct. This is comparable to the offence of consorting.

35. The then NSW Attorney-General, Mr Frank Walker in 1979, during Parliamentary Debates in his Second Reading Speech on the offence of habitually consorting with someone convicted of an indictable offence, stated in the Legislative Assembly Hansard:

This offence is presently objectionable for the following reasons: first, because it equates association with a particular class of individuals with the commission of a criminal offence. Unless there are exceptional and compelling reasons for otherwise providing, the basis of criminal liability should be what a person does, or, in appropriate cases, omits to do, rather than the identity of the person...

36. This is analogous to the comments made by Chief Justice King of the South Australian Supreme Court in the context of sentencing for the offence of consorting. In *Jan v Fingleton* (1983) 32 SASR 379 at 380, King CJ stated:

...Apart from the statute the conduct to be punished may be quite innocent...He is to be punished not for any harm which he has done to others, but merely for the company which he has been keeping, however difficult or even disloyal it might be to avoid it. The wisdom and even the justice of such a law may be, and often has been questioned.

37. Accordingly, the Committee in its *Digest Report No 5 of 2009* concluded that Part 3 constituted an undue trespass on personal rights and liberties by undermining the right of freedom of association as a fundamental right established by Article 22 (1) of the *International Covenant on Civil and Political Rights* 1966 (ICCPR).<sup>79</sup>

38. The Committee also observed that the South Australian *Serious and Organised Crime (Control) Act 2008* states that under its section 4 (2) of its Objects:

It is not the intention of Parliament that the powers in this Act be used in a manner that would diminish the freedom of persons in this State to participate in advocacy, protest, dissent or industrial action.

39. The South Australian *Serious and Organised Crime (Control) Act 2008* provides for other similar provisions in relation to the making of **public safety orders** under its Part 4, Division 1 [with our own emphasis added in bold]:

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<sup>77</sup> Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Vagrancy Act 1966: Final Report*, 2002: pp 12 – 13.

<sup>78</sup> Law Reform Commission of Western Australia, *Report On Police Act Offences*, Project No 85, 1992: pp 41 – 42.

<sup>79</sup> As well as an undue interference on a person's honour and reputation as established by Article 17 of the ICCPR.

Section 23 (2)(c): if advocacy, protest, dissent or industrial action is the likely reason for the person or members of the class of persons being present at the relevant premises or event, or within the relevant area – the **public interest** in maintaining freedom to participate in such activities; and

Section 23 (5): Despite any other provision of this section, a senior police officer must not make a public safety order that would prohibit a person or class of persons from being present at any premises or event, or within an area, if –

(a) those persons are members of an organisation formed for, or whose primary purpose is, non-violent advocacy, protest, dissent or industrial action; and

(b) the officer believes that advocacy, protest, dissent or industrial action is the likely reason for those persons to be present at the premises or event or within the area.

40. Therefore, the South Australian legislation recognises the **public interest** in maintaining the freedom to participate in advocacy, protest, dissent or industrial action. These freedoms are also recognised in Articles 19, 21 and 22 of the *International Covenant on Civil and Political Rights*.<sup>80</sup>
41. However, the NSW Act does not contain any such similarly stated intent in its provisions or in its general objects. Therefore, it could apply to any organised group or 'particular organisation' and not be limited to 'bikie gangs'. This aspect has attracted criticisms.<sup>81</sup> For instance, Associate Professor Michael Head of the University of Western Sydney, commented that the legislation could target political groups.<sup>82</sup>
42. The Parliamentary Joint Committee on the Australian Crime Commission recently released its Inquiry report<sup>83</sup> into the legislative arrangements to outlaw serious and organised crime groups (including 'bikies' or 'outlaw motorcycle groups'). The report outlined the benefits of association offences. The Parliamentary Joint Committee heard from several law enforcement agencies about the difficulties with targeting sophisticated criminal networks.<sup>84</sup>
43. The President of the Law Council of Australia provided the following comments to the Parliamentary Joint Committee's Inquiry:

The notion of prosecuting people for associations rather than substantive offences is really quite abhorrent. If somebody is involved, is sufficiently proximate and commits an offence, even one of an attempt or one of conspiracy nature, then the existing laws are there to deal with them. It is

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<sup>80</sup> Article 19 recognises the right to freedom of expression. Article 21 recognises the right of peaceful assembly. Article 22 recognises the right to freedom of association.

<sup>81</sup> For example, Nicholas Cowdery AM QC, Director Public Prosecutions, NSW, *The Rule of Law: Its Substance And Reach*, Lecture notes, Foundations of Law, University of Sydney, 4 May 2009.

<sup>82</sup> Cited from *Lawyers Weekly*, 'Anti-bikie laws: associating deeper underground', April 3, 2009.

<sup>83</sup> Parliamentary Joint Committee on the Australian Crime Commission, *Report, Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliament House, Canberra, 17 August 2009.

<sup>84</sup> Parliamentary Joint Committee on the Australian Crime Commission, *Report, Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Parliament House, Canberra, 17 August 2009, at p 56 and Submission 6 from the Queensland's Crime and Misconduct Commission. See also Assistant Commissioner Harrison, South Australia Police, from Committee Hansard, 3 July 2008, p 5, cited in Parliamentary Joint Committee's report at p 57.

very clear that not only do some of these laws have the potential to be structurally unfair and restrict relationships – they introduce laws that are really Big Brother laws, dictating who you can talk to and where you should be – but they also create other issues of accidental capture of conduct that is clearly not criminal. The accidental capture of such conduct is a reflection of legislation that is emotively introduced, such as the terrorism legislation, and has within it changes that are based on fear rather than the logical application of law.<sup>85</sup>

44. Association and participation laws have led to challenges under the human rights legislation in jurisdictions which have statutory rights protections, including Canada and the United Kingdom. These jurisdictions will be discussed further in Chapter Five of this discussion paper.
45. Victoria and the Australian Capital Territory are the only Australian jurisdictions which have statutory human rights legislation. Victoria Police submitted to the Parliamentary Joint Committee that:

An adoption of similar reform [to that in South Australia] in Victoria may possibly be inconsistent with Victoria's Charter of Human Rights and Responsibilities.<sup>86</sup>
46. Along with others<sup>87</sup>, Victoria Police<sup>88</sup> has expressed doubts about the effectiveness of such legislation. The view of Victoria Police that criminal members of declared organisations may be driven underground, which would make it harder for police to gain information about their activities, is also shared by others.<sup>89</sup> It has also been noted that there has not been a remarkable decrease in organised crime in Canada and in New Zealand with the introduction of similar 'anti-gang' laws.<sup>90</sup> Prosecutors in these countries appear to use other substantive offence provisions rather than the participation offence provisions<sup>91</sup>. Several commentators, including Queensland's Crime and Misconduct Commission (CMC) and the Australian Crime Commission (ACC) have suggested laws that target profits from the criminal activities could be more effective than laws targeted at banning the organisations themselves.<sup>92</sup>
47. Concerns have been expressed that the legislation could apply to members of any organised group that the Commissioner of Police could allege is associating 'for the purpose of organising, planning, facilitating, supporting or engaging in serious

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<sup>85</sup> Mr Ray, Law Council of Australia, from Committee Hansard, 6 November 2008, p 48, cited in Parliamentary Joint Committee on the Australian Crime Commission, at p 58.

<sup>86</sup> Parliamentary Joint Committee on the Australian Crime Commission, Report, as above, at p 60, and Submission 4 from Victoria Police, p 2.

<sup>87</sup> For example, the Australian Crime Commission; Queensland Crime and Misconduct Commission; Dr Andreas Schloenhardt.

<sup>88</sup> Victoria Police, Chief Commissioner Christine Nixon, Submission to the Parliamentary Joint Committee Inquiry on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups* (undated), 2009.

<sup>89</sup> Nicolee Dixon, *Regulating Bikie Gangs*, Queensland Parliamentary Library, Research Brief No 2009/18, August 2009, at p 57; which also cited Jane Margetts, 'New anti-bikie laws creating a stir', and referred to comments by Professor Mark Findlay, Faculty of Law, University of Sydney.

<sup>90</sup> Dr Andreas Schloenhardt, "Mafias and Motorbikes: New Organised Crime Offences in Australia", *Current Issues in Criminal Justice*, 2008, 19 (3) at p 279.

<sup>91</sup> Dr Andreas Schloenhardt, as above, at p 279.

<sup>92</sup> Nicolee Dixon, *Regulating Bikie Gangs*, Queensland Parliamentary Library, Research Brief No 2009/18, August 2009, at p 58.

criminal activity'.<sup>93</sup> The broad scope and ill-defined nature of these words also cast a net that is far wider than the legal elements of conspiracy.<sup>94</sup>

48. Commentary has also been made that the legislation takes away the right of free speech and the right of lawful assembly for a lawful purpose without conviction on secret information.<sup>95</sup>
49. On the nature of control orders, the United Kingdom (UK) House of Lords decision in the context of anti-terrorism legislation (on which the 'bikies' legislative concept of control orders is similarly based), Lord Hope of Craighead stated that:

When account is taken of their nature, duration, effects and manner of implementation...there is no doubt that control orders severely restricts the freedom of movement of those who are subjected to them.<sup>96</sup>

### Criminal Intelligence - Fair Trial, Procedural Fairness And Non-Reviewable Decisions

50. In the Committee's *Digest Report No 5 of 2009*, the Committee raised the concern that the eligible NSW Supreme Court judge is not required to provide any reasons or grounds for the decision that a particular organisation is a declared organisation for the purposes of the Act under section 13 (2) of Part 2. The effect is that the applicant will not know the grounds for appeal if reasons were not given.<sup>97</sup> This could mean the declaration will remain in force for 3 years without review. The only exception is that reasons must be provided to the NSW Ombudsman when the Ombudsman is conducting a review under section 39.
51. The 'closed justice' of not requiring the judge to provide any grounds or reasons for making a declaration has also been criticised as preventing the affected person from seeking judicial review.<sup>98</sup>
52. The Commissioner of Police or the 'controlled member' may appeal to the Court of Appeal with regard to a decision made in relation to a control order within 28 days after the decision was made. The appeal is by way of a judicial review and only with leave for a merits review. However, under section 35, individuals who undertake functions conferred by the Act are also protected from having their decisions challenged even if the challenge is based on a denial of procedural fairness. There have been criticisms of this restricted right of review as contrary to the fundamental principles of natural justice.<sup>99</sup>
53. Under sections 8 and 39 of the *Crimes (Criminal Organisations Control) Act 2009*, an individual may make a protected submission (made in private) where the individual fears action in reprisal. Protected submissions aim to ensure privacy and address

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<sup>93</sup> Nicholas Cowdery AM QC, Director Public Prosecutions, NSW, *The Rule of Law: Its Substance And Reach*, Lecture notes, Foundations of Law, University of Sydney, 4 May 2009.

<sup>94</sup> As above.

<sup>95</sup> Geoffrey Nicholson, barrister on *Lateline*, 'Bikers council to challenge new laws', ABC, 24 April 2009, reported by John Stewart.

<sup>96</sup> *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28 at 77.

<sup>97</sup> The Law Society of NSW (Criminal Law Committee) and the NSW Bar Association have raised a similar concern. Refer to the Hansard during the debate on the Bill, Legislative Council, 2 April 2009.

<sup>98</sup> Greg Walker, "A case of legislative overkill", *Canberra Times*, 28 May 2009.

<sup>99</sup> Mark Le Grand, "The strange new bokie legislation", *The Australian*, 19 June 2009. Also, Nicholas Cowdery AM QC, Director Public Prosecutions, NSW, *The Rule of Law: Its Substance And Reach*, Lecture notes, Foundations of Law, University of Sydney, 4 May 2009.

- personal security considerations. However, this has attracted criticism as it enables the judge to withhold information from those who may be adversely affected by the submission if they were to be subjected to a control order. Such affected individuals are then denied a right of reply or an opportunity to test the veracity of the evidence submitted against them.<sup>100</sup>
54. However, George Mancini, barrister and chair of the Criminal Law Committee in South Australia, suggested that alternative approaches to the right to challenge such criminal intelligence, could include modelling control orders such as those used on parolees and paedophiles where evidence is openly and transparently presented in court that allows the right to challenge.<sup>101</sup>
55. A recent decision of the House of Lords in the United Kingdom held that control orders (issued under their anti-terrorism laws) breach the right to a fair trial. This may be relevant to Australia and NSW as the control orders for bikie gangs are modelled on the anti-terrorism legislation.
56. In the UK House of Lords case, *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, the three appellants were subject to control orders on the ground that the Secretary of State had reasonable grounds for suspecting that appellants had been involved in terrorism-related activity. Each of the appellants argued that the right to a fair trial had been violated by relying on secret evidence which was not disclosed to the appellants. They argued that this right was violated by the reliance by the judge making the order based on material received in closed hearing. The House of Lords agreed with the appellants and they based their decision also on the recent European Court of Human Rights' decision in *A and others v United Kingdom*.<sup>102</sup>
57. The UK decision<sup>103</sup> highlights the balancing of **public interest** and individual rights such as the right to a fair trial in the UK context of section 2 of their *Prevention of Terrorism Act 2005* (the PTA) and a right to a fair hearing established by Article 6 of the *European Convention on Human Rights 1950* together with the UK *Human Rights Act 1998* (the HRA).
58. Section 3 (1) of the NSW *Crimes (Criminal Organisations Control) Act 2009* provides that although a control order must include a statement of grounds on which the order has been made, it must not contain 'criminal intelligence', defined as information relating to actual or suspected criminal activity, the disclosure of which could prejudice a criminal investigation, enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or endanger a person's life or physical safety. Section 35 of the NSW legislation also protects individuals who undertake functions conferred by the Act from having their decision challenged even if the ground for the challenge was a denial of procedural fairness.

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<sup>100</sup> Greg Walker, "A case of legislative overkill", *Canberra Times*, 28 May 2009. See also Nicholas Cowdery AM QC, Director Public Prosecutions, NSW, *The Rule of Law: Its Substance And Reach*, Lecture notes, Foundations of Law, University of Sydney, 4 May 2009, who made similar comments in relation to section 28 (3) on hearing an application in relation to receiving evidence and hearing arguments in private concerning the confidentiality of information classified as criminal intelligence.

<sup>101</sup> Cited from *Lawyers Weekly*, 'Anti-bikie laws: associating deeper underground', April 3, 2009.

<sup>102</sup> *A v UK* (2009) 268 BHRC 1.

<sup>103</sup> Appendix at the end of the discussion paper provides summations of some of the relevant judgments from the UK House of Lords decision.

59. However, the UK House of Lords judgment<sup>104</sup>, read together with the recent European Court of Human Rights decision<sup>105</sup>, could inform or impact on the above issues arising potentially from the NSW legislation with regard to 'criminal intelligence', the denial of procedural fairness and the right to a fair trial.

### Constitutional Validity, Natural Justice And Rule Of Law

60. Recent Australian High Court judgments may impact on the validity of legislative provisions with regard to the confidentiality of criminal intelligence and the independence and impartiality of a court exercising judicial power of the Commonwealth. The protection of the independence and impartiality of the judiciary would, generally be seen as in the public interest.
61. The High Court of Australia in *K-Generation Pty Limited v Liquor Licensing Court [2009] HCA 4* (2 February 2009), held that the requirement for South Australian courts to maintain the confidentiality of criminal intelligence about an applicant for a liquor licence did not diminish their integrity as impartial and independent courts. In this case, the Police Commissioner of South Australia gave evidence and made representations to the Liquor and Gambling Commissioner that the applicants were not fit and proper persons to hold the licence. The Liquor and Gambling Commissioner then refused the application on the ground that the grant of a licence would be contrary to the **public interest**.
62. The Licensing Court's assessment as to whether the applicant was a 'fit and proper person' for the licence was made by reference to the court's assessment of the **public interest**, a criterion which did not have any objective standard.<sup>106</sup>
63. K-Generation and Mr Krasnov appealed to the High Court on the ground that the Full Court of the Supreme Court of South Australia was mistaken in finding section 28A of the *Liquor Licensing Act 1997* (South Australia) as valid. They argued that section 28A deprived the Licensing Court of the independence and impartiality required of a court exercising the judicial power of the Commonwealth as it directed the Liquor and Gambling Commissioner, the Licensing Court and the Supreme Court to take steps to maintain the confidentiality of information classified as criminal intelligence.
64. However, the High Court unanimously dismissed the appeal. The High Court of Australia held that section 28A did not confer upon the Licensing Court or the Supreme Court functions incompatible with their integrity as courts of the States or with their constitutional role as courts exercising federal jurisdiction. It held that section 28A left the courts to decide on whether facts existed to justify classification of information as 'criminal intelligence', what weight be placed on it, and what steps to take to preserve the confidentiality of that material.<sup>107</sup> The section did not direct the courts as to which particular steps may be taken and the court was allowed to question the evidence.
65. In another similar case, *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police [2008] HCA 4* (7 February 2008), the High Court also upheld the validity of Western Australian legislation concerning the judicial review of fortification removal

<sup>104</sup> *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28.

<sup>105</sup> *A v UK* (2009) 268 BHRC 1.

<sup>106</sup> Pamela Tate S.C., Solicitor-General for Victoria, *The High Court On Constitutional Law: The 2008 Term*, Address delivered to the 2009 Constitutional Law Conference, Sydney, 20 February 2009: p 10.

<sup>107</sup> From *Hearsay – The Journal of the Bar Association of Queensland*, Issue: 33, February 2009. Also, from the Public Information Officer, High Court of Australia, 2 February 2009.

- notices.<sup>108</sup> The Gypsy Jokers Motorcycle Club appealed to the High Court and argued that section 76 (2) of the *Corruption and Crime Commission Act 2003* exercised an impermissible form of control over the Supreme Court of its jurisdiction and also constituted a denial of procedural fairness.
66. By a majority of 6 to 1 (Kirby J in dissent), the High Court dismissed the appeal from the Gypsy Jokers. The Court held that it was for the Supreme Court of Western Australia, not for the Commissioner of Police, to determine whether the disclosure of information by the Commissioner might prejudice police operations. Section 76 (2) of the *Corruption and Crime Commission Act 2003* did not direct the Supreme Court on how to exercise its jurisdiction so as to impair the character of the Court as independent and impartial. The High Court found that in the absence of section 76 (2), a **public interest** immunity could have applied, which would have meant that the Supreme Court could not have considered information subject to the immunity and would not have been able to exercise its review function.<sup>109</sup>
67. Some of the above concerns are based on whether parliament's laws could cause a court to act in a manner contrary to natural justice by denying people the right to know the allegations made against them.<sup>110</sup>
68. The wider questions raised in both the *Gypsy Jokers* and *K-Generation* cases related to whether Chapter III of the Constitution impliedly guaranteed a right to due process including a right of access by a party to all adverse materials taken into account by a court.<sup>111</sup> These cases addressed the issue only to the extent that the procedures remained within the discretionary control of the court.<sup>112</sup>
69. It has been argued that the *Gypsy Jokers* and *K-Generation* decisions did not address the relationship between the capacity of a court to control its own procedures such as the testing of the reliability of evidence even if in closed session and the guarantees of the right of a party to meet the case against him or her.<sup>113</sup>
70. It should be noted that the above Australian High Court cases were decided just before the recent UK House of Lords decision<sup>114</sup> and the European Court of Human Rights decision<sup>115</sup> as discussed previously. The UK Court and the European Court discussed the right to a fair trial. By contrast, the Australian High Court cases did not squarely address the right to a fair trial and due process, but instead decided that the courts were independent and impartial as long as the procedures remained within the discretionary control of the court.

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<sup>108</sup> The Commissioner of Police of Western Australia may apply to the Corruption and Crime Commission for the issue of a fortification warning notice. The Commission may issue such a notice if satisfied on the balance of probabilities that there are reasonable grounds for suspecting that the premises to which it relates are heavily fortified and habitually used as a place of resort by members of a class of people a significant number of whom may reasonably be suspected to be involved in organised crime. See also section 68 for the issue of fortification warning notice under the *Corruption and Crime Commission Act 2003* (Western Australia).

<sup>109</sup> From the Public Information Officer, High Court of Australia, 7 February 2008. Also, from *Hearsay* – *The Journal of the Bar Association of Queensland*, Issue: 24, February 2008.

<sup>110</sup> Hendrik Gout, 'SA Challenge In High Court', *Independent Weekly*, 30 May 2008.

<sup>111</sup> Pamela Tate S.C., Solicitor-General for Victoria, *The High Court On Constitutional Law: The 2008 Term*, Address delivered to the 2009 Constitutional Law Conference, Sydney, 20 February 2009: p 3.

<sup>112</sup> As above.

<sup>113</sup> As above, at p 11.

<sup>114</sup> *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28.

<sup>115</sup> *A v UK* (2009) 268 BHRC 1.



71. The different outcomes from, and focus of, the Australian High Court judgments as contrasted with the UK House of Lords and the European Court of Human Rights judgments, illustrate that '**public interest**' and the weighing of different considerations can vary. The context of the UK and European courts involved serious allegations of suspected terrorists or suspected terrorist activity. The relevant '**public interest**' would have been at a higher stake with potentially more serious consequences for the citizens and the State, including the protection of **national security**. However, the UK House of Lords held that the right to a fair trial had been violated. The UK *Human Rights Act* requires the courts to act compatibly with the *European Convention on Human Rights* in so far as Parliament permits, and to also take into account the Strasbourg jurisprudence (European Court of Human Rights).
72. In relation to the question of 'balance' of interests, Lord Hope of Craighead in the UK House of Lords case, at 84, stated:
- But the slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him.
73. In the same case, Lord Brown of Eaton-Under-Heywood, at 121, also explained that:
- Sometimes, of course, it will be impossible to separate out allegations from evidence and, in turn, evidence from its sources (whether these be informants or techniques, neither of which can be disclosed). And in these cases national security may need to give way to the interests of a fair hearing. That is where the EctHR has chosen to strike the balance between the competing interests.
74. By comparison, the Australian High Court decisions involved persons considered to be not 'fit and proper' or persons associated with criminals or with suspected criminal activity, where the relevant '**public interest**' would not involve as high stakes as national security or suspected terrorism. However, the Australian High Court has dismissed the appellants' appeal. This contrasts sharply with the successful outcomes for the appellants in their appeals to the recent UK House of Lords and the European Court.
75. The above decisions may hold relevance in the NSW context as the NSW *Criminal Organisations Legislation Amendment Act 2009* amended various Acts to create a means for the Commissioner of Police to make available to regulators in the affected industries confidential criminal intelligence relating to associates of declared criminal organisations in order to prohibit their participation in those industries.<sup>116</sup> The amendments included provisions to ensure that any information provided by the Commissioner of Police to the regulatory authorities that the Commissioner classified as criminal intelligence would not be disclosed in the reasons given by the regulator. Criminal intelligence cannot be disclosed in any subsequent review by the Administrative Decisions Tribunal unless approved by the Commissioner of Police.<sup>117</sup>

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<sup>116</sup> Relevant regulatory authorities and industries include: commercial agents and private inquiry agents; licences and approvals to manage licensed premises; licences under the *Motor Dealers Act*; licences and tradespersons' certificates under the *Motor Vehicle Repairs Act*; licences under the *Pawnbrokers and Second-hand Dealers Act*; and Tow Truck Industry licences and drivers certificates.

<sup>117</sup> *Legislation Review Digest Report No 6*, 12 May 2009, referred issues of concern to Parliament with regard to the *Criminal Organisations Legislation Amendment Bill 2009* at pages 21 – 31.

76. As already referred to earlier, on 25 September 2009, the Supreme Court of South Australia held that section 14 (1) of the South Australian *Serious and Organised Crime (Control) Act 2008* was unconstitutional. In *Totani & Anor v The State of South Australia* [2009] SASC 301, the person appealing to the court was not permitted to know what was alleged against them and the 'information' provided by the Commissioner of Police could not be tested as to its accuracy by the court. Justice Bleby of the South Australian Supreme Court found that at 93:
- To hold that an application under s 14 (1) must proceed without notice to the defendant is a significant denial of the defendant's fundamental right at common law to be heard in proceedings that may adversely and significantly affect his civil liberties. It would require clear and unambiguous language in the Act if that right were to be denied. I can see no such provision in the Control Act beyond that of s 14(3) which is enabling only.
77. In the above Supreme Court case of *Totani*<sup>118</sup>, the plaintiffs accepted that based on the previous decisions in *Gypsy Jokers* and *K-Generation*, the provisions of the Act which required withholding criminal intelligence from a defendant who is the subject of a s 14 (1) application, do not invalidate the legislation when the Court could determine whether the information is properly classified. Their main argument, however, is that such a provision when combined with a 'directed outcome' of the proceedings, would be sufficient to engage the *Kable*<sup>119</sup> principle, which states that there are limits on the extent to which state courts can be conferred with non-judicial functions.
78. The South Australian Supreme Court in *Totani* applied the rule from the *Kable* case by holding that s 14 (1) of the South Australian legislation was not valid because it required the state court to fulfil a role incompatible with the nature of judicial power.
79. Justice Bleby, at 139, explained that the fact Parliament has conferred a limited jurisdiction on the Magistrates Court with a direction that an order must be made if certain things are proved does not mean that the integrity of the Court is compromised. Justice Bleby at 139, stated that: "What is relevant to that question is the extent to which, if at all, Parliament has perversely directed the Court how it is to go about deciding the issue or issues that have been committed to it".
80. However, Justice Bleby, at 144, explained that the exercise of the Court's jurisdiction cannot be isolated from other essential features of the legislation which impinges on and affects the exercise of that jurisdiction.
81. The majority, at 160, in *Totani* also discussed the fundamental right of a person to a fair trial in a court of law. Justice Bleby found that at 161, "the requirement is fundamental to the rule of law". The Appendix contains further details of the relevant judgments.
82. Therefore, the South Australian Supreme Court decision in *Totani* discussed that:
- the legislation involved secret criminal intelligence and administrative decision-making on questions which should be judicially decided and on appeal by a superior court;
  - the person should have a right to know that they have been accused as well as what they have been accused of;

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<sup>118</sup> *Totani & Anor v The State of South Australia* [2009] SASC 301.

<sup>119</sup> *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.

- courts should have the right to question and test the accuracy of 'criminal intelligence';
  - the provisions of the legislation took away the integrity and authority of the courts that breached the constitutional rule on the separation between judicial and administrative decision making.
83. It should be noted that the Scrutiny of Legislation Committee of Queensland Parliament's *Legislation Alert Report No 11 of 2009* contains an extensive examination of the Queensland *Criminal Organisation Bill 2009*.<sup>120</sup> On page 27, the Queensland Scrutiny of Legislation Committee identified that clause 64 may raise concerns regarding interference with the independence and impartiality of the Supreme Court exercising powers under the legislation as it deals with evidence provided to the Commissioner of Police (or his or her delegate) by an informant. It provides that the 'informant cannot be called to give evidence'. This would breach the fundamental principle of natural justice that one must have the power to face one's accusers. The Queensland legislation removes the power of the Supreme Court to hear directly from a witness whose evidence might be central in judicial proceedings with possible penal consequences. The Queensland Scrutiny of Legislation Committee, therefore, draws to the attention of the Parliament a possible interference with the independence and impartiality of a court contrary to the *Kable* principle.<sup>121</sup>
84. References had been made with regard to the potential for judicial power to be subjected to the direction of the executive, which may erode the doctrine of separation of powers.<sup>122</sup>
85. However, the recently passed *Courts and Crimes Legislation Amendment Act 2009*, amended the relevant sections of the *Crimes (Criminal Organisations Control) Act 2009* to remove the power of the NSW Attorney General to revoke the declaration of an eligible Judge and to provide for the automatic revocation of such a declaration if a Supreme Court Judge revoked his or her consent, ceases to be a Judge or if the Chief Justice notifies the Attorney General that the declaration should not continue. It also made it clear that the selection of the eligible Judge to exercise a function is not made by the Attorney General or another Minister and that the exercise of the function is not subject to the control and direction of the Attorney General or other Minister.
86. The following questions are posed for comment to provide guidance for the Committee on how to assess the issues of concern and where to place the appropriate focus when addressing similar concerns in the future development of this legislation or other similar legislation.

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<sup>120</sup> Scrutiny of Legislation Committee, *Legislation Alert No 11 of 2009*, Queensland Parliament, 10 November 2009.

<sup>121</sup> As above, at p 27.

<sup>122</sup> Nicholas Cowdery AM QC, Director Public Prosecutions, NSW, *The Rule of Law: Its Substance And Reach*, Lecture notes, Foundations of Law, University of Sydney, 4 May 2009.

**Questions For Comment:**

- Are the rights of freedom of association and that of lawful assembly core rights when considering public interest?
- Are the rights to fair trial and procedural fairness core rights when assessing public interest concerns?
- What are some of the key considerations for addressing the relationship between the confidential use of criminal intelligence and the right to procedural fairness and due process?

## Chapter Five – Approaches In Overseas Jurisdictions

### Background

1. There have been a number of developments in jurisdictions overseas that are relevant to the discussion in NSW about “public interest”, specifically which factors the Committee should consider when reporting to Parliament when legislation trespasses unduly on “personal rights and liberties” under section 8A *Legislation Review Act 1987*. These developments are relevant to the discussion in Australia with respect to the *Crimes (Criminal Organisations Control) Act 2009* in NSW and the *Serious and Organised Crime (Control) Act 2008* in South Australia.<sup>123</sup>
2. This section will provide an overview of these developments, focusing on examples of legislation that have been introduced in response to criminal organisations in Canada, New Zealand and the United Kingdom. In each of these countries, personal rights and liberties such as of “freedom of association” (Article 22 of the *International Covenant on Civil and Political Rights*, ICCPR) are protected through the *Canadian Charter of Rights and Freedoms 1982*, the *New Zealand Bill of Rights Act 1990* and the *European Convention on Human Rights 1950* (ECHR), and the UK *Human Rights Act 1998* (which incorporates the ECHR).

### Canada

#### Amendments To The Canadian Criminal Code: Bill C-95

3. In Canada, there were a number of violent incidents in Quebec in the late 1990s and early 2000s between rival bikie gangs.<sup>124</sup> In 1997, the Canadian Government introduced specific offences against criminal organisations in response to these incidents.<sup>125</sup> This legislative response made Canada along with New Zealand, one of the first common law jurisdictions to introduce specific offences against criminal organisations, specifically motorcycle gangs. Bill C-95 passed through Parliament quickly.<sup>126</sup>
4. Section 467.1(1) of Bill C-95 created an offence of “participation in a criminal organization”, which provided that it is an indictable offence for a person to:
  - participate in or substantially contribute to the activities of a criminal organization, knowing that any or all of its members engage in or have engaged in a series of indictable offences within the preceding five years; and

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<sup>123</sup> A. Scholoenhardt, “Mafias and Motorbikes: New Organised Crime Offences in Australia”, *Current Issues in Criminal Justice*, 19(3), 2008: pp 259 - 282; Arlie Loughnan, “The legislation we had to have? The Crimes (Criminal Organisations Control) Act 2009”, *Current Issues in Criminal Justice*, 20 (3), 2009: pp 457-465; Nicolee Dixon, *Regulating Bikie Gangs*, Queensland Parliamentary Library, August 2009.

<sup>124</sup> Criminal Intelligence Service Canada, *Annual Report on Organised Crime in Canada*, 2000; CBC News, “Canada’s anti-gang law”, 10 April 2006; CBC News, “Biker Gangs in Canada”, April 21, 2009.

<sup>125</sup> Bill C-95 was introduced, cited from Dr Andreas Schloenhardt, Australian Crime Commission Parliamentary Joint Inquiry, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Submission 1, April 2009 at p 19.

<sup>126</sup> It was introduced into Parliament on 17 April 1997, received the Royal Assent on 25 April 1997 and came into force on 2 May 1997.

- being party to the commission of an indictable offence for the benefit of, at the direction of, or in association with the criminal organization.<sup>127</sup>

## Bill C-24

5. During 2001, Bill C-24 was introduced into Canadian Parliament. The Bill received the Royal Assent on 18 December 2001 and the majority of its provisions came into force on 7 January 2002.
6. However, a proposal by the Bloc Quebecois to criminalise mere membership in a criminal gang was rejected in Parliamentary Debates.<sup>128</sup> Further, under the legislation, membership in the organisation is not an offence but it provided for the following offences:
  - knowingly participate in or contribute to activities of a criminal organization for the purposes of enhancing the ability of that organization to facilitate or commit indictable offences (s 467.11);
  - the commission of an indictable offence for the benefit of, at the direction of or in association with a criminal organization (s 467.12); and
  - a person who is one of the persons constituting a criminal organization knowingly instructing the commission of an offence for the benefit of, at the direction of or in association with a criminal organization (s 467.13).
7. In response to the amendments, commentators have suggested that the legislation appeared to create offences of guilt by association and constituted a limitation on fundamental rights.<sup>129</sup> Similar concerns about the provisions have been considered by the Canadian Courts with reference to the *Canadian Charter of Rights and Freedoms*.

## The Canadian Charter Of Rights And Freedoms

8. The *Canadian Charter of Rights and Freedoms* (the Charter) is entrenched in the Canadian Constitution and can override inconsistent legislation. It covers civil and political rights and also protects language and educational rights of minority groups. The Charter covers fundamental freedoms such as “freedom of association” (section 2(d)) as well as a number of other rights, such as legal rights (sections 7 to 14). Section 1 of the Charter provides that the Charter guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
9. Section 1 of the Charter makes it clear that individual rights and freedoms are not absolute and that there are some circumstances where rights and freedoms in the Charter are required to give way to certain justifications. In *R v Oakes* [1986] 1 S.C.R. 103, the Court held that if the legislation has the effect of limiting a Charter right, the subject matter of the legislation must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom”. Once it is proven that the objective is sufficiently important to limit a Charter right, it must be shown that the means chosen are reasonable and demonstrably justified, which involves a

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<sup>127</sup> The Canadian Department of Justice, “Fact Sheet Bill C-95 – National Anti-Gang Measures”, May 1997.

<sup>128</sup> *R v Beauchamp* (July 8, 2009), Ontario Superior Court of Justice, at paragraph 68.

<sup>129</sup> David Freeman, “The New Law of Criminal Organizations in Canada”, *The Canadian Bar Review*, 2006, 85 (2) at p 208; Dr Andreas Schloenhardt, Australian Crime Commission Parliamentary Joint Inquiry, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, June 2009, Submission 1 at p 34; Kent Roach, “Panicking over Criminal Organizations: We Don’t need another offence”, (2000) 44(1) *The Criminal Law Quarterly* 1, 2000, 44 (1) at p 2.

proportionality test. Section 7 has also been interpreted as requiring that all criminal laws have a mens rea (or mental) element.<sup>130</sup>

10. It has been suggested that the freedom of association provisions in section 2(d) of the Charter has meant that the amendments to the Criminal Code have tended to focus on targeting participation rather than membership of a criminal organisation.<sup>131</sup> However, there have been a number of challenges in the Courts under section 7 of the Charter to the legislation that was introduced to address criminal organisations. Section 7 of the Charter of Rights and Freedoms provides that “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. This section has meant that Canadian legislation can be challenged under section 7 on the basis that it is vague and overbroad. As stated by Justice Cory in *R v Heywood* [1994] 3 S.C.R 761:

Overbreadth and vagueness are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an objective. In the case of vagueness, the means are not clearly defined. In the case of overbreadth the means are too sweeping in relation to the objective.

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual.

...However, where an independent principle of fundamental justice is violated, such as the requirement of *mens rea* for penal liability, or of the right to natural justice, any balancing of the public interest must take place under s.1 of the *Charter*.

In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the *Charter*, legislatures must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator.

11. Another recent example is the case of *R v Beauchamp* (2009), where the Ontario Superior Court of Justice applied the test for overbreadth in *R v Heywood* [1994] 3 S.C.R 761. According to this two stage test in *R v Heywood*, the Court must first determine whether the effect of the legislation infringes life, liberty or security of the

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<sup>130</sup> Cited from Australian Crime Commission Parliamentary Joint Inquiry, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups, Final Report*, August 2009 at p 69.

<sup>131</sup> Cited from Australian Crime Commission Parliamentary Joint Inquiry, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, Report of the Australian Parliamentary Delegation to Canada, the US, Italy, Austria, the UK & the Netherlands, June 2009 at paragraph 2.62.

person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the government objective (section 7 of the Charter). The second stage of the test involves **balancing the state interest against the individual interest** under section 1 of the Charter. In *R v Beauchamp*, the applicants submitted that Parliament, in pursuing the legitimate objective of combating organised crime had used means that were broader than necessary to achieve the objective.

12. The Court held that the provision was not vague and overbroad and was tailored by the legislature to achieve the objective of combating organised crime. The Court held that Parliament had a legitimate social policy of deterring individuals from participating in the activities of a criminal organisation for the purpose of facilitating criminal offences.<sup>132</sup> Accordingly, the Court applied the reasoning of Justice Cory in *R v Heywood* [1994] 3 S.C.R 761, and stated that a measure of deference is owed to the means selected by the legislature in achieving this objective. When considering the intention of Parliament, the Court also inferred that Parliament had intended to criminalise the participation in a criminal organisation consistently with the *United Nations Convention Against Transnational Organised Crime*.<sup>133</sup>
13. The Ontario Court of Appeal in *R v Lindsay* (30 June 2009) recently upheld a previous decision where Justice Fuerst held that certain sections of the Criminal Code relating to criminal organisations were constitutional. In *R v Lindsay*, two men were alleged to have committed extortion in association with the Hells Angels Motorcycle Club.<sup>134</sup> The applicants sought a declaration that certain sections of the Canadian Criminal Code with respect to criminal organisations, for example, sections 467.1 and 467.12 violated section 7 of the Charter. They accepted that there was a legitimate state objective behind the legislation. However, they argued that the means used to accomplish the objective was broader than necessary. In the 2009 decision, the Court highlighted that overbreadth exists only if the adverse effect of the individuals subject to it is grossly disproportionate to the **state interest** the legislation seeks to protect or achieve. Justice Fuerst had previously held that the legislation was not vague and overbroad and that the Hells Angels Motorcycle Club was a criminal organisation, as one of its purposes was the facilitation of a serious offence.<sup>135</sup>

## New Zealand

14. In February 2009, the *Gangs and Organised Crime Bill* was introduced into New Zealand's Parliament. The *Crimes Amendment Act 2009* came into force on 1 December 2009 as a result of the *Gangs and Organised Crime Bill 2009*. This legislation amends section 98A of the *Crimes Act 1961*, which was initially introduced in 1997 to restrict the activities of criminal associations or gangs in response to community concern about organised criminal groups.<sup>136</sup> Section 98A was broadened

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<sup>132</sup> Daniel Prefontaine QC; Eileen Skinnider, International Society for the Reform of Criminal Law, 22<sup>nd</sup> International Conference Codifying the Criminal Law: Modern Initiatives, 11-15 July 2008, Dublin, Ireland, "Canada's experience in dealing with organised Crime/ Gangs: Legislation and Case Law" at p 9.

<sup>133</sup> *R v Beauchamp* (July 8, 2009), Ontario Superior Court of Justice at paragraph 61.

<sup>134</sup> *Re Lindsay and Bonner v The Queen* [2005] O.J. No. 2870; *R v Lindsay* (2004) 182 C.C.C. (3d) 301 (Ont S.C).

<sup>135</sup> Daniel Prefontaine QC; Eileen Skinnider, International Society for the Reform of Criminal Law, 22<sup>nd</sup> International Conference Codifying the Criminal Law: Modern Initiatives, 11-15 July 2008, Dublin, Ireland, "Canada's experience in dealing with organised Crime/ Gangs: Legislation and Case Law" at p 10.

<sup>136</sup> Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups, Final Report*, August 2009 at p 75.



through the *Crimes Amendment Act 2002*, which also made the provisions consistent with the *United Nations Convention against Transnational Organised Crime*.<sup>137</sup>

15. As it is currently drafted, section 98A of the *Crimes Act 1961* makes it an offence to participate in an organised criminal group knowing that the participation may contribute to the occurrence of criminal activity. Under the current section 98A *Crimes Act 1961*, a person is liable to imprisonment for a maximum penalty of five years if they participate in an organised group knowing that it is a criminal organisation; and:
  - knowing that their participation contributes to the occurrence of criminal activity; or
  - reckless as to whether his or her participation may contribute to the occurrence of criminal activity.
16. The main features of the *Gangs and Organised Crime Bill* are to amend section 98A so that it is an offence punishable by up to ten years imprisonment to participate in an organised criminal group. It also clarifies the knowledge requirements of the offence of participating in an organised criminal group under section 98A and amends the *Sentencing Act 2002* to make participation in an organised criminal group or other form of organised criminal association an aggravating factor at sentencing.
17. As indicated above, there have been concerns expressed that section 98A (including the amendments) may infringe on rights of “freedom of association” provided in section 17 of the New Zealand *Bill of Rights Act 1990*. However, in its review of the Bill, the Attorney General advised that it did not limit the right to freedom of association under section 17 of the New Zealand *Bill of Rights Act 1990*.<sup>138</sup> Under section 7 of the New Zealand *Bill of Rights Act 1990*, where any Bill is introduced into the House of Representatives, the Attorney-General must bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms in the Bill of Rights.

## United Kingdom

18. The *Serious Crime Bill 2007* came into force on 8 April 2008. This legislation gave courts the power to make a new type of civil order, namely a Serious Crime Prevention Order (SCPO). An SCPO may be made on an application by the Director of Public Prosecutions, the Director of the Revenue and Customs Prosecutions Office, the Director of the Serious Fraud Office and the Director of Public Prosecutions for Northern Ireland, to the High Court, or by application to a Crown Court before whom a person appears having been convicted of a serious offence.
19. A number of concerns were raised about the legislation by the Select Committee on Constitution in its Second Report, *Serious Crimes Bill* in January 2007. As stated by the Select Committee:<sup>139</sup>

A broad question for the House is whether the use of civil orders in an attempt to prevent serious criminal activity is a step too far in the development of preventative orders. Whether or not the trend towards

<sup>137</sup> Dr Andreas Schloenhardt, Palermo on the Pacific Rim Organised Crime Offences in the Asia Pacific Region, The United Nations Office on Drugs and Crime, Regional Centre for East Asia and the Pacific, Study Series Number 1, August 2009.

<sup>138</sup> The Ministry of Justice, Attorney General of New Zealand, *Gangs and Organised Crime Bill: Consistency with the New Zealand Bill of Rights Act 1990*, 5 February 2009.

<sup>139</sup> House of Lords, Select Committee on the Constitution, *Second Report of Session 2006-07, Serious Crime Bill: Report*, HL Paper 41, 2 February 2007.

greater use of preventative civil orders is constitutionally legitimate (a matter on which we express doubt), we take the view that SCPOs represent an incursion into the liberty of the subject and constitute a form of punishment that cannot be justified in the absence of a criminal conviction.

20. Further, concerns were raised about the legislation, in particular, whether it **balances community and the public interest** of preventing serious crime and **individual rights** which has also been discussed in the United Kingdom with respect to anti-terrorism legislation (including “control orders”)<sup>140</sup> and “anti-social behaviour orders” (ASBO).<sup>141</sup> In the report of the Joint Committee on Human Rights, the following comments were made with respect to the legislation:

In our view the Bill's provisions on SCPOs raise three significant human rights issues:

- (1) whether SCPOs amount to the determination of a criminal charge for the purposes of the right to a fair trial in Article 6(1) ECHR;
- (2) whether the standard of proof in proceedings for an SCPO should be the civil or the criminal standard; and
- (3) whether the power to make SCPOs is defined with sufficient precision to satisfy the requirement that interferences with Convention rights be "in accordance with the law" or "prescribed by law".<sup>142</sup>

21. A SCPO may impact a person's rights under the *European Convention on Human Rights* (ECHR). For example, under the Convention, any interference with those rights such as freedom of association must be prescribed by law and necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime or for the protection of the rights and freedoms of others (Article 11 ECHR).<sup>143</sup> The Parliamentary Delegation of the Australian Crime Commission Parliamentary Joint Inquiry was informed that a number of concerns regarding the human rights implications of SCPOs had been raised.<sup>144</sup> Legislation has also been introduced into Parliament in the UK to provide powers to the Courts to issue injunctions to prevent gang related violence through the *Policing and Crime Act 2009*, which has raised further issues under the ECHR and *UK Human Rights Act 1998*.<sup>145</sup>
22. The *Policing and Crime Bill* was introduced into the House of Commons on 18 December 2008. It received Royal Assent on 12 November 2009. Sections 88 and 91 of the UK *Policing and Crime Act 2009* (with regard to the provisions of safeguarding information to the police) commenced on 30 November 2009 and other parts commenced on 25 January 2010. Under the Act, the Court may grant an injunction if the two conditions are met: (a) the court is satisfied on the balance of probabilities that the respondent has engaged in or has encouraged or assisted in gang-related violence; (b) the court considers it necessary to grant the injunction to

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<sup>140</sup> *Prevention of Terrorism Act 2005*.

<sup>141</sup> *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787. In this case, the court discussed the standard of proof for ASBOs.

<sup>142</sup> Joint Committee on Human Rights Twelfth Report Session 2006-07 HL91/HC490.

<sup>143</sup> The Crown Prosecution Service, Serious Crime Prevention Orders Guidance, 9 October 2008.

<sup>144</sup> Australian Crime Commission Parliamentary Joint Inquiry, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups, Report of the Australian Parliamentary Delegation to Canada, the US, Italy, Australia, the US, Italy, Austria, the UK & the Netherlands*, June 2009 at paragraphs 4.112.

<sup>145</sup> See for example, Joint Committee on Human Rights Tenth Report Session 2008-09 HL 68/HC 395.

prevent the respondent from engaging in or encouraging or assisting in gang-related violence and/or to protect the respondent from gang-related violence.<sup>146</sup>

23. Under Part 4 of the Act, the Court can grant an injunction with prohibitions on certain conduct including: being in a particular place; being with particular persons in a particular place; wearing particular descriptions of articles of clothing in a particular place; using the internet to facilitate or encourage violence.
24. The Joint Human Rights Committee raised a number of concerns about the then Bill's compatibility with rights in the ECHR, for example the right to a fair trial (Article 6 ECHR); the right to respect for private and family life (Article 8 ECHR) and the right to freedom of association with others (Article 11 ECHR). Article 11 ECHR states (with respect to the rights in Article 11) that "no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others".
25. The issues raised by the Joint Committee on Human Rights included the standard of proof for the making of an injunction. The Committee recommended that the injunctions should be based on a higher, criminal standard of proof similar to the standard of proof required for anti-social behaviour orders (ASBOs) and consistent with the House of Lords decisions in *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787 and *Birmingham City Council v Shafi* [2008] EWCA Civ 1186.
26. In *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787, the House of Lords held that the proceedings leading to the making of an ASBO are civil proceedings, but they should have a criminal standard of proof. The House of Lords held that there were good reasons, in the interests of fairness, for applying the higher standard when allegations were made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they were made.<sup>147</sup> It held that magistrates should apply the criminal standard of proof with respect to ASBOs, namely that "they must *be sure* that the individual in question has acted in an anti-social manner before they can make an order".<sup>148</sup>
27. In *Birmingham City Council v Shafi* [2008] EWCA Civ 1186, the Council sought injunctions against individuals involved in gang related offences under the *Local Government Act 1972*. The Court of Appeal dismissed the Council's application and commented that the terms of the injunction were similar to those in an ASBO under the *Crime and Disorder Act 1998* and that a wide range of powers already existed to deal with gang related violence.
28. The Joint Human Rights Committee also made the following comments in relation to the use of civil injunctions in the context of gang related violence:

In previous reports, we have drawn attention to the unsustainability in the long term of resort to methods of control which are outside of the criminal process and which avoid the appropriate standards of fairness. We are concerned that the introduction of gangs injunctions represents yet another

<sup>146</sup> Tenth Report of Session 2008-09, *Legislative Scrutiny: Policing and Crime Bill*, HL Paper 68, HC 395; Fifteenth Report of Session 2008-2009, *Legislative Scrutiny: Policing and Crime Bill (gang injunctions)*, HL Paper 81, HC 441.

<sup>147</sup> See paragraphs 37 (Lord Steyn) and 82-83 (Lord Hope).

<sup>148</sup> As above.

step in this direction...In our view, the civil law is a[n] inappropriate tool to deal with what is effectively criminal behaviour.<sup>149</sup>

29. It also raised concerns about the duration of an injunction and recommended the inclusion of a maximum time limit in order to safeguard rights under Article 8 ECHR.<sup>150</sup> During the Public Bill Committee, the injunctions were also likened to a “control order” and questions were raised whether a lower civil standard of proof was appropriate for injunctions that would have a major impact on a person’s basic civil liberties, including rights of association and freedom of movement.<sup>151</sup>
30. As can be seen from the examples above, overseas jurisdictions are also grappling with similar concerns and issues. Commentaries have been made on similar grounds of intrusions into personal rights and liberties and the rule of law with respect to natural justice, fair trial, standard of proof, and constitutional validity.

### Questions For Comment:

- Where a principle of fundamental justice may be undermined, such as the requirement of mens rea (intent) for criminal liability, the requirement of the right to natural justice, or relevant standard of proof, what are the key considerations for striking a balance between public interest and the principle of fundamental justice, including what should constitute as an undue trespass on personal rights and liberties?
- What important sources or principles could provide guidance on evaluating the extent or degree of a trespass on a right?
- What are the key principles that could assist in asking the Parliament or the government to demonstrate why a particular right could be reasonably limited?

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<sup>149</sup> Fifteenth Report of Session 2008-2009, *Legislative Scrutiny: Policing and Crime Bill (gang injunctions)*, HL Paper 81, HC 441 at paragraph 1.12.

<sup>150</sup> As above, at paragraph 1.41.

<sup>151</sup> Sally Almandras, *Policing and Crime Bill, Committee Stage Report*, Bill 7 of 2008-2009, House of Commons Library, Research Paper 09/39, 29 April 2009 at p 28; Public Bill Committee Debate on 26 February 2009 at c588.

## Chapter Six – Concluding Observations: Personal Rights And Liberties And Public Interest

### Background

1. A search of the Parliament of NSW Hansard records for 2008 and the first half of 2009 (up to 25 June 2009), revealed very few discussions of 'public interest' during the debating of bills.
2. For the Legislative Assembly, the Hansard records show that the term 'public interest' was raised in relation to only 30 bills when a total of 139 bills had been introduced. As for the Legislative Council, the Hansard records show that public interest was referred in relation to only 24 bills. During the first half of 2009, the Hansard records show that during the debates on bills, the Legislative Assembly referred to public interest in relation to 16 bills when a total of 79 bills had been introduced to Parliament. The Legislative Council Hansard records show that the term 'public interest' was raised with respect to 15 bills during the same period.
3. In the majority of instances, when the public interest was canvassed, the debates did not involve lengthy or detailed discussions.<sup>152</sup>
4. The debate on the *Crimes (Criminal Organisations Control) Bill 2009* and the *Criminal Organisations Legislation Amendment Bill 2009*, however, did generate reference to public interest in a lengthier debate by the Legislative Council on 2 April 2009 and on 13 May 2009 respectively.
5. As the primary function of the Committee is to examine potential trespasses to personal rights and liberties, the areas of law involving the greatest potential incursions include criminal law enforcement processes and laws that carry a punitive function for offenders or suspected offenders. The discussion paper, therefore, has focussed on the examples of the NSW 'bikies' legislation, covert search warrant powers and adequate housing rights for registrable persons, in order to illustrate the complexities surrounding public interest and personal rights and liberties.
6. The following section seeks to summarise the main models or tests used in the assessment of the necessity of trespassing on personal rights to achieve the public interest or legislative objective.

### Rights As Protected Interests And The Public Interest As Common Interests

7. Under this model, whenever a conflict arises, the personal rights and the public interest would be weighed against one another and whichever is the stronger would then prevail.<sup>153</sup>

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<sup>152</sup> Most of the references to the public interest related to the confidentiality of information; information disclosures; privacy; whistleblowers; privatisation; environment or planning; gambling or gaming; racing; and transport. As discussed in the introductory chapter, freedom of information and information disclosures (including related issues of privacy, confidentiality of information, protected disclosures, and public interest immunity) have already been extensively reviewed and have undergone major public consultations, including the imminent establishment of the new role and functions of the Information Commissioner in NSW (with oversight by the Joint Committee on the Office of the Ombudsman and the Police Integrity Commission). Therefore, this paper has not included these areas for discussion.

8. The criticisms made against this model include that the protection given to individual rights may be vulnerable to changes over time. The scope of personal liberties is limited by what governments choose to do in the public interest rather than what they are able to do dependent on the interpretation given to rights.<sup>154</sup> This model also suggests that rights should always give way to the public interest.<sup>155</sup>
9. This approach is frequently used in cases where national security and prevention of disorder or crime defences are raised. These public interests tend to override personal rights. Such cases tend to focus on the factual necessity of the rights' interference to the achievement of the purposes, with the personal rights giving way if necessity is accepted.<sup>156</sup>

### Rights As Trumps And The Unitary Public Interest

10. This approach suggests a relationship with rights as a process of establishing rules and exceptions.<sup>157</sup> A rational balancing process may give stronger protection to rights based on the concept of proportionality. This raises the question as to whether it is necessary to impinge on the rights to such a degree in order to achieve the collective goals, rather than whether the infringed rights serve legitimate collective goals.<sup>158</sup> If it is not necessary to encroach on rights to such a degree, then the breach would be found to be disproportionate.
11. Under this model, the contradiction between rights and public interest would be resolved by approaching the concept of rights as rules which are subject to exceptions.<sup>159</sup> Based on this approach, by conferring rights on individuals, the decision has been made that the interests or choices protected should take priority over certain collective interests.<sup>160</sup>
12. The concept of 'right' applies in situations where individual legitimate interests are to be protected from other interests such as public interest. If there is a reasonable amount of consensus on the priority of rights over other public interests, then the rights would function as 'trumps' and be respected as if they were 'universal' or 'absolute'.<sup>161</sup>
13. According to this model, a right, by definition, must 'trump' over some collective goals or utilitarian considerations but it does not mean that it must 'trump' all such goals. In order to determine whether a particular right may be overridden, one would need to look at the values that underpin the right.<sup>162</sup> If those values are not at stake, then their scope may be limited accordingly.<sup>163</sup>

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<sup>153</sup> Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights', *The Modern Law Review*, Vol. 62, September 1999: pp 671 – 696 at p 678.

<sup>154</sup> As above, at p 679.

<sup>155</sup> As above, at p 679.

<sup>156</sup> As above, at p 688.

<sup>157</sup> As above, at p 680.

<sup>158</sup> As above, at p 679.

<sup>159</sup> As above, at p 680.

<sup>160</sup> As above, at p 681.

<sup>161</sup> Adrian-Paul Iliescu, 'Universal Human Rights Versus Public Interest', Bucharest University.

<sup>162</sup> Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights', *The Modern Law Review*, Vol. 62, September 1999: pp 671 – 696 at p 681.

<sup>163</sup> As above, at p 681.

14. This model is concerned with the effect of the interference on the right in question and takes a more definitional or purposive approach.<sup>164</sup>
15. Which model is applied would depend on one's view of the relative importance of protecting personal rights (or a commitment to substantive human rights standards) or the pursuit of collective goals or public interest.<sup>165</sup>

### Suitability, Necessity And Balancing Approach

16. The test of 'suitability' asks the question of whether the law is a real means to achieve the supposed end. If a law is not capable of achieving the stated objective, then it should not be legitimate.<sup>166</sup>
17. The test of 'necessity' involves looking at the relationship between the means and the ends of the law. The law is examined to see if it does no more than is necessary to achieve the objective. It looks at whether there are any alternative means to achieve the same end but, that are less restrictive of the right in question.<sup>167</sup>
18. 'Balancing' requires weighing the law's detriments against its benefits. This involves assessing the importance of the right itself and the degree to which the right is being interfered with, and then weighing that detriment against the importance of the social or public interest that the law seeks to achieve, the extent to which the law actually achieves that end, and the benefits to the community.<sup>168</sup> This would involve the making of social, political and policy considerations.
19. This approach has a focus on consequences by weighing the consequences of protecting the right against the consequences of restricting it with the aim to promote the greatest balance of beneficial over detrimental consequences.<sup>169</sup>
20. This also requires assessing the law to see if it could be compatible with the rule of law and the Constitution.

### Presumptive And Re-Weighting Approach

21. Contrary to the traditional view of using a balancing test that weighs the effects of restricting rights in the public interest, this approach suggests the need to 'overprotect' rights by assigning more weight to rights and less weight to public interest.<sup>170</sup>
22. A critique of the previous balancing model is that it treats rights and the public interest as being commensurable with each other, where all reasons are given the same weight. It assumes there is a single scale on which the value of protecting rights and that of protecting the public interest could be compared and balanced.<sup>171</sup>

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<sup>164</sup> Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights', *The Modern Law Review*, Vol. 62, September 1999: pp 671 – 696 at p 688.

<sup>165</sup> As above, at p 695.

<sup>166</sup> Aroney, Nicholas, 'Justice McHugh, Representative Government and the Elimination of Balancing', *Sydney Law Review*, Vol. 2, 2006: pp 505 – 534, at p 532.

<sup>167</sup> As above.

<sup>168</sup> As above.

<sup>169</sup> Denise Meyerson, 'Why Courts Should Not Balance Rights Against The Public Interest', *Melbourne University Law Review*, Vol. 31, 2007: pp 873 – 902, at p 881.

<sup>170</sup> As above, at p 873.

<sup>171</sup> As above, at p 881

23. Frederick Schauer similarly claimed that “decision-makers who conceptualise rights as shields will **presumptively** but not *conclusively* ignore governmental interests”.<sup>172</sup> Accordingly, there is “not just the aggregate of consequences to consider, but also the more intangible insult to human dignity created by the invasion of rights”.<sup>173</sup>

### Interconnection With The Rule Of Law And Protection Of Rights

24. To reiterate, the *Preamble to the Universal Declaration of Human Rights* (1948) states that:

It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

25. The rule of law is applied in a way which recognises the separation of powers – between the legislature (which makes the law), the executive (which manages the functions of the state) and the judiciary (which administers justice by adjudicating disputes and imposing penalties and also, occasionally, makes law through judicial interpretation).

26. The following concluding observations are made based on a resolution passed by the Council of the International Bar Association (IBA) in 2005 which partly stated that:<sup>174</sup>

An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are the fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process, are all unacceptable. The Rule of Law is the foundation of a civilised society. It establishes a transparent process available and equal to all. It ensures adherence to principles that both liberate and protect.

27. In summation, there appears to be an interconnection between the **public interest** and principles of the Rule of Law. The principles of the Rule of Law establish a fair, equal and transparent process to protect personal rights and liberties, which also promote the public interest in strengthening the foundation of a democratic and civilised society against tyranny and oppression.

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<sup>172</sup> Denise Meyerson, ‘Why Courts Should Not Balance Rights Against The Public Interest’, *Melbourne University Law Review*, Vol. 31, 2007: pp 873 – 902, at p 885.

<sup>173</sup> As above, at p 888.

<sup>174</sup> Francis Neate (ed), former President of the Council of the International Bar Association, *The Rule of Law: Perspectives from around the Globe*, LexisNexis, 2009. From lecture by Nicholas Cowdery AM QC, Director Public Prosecutions, NSW, *The Rule of Law: Its Substance And Reach*, Foundations of Law, University of Sydney, 4 May 2009.



**Questions For Comment:**

- What considerations or sources could assist in the assessment of whether there are less restrictive ways of achieving the intended legislative purpose without the Committee engaging in an evaluation of government policy?
- Should matters of fundamental principles and rights be referred to Parliament for consideration over and above the weighing of the public interest?

## Proposed Questions And Framework For Comment

In order to assist the Legislation Review Committee of Parliament of NSW to assess whether a bill or its provisions contain an undue trespass on individual rights and liberties, the following questions are raised for comment to guide the Committee in its future approach when dealing with similar issues in other areas of proposed legislation.

### Questions 1 - 10

1. Are the rights of freedom of association and that of lawful assembly core rights when considering public interest?
2. What important sources or principles could provide guidance on evaluating the extent or degree of a trespass on a right?
3. What important sources could guide the assessment of whether the legislative measures are proportionate to the pursuit of the legislative purposes for ensuring that trespasses on personal rights are not undue?
4. What considerations or sources could assist in the assessment of whether there are less restrictive ways of achieving the intended legislative purpose without the Committee engaging in an evaluation of government policy?
5. Are the rights to fair trial and procedural fairness core rights when assessing public interest concerns?
6. Should matters of fundamental principles and rights be referred to Parliament for consideration over and above the weighing of the public interest?
7. What are the key principles that could assist in asking the Parliament or the government to demonstrate why a particular right could be reasonably limited?
8. Just as personal rights are not absolute, what are the principles that could inform the assessment of the boundaries or limits of public interest?
9. What are some of the key considerations for addressing the relationship between the confidential use of criminal intelligence and the right to procedural fairness and due process?
10. Where a principle of fundamental justice may be undermined, such as the requirement of mens rea (intent) for criminal liability, the requirement of the right to natural justice, or relevant standard of proof, what are the key considerations for striking a balance between public interest and the principle of fundamental justice, including what should constitute as an undue trespass on personal rights and liberties?

### Framework For Limits On Personal Rights And For The Assessment Of Undue Trespasses On Personal Rights And Liberties

Victoria and ACT contain provisions setting out the criteria for when a human right may be limited by law. The *Victorian Charter of Human Rights and Responsibilities Act 2006* provides that:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –

- (a) the nature of the right; and

- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The NSW Legislation Review Committee seeks comment on whether the above provisions could be adapted as a possible guide or framework to assist the Committee in its deliberations on whether a personal right or liberty may be limited by law, such as under (b): where the importance of the purpose of the limitation may involve public interest concerns.

The Committee also seeks comment on which could be the most appropriate model or approach (as summarised in Chapter Six), when trying to strike a balance in assessing the weight to be given on personal rights and liberties when there are strong public interest concerns for ensuring that the best alternative (or least restrictive means) to achieving the legislative objective that could leave the particular right intact:

The Committee seeks comment on whether the presumptive and re-weighting approach (see Chapter Six) could be more preferable than the balancing test, proportionality or necessity model, by assigning more weight to rights and less weight to public interest concerns, particularly if the principles of the rule of law may be undermined. Personal rights and liberties will presumptively, but not conclusively, be given more weight than public interest considerations.

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## **APPENDIX**

## Appendix

### ***International Finance Trust Company Ltd & Anor v New South Wales Crime Commission & Ors [2009] HCA 49:***

Section 10(2)(b) of the NSW *Criminal Assets Recovery Act 1990* provided that the NSW Crime Commission may make an ex parte application (an application made without notice to the affected party and determined in their absence), to the Supreme Court for a restraining order preventing dealings with interests in property which is suspected to have been derived from serious crime related activity. Under section 10(3), the Supreme Court must make the order if the application is supported by an affidavit of an authorised officer with the grounds upon which the officer suspected the property is serious crime derived property. The Supreme Court, having regard to the matters raised in the affidavit, then considers there are reasonable grounds for the suspicion. On appeal, the Court of Appeal of the Supreme Court of NSW set aside the restraining order made by the Supreme Court judge. The Court of Appeal found there was no admissible evidence before the primary judge that provided reasonable grounds for the suspicion raised by the authorised officer in the affidavit. However, the Court of Appeal rejected that section 10 was constitutionally invalid. The High Court then granted special leave to appeal against that decision.

By majority, the High Court found that section 10 was constitutionally invalid. The High Court considered that section 10 did not require the NSW Crime Commission to make ex parte applications for restraining orders. If the Commission did make an ex parte application, the Supreme Court was required to make the restraining order if it was satisfied that the authorised officer's affidavit reasonably supported the officer's suspicions about the subject of the application.

Chief Justice French stated that section 10 of the Act directed the Supreme Court "as to the manner in which it exercises its jurisdiction and in so doing to deprive the court of an important characteristic of judicial power".

### ***Criminal Assets Recovery Amendment Act 2009***

As a response, on 24 November 2009, the NSW Parliament passed the *Criminal Assets Recovery Amendment Bill 2009* to amend the *Criminal Assets Recovery Act 1990* and the *Confiscation of Proceeds of Crime Act 1989* with respect to applications for restraining orders, former restraining orders and assets forfeiture orders; and for other purposes. The *Criminal Assets Recovery Amendment Act 2009* enables the NSW Crime Commission to apply for restraining orders without notifying the suspected party but a Supreme Court judge will be able to order that the owner of the assets be notified if it thinks fit. Under the amendments, the NSW Crime Commission will also be able to confiscate assets without first applying for an order to seize them if they establish that on the balance of probabilities, the affected person was engaged within the past 6 years in a crime punishable by 5 years' imprisonment.

### ***Secretary of State for the Home Department v AF (No 3) [2009] UKHL 28:***

Summation of some relevant judgments from the *Secretary of State for the Home Department v AF (No 3) [2009] UKHL 28*, with our own added emphasis on public interest in bold and italics.

The UK decision highlights the balancing of the ***public interest*** and that of individual rights such as the right to a fair trial in the UK context of section 2 of their *Prevention of Terrorism Act 2005* (the PTA) and a right to a fair hearing established by Article 6 of the *European*

*Convention on Human Rights 1950* together with the UK *Human Rights Act 1998* (the HRA). At 50, the Government, at 50, [with our own added emphasis on public interest in bold and italics], submitted that the applicants were wrong in principle as the applicants' submission wrongly elevated the:

right of an individual to disclosure of relevant evidence under Article 5(4) (or Article 6) to an absolute right which necessarily overrides the rights of others, including the right to life under Article 2, and overrides the interests of the State in protecting secret sources of information so as to preserve the effectiveness of its intelligence, police and counter-terrorism services. Such an absolute right to disclosure would, if it existed, create a serious lacuna in the protection of the State may offer its citizens and disregards the principle, inherent in the Convention as a whole, including Article 5(4) (and Article 6), that the ***general interests of the community*** must be balanced against the rights of an individual...

However, Lord Phillips of Worth Matravers, at 59, in the above case, held that:

This establishes that the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.

At 63, Lord Phillips of Worth Matravers also stated [with our own added emphasis on public interest in bold and italics]:

Indeed, if the ***wider public*** are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust.

At 64: The best way of producing a fair trial is to ensure that a party to it has the fullest information of both the allegations that are made against him and the evidence relied upon in support of those allegations. Where the evidence consists of oral testimony, then he should be entitled to cross-examine the witnesses who give that testimony, whose identities should be disclosed. Both our criminal and our civil procedures set out to achieve these aims. In some circumstances, however, they run into conflict with other aspects of the ***public interest***, and this is particularly the case where national security is involved. How that conflict is to be resolved is a matter for Parliament and for government, subject to the law laid down by Parliament. That law now includes the Convention, as applied by the HRA. That Act requires the courts to act compatibly with Convention rights, in so far as Parliament permits, and to take into account the Strasbourg jurisprudence. That is why the clear terms of the judgment in *A v United Kingdom* resolve the issue raised in these appeals.

Lord Hope of Craighead, at 80, stated:

The procedural protections can never outweigh the controlled person's right to be provided with sufficient information about the allegations against him to give effective instructions to the special advocate.

At 85: The judge must insist in every case that the controlled person is given sufficient information to enable his special advocate effectively to challenge the case that is brought against him. That is the core principle.

On the nature of control orders and freedom of movement, Lord Hope of Craighead stated:

At 77: when account is taken of their nature, duration, effects and manner of implementation...there is no doubt that control orders severely restrict the freedom of movement of those who are subjected to them.

Appendix

On the question of balancing rights, the rule of law and right to fair hearing, [with our own added emphasis on public interest in bold and italics], Lord Hope of Craighead remarked that:

At 84: The consequences of a successful terrorist attack are likely to be so appalling that there is an understandable wish to support the system that keeps those who are considered to be most dangerous out of circulation for as long as possible. But the slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him.

At 86: It is a sufficient statement of the allegations against him, not the underlying material or the sources from which it comes, that the controlled person is entitled to ask for. The judge will be in the best position to strike the balance between what is needed to achieve this and what can properly be kept closed.

At 88: The judge at first instance must have access to it where it is said that disclosure of relevant material will be **contrary to the public interest**, and the Court of Appeal may perhaps need to do so if this is necessary for the exercise of its jurisdiction...But the process should stop there. The function of the House, as the final court of appeal, is to give guidance on matters of principle. Its judgments must be open to all, not least to the controlled person. The giving of reasons in a closed judgment, which would be inevitable if it were to be based to any extent on closed material, is inimical to that requirement.

Baroness Hale of Richmond stated the following:

At 103: Strasbourg has now, in *A and others v United Kingdom*...made it entirely clear what the test of a fair hearing is. The test is whether the controlled person has had the possibility effectively to challenge the allegations against him. For this he does not have to be told all the allegations and evidence against him, but he has to have sufficient information about those allegations to be able to give.

With balancing the rights of individual and that of the community, Lord Brown of Eaton-Under-Heywood observed the following [with our own added emphasis on public interest in bold and italics]:

At 119: Plainly there is now a rigid principle. Strasbourg has chosen in para 220 of *A* to stipulate the need in all cases to disclose to the suspect enough about the allegations forming the sole or decisive grounds of suspicion against him to enable him to give effective instructions to the special advocate. In reaching this decision Strasbourg clearly rejected the argument set forth in the Government's Memorial, including, for example, that article 6 confers no "absolute right which necessarily overrides the rights of others, including the right to life under article 2, and **overrides the interests of the state** in protecting secret sources of information so as to preserve the effectiveness of its intelligence, police and counter-terrorism services. Such an absolute right to disclosure would, if it existed, create a serious lacuna in the protection of the State may offer its citizens and disregards the principle, inherent in the Convention as a whole, including...article 6, that the **general interests of the community must be balanced against the rights of an individual** (see eg *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 69 [and] *Soering v United Kingdom* (1989) 11 EHRR 439, para 89)".

At 120: That said, however, Strasbourg's solution to the problem itself plainly represents something of a compromise and gives some weight at least to the demands of national security...Plainly *A* does not require the disclosure of the witness's identity or even their evidence, whatever difficulties that may pose for the suspect. What is required is rather the substance of the essential allegation founding the Secretary of State's reasonable suspicion.

***Totani & Anor v The State of South Australia* [2009] SASC 301:**

Summation of relevant judgment from *Totani & Anor v The State of South Australia* [2009] SASC 301.

Bleby J at 155 to 157, stated that:

The relatively much more significant and complex factual 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.

The 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. It is as though the legislation provided for the required elements to be proved on application to the Court, but that the Court was to refer the findings on the major elements to a non-judicial officer, acting without any judicial safeguards, whose decision would be final, not reviewable and binding on the Court. In a very real sense the Court is required to "[act] as an instrument to the Executive".

It is the integration of the administrative function with the judicial function to an unacceptable degree which compromises the institutional integrity of the Court. Although it is not necessary so to decide, when grafted onto s 14(1) of the Control Act, 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 Chapter III of the Constitution if this were a federal court. It is not merely a question of the separation of powers, a principle which is not binding on the States in the same way that it is with respect to the Commonwealth institutions. 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.

Further, at 165 to 167, the majority in *Totani*, held that in relation to a fair hearing:

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 notably absent. The litigant is not even offered the limited assistance of the UK equivalent of a 'special advocate'.

Thus it can be seen that 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. But the process is devoid of the fundamental protections which the law affords in the making of such an order, namely the right to have significant and possibly disputed factual issues determined by an independent and impartial judicial officer and the right to be informed of and to answer the case put against the person.

The statutory requirement embodied in s 14 (1) that the Court must act without question on a declaration which represents the finding of the Attorney-General on matters critical to the making of the control order, and without the right to a fair hearing, means that the judicial function actually performed by the Magistrates Court is significantly impaired in a manner which is incompatible with its institutional integrity. The difficulty is not removed by providing a right of appeal to this Court. The Attorney-General's certificate is equally binding on this Court which has its own institutional integrity impaired in the same way.