

## **THE LAW OF THE RULER?**

Keynote Address by:

**Nicholas Cowdery AM QC**  
Director of Public Prosecutions, NSW  
Past President, International Association of Prosecutors

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### INTRODUCTION

The title I have given to this address arises out of the misunderstanding that some people have of the rule of law – that so long as there is a law, so long as the ruler (even a democratic one) has made valid law, then the rule of law operates. The question mark is intended to prompt consideration of whether or not, at least in NSW, the criminal law at least has truly become the law of the ruler – without proper consideration of the requirements of the just rule of law, the separation of powers in our democratic system of government, the independence of the judiciary and the protection of human rights. I would like to make some observations on those requirements drawn from my own experience.

I am a legal practitioner and I regard the law as a tool for my work. I am keen to ensure that my tools are carefully and properly designed and constructed, fit for the purpose to which they will be put and practical and useful. I have become increasingly concerned that the criminal law in NSW does not satisfy those tests.

### PURPOSES OF THE LAW – CRIME AND PUNISHMENT

The overall purpose of the criminal law must surely be the protection of the community. *“The role of law is not to impose a particular moral or political agenda, but to maintain order, facilitate government, and protect human rights. The criminal law, in particular, should generally be governed by the ‘harm principle’, expanded to permit the protection of the vulnerable and to prevent serious alarm or offence... The system of justice should be fair, and penal sanctions accepted as a form of communal self-defence, subject to the constraint that responses should not exceed those reasonably necessary to protect the community and its members.”*<sup>1</sup> As noted, one specific important purpose of the law is to protect the human rights of those who are subject to it. This requires a balancing of apparently conflicting considerations.

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<sup>1</sup> “The Quest for Justice”, Ken Crispin, Scribe, 2010 (page 54)

Crime is created by rules that are imposed upon the community with its agreement (in a democratic system). Human nature being what it is, there will still be those who break the rules. We need to find ways of dealing with those breaches that will provide future protection as they deal with the instant infractions. Those ways must also be broadly consistent with the values, aims and desires of the community in whose name the criminal justice system operates and, of course, consistent with the broad principles of human rights.

Don Weatherburn<sup>2</sup> describes the hallmarks of a rational approach to crime control as:

- adequate investment in measurement and monitoring of crime and offending;
- open access to crime and justice information;
- reliance on evidence in the development of policy;
- commitment to rigorous evaluation; and
- a flexible and eclectic approach to control.

He also describes how Australia is falling short on all those indicators. We can do better, especially in NSW.

One stand-out area in which our present approaches have been proven to be inadequate and inappropriate is in the area of the prohibition of illicit drugs. Ken Crispin says: “*Crime and punishment remains one of the very few areas of public policy that is largely uninfluenced by careful consideration of the causes of the problems or how those causes might be effectively addressed.*”<sup>3</sup> In relation to laws against drugs he says: “*In blindly adhering to our present policies, we are trampling on people’s rights, endangering lives, and causing untold misery and hardship. This is making the problem worse rather than better. It is also morally unsustainable.*”<sup>4</sup>

Yet what hope is there of persuading any politician in power to alter course and move towards the licensing and regulation of illicit drugs by treating drugs as the health and social problem that they are, rather than a law and order issue?<sup>5</sup>

In general terms in criminal justice, vicarious revenge seems to guide the politicians. It is politely called retribution. Revenge is trumpeted by the media. It resonates in the minds of the unthinking and uninformed. It buys votes. But we all become its victims, if only in our pockets.

In a column in the Sydney Morning Herald on 28 April 2010 Ross Gittins noted that: “*Modern politicians have become so adept at monitoring public opinion that they’ve developed a preference for wanting to be seen fixing problems rather than to actually fix them. They purport to fix problems by doing whatever the punters and media commentators imagine should be done rather than what the experts say is worth doing.*” He referred to the media giving an exaggerated impression of the extent of crime and voters responding by demanding that government do something about it.<sup>6</sup>

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<sup>2</sup> “Law and Order in Australia – Rhetoric and Reality”, Don Weatherburn, The Federation Press, 2004

<sup>3</sup> Op cit, page 163

<sup>4</sup> Op cit, page 217

<sup>5</sup> For a blueprint for regulation of drugs “After the War on Drugs”, see Transform Drug Policy Foundation (UK) at [www.tdpf.org.uk](http://www.tdpf.org.uk)

<sup>6</sup> In a column in the Sydney Morning Herald on 23 June 2010 Ross Gittins wrote:

The most common and apparently popular political response to real and imagined criminal threats to society is “tougher enforcement” – arrangements made for more police to arrest more people and for judges and magistrates to lock them away for longer. Of course, figures from the NSW Bureau of Crime Statistics and Research have shown that the rates for most crimes have been steadily falling or remaining constant for years. But the rate of imprisonment – numbers of persons sentenced and lengths of sentences – has been steadily increasing. Politicians say that this is the cause of the crime statistics, but is it?

It is also notable that at present in NSW almost 60 % of prisoners reoffend and return to prison. While there might be a small temporary effect on the rate of offending made by imprisonment (e.g. by incapacitation – for a time – of serial breakers and enterers) in Aboriginal communities the effect is the other way – locking up people leads to more being locked up. And while a little over 2% of the population of NSW is Aboriginal-identified, over 20% of the prison population is Aboriginal. In his farewell speech on 27 May 2010 Chief Justice Martin of the Northern Territory voiced his anguish about the place of Aborigines generally in criminal justice, saying that gaol had become an ineffective means of rehabilitating people.

In NSW there is a group calling itself the Crime and Justice Reform Committee which maintains that not only is prison a bad experience for all concerned (as, no doubt, it is), it is less cost-effective than other options that would reduce crime rates even more. The Committee cites the denial of bail and longer sentences, but also breakdowns in NSW in managing mental health, early childhood intervention, infrastructure development and consequent job growth, public housing and so on, as contributing to the gaol population. It advocates the greater use of alternatives to imprisonment, such as expansion of the Drug Court, for more cost-effective reduction of offending.

The media’s wrong-headed response to these issues was typified recently by none other than the Daily Telegraph. The government held a media conference on 10 June 2010 to announce the commencement of Intensive Correction Orders, to replace Periodic Detention. By these orders offenders will be intensively monitored in the community while they attend rehabilitative and therapeutic treatment programs. Any

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„Many people assume the media give them a representative picture of what's going on in the world beyond their own experience. But this is a misunderstanding of the role of the news media and the nature of "news". The media select from all the things happening in the world only those things they consider "newsworthy" and thus worth drawing to our attention. What is newsworthy? Anything the media believe their audience will find interesting and nothing they fear the audience will find boring. What's interesting? Anything unusual. But also anything threatening. It's perfectly clear that people find bad news more interesting than good news, which is why the media give prominence to things that are going wrong and say little about things that are going well. Most of what's happening in the world is highly predictable and terribly ordinary. This means much news is selected because it's unrepresentative. So there's a high risk it will leave people with a mistaken impression of what's happening in the world. Journalists like to believe everything they report is new. In truth, it's often just a new example of a familiar story, one the journos know the audience loves to hear again. Sometimes a new, offbeat angle is ignored so the story can be forced to fit a tried-and-true formula. A lot of news is selected because it will appeal to the audience's prejudices or stir people's emotions in the way they like to be stirred.,,

breaches of conditions will see full time imprisonment imposed. The announcement was received approvingly by virtually all media outlets and victims' groups – but the Daily Telegraph sensationally reported the criticism by one victims' advocate (not in the mainstream) and announced in headlines that this would mean “Get Out of Jail Free” (page 1) and “Sentenced to TV and brekkie in bed” (page 7) and that recipients of the orders would serve sentences “in the luxury of their homes”. That reportage was appropriately dealt with by ABC TV's Media Watch program on 21 June 2010 – but it shows how the media, apparently deliberately and in the face of the evidence, does plant false information most forcefully in the minds of the uninformed public. (The report was clearly aimed at the present Premier as part of the newspaper's current anti-government campaign; but the scheme pre-dates Ms Keneally by two Premiers and has the support of the NSW Sentencing Council. The report also contradicted a Daily Telegraph editorial of several years before in which such diversionary schemes were advocated.)

## RIGHTS

Human rights cannot be and are not ignored in the criminal justice system. For at least the last 60 years prosecutors have been increasingly required to incorporate into the execution of their difficult duties the observance and protection of the human rights of all involved in the criminal justice process and to do that in the application of the just rule of law. There are some documentary imperatives for that.

The UN Universal Declaration of Human Rights of 1948 (UDHR) requires it. The UN International Covenant on Civil and Political Rights (ICCPR) details it (especially Article 14).

The International Association of Prosecutors (IAP) Standards give it more immediate legitimacy and force. In addition, the IAP has published the Human Rights Manual for Prosecutors, the second edition of which is now available (see [www.iap-association.org](http://www.iap-association.org) ). Its Human Rights Training Package has recently been finalised. The IAP is also a body with consultative status with the UN's ECOSOC.

The UN Vienna Declaration and Programme of Action of 1993 noted that:

*“The administration of justice, including law enforcement and prosecutorial agencies and, specially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realisation of human rights and indispensable to the process of democracy and sustainable development.”*

In 1994, following on the Vienna conference, the UN General Assembly prepared a Plan of Action for the UN Decade for Human Rights Education (1995-2004) calling for special attention to be given to:

*“the training of police, prison officials, lawyers, judges ... and other groups which are in a particular position to effect the realisation of human rights.”*

So the obligation on all criminal legal practitioners and criminal justice operatives is clear. The legal regime applicable in any jurisdiction must be applied consistently with the protection of human rights.

We all (including especially prosecutors) need to be alert to threats to and the erosion of rights and be proactive in preventing them. This is particularly so when the community, rightly or not, feels itself under threat from particular forms of usually transient offending. It is exactly when the risk of abuse is at its highest, often as a result of media and political agitation, that particular efforts need to be made to ensure that the right balance between community protection and the protection of individual rights mentioned above has been struck. (Almost all aspects of criminal justice involve balance).

In 2000 the Hon Arthur Chaskalson, National Director of the Legal Resources Centres in South Africa and inaugural President of the Constitutional Court of that country, addressed a Public Interest Advocacy Centre (PIAC) dinner in Sydney. He said:

*“... (C)ourts are the institutions to which people in democratic societies turn for the protection of their rights and no one has greater responsibility for promoting and protecting human rights than judges and lawyers. If that protection is lacking, if institutions fail, the consequences can be catastrophic. ... Although South Africa was ruled by a minority regime the same course could (also) be followed ... by majority governments, where the opposition is weak and the courts and the legal profession are either not powerful enough nor vigilant enough to resist incursions upon freedom. ... (F)irst incursions into the protection of human rights are often the most dangerous, for they begin a process of erosion which is difficult to stop once it has begun. ... (T)he erosion of the power and independence of courts, and the lack of vigilance by lawyers, judges, and organs of civil society, permit those who should be held accountable for their conduct, to go free.”*

At the end of her term as President of the NSW Bar Association in 2001, Ruth McColl SC (now a Judge of Appeal in NSW) sounded a timely warning for us all. In her final column in the Bar's monthly newsletter she wrote:

*"Lawyers tend to take these core values [i.e. 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."*

The corrupting force may not be just responses to opinion polls. These influences may be exerted openly or covertly by politicians, the media or rulers and policy makers of all kinds for many reasons. We cannot know what is in the minds of our rulers, what plans they may have for the future, so there may be no early warning to be had there. But we can know what they do, the way they act – and we can look to their actions

and to events surrounding them to draw conclusions about the course that is likely to be taken in the future.

It matters not that the motives of the urgers or policy makers may be honourable. This is not a new challenge; and many years ago in 1928 Justice Brandeis warned in *Olmstead v United States* (277 US 438,479):

*"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."*

It is our obligation to assist them towards that understanding.

## POLITICISATION OF LAWMAKING

It is not overstating the situation to say that on occasions the lawmakers have taken their drafting instructions from the most prominent rantings of the tabloid media. There have been many examples of inappropriate knee-jerk political reaction, often ultimately demonstrating the truth of the old adage that "bad cases make bad law"; but one will suffice. When legislation was being introduced for standard non-parole periods (Division 1A, Part 4 of the Crimes (Sentencing Procedure) Act 1999) a report of a particularly nasty case appeared the same day on the front page of the Daily Telegraph with a complaint about the leniency of the sentence imposed. That is how sub-sections 61M(1) and (2) of the Crimes Act 1900 came to be included in the Table of Standard Non-Parole Periods (numbered as 9A and 9B at the last moment).

Sometimes legislation is the product of the most informal of procedures. Section 51B of the Crimes Act 1900 relating to police pursuits was inserted this year and became operational on 18 March 2010. It was driven by Police Association representations to the Attorney General in which draft legislation was suggested that would have been substantially unworkable and by the Association's calls upon the Premier to act in response to an individual (and tragic) case. Direct consultations by the Attorney General, fortunately, resulted in legislation that can be effective (and has been used). I suspect that the consultations were made primarily to strengthen the Minister's hand in dealing with the Police representations, but they did serve a useful purpose. That is an instance, however, of lawmaking with minimal consultation and in great haste. Sometimes my Office is not consulted at all about planned criminal legislation. At other times, however, we have been able to have substantial input into criminal legislation and I suggest that we have a proper role to play in that process.

In his valedictory speech in the Legislative Assembly on 23 November 2006, the former Attorney General, Bob Debus, boasted of the 258 legal bills passed through the Parliament in the previous six years, being one third of all bills passed. The pace has not slackened under the present Attorney General. Much of this legislation, at least so far as the criminal law is concerned, has been to tinker at the margins of substance and procedure in an *ad hoc* fashion, often (as with changes to bail laws) in response to unusual and atypical situations and to appease the latest demand for ever more punitive measures to be applied in the criminal justice system.

## PUNITIVENESS

The trend in lawmaking and in political commentary in NSW has been for some time towards greater punitiveness in the disposition of criminal cases – the prescription of more restrictive procedures to apply to accused persons, of more and harsher penalties for criminal conduct and of the extension of punishment beyond the sentences imposed by trial judges.

On 2 June 2010 Chief Judge Blanch of the District Court of NSW spoke at a conference of Legal Aid Commission lawyers. He drew comparisons between NSW and Victoria. In 2009 there were 150 people in custody (on average each day) per 100,000 in NSW and half that in Victoria. In NSW for the 2008-09 financial year just over a billion dollars were spent on Corrective Services. If we did whatever is being done in Victoria, he said, we could spend half that amount. (And it might also be remarked that if imprisonment reduces criminal offending, then NSW's crime rates should be significantly lower than those in Victoria – but they are not. Rates of personal assault, murder, robbery, break-ins, burglary and car theft are lower in Victoria.)

Furthermore, in NSW 25% of the prison population is unsentenced – on remand. In Victoria the figure is 18% (where the delays in coming to trial, however, are significantly greater than in NSW).

The Bail Act 1978 (NSW) was passed substantially to address a burgeoning number of prisoners on remand. Presumptions in favour of bail were enacted in some cases and offences and situations stipulated where no presumption applied or there was a presumption against bail. We seem to have come full circle with the progressively legislated removal of presumptions in favour of bail and the enactment of presumptions against – often in response to individual and atypical cases that have received publicity. Many people refused bail are ultimately acquitted and many receive non-custodial dispositions of their cases. There is no recourse to compensation in such circumstances (as there is in some other countries, especially in Scandinavia).

The editorials in the Sydney Morning Herald and The Age of 20 April 2010 had referred to the “Disappearing right of bail” and to the matters raised above. They said: *“As the NSW government steadily piles on new categories of serious crime in response to the latest crime scare..., ramps up mandatory sentences, restricts bail eligibility, and most recently, throws away the key for convicts perceived as unrepentant, we are entitled to ask what returns in safety we are getting from our billion-dollar-a-year jail industry. On a more humane calculation, we should be asking what damage is being done to individuals and society by this pursuit of vengeance... Of course, there will always be a few who go out and commit new crimes while on bail or parole, and set the tabloid dogs barking again at the Attorney General. If jail worked at reform, the lock-'em-up philosophy might have more appeal. Unfortunately, the statistics show NSW also has a much higher recidivism rate than Victoria.”*

The Bail Reform Alliance in NSW has been set up to address these issues, headed by a former magistrate.

A NSW Parliamentary Briefing Paper<sup>7</sup> examines the bail issue in great detail. It concludes: *“Changes to bail laws since 2002 have followed the dominant trend of making it more difficult for accused persons to obtain bail: both in relation to a range of offences, and where the accused person is regarded as a ‘repeat offender’. These changes have been justified on the basis that they provide greater protection for the community against the risk that such persons will commit offences while awaiting trial. However, critics have argued that the changes have largely been ad hoc responses to particular crime incidents, and that a good case has not been made out for reforms that have undermined an accused person’s right to the presumption of innocence.”*

The Chief Judge in his paper put forward as another reason for the growth in the gaol population the operation of the Standard Non-Parole Period regime. The stated objective of the scheme was limited to “promoting consistency and transparency in sentencing”<sup>8</sup>, but the intention of its proponents must also have been to increase sentences for the offences listed. (In the absence of information about how offences were selected and how the standard non-parole periods were set – ranging from 17% to 70% of the maximum penalties prescribed – it is not possible to be sure.) While, following the decision in *R v Way*<sup>9</sup>, judges have skilfully avoided the worst of the regime, there is no doubt that it has resulted in more and longer sentences of imprisonment. In Monograph 33 (May 2010)<sup>10</sup> the NSW Judicial Commission has reported that:

- the use of full-time imprisonment increased, at least in respect of items 9A and 9B (from 37.3% to 59.3% and from 57.1% to 81.3% respectively);
- lengths of non-parole periods and full terms increased in the 4 items measurable, the largest being of 125% and 60% respectively for offences against section 33 of the Crimes Act 1900;
- uniformity and consistency of sentences improved;
- cases in which there had been pleas of guilty (for which the scheme was not designed) also showed increases in sentences (apparently as a result of an upwards shift in sentencing patterns generally).

The Chief Judge said: *“40 years ago murderers received a life sentence but most were released after serving 10 – 15 years and that was generally regarded as the most serious of offences. It was unusual for a prisoner to spend more than 20 years in gaol. It was then generally accepted that prisoners became institutionalised after serving 5 years in gaol and that after 10 years, they would have extreme difficulty coping with living by themselves in the community. I suspect little has changed in that regard. We also should ask if our community is now any safer and less prone to crime because of the increase in sentences.”*

The upwards shift in sentencing was substantially accelerated by the Sentencing Act 1989 and the introduction of “truth in sentencing”. It also brought in “true life”

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<sup>7</sup> “Bail law: developments, debate and statistics”, Briefing Paper 5/2010, Lenny Roth, NSW Parliamentary Library Research Service, June 2010

<sup>8</sup> Explanatory Note to the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002

<sup>9</sup> [2004] NSWCCA 131

<sup>10</sup> “The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales”

sentences, of which there are presently about 50 being served (and some lifers have died in custody).

The Chief Judge asked if we should review a number of practices, including amending or abolishing the Standard Non-Parole Period regime: *“As I have said, gaol sentences must be imposed in many cases and in some the sentence should be substantial but the real question is how much is enough. You would have a good understanding of just how difficult serving time in gaol is. As you know, in the gaol population there is an over representation of people with mental disabilities, people with very low IQs, people with personality disorders and people from severely disadvantaged backgrounds. That is a difficult environment in which to live.*

*Sir Winston Churchill said in 1912: ‘The mood and temper of the public in relation to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of a country. A calm, dispassionate recognition of the rights of the accused and even of the convicted criminal ... (is a) sign and proof of the living virtue in it.’*

*The question how much is enough assumes real significance in the context of a prison budget of more than a billion dollars a year.”*

As I have already mentioned, recidivism is a significant issue in NSW. Ross Gittins in his column of 28 April 2010 said: *“...how would you go about reducing recidivism? You’d do it by putting a lot more effort into rehabilitation, while people were in jail or after they’d been released.*

*Would it work? According to a big US study, yes it would. It finds (in descending order of cost-effectiveness) vocational education in prison, intensive supervision using treatment-oriented programs, primary – or secondary-level education in prison, cognitive behavioural therapy, and drug treatment in the community are particularly effective.*

*These programs would have a cost, but they’d end up saving a lot more than they cost. And, of course, as well as saving the taxpayer money they’d achieve a reduction in crime – the thing we supposedly care most about.*

*The one thing they wouldn’t be is politically sexy – which may explain the public’s, the media’s and the politicians’ lack of interest.”*

## AFTERMATH OF THE TERRORIST THREAT

These difficulties with the modern development of familiar laws have been compounded by the creation of new laws for new applications.

Australia (and NSW) acquired anti-terrorism laws after the “9/11” events and the Bali bombings. I do not pause here to consider the necessity for or the appropriateness of the legislation, although anyone supportive of the just rule of law should have concerns about some aspects of it. The Clarke Report into the Haneef case<sup>11</sup> identifies many of them. However, legislation at federal and state levels seems to have been received as a signal for the legislators to expand such measures from exceptional and clearly dangerous circumstances requiring exceptional responses into areas of what

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<sup>11</sup> [www.haneefcaseinquiry.gov.au](http://www.haneefcaseinquiry.gov.au)

might be described as “ordinary crime” – to push the envelope of measures available to law enforcement with the anti-terrorism laws as a guide. I query the desirability, effectiveness or legitimacy of such a course.

The International Bar Association has addressed the principles to be applied in the legal responses to the threat of terrorism in its report *International Terrorism: Legal Challenges and Responses*<sup>12</sup>. It is well possible to react in a principled and effective way while observing the principles of the just rule of law.

However, we have seen inappropriate measures taken against asylum seekers, against Vivienne Solon and Cornelia Rau and against children in immigration detention.

We have seen the bold (but thankfully ill-fated) move of the *Kable* legislation in NSW (prior to 2001)<sup>13</sup> follow through to serious sex offenders<sup>14</sup>, fortified by anti-terrorism measures and the High Court’s decision in *Fardon*<sup>15</sup>. The UN Human Rights Committee, in cases from NSW and Queensland<sup>16</sup>, reported in March 2010 that continuing detention or extended supervision are double punishment and contrary to Article 9 of the ICCPR – the Australian Government has 180 days in which to respond. The NSW government has talked about extending such measures to serious violent offenders who do not satisfactorily participate in rehabilitation programs in gaol. The Premier was reported to have ordered Corrective Services to begin an audit of the 750 “worst of the worst” prisoners in NSW. (I understand that it may be possible to identify about 20 prisoners to whom this scheme could apply.) The Council for Civil Liberties (CCL) said in response: “*The rule of law requires politicians to set the framework of justice and for judges to deliver sentences away from political influence. The prison system is there to encourage prisoners to reform but, if they know they can effectively be resentenced by the government, there is no incentive to reform.*”<sup>17</sup>

One serious difficulty with legislation of this kind is the prediction of future offending or future dangerousness. Another (illustrated starkly by the case of Denis Ferguson) is the community’s and the media’s responses to having such persons under extended supervision orders in the community.

In South Australia<sup>18</sup>, NSW and Queensland<sup>19</sup> we have seen legislation described as laws against “bikie gangs” and as “gang laws”. However, it is not confined in its terms to “outlaw motorcycle gangs” and its potential reach is much broader. It could apply, for instance, to political parties, labour unions, religious groups or charities

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<sup>12</sup> A report by the IBA’s Task Force on International Terrorism, 2003.

Recommendation 9 states: “*States should not use the fight against terrorism as a pretext to adopt measures which unlawfully restrict the rights to freedom of expression, religion, opinion and belief, nor the rights of minorities.*”

Recommendation 11 states: *All restrictions of substantive human rights must be expressly provided by law, must be necessary and proportionate, and must not exclude the possibility of judicial review.*”

<sup>13</sup> *Kable v The Director of Public Prosecutions for New South Wales* [1996] HCA 24

<sup>14</sup> Crimes (Serious Sex Offenders) Act 2006

<sup>15</sup> *Fardon v The Attorney General for the State of Queensland* [2004] HCA 46

<sup>16</sup> Under the Dangerous Prisoners (Sexual Offenders) Act 2003

<sup>17</sup> AAP, 11 April 2010

<sup>18</sup> Serious and Organised Crime (Control) Act 2008

<sup>19</sup> Criminal Organisation Act 2009

(among many other possibilities). [I have expressed my personal views, as follow, on my Office's website with the qualification, of course, that if my Office is required to prosecute in accordance with this or any other law, that will be done.]

The Crimes (Criminal Organisations Control) Act 2009 (NSW) [the Act] became law with insufficient community consultation and over the deep concerns and protests of the NSW Bar Association, the NSW Law Society, academics, the CCL and many others. My Office was not consulted. While both the state government and the opposition may be right that something more needs to be done about bikie gangs and criminal groups, especially when they involve themselves in an organised manner in drug manufacture and supply and crimes of violence, this very troubling legislation (which in NSW borrows from and seeks to "improve upon" the related legislation in South Australia) is another giant leap backward for human rights and the separation of powers – in short, the rule of law in NSW. One questions the need for further legislation in this area at all. There is already anti-criminal-group legislation in Division 5 of Part 3A of the Crimes Act 1900, enacted in 2007, under which successful prosecutions have been brought (including pleas of guilty). We have successfully prosecuted members of motorcycle gangs for serious drug and other offences. There may be more a need for better enforcement, than for new legal powers.

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

The machinery of the Act works in two stages. First, the Police Commissioner may apply to have an organisation declared under the Act by an "eligible" Supreme Court judge. That judge must be satisfied (section 9(1)) that members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and the organisation represents a risk to public safety and order in NSW. "*Serious criminal activity*" is defined to connect with "*serious indictable offences*" which are offences punishable by imprisonment for 5 years or more.

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

Section 26 of the Act makes it an offence for a controlled member of a declared organisation to associate (*simpliciter*) with another controlled member of the same organisation. The purpose of any such association is irrelevant to liability. A first offence is punishable with a maximum penalty of 2 years imprisonment; a second or subsequent offence is liable to a maximum penalty of 5 years imprisonment. Certain reasonable circumstances of association are exempted (for example, between "*close*

*family members*” or in the course of a lawful occupation, business or profession, during education courses, etc – including in lawful custody), but the onus is on the controlled person to prove that the association falls within such a reasonable exemption. The making of a final control order has the effect of revoking any authority or licence that the person had to carry on any prescribed activity (for example and from a long list, operating a pawn broking business, a tow truck, selling or repairing motor vehicles, selling liquor, possessing a firearm, acting as a security agent, operating a casino).

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

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

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

- Only an “*eligible*” Supreme Court judge can declare an organisation under the Act. (Similar officers have been described in legislation relating to anti-terrorism, covert search warrants and surveillance devices.) To be eligible a judge must first consent to being declared eligible for this purpose and then be so declared by the Attorney General, who has the power to declare (or not to declare) him or her eligible. Therefore, only judges willing to enforce the legislation and acceptable to the Attorney General become involved at that stage. (Until the original legislation was amended, the Attorney General also had the power to withdraw or qualify approval as an eligible judge.)
- Whereas section 24 of the Act creates a right of appeal against the making of a control order against a person, section 35 purports, in the widest possible terms, otherwise to oust any review by the Supreme Court or any other review body (excepting investigations or proceedings under the *Independent Commission Against Corruption Act*) of a declaration or order made against an organisation or a person and to deny any right of appeal or review even when there has been a breach of the rules of procedural fairness (natural justice).
- An “eligible” judge (in the case of an application for a declaration against an organisation) or any Supreme Court judge (in the case of an application in respect of a control order against a member of a declared organisation) hearing an application, is by section 28(3) “*to take steps to maintain the confidentiality of information that [they consider] to be properly classified by the Commissioner as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the*

*parties to the proceedings and their representatives and the public*". One can only wonder what "argument" there can possibly be when affected parties and their legal representatives are excluded from the proceedings. Procedural fairness is not a requirement.

- Part 3 of the Act empowers any judge of the Supreme Court to make control orders against an individual member or former member of an organisation. The definition of "member" of an organisation in section 3 is alarmingly wide – for example, it includes a "*prospective member (however described)*". It also includes "*a person who is treated by the organisation or persons who belong to the organisation, in some way, as if he or she belonged to the organisation*". This is extraordinarily broad-reaching – this criterion could be fulfilled without the person himself having any intention of being part of the organisation and could be established without any direct evidence of that person's actual involvement with the organisation.
- Section 13 provides that the rules of evidence do not apply to hearings of applications for a declaration of an organisation. Are organisations to be declared on the basis of hearsay upon hearsay, or a police intelligence officer's "hunch", or a report of an anonymous telephone call? No limits are set.
- Section 32 provides that "*Any question of fact to be decided in proceedings under this Act is to be decided on the balance of probabilities*" (this does not apply to proceedings for offences under the Act). Such a standard is insufficiently rigorous for the removal of a right as fundamental as the right to freedom of association. Indeed, the Act purports to remove the rights to freedom of association and expression in circumstances that do not come within the permissible exceptions described in the ICCPR – for national security, public order, etc.
- Section 13(2) of the Act provides that an "eligible" judge is not required to provide any grounds or reasons for his or her decision in respect of a declaration against an organisation (except to the Ombudsman conducting a review under section 39). This is entirely contrary to the general practice in modern jurisprudence that judges should give public reasons for their decisions.
- The placing of the burden of proof upon a controlled person to establish that an association with another controlled person falls within the exemptions under the Act (for example, close family members) is a draconian measure, reminiscent of reverse onus provisions that were in place for a time in Northern Ireland during the "troubles" where extraordinary measures were considered appropriate in a time of general emergency. This is highly unusual and almost always inappropriate in the context of legislation creating potential criminal consequences.
- The Act criminalises conduct other than by rules of general application in the community – another infringement of the rule of law.

Further legislation was passed targeting the recruitment of a person to be a member of a declared organisation, enabling the substitute service of notices on those subject to applications to be placed under control orders and authorising search warrants to be issued by “eligible” judges upon reasonable suspicion (rather than reasonable belief) – which may be based only upon “criminal intelligence”.

In response to a critical article about such legislation in *The Australian* on 16 June 2010 the NSW Attorney General, in a letter to the Editor, affirmed that the Police Commissioner could rely on criminal intelligence in taking action under the Act. He said: *“The NSW legislation defines criminal intelligence as information about criminal activity that, if disclosed, may prejudice an investigation, expose a law enforcement source or endanger someone’s life of physical safety. If a judge is not satisfied that this definition is met, the Police Commissioner can be asked to withdraw that information or make it available to the other parties. The involvement of high-level judicial scrutiny is an important safeguard in the process by which declarations and orders under the legislation can be made and a critical variation between NSW and South Australian legislation.”*

No applications have been made under the NSW Act yet, but I believe that one is pending. The South Australian legislation is presently the subject of proceedings before the High Court<sup>20</sup>.

The APEC legislation<sup>21</sup> was another recent example of a response to the perceived need for extraordinary measures for public control. (Remember the Chasers...) The so-called World Youth Day was another – when Ian Bryce rolled out his fake “Popemobile”, was charged with an inappropriate offence (causing unreasonable annoyance, after an even more inappropriate traffic charge was withdrawn) which ultimately was withdrawn – with the involvement and assistance of the CCL. The V8 Supercars arrangements are another example of the compromise by government of the rights of sections of society for political expedience. One must question the need for such action and the expansion of executive power in these ways with penal consequences.

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

## CHARTER OF RIGHTS

For now, at least, Australia is not to have a national charter of rights. Instead we have pending the Human Rights (Parliamentary Scrutiny) Bill 2010. It seems unlikely that NSW will “go it alone”, especially with the present government.

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<sup>20</sup> *The State of South Australia v Totani & Anor* [2010] HCA Trans 95 (20 April 2010), Trans 96 (21 April 2010), Trans 157 (17 June 2010)

<sup>21</sup> APEC Meeting (Police Powers) Act 2007

Richard Ackland wrote in the Sydney Morning Herald on 2 April 2010, after the Victorian Court of Appeal had ruled in the Momcilovic case that legislation removing the presumption of innocence was incompatible with Victoria's Charter of Rights and Responsibilities: *"We were warned the sky would fall in once unelected judges started to tinker with the handiwork of elected politicians. Just about the entire Liberal Party, various Laborites and many of the Murdoch commentators were lecturing us sternly about this. The central proposition was that a charter of rights would shift power from the Parliament to the courts. Further, in the words of one newspaper sage, this will result in a "transformation of Australia's political culture". (Let's hope so.) The rhetoric on this topic has been up there with the great moral panics of Australian history. Our way of life would be destroyed variously by Asian invasion, Communist invasion, Muslim rule, 'grubs' at Cronulla, lawlessness, fluoride and socialism."*

Let us hope that this debate has not died. A Charter may be the only effective defence against the law of the ruler.