

## Australian 'Bikie' Laws in the Absence of an Express Bill of Rights

In this article, I discuss so-called 'bikie' legislation introduced already in some Australian states and suggested in others. I will use this convenient name for the legislation,<sup>1</sup> though the Acts do not name 'bikie' or 'bikie gangs' as being the object or target of the legislation. In discussing the supposed need for such legislation, politicians often use the 'problem' of bikie gangs as a reason for such legislation, although as has been commented upon elsewhere, the perception of the connection between gangs and crime is often false.<sup>2</sup> Legislation has already been passed in South Australia (SA) and New South Wales (NSW); it is being canvassed in other States. Here I will focus largely on the South Australian model of legislation (and explain its New South Wales counterpart, where there are important differences), and consider the constitutionality of such legislation, given its impact on fundamental human rights. This discussion takes place in a context where Australia is one of the few western nations without an express Bill of Rights,<sup>3</sup> and has not enacted the *International Covenant on Civil and Political Rights* into legislation.

### *Serious and Organised Crime (Control) Act 2008 (SA)*

Section 8 of the Act allows the Commissioner of Police to apply to the Attorney-General for a declaration. The application must be in writing, identify the organisation the subject of the request, set out the supporting information for the application, and details of any previous application. Once the Attorney receives the application, they must publicly advertise that the application has been made, and invite members of the public to comment on it.<sup>4</sup> There is no requirement to give the organisation the subject of the request a specific notice of the application.

#### *(a) When a Declaration Can be Made*

If the Attorney-General thinks members of the organisation associate for the purposes of organising or planning serious criminal activity (we will call this a 'criminal purpose'), and the organisation represents a risk to public safety and order in the State, they may make a declaration about the organisation. Serious criminal activity mostly means indictable offences. In considering whether or not to make the declaration, relevant factors are:

- (a) information suggesting a link between the organisation and serious criminal activity;
- (b) criminal convictions recorded against current or former members of the organisation, or those who associate, or have associated, with members of the organisation;
- (c) information suggesting that current or former members of the organisation, or those who associate, or have associated, with such members, have been or are

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<sup>1</sup> This is the media's preferred form of reference for these laws.

<sup>2</sup> As Thomas Barker and Kelly Human recently put it, 'deviant clubs have always represented a small percentage of the motorcycle riding public but they receive the most attention and publicity': 'Crimes of the Big Four Motorcycle Gangs' (2009) 37 *Journal of Criminal Justice* 174; Louis Holland 'Can Gang Recruitment Be Stopped? An Analysis of the Social and Legal Factors Affecting Anti-Gang Legislation?' (1995) 21 *Journal of Contemporary Law* 259, 263.

<sup>3</sup> There is currently a review of the extent to which human rights are adequately protected in Australia. Two regional jurisdictions, Victoria and the Australian Capital Territory, have introduced human rights legislation.

<sup>4</sup> Section 9.

involved in serious criminal activity (directly or indirectly, and regardless of whether the conduct has resulted in any criminal convictions);  
(d) information suggesting members of an interstate or overseas chapter or branch of the organisation associate to organise or plan serious criminal activity;  
(e) public submissions on the matter; and  
(f) other relevant matter.<sup>5</sup>

It doesn't matter whether all or only some members of the association associate for the criminal purpose, provided those that do form a 'significant group within the organisation' either in terms of numbers or influence. It doesn't matter whether they associate for other non-criminal purposes as well. It doesn't matter whether the association for the criminal purpose relates to the same serious criminal activities or different ones.<sup>6</sup> If the Attorney-General makes a declaration, they are not required to provide reasons<sup>7</sup>.

*(b) The Effect of the Declaration*

The making of a declaration affects members of the declared organisation or associates of members.

*(i) how it affects members*

Section 14 of the South Australian legislation provides that the Court *must*, on application by the Commissioner, make a control order against a defendant if they are satisfied on the balance of probabilities that they are a member of the declared organisation. It is not necessary to give notice to any person before a control order is made.<sup>8</sup> If the defendant is a member of a declared organisation, the order *must* prohibit the defendant from associating with others who are members of declared organisations, and possessing dangerous articles or prohibited weapons.

*(ii) how it affects current non-members*

The court *may* also make an order against a person (a) who has been a member, (b) who has engaged in or engages in serious criminal activity and regularly associates with members of the declared organisation, or (c) the defendant has engaged in serious criminal activity and regularly associates with others who do the same.

The control order *may* prohibit the defendant from associating or communicating with certain persons of a certain class, enter or be near the specified premises or those of a specified class (eg premises belonging to a 'bikie' group), or from having specified

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<sup>5</sup> This list is very similar to the list of factors that an 'eligible judge' hearing such an application in New South Wales may consider in making the application to have an organisation declared under the *Crimes (Criminal Organisations Control) Act 2009* (NSW)(s9(2)). A key difference between the New South Wales law and the South Australian law is that the application to have the organisation declared in New South Wales takes place before a judge, while in South Australia the order is made by a member of the Executive. The New South Wales legislation also provides for notice of the application to be given to the members of the organisation subject to the application, allowing them to make submissions to the eligible judge (subject to the provisions about 'criminal intelligence').

<sup>6</sup> Section 10(4).

<sup>7</sup> Section 13(1).

<sup>8</sup> Section 14(3). The New South Wales law also provides that a control order application can be heard against a person in their absence (s19(4)).

articles or those of a particular class (eg weapons).<sup>9</sup> Relevant factors include whether the defendant's behaviour, or history of behaviour, suggests that they will engage in serious criminal activity, whether the order might stop the defendant engaging in serious criminal activity, the defendant's prior record and that of any of their associates named in the application, any legitimate reason the defendant might have for associating with a person specified in the application, and other relevant matters.<sup>10</sup>

A control order must be directed at the person specified in the application, set out the terms of the order, including a statement of reasons, and set out rights of objection.<sup>11</sup> However, information that meets the definition of 'criminal intelligence' must not be disclosed in giving reasons, as I discuss below. The order must be served on the person personally.<sup>12</sup> The person can appeal the making of the order to a magistrate who might confirm, vary or revoke the order.<sup>13</sup> The magistrate's decision can be further appealed to the Supreme Court.<sup>14</sup> It is an offence to not comply with a control order, with a maximum five year jail term. It is a defence if the person did not know that they were contravening the control order as long as they were not reckless.<sup>15</sup>

Section 27 of the New South Wales Act provides a further consequence of the making of a control order in relation to a person; that any authorisation they possess to carry on a 'prescribed activity' is automatically suspended until the interim or control order is revoked. The person cannot apply for permission to conduct a 'prescribed activity' while the order is in place. The section provides examples of prescribed activities including to work in the security industry, carry on a pawnbroker business, work as a commercial agent, operate a tow truck business, sell motor vehicles, work as a mechanic, sell liquor, or work in the racing industry.

#### *Disclosure of Certain Types of Evidence – Criminal Intelligence*

Section 21 of the South Australian law (with similar provisions in s28 of the New South Wales Act) provides that no information provided by the Commissioner to a court for these proceedings may be disclosed to any person (other than the Attorney-General or the court), if the information is 'criminal intelligence'. This is defined in s3 as information relating to actual or suspected criminal activity (in the State or elsewhere) where disclosure could reasonably be expected to prejudice criminal investigations, enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement, or to endanger a person's life or physical safety.

#### *Public Safety Orders*

Section 23 of the South Australian law allows a senior police officer to make a public safety order if they believe that the presence of the person, or persons of that class, at

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<sup>9</sup> Section 14(5); the equivalent provision in New South Wales is s26(1) which provides that a controlled member of a declared organisation who associates with another controlled member of the declared organisation is guilty of an offence.

<sup>10</sup> Section 14(7) provides that upon making a control order, ancillary orders may be made, including one for the confiscation and disposal of a particular article, or authorising a police search of premises on which such an article is suspected to be located.

<sup>11</sup> Section 15.

<sup>12</sup> Section 15.

<sup>13</sup> Section 18. In New South Wales, the appeal is to the Court of Appeal (s24).

<sup>14</sup> Section 19.

<sup>15</sup> Section 22.

any premises or event, or within an area, poses a serious risk to public safety and security. Relevant factors include whether persons of that class have previously behaved in a way that poses serious risk to public safety or security or have a history of engaging in serious criminal activity, and whether they are or have been members of a declared organisation, subject to control orders or associated with such people. If the reason for the gathering is to conduct a protest, dissent or strike, the public interest in maintaining freedom to participate in such activities must be considered. It is also relevant to consider the risk involved in allowing the individuals to be there, whether they have legitimate reasons for doing so, whether other measures are available to manage the risk, and to what extent the order will mitigate the risk.

Any order made must contain reasons, unless they relate to ‘criminal intelligence’ as already defined. The maximum period of a public safety order is 72 hours.

#### *Criminal Associations*

Section 35 of the South Australian law provides that a person who associates at least six times during a period of 12 months with a person who is a member of a declared organisation or the subject of a control order is guilty of an offence. The maximum penalty is five years’ jail. The person accused must know the other person is a member of a declared organisation or the subject of a control order, or be reckless about that fact. It is also a crime for a person with certain criminal convictions to associate at least six times within a year with another such person. The maximum penalty is again five years’ imprisonment.

#### *Some Issues With This Legislation*

These laws have stirred great controversy. Recently, Brisbane barrister Mark Le Grand discussed them in *The Australian*. Le Grand, a lawyer experienced in the field of law enforcement and fighting organised crime, described the New South Wales laws thus:

This legislation represents the most complete abrogation of the citizen’s right to a fair trial that I have witnessed in four decades of practice.<sup>16</sup>

I will now discuss three specific areas of concern – infringement of a right to a fair trial, breach of the principles of separation of powers, and infringement of the right to freedom of association.

#### *(1) Infringement of a Right to a Fair Trial/Right to Due Process*

Two specific aspects of the South Australian regime will be considered in suggesting that the law infringes the right to a fair trial/right to due process– the use of ‘criminal intelligence’ in relation to the application, and the fact that the organisation may know of the proceedings against it until after a control order has been made. In spite of the absence of an express bill of rights or express inclusion of the right in the *Constitution*, the High Court of Australia has (arguably) accepted that the concept of due process is part of Australia’s constitutional arrangements.<sup>17</sup> In *Bass*, Gleeson CJ Gaudron

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<sup>16</sup> P23, *The Australian* April 25-26, 2009.

<sup>17</sup> *Bass v Permanent Trustee* (1999) 198 CLR 334, 359; *Nicholas v The Queen* (1998) 193 CLR 173; Fiona Wheeler ‘Due Process, Judicial Power and Chapter III in the New High Court’ (2004) 32 *Federal Law Review* 205; ‘The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia’ (1997) 23 *Monash University Law Review* 248; Janet Hope ‘A Constitutional

McHugh Gummow Hayne and Callinan JJ agreed that judicial power involved proceedings conducted in accordance with the judicial process, requiring the application of the law to facts as found, and that parties be given an opportunity to present their evidence and to challenge the evidence led against them. Of course, due process can mean different things to different people, but as Wheeler has noted, the judges have tended to express the concept in terms of fairness and impartiality.<sup>18</sup> The requirement of natural justice has been noted in this context.<sup>19</sup> It seems that this requirement is not confined to federal courts.<sup>20</sup>

(a) *criminal intelligence*

Both laws provide for the concept of ‘criminal intelligence’; the definition matters because any evidence within its meaning, in the case of the South Australian law, cannot be disclosed to the accused or their legal representative, and in the case of the New South Wales law, steps are to be taken to maintain the confidentiality of such information, steps which might include receiving evidence and hearing argument in private (ie without the accused and their legal representative). This means, of course, that a control order may be made, with serious consequences, against a person without their having the opportunity to see or test the evidence being used against them.

In other contexts, this has been objectionable. For example, in *Nicholas v The Queen*,<sup>21</sup> Gaudron J set out what was necessary for the due process in a Chapter III court to be maintained.<sup>22</sup> (Of course, State Courts are not Chapter III courts, but the principle of separation of powers can be drawn down from the Commonwealth *Constitution* to state courts, at least those with federal jurisdiction).<sup>23</sup> Her Honour stated:

Consistency with the essential nature of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with the rules and procedures which truly permit the facts to be ascertained, and in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law.<sup>24</sup>

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Right to a Fair Trial? Implications for the Reform of the Australian Criminal Justice System’ (1996) 24 *Federal Law Review* 173. In *Thomas v Mowbray* (2007) 233 CLR 307, 355 Gummow and Crennan JJ claimed High Court decisions did not establish a right to due process flowing from Chapter III, but agreed that legislation requiring a court to depart significantly from the methods and standards that have characterised judicial activities in the past may be offensive to Chapter III.

<sup>18</sup> Ibid; Gaudron J in *Re Nolan; Ex Parte Young* (1991) 172 CLR 460, 496 spoke of the judicial process as ‘protect(ing) the individual from arbitrary punishment and the arbitrary abrogation of rights by ensuring that punishment is not inflicted and rights are not interfered with other than in consequence of the fair and impartial application of the relevant law to facts which have been properly ascertained’.

<sup>19</sup> *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ Dawson and McHugh JJ). A good working definition of natural justice is provided in the judgment of Mason J in *Kioa v West* (1985) 159 CLR 550, 582: ‘it is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest in the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it’.

<sup>20</sup> *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 363 (Gaudron J) and 373 (Kirby J).

<sup>21</sup> (1998) 193 CLR 173.

<sup>22</sup> Chapter III of the Australian Constitution provides for the establishment of the federal judiciary.

<sup>23</sup> *Kable v Director of Public Prosecutions* (1996) 189 CLR 51.

<sup>24</sup> 208-209.

It is submitted that the application of the criminal intelligence exception discussed above can, in practice, mean that a person might not have the right to ‘meet the case made against him or her’, considered by Gaudron J to be fundamental. Gaudron J also saw it as essential that a process be adopted whereby the facts must be ascertained – traditionally, this occurs through sometimes robust cross-examination, an avenue again denied to a person in respect of evidence said to be ‘criminal intelligence’ in these cases. In *Dietrich*,<sup>25</sup> members of the High Court discussed the requirement of a fair trial, including that an accused be properly prepared for trial<sup>26</sup> and that evidence be discarded if its weight and credibility cannot be effectively tested.<sup>27</sup> A current member of the High Court concludes, in relation to cross-examination, that

No evidence given by one party affecting another party in the same litigation can be made admissible against the other party, unless there is a right to cross-examine.<sup>28</sup>

The right of a person to meet a case against them is also specified in international documents, including Article 14(3)(d) of the *International Covenant on Civil and Political Rights* (the right of an accused to be tried in their presence), Article 14(3)(e), the right to examine witnesses called against them. Article 6(3)(a) of the *European Convention on Human Rights* requires that an accused be informed promptly and in detail of the nature and cause of a case against them; be given adequate time and facilities to prepare a defence, and to have the right to examine witnesses. In *Hamdi v Rumsfeld*, the Supreme Court of the United States re-asserted the right of an accused terrorist to be given notice of the factual basis for his classification as an enemy combatant, and a fair chance to rebut the government’s assertions. The Court emphasised the right of the accused to challenge the government’s case:<sup>29</sup>

Any process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short ... An essential principle of due process is that a deprivation of life, liberty or property must be preceded by notice and opportunity for hearing appropriate to the nature of the case.<sup>30</sup>

In order to exercise their right to be heard, and in order to enjoy that right, they had to be notified of the application. The right to notice and an opportunity to be heard had to be granted at a meaningful time and in a meaningful manner.<sup>31</sup> Neither in the South Australian legislation nor the New South Wales legislation is there a

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<sup>25</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 311 (Mason CJ and McHugh J), Brennan J 323, Deane J 326, Toohey J 353 and Gaudron J 362.

<sup>26</sup> Deane J, 335.

<sup>27</sup> Gaudron J, 363.

<sup>28</sup> *Cross on Evidence: Seventh Australian Edition* (2004) 548.

<sup>29</sup> (2004) 542 US 507; see also *United States v Moussaoui* (2004, Court of Appeals 4<sup>th</sup> Circuit).

<sup>30</sup> *Hamdi v Rumsfeld* (2004) 542 US 507, 533, 537 (Rehnquist CJ, O’Connor Kennedy and Breyer JJ). The reference to ‘constitutionally short’ is a reference to due process, expressly guaranteed by the Fifth Amendment to the United States *Constitution*.

<sup>31</sup> 533. In the case of the South Australian legislation, arguably the notice provision is at the wrong time – a person’s right to challenge a control order comes AFTER it is made (s17), not prior. They may not even be aware that an application has been made in relation to them. The New South Wales legislation similarly does not require that particular members of the organisation, or the organisation itself, be given notice of the application – a newspaper advertisement and gazette notice are sufficient (s7). However, s8 does provide for a member of the organisation to make submissions in respect of the application, before a decision is made.

requirement that an association about whom an application for a control order is to be made be given specific notice.

Judgments in the majority in *Thomas v Mowbray* acknowledge in dicta the importance of the right of an accused to make full arguments, departure from which might be justified only on grounds of national security, and even in the context of terrorism offences some judges have expressed at least some ambivalence towards a lack of cross-examination on evidence.<sup>32</sup> In dissent, Kirby J would have invalidated the provisions challenged in that case; his reasons included that ‘the individual subject to an application or order may not be informed of particular evidence raised in the case against them’.<sup>33</sup>

This legislation, allowing a court to hear and interpret evidence in relation to a person, without the involvement of that person and/or their representative, is similar to other legislation that has been challenged. For example, in considering legislation that provided for an application for a restraining order in relation to property, without the presence of the person whose property it was, courts have not been impressed. In the case of *Re Criminal Proceeds Confiscation Act 2002 (Qld)*, such legislation was struck down:

The direction or command to the judge hearing the application to proceed in the absence of any party affected by the order to be made is such an interference with the exercise of the judicial process as to be repugnant to or incompatible with the exercise of the judicial power of the Commonwealth. Then because the Supreme Court of Queensland is part of an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth, such a provision is constitutionally invalid.<sup>34</sup>

In the context of terrorism legislation, Ian Barker QC commented in strong terms on legislation allowing for the suppression of evidence used by the prosecution:

The idea that information might be used by the prosecution without the accused seeing the information need only be stated for its offensiveness to basic notions of fairness and justice to be apparent.<sup>35</sup>

This is what is possible given the definition of ‘criminal intelligence’ in both the South Australian and New South Wales ‘bikie’ legislation. The South Australian legislation allows the Minister to make the declaration about an association without

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<sup>32</sup> (2007) 233 CLR 307, 358 (Gummow and Crennan JJ – ‘there may remain a question whether in the terms used in the Security Information Act the Parliament has sought to over-reach the bounds of the understanding of ‘national security’; 335 (Gleeson CJ – ‘we are not concerned in this case with particular issues as to procedural fairness that could arise where, for example, particular information is not made available to the subject of a control order or his or her lawyers’;

<sup>33</sup> 434.

<sup>34</sup> [2003] QCA 249, per Williams JA (with whom White and Wilson JJ agreed). Williams J objected to the application of a ‘public interest’ test when the person whose property was affected had no right to give submissions: ‘how could a judge possibly be so satisfied in the exercise of judicial power when the only entity entitled to place material before the court on which a judgment on that issue could be formed was the State ... asking a judge to make a decision on such issues ... makes a mockery of the exercise of the judicial power in question. The statutory provision removes the essential protection of the citizen inherent in the judicial process. Effectively the provision directs the court to hear the matter in a manner, which ensures the outcome will be averse to the citizen and deprives the court of the capacity to act impartially’ [57].

<sup>35</sup> Ian Barker ‘Human Rights in an Age of Counter Terrorism’ (2005) 26 *Australian Bar Review* 267.

hearing the views of the association.<sup>36</sup> The views of the association need not be taken into account. It is not even necessary that the organisation be notified that the Attorney (in South Australia) is considering making a declaration in respect of them, or that the Court (in South Australia and New South Wales) is being asked to make a control order in respect of the association, based on the declaration.

It is hard to see how such procedures are consistent with the requirements of natural justice. As Mason J said in *Kioa v West*<sup>37</sup>

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

McHugh J in *Kable* denied that a State Parliament could validly legislate to permit a Supreme Court to disregard the rules of natural justice,<sup>38</sup> yet this is what the current legislation authorises. Clearly the rights of members of the association are going to be affected by the making of a control order in respect of their organisation, yet they may not know about the application.

My conclusion here is that the South Australian legislation is offensive to due process in that it:

- (i) does involve a process in which the Executive's factual assertions can go wholly unchallenged, in direct contradiction to the view of the United States Supreme Court as to due process;
- (ii) does breach the rules of natural justice by requiring the court to make the control order without having heard from representatives of the organisation affected. Indeed they may not even know that the application has been made, because there is no requirement that the organisation affected be served with a specific notice; general advertising of the application in a newspaper and the gazette is sufficient. This is contrary to the United States Supreme Court's conception of the requirements of due process, a principle that has been accepted by the High Court of Australia.

(b) *Overreach of legislation at Minister's behest*

Unlike the New South Wales model, the South Australian bikie laws directly involve a member of the Executive. The State Attorney-General is given the power, based on specified criteria, to make a declaration in relation to a particular group. As Schloenhardt says, there is nothing to limit the legislation to organised crime; its operation is based on organisations that the Attorney considers to be risks to public safety and order.<sup>39</sup> In contrast, the United Nations *Convention Against Transnational*

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<sup>36</sup> In contrast, the New South Wales legislation allows a member of an organisation specified in an application to be present and make submissions in relation to it (s8(1)).

<sup>37</sup> (1985) 159 CLR 550, 582.

<sup>38</sup> (1996) 189 CLR 51, 116.

<sup>39</sup> Andreas Schloenhardt 'Mafias and Motorbikes: New Organised Crime Offences in Australia' (2008) 19(3) *Current Issues in Criminal Justice* 259, 277. Moon suggests that organised crime legislation be based on the United States Racketeering Influenced Crime Organisations Act (RICO) and be limited to cases where there is a common criminal purpose bonding the individuals: Michael Moon 'Outlawing the Outlaws: Importing RICO's Notion of Criminal Enterprise Into Canada to Combat Organised Crime' (1999) 24 *Queen's Law Journal* 451. Indeed a comment made in the context of the federal anti-terrorism laws is also considered apposite in describing the South Australian bikie laws – Ricketts noted 'there are virtually no safeguards against cynical political use of such powers by future regimes':

*Organised Crime*, which criminalises participation in a criminal group, defines an organised criminal group as a structured group of three or more persons acting in concert with the aim of committing one or more serious crimes or offences.<sup>40</sup>

As we know, this declaration has serious consequences, in that a control order will then be made in relation to the group's members, provided the Commissioner makes application.<sup>41</sup> The Minister need not prove anything in order to make the declaration or in order to have a control order made. It is suggested then that the legislation is overly broad and can possibly be applied to groups and organisations that have no link at all to public danger, but are the victims of a political witch-hunt or crusade. The relevance of the fact that the legislation is considered overly broad is that, in any balancing exercise that might be required because the law is offensive to human rights, and allowing some deference to the legislature in terms of policy options to deal with important community issues, it is a relevant factor to be considered whether the legislation is proportional to the objects sought to be achieved, and/or whether it impacts on human rights to the minimal extent consistent with the achievement of its objectives, and/or whether other, less drastic options are available is also a relevant factor.

We should bear in mind the wisdom expressed by Dixon J in the *Australian Communist Party v Commonwealth*.<sup>42</sup> In that famous case, Dixon J pointed out that

History ... shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power.<sup>43</sup>

The Court in that case struck out as unconstitutional provisions of the *Communist Party Dissolution Act 1950* (Cth). The Act abolished the Australian Communist Party and ordered the seizure of its assets, and allowed the Governor-General to declare a particular association to be unlawful. The criteria upon which the Governor General would make their decision were vaguely written. It was an offence punishable by five years' imprisonment to be a member of a declared organisation. The property of a declared association would be seized by the government. An individual could also be declared if the Governor General was satisfied that an individual was a communist or was engaged or likely to engage in activities prejudicial to Australian security. Declared persons could not work for the Commonwealth or hold certain offices within some unions. Judicial review of the Governor-General's declarations was not available. A majority of the Court declared the law was invalid, as not being supported by a head of power. The lack of specific criteria upon which the power would be exercised was problematic.

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Aidan Ricketts 'Freedom of Association of Guilt by Association: Australia's New Anti-Terrorism Laws and the Retreat of Political Liberty' (2002) 6 *Southern Cross University Law Review* 133, 149. At least with the federal terrorism laws providing for proscription of an organisation, parliamentary approval was required, a safeguard not apparent in the South Australian legislation here considered.

<sup>40</sup> Article 2 of the Convention; see David Freedman 'The New Law of Criminal Organizations in Canada' (2006) 85 *Canadian Bar Review* 171. I acknowledge that the bikie laws in Australia do not criminalise membership of a group, but they still carry serious consequences for being a member of a declared organisation.

<sup>41</sup> Logic would suggest the Commissioner would make the application – it would make no sense, having asked the Attorney-General to make the declaration, to then not ask the Court to make a control order based on the declaration.

<sup>42</sup> (1951) 83 CLR 1.

<sup>43</sup> 187.

Of course, these two factors are not in play here. We are dealing with State legislation, so no question of a head of power arises. Further, the Act does provide for specific criteria upon which the power is to be exercised. So, to this extent, the Australian Communist Party precedent is of limited assistance in resolving the issues here.<sup>44</sup> It is true also that in the early case of *Lloyd v Wallach*, the High Court validated legislation enabling the declaration of a Minister that a citizen was disloyal. The effect of the declaration could be that person's indefinite detention. The court found it could not question the basis on which the Minister found their belief.<sup>45</sup>

While the specific grounds upon which that legislation was held invalid are not available in the current case, there are other possible constitutional arguments available; these are discussed, in the context of the South Australian laws, elsewhere in this article. But we should remember the Communist Party case as a previous instance where government attempts were made to effectively ban organisations, and the court stood firm against such manoeuvres and upheld fundamental legal principles that remain to this day.

## (2) *Separation of Powers Arguments*

The South Australian legislation, in contrast to the New South Wales model, allows a Government Minister, the Attorney-General, to make a declaration about a particular organisation. The effect of the declaration is that, once the Commissioner makes an application, the Court *must*, as long as it is satisfied that a defendant is a member, make a control order against the defendant. It *must* prohibit the defendant from associating with others who are members of declared organisations, and from possessing dangerous articles or prohibited weapons.

There is a risk that this regime impinges on the principle of separation of powers. In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,<sup>46</sup> a majority of the High Court invalidated a provision which stated that 'a court is not to order the release from custody of a designated person', on the basis that was an unacceptable infringement of the separation principle. The majority declared the provision was a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction. The majority drew a distinction between the granting or withholding of jurisdiction, which was acceptable, and the direction of a court as to the manner and outcome of the exercise of their jurisdiction, which was unacceptable.<sup>47</sup> Similarly, in *Kable*, a majority of the High Court struck out legislation which, in the words of McHugh J, made the court 'an instrument of a legislative plan, initiated by the executive government'. Such legislation undermined

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<sup>44</sup> Indeed, George Winterton commented that if the legislation in the case had been passed by a State rather than the Commonwealth, it would have been validated by the High Court: George Winterton 'The Communist Party Case' in George Winterton and HP Lee ed *Australian Constitutional Landmarks* (2003) p133, because at that time the implied freedom of political communication was not established. Winterton suggests that if the case were litigated today, the High Court would likely declare the Act to be invalid on additional grounds, including an infringement of the freedom of political communication, and a breach of the principle of separation of powers (p134).

<sup>45</sup> (1915) 20 CLR 299.

<sup>46</sup> (1992) 176 CLR 1.

<sup>47</sup> Brennan Deane and Dawson JJ (35), with whom Gaudron J agreed.

public confidence in the judiciary and was offensive to the integrated court system that the *Constitution* contemplated.<sup>48</sup>

It is submitted that the South Australian legislation is challengeable on this basis. The legislation directs the court to make a control order against anyone who is a member of a declared organisation. It makes the court an instrument of a legislative plan initiated by the executive, offensive to majorities in *Lim* and *Kable*. In the interesting recent case of *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police*,<sup>49</sup> Kirby J invalidated legislation because, in his view, it involved a direction to the Supreme Court, ‘imposing the decision of an officer of the Executive Government upon the Supreme Court’.<sup>50</sup> So, it is submitted, does this South Australian legislation.

It might similarly be argued that the power being exercised by the Court in the South Australian legislation is not judicial in nature. Though a definition of judicial power is notoriously difficult, it at least involves deciding controversies between subjects.<sup>51</sup> In these applications, there is no controversy between subjects – the court must make the order in respect of a member of an organisation that has been declared. For this reason, it is suggested that the court is not exercising judicial power, and this provides further support for an argument about separation of powers.

One question might be whether it matters that the direction to make the control order is given to a magistrate rather a Supreme Court judge. However, s39 of the *Judiciary Act* 1903 (Cth) makes clear that all State courts can be invested with federal jurisdiction. This was the key to the *Kable* decision – that while State Constitutions do not formally embody the principle of separation of powers, the Commonwealth *Constitution* does; that there was one integrated court system in Australia, so in effect the principle of separation of powers was drawn down from the federal level to the state level. There is no suggestion in the reasoning in *Kable* that it would not apply in the case of State magistrates.<sup>52</sup> It is submitted the better view is that the drawing down would also apply to the level of a magistrate in a State magistrates’ court.

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<sup>48</sup> *Kable v Director of Public Prosecutions* (NSW)(1996) 189 CLR 51, 121. McHugh also denied the ability of a State Parliament to legislate to allow the Supreme Court to disregard the rules of natural justice (116). Later cases have confirmed that compromise of the institutional integrity of courts is a preferred touchstone rather than public confidence: *Fardon v Attorney-General* (Qld)(2004) 223 CLR 575.

<sup>49</sup> (2008) 234 CLR 532.

<sup>50</sup> [52](dissenting); the majority was only able to validate the provision by interpreting a sub-section allowing the Police Commissioner to identify information as confidential and not to be disclosed to anyone else as being subject to judicial review in terms of that belief: Gleeson CJ [7], and Gummow Hayne Heydon and Keiffel JJ [33]; see Hugo Leith ‘Turning Fortifications Into Constitutional Bypasses: *Gypsy Jokers Motorcycle Club v Commissioner of Police*’ (2008) 36 *Federal Law Review* 251.

<sup>51</sup> *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357, *White v Director of Military Prosecutions* (2007) 231 CLR 570. As a result, there is current controversy as to whether declarations of incompatibility, a feature of bills of rights/charter regimes, could be possible in the case of a federal charter of rights, because it may involve a court exercising a power that is not judicial in nature in that it is not deciding a controversy. For the same reason, federal courts will not issue advisory opinions: Helen Irving ‘Advisory Opinions, The Rule of Law and the Separation of Powers’ (2004) *Macquarie Law Journal* 6.

<sup>52</sup> For example, McHugh J stated that ‘in the case of State courts, they must be independent and appear to be independent of their own State’s legislature and executive government’ (116). He drew no distinction between senior and junior State courts. There are other references in the judgment to what

While the granting of a power to a court to make a control order has been validated by the High Court, most recently in relation to preventive detention in *Fardon*,<sup>53</sup> and in relation to the federal anti-terrorism law in *Thomas v Mowbray*,<sup>54</sup> in *Thomas* the Court had discretion whether or not to make a control order, based on factors it would assess. This contrasts sharply with the South Australian regime, which gives no discretion to a court to make a control order or not in relation to a member of an association, once the Attorney has made the declaration about the association. There were also additional safeguards in place in relation to the power to declare terrorist organisations under the federal regime that do not appear in the bikie legislation.<sup>55</sup>

### (3) *Freedom of Association*

Given the lack of an express bill of rights in Australia, and no mention of a right to freedom of association expressed in the *Constitution*, it is interesting to debate the extent to which the right to freedom of association is protected in Australia.

One mechanism is Article 22 of the *International Covenant on Civil and Political Rights*, which provides expressly for the right to freedom of association with others. The article provides that the right is not absolute, but that any limits must be prescribed by law and must be necessary in a democratic society in the interests of national security or public safety, the protection of public health or morals, or the protection of the rights and freedoms of others. A proportionality test is envisaged.<sup>56</sup> The High Court of Australia has recently clarified that international law is relevant in interpreting the requirements of the Australian *Constitution*.<sup>57</sup>

Presumably the argument of the South Australian Government would be that the bikie legislation is necessary to secure public safety and security. However, when this justification has been given, courts have been sceptical and have required evidence

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powers a State Supreme Court may or may not be given, but this might be explained by the fact that the actual case involved the conferral of powers on the State Supreme Court.

<sup>53</sup> *Fardon v Attorney-General* (Qld)(2004) 223 CLR 575.

<sup>54</sup> (2007) 233 CLR 307.

<sup>55</sup> For example, in the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth), the Governor-General, rather than a Government Minister, is authorised to make the declaration that an organisation be proscribed as a terrorist organisation. This action must be preceded by a briefing of the Leader of the Opposition (s102.1 (2A)). The proscribing regulation is subject to disallowance by Parliament, which is not the case in relation to the Attorney's declaration in the case of the South Australian law. The decision to proscribe in the terrorist context is subject to review by a Parliamentary Joint Committee on ASIO, ASIS and DSD. See Joo-Cheong Tham 'Possible Constitutional Objections to the Powers to Ban Terrorist Organisations' (2004) 27(2) *University of New South Wales Law Journal* 482, 484. These safeguards do not appear in the legislation being considered here. Further, while the Commonwealth's terrorist legislation was narrowly confined in its operation, these State laws are of much wider application, and their potential to harm fundamental civil rights are correspondingly much greater.

<sup>56</sup> Joseph suggests, in the context of terrorism laws but in terms equally applicable here, that the exclusion of judicial involvement in the prescription process might mean that the law lacks the proportionality required by Article 22: Sarah Joseph 'Australian Counter-Terrorism Legislation and the International Human Rights Network' (2004) 27(2) *University of New South Wales Law Journal* 428, 437. See also Jenny Hocking 'Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control' (2003) 49 *Australian Journal of Politics and History* 355 and 'Protecting Democracy by Preserving Justice: Even for the Feared and the Hated' (2004) 27 *University of New South Wales Law Journal* 319.

<sup>57</sup> *Roach v Electoral Commissioner* (2007) 233 CLR 162.

from the enacting government rather than mere assertion. For example, in *Al-Nashif v Bulgaria*, a case concerning the European Convention on Human Rights, the European Court of Human Rights stated:

Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the decisions for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information.

The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of national security that is unlawful or contrary to common sense and arbitrary.<sup>58</sup>

In contrast, the South Australian legislation does not allow an individual to challenge the finding of the Attorney that national security or public safety is at stake. There is a danger that the exercise of the power to declare will be arbitrary in nature.

As indicated above, the Australian *Constitution* does not contain an express guarantee of political association. However, it has now been established that the *Constitution* contains an implied freedom of political communication, flowing from the system of representative democracy which it prescribes. The implied freedom is not a source of positive rights but a freedom from interference by certain laws. The Court has clarified that a two-stage test is appropriate when laws are challenged on this basis, considering (a) whether the law effectively burdens freedom of communication about government or political matters in terms or effect; and (b) if so, whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the referendum process. If the answer to the first question is yes and the second no, the law is invalid.<sup>59</sup>

The question is whether the established freedom of political communication includes a freedom of political association. In *Australian Capital Television Pty Ltd v Commonwealth*,<sup>60</sup> Gaudron J claimed that representative democracy may include freedom of association, and McHugh J also discussed a right to associate.<sup>61</sup> In *Kruger v The Commonwealth*,<sup>62</sup> three judges agreed with a freedom of association. Toohy J found it was an essential ingredient of political communication.<sup>63</sup> Gaudron J agreed, to the extent necessary for the maintenance of the system of government for which the Constitution provides, as did McHugh J.<sup>64</sup> Gaudron J noted that

Just as communication would be impossible if each person was an island, so too it is substantially impeded if citizens are held in enclaves, no matter how large the enclave or congenial its composition.

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<sup>58</sup> [2002] Eur Court HR 497.

<sup>59</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-568, with the slight rewording made in *Coleman v Power* (2004) 220 CLR 1, 50 (McHugh J), Gummow and Hayne JJ (78) and Kirby J (82).

<sup>60</sup> (1992) 177 CLR 106, 212.

<sup>61</sup> 232.

<sup>62</sup> (1997) 190 CLR 1.

<sup>63</sup> 91.

<sup>64</sup> 116, 142.

Freedom of political communication depends on human contact and entails at least a significant measure of freedom to associate with others. And freedom of association necessarily entails freedom of movement.<sup>65</sup>

In *Mulholland v Australian Electoral Commission*,<sup>66</sup> several members of the Court considered the argument in favour of a freedom of political association. McHugh J reiterated his belief in such a freedom.<sup>67</sup> Kirby J accepted there was implied in s7 and 24 of the *Constitution* a freedom of association and freedom to participate in community debate about their policies and programs and the substantially uncontrolled right of association enjoyed by electors to associate with political parties and communicate about such matters with other electors.<sup>68</sup> Gummow and Hayne JJ, with whom Heydon J agreed, did not dismiss freedom of association but appeared to confine it to a corollary of the freedom of political communication.<sup>69</sup> Various commentators have suggested that freedom of association is essential to representative democracy.<sup>70</sup>

On the assumption then that the freedom of political association is to be equated with the freedom of political communication, the *Lange* test can be adapted in this context as follows: (a) does the law effectively burden freedom of association in relation to government and political matters in terms or effect, and if so (b) is the law appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the referendum process.

I will now apply this two-stage test to the South Australian law. Take first an extreme application of the legislation, where the Attorney declares the Opposition party under the Act. The effect will be that the Court must make a control order against the members, including banning them from associating with other members.<sup>71</sup> Most would suggest that the law would effectively burden freedom of association in relation to government and political matters – the answer to (a) above would be yes, and (b) the law is not appropriate and adapted to serve a legitimate end compatible with representative and responsible government, since most believe that an effective Opposition is in fact vital to a decent system of representative and responsible democracy. Government would not work very well if politicians were not effectively accountable to the people, because there was no Opposition, or if Ministers were not held accountable in Parliament, which would happen if there were no Opposition. It is submitted that the law, at least as applied in this way, should be struck out as being

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<sup>65</sup> 115.

<sup>66</sup> (2004) 220 CLR 181.

<sup>67</sup> 225.

<sup>68</sup> 277.

<sup>69</sup> 234, 306; Callinan J claimed that an implication of freedom of association was ‘not necessary’ (297) and Gleeson CJ found it unnecessary to decide (201) but seemed to assimilate freedom of association with freedom of political communication.

<sup>70</sup> For example, Jeremy Kirk ‘Constitutional Implications from Representative Democracy’ (1995) 23 *Federal Law Review* 37, 55; R Bassett *The Essentials of Parliamentary Democracy* (1935) 116-117; D Held *Models of Democracy* (1987) p67. Similarly the United States Supreme Court found in *Sweezy v New Hampshire* that free association was part of the political freedom upon which democracy was based: 354 US 234 (1957). It has been noted that advocacy is improved by group association: *National Association for the Advancement of Coloured People v Alabama* 357 US 449 (1958), 460.

<sup>71</sup> Section 14(5).

an unconstitutional interference with the freedom of political association essential to our democracy.

Take a more ambiguous situation – a chamber of commerce group, whose primary aim is to boost business in a particular region, but also provides a forum for members to meet, at which time political issues (among many other issues) are discussed. Current debates might include industrial relations reform. Or perhaps a trade union, whose primary aim is to lobby on behalf of its members and raise their grievances. At some meetings of the union, issues such as existing law regarding occupational health and safety, wages, unfair dismissal and discrimination are discussed. Say that the South Australian Attorney decides to ‘declare’ the chamber of commerce group or the trade union group, with the consequences that are by now familiar. Again, it is suggested that the law would burden freedom of association in relation to government and political matters, and the question would need to be determined as to whether the law was appropriate to serve a legitimate end compatible with representative and responsible government required by the *Constitution*.

It is anti-democratic to not allow individuals to meet together in groups where common concerns and grievances can be raised. And it would be ridiculous, in my opinion, to hold that groups could meet, but their right to do so was confined to meetings, or at points during meetings, when they discussed what we define as ‘political issues’, but that as soon as they began to discuss things that didn’t fit the definition of ‘political issues’, their right to meet was no longer guaranteed and the government could legally prevent the meeting from occurring or continuing.

Since a law is either constitutional or not constitutional, it is submitted that the South Australian legislation is offensive to the implied freedom of political association, since it does potentially burden that association in terms and effect, and it is not compatible with representative and responsible government. It is simply not possible to draw a neatly divide meetings that involve ‘political speech’ and ones that don’t.<sup>72</sup> Many meetings or associations will involve both kinds of speech. Gaudron J recognised this difficulty in *Kruger* thus:

Not every restriction on communication is a restriction on the communication of political ideas and information. On the other hand, any abridgement of the right to move in society and to associate with one’s fellow citizens necessarily restricts the opportunity to obtain and impart information and ideas with respect to political matters.<sup>73</sup>

So, at least for Gaudron J, it would not be necessary to prove that the organisation discussed political issues, or had a political objective. It would be enough that the organisation provided the opportunity for citizens to meet, given the reality that when citizens meet, they often do talk about ‘political’ issues. I would respectfully agree with the comments of Gaudron J in this regard. Another commentator has called Gaudron J’s logic on this point ‘compelling’.<sup>74</sup>

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<sup>72</sup> Kirk takes the same position, concluding that ‘a right to form or join any association with even potentially political aims should be recognised’: Jeremy Kirk ‘Constitutional Implications from Representative Democracy’ (1995) 23 *Federal Law Review* 37, 56.

<sup>73</sup> (1997) 190 CLR 1, 126-127.

<sup>74</sup> Joo-Cheong Tham ‘Possible Constitutional Objections to the Powers to Ban Terrorist Organisations’ (2004) 27(2) *University of New South Wales Law Journal* 482, 496.

Given that the question whether there is a protected freedom of association in Australia has not been definitively answered, we are justified in considering the law of another nation where this issue has been more extensively litigated, including in the context of membership of bikie gangs. The usual rider with such comparisons is again apposite – that the provisions differ and must be read in their context, and it should not be assumed that they mean the same thing or have the same scope.

I concede that the freedom of political communication recognised in Australia is an implied freedom rather than an express one, while the cases I discuss below in relation to the United States have occurred in the context of an express First Amendment protection of freedom of speech.<sup>75</sup> While the First Amendment right is a positive one, the High Court has found the implied freedom of political communication in Australia to be a negative one. While the Australian implied freedom has arisen in the context of ‘political speech’ due to its source in the constitutional requirement of representative democracy, the right as expressed in the First Amendment is not confined to ‘political’ speech, even if the inclusion of ‘and to petition the Government for a redress of grievances’ could be argued to give flavour to the intention of the drafters in guaranteeing free speech and free assembly. The United States provision also expressly includes peaceful assembly and petition rights.<sup>76</sup> However, in both cases the right is not absolute, and is subject to some kind of ‘reasonable regulation’/‘compelling justification’ exception that is familiar in rights discourse. Bearing these differences in mind, it is submitted that the American jurisprudence in this area is helpful in addressing freedom of association in the context of the subject matter of this article, because some of the cases have directly considered First Amendment protections in the context of motorcycle gangs, as well as other groups.<sup>77</sup>

The United States Supreme Court has referred to freedom of association in two senses; the choice to enter into and maintain intimate human relationships, and the right to associate for the purpose of engaging in activities protected by the First Amendment. The court has declared that

According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority ... implicit in the right to engage in activities protected by the First Amendment (is) a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.<sup>78</sup>

The United States Court of Appeals (9<sup>th</sup> Circuit) has specifically held that the First Amendment protects the right of members of a motorcycle gang to associate with one

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<sup>75</sup> Relevantly, the First Amendment provides that Congress shall make no law ‘abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances’. (The section also forbids a law respecting an establishment of religion, or prohibiting the free exercise thereof).

<sup>76</sup> Arguably, in the Australian context these would be protected by the implied freedom of political communication.

<sup>77</sup> Again, the Australian legislation does not single out ‘bikie groups’ specifically, but newspaper reports and Ministerial speeches make it clear that they are at least the main intended targets of such legislation.

<sup>78</sup> *Roberts v United States Jaycees* (1984) 468 US 609, 622 (Brennan White Marshall Powell Stevens Rehnquist JJ). It is said that effective advocacy is enhanced by group association: *NAACP v Alabama* 357 US 449, 460 (1957).

another and with the club.<sup>79</sup> It has been held that guilt by association alone, without establishing that an individual's association poses the threat feared by the government, is an unacceptable basis on which to deny First Amendment rights. The government must show a knowing affiliation with an organisation with unlawful aims and a specific intent to further such aims.<sup>80</sup>

In the leading case of *Boy Scouts of America v Dale*,<sup>81</sup> the Court clarified that the association concerned in such cases must show that it engages in 'expressive association' in order to have a First Amendment argument. This expressive association can be in private or publicly.<sup>82</sup> It is not necessary that the association occurs for the purpose of disseminating a certain message,<sup>83</sup> nor that every member of a group agree on every issue. The requirement of expressive association is satisfied by something as simple as a mission statement for the organisation wherein a wish to instill values in young people is expressed.<sup>84</sup>

### *Less Drastic Means Doctrine*

Another relevant factor in considering these laws is whether other means are available to achieve the ends to which the legislation apparently aspires that are less intrusive of fundamental rights. There is some support for this doctrine in the Australian and American case law. A unanimous court in *Lange v Australian Broadcasting Corporation* seemed to accept the validity of such an approach, in the current context:

In *ACTV* for example, a majority of this Court held that a law seriously impeding discussion during the course of a federal election was invalid because there were other less drastic means by which the objectives of the law could be achieved.<sup>85</sup>

Logic might suggest that in examining whether laws are 'appropriate and adapted' with respect to a particular power or to pursue legitimate ends, the question of the availability of less intrusive means, where the law does impact rights and freedoms, is relevant. Article 22 of the *International Covenant on Civil and Political Rights*, by recognising that the right to freedom of association but accepting it is not absolute,

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<sup>79</sup> *United States v Rubio* 727 F. 2d 786, 791 (1983). Other examples include *Piscottano and Others v Murphy* 511 F. 3d 247 (United States Court of Appeals, 2<sup>nd</sup> Cir, 2007) and *Villegas and Others v City of Gilroy* 484 F. 3d 1136 (United States Court of Appeals, 9<sup>th</sup> Cir, 2007).

<sup>80</sup> *Healy v James* 408 US 169, 186 (1972).

<sup>81</sup> (2000) 530 US 640.

<sup>82</sup> 648.

<sup>83</sup> 655.

<sup>84</sup> The facts in *Boy Scouts*; where the Court found this organisation was engaged in protected expressive association and could not be subject to anti-discrimination legislation (Rehnquist CJ, O'Connor Scalia Kennedy and Thomas JJ; Stevens Souter Ginsburg and Breyer JJ dissenting). For further discussion of the American cases, see Douglas Linder 'Freedom of Association After *Roberts v United States Jaycees*' (1984) 82 *Michigan Law Review* 1878 and Daniel McGuire 'The Supreme Court's Latest Resolution of the Conflict Between Freedom of Association and Public Accommodation Laws: *Boy Scouts of America v Dale* and its Implications In and Out of the Courtroom' (2002) 47 *Villanova Law Review* 387; David Bernstein 'Trends in First Amendment Jurisprudence: Anti-Discrimination Laws and the First Amendment' (2001) 66 *Missouri Law Review* 83; Alexander Molina 'California's Anti-Gang Street Terrorism Enforcement and Prevention Act: One Step Forward, Two Steps Back?' (1993) 22 *Southwestern University Law Review* 457, 462-471; David Truman 'The Jets and Sharks Are Dead: State Statutory Responses to Criminal Street Gangs' (1995) 73 *Washington University Law Quarterly* 683, 712-719.

<sup>85</sup> (1997) 189 CLR 520, 568; to like effect were the comments of McHugh J in *Coleman v Power* (2004) 220 CLR 1, 52.

also calls for such a proportionality consideration by allowing laws infringing upon freedom of association if they are *necessary*.<sup>86</sup>

So, for example, in arguing against the proscription regime in the South Australian legislation, it can be argued, as Joseph has argued in relation to the anti-terrorism proscription laws, that

the exclusion of substantive judicial involvement from the proscription process may also deprive Australia's proscription measures of the proportionality needed to comply with Article 22 of the ICCPR. Indeed, there seems to be no reason why proscription could not take place on the basis of a judicial declaration sought by the Attorney-General.<sup>87</sup>

In relation to the South Australian legislation, it might also be asked why it is necessary to provide for control orders which have the effect of prohibiting a person who is a member of a declared organisation from owning particular weapons, when weapons regulations already directly provides rules in terms of eligibility to possess weapons. Why is it necessary to provide, as the New South Wales legislation does, that members of declared organisations then lose their right to carry out particular occupations that require a licence? It is expected that anyone wishing to obtain or renew such a licence would already be subject to particular rules and requirements in relation to behaviour, lack of criminal behaviour etc. The need to connect eligibility to engage in such activities to non-membership of a particular group has not been established. To the extent that groups are involved in criminal activity, where is the evidence that current laws regarding drugs, money laundering, proceeds of crime legislation, and criminal conspiracy are not sufficient to tackle the ends to which this legislation is said to be aimed?

### *Conclusion*

These legislative developments involve a very substantial interference with fundamental human rights. The South Australian legislation is offensive to well-established principles of due process, natural justice, freedom of association, and the separation of powers. The New South Wales provisions impact substantially on freedom of association, although the procedures the Act adopts are fairer and less likely to infringe the due process requirement. The justification for such intrusions has not been shown. Courts must uphold fundamental democratic principles in the face of such populist measures, even in the absence of an express bill of rights in Australia.

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<sup>86</sup> Sarah Joseph 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' (2004) 27(2) *University of New South Wales Law Journal* 428, 437.

<sup>87</sup> Sarah Joseph 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' (2004) 27(2) *University of New South Wales Law Journal* 428, 437.