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Criminal Session: Discriminatory Laws
The Honourable Justice Julie Ward¹

Topic: In specific countries of the region, some laws or application of them may be seen to single out various sectors of society for different treatment. What are the issues for the legal profession in laws that are seen as discriminatory?

Introduction

Australia has long venerated its larrikin nature. Ned Kelly, a convicted bushranger, is a national hero; the song *Waltzing Matilda* (highlighting the activities of sheep rustlers) almost became our national anthem; the ANZAC tradition of bravery and courage against all the odds is part of our national spirit. Lawlessness and a willingness to flout the rules, in some contexts at least, is admired. Perhaps that is a hangover from our convict colonial past; it certainly does not appear to derive from our indigenous history.

Yet one of the fundamental tenets of the Australian legal system is the rule of law. In a lecture delivered in November 2000,² the then Chief Justice of Australia's High Court, its constitutional court, the Hon Murray Gleeson, adopted, as applicable to Australia, the description of the rule of law given in 1998 in an opinion of the Canadian Supreme Court in relation to the possible secession of Quebec,³ as containing the following three elements.

First that there is one law for all; second, that it requires the creation and maintenance of an actual order of positive laws; and third, that the relationship between the state and the individual must be regulated by law. The first element encompasses the protection of individuals from

¹ Justice of Appeal, Supreme Court of New South Wales, Australia. I am indebted to the invaluable assistance provided by my tipstaff, Ms Kate Ottrey, in the preparation of this paper. I also acknowledge that I have drawn upon material from an address given by me at the World Bar Association conference in New Zealand last month ("War is not the answer: the ever present threat to the rule of law")

² Chief Justice A M Gleeson, "A Country Planted Thick with Laws", Boyer Lecture 1, 19 November 2000.

³ *Reference re Secession of Quebec* [1998] 2 SCR 217, 247-263.

arbitrary state action and the assurance of a predictable and ordered society.

Our wartime Prime Minister of Australia, Robert Menzies, when writing in 1917 on the repercussions of the *War Precautions Act 1914* (Cth) for the rule of law⁴, relied upon the principles elucidated by Professor Dicey as to the content of the rule of law, namely that it entails;

The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.⁵

One of the elements of the rule of law as articulated by Professor Dicey is that no one is punishable except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.⁶

It is against this background that I propose to consider the issues arising for the legal profession from laws in the criminal context that may be seen as discriminatory.

Discriminatory laws in the criminal context

Of course, all criminal laws are discriminatory in the sense that they discriminate against particular conduct or omissions. However, on occasions in both my jurisdiction and others, laws are enacted which impose criminal sanctions on sectors of society based on no more than the characteristics of members of that sector or those with whom they associate; in other words, which single out and impose criminal liability on persons because of their status or associates, not what they have done or have failed to have done. This is despite what has been recognised as the long established principle of the criminal law that

a person cannot be convicted of any crime unless he has committed an overt act prohibited by the law, or has made default in doing some act which there is a legal obligation upon him to do.⁷

In so doing, Parliaments have legislated to extend criminality beyond overt acts or omissions.

⁴ Robert Menzies, *The Rule of Law during the War: Bowen Prize Essay*, University of Melbourne (Charles F Maxwell 1917).

⁵ A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 10th ed, 1959) 202.

⁶ *Ibid* 183-4.

⁷ A P Randerson, 'Status Offences' (1968) 1(1) *Auckland University Law Review* 37, 37.

Australian Parliaments have a long history of creating what have been called “status offences”.⁸ It is that history, and the implications for the legal profession of such legislation, that I will address in this paper.

At the outset, I note that the Australian system of government is a federal not unitary system of government.

The *Australian Constitution* provides that the federal Parliament may legislate in relation to specified heads of power, and residual powers remain with the states.⁹ However, the states may refer their powers to the federal Parliament. The criminal law is not a federal head of power and thus the bulk of Australian criminal laws are legislated on a state by state basis and there is at times much jurisdictional variation. This paper concentrates mostly on New South Wales law, as the jurisdiction with which I am most familiar. Terrorism offences are federal criminal laws in Australia. In order for the federal Parliament to legislate terrorism offences, the states and territories referred anti-terrorism power to the federal Parliament in 2002.¹⁰

Further, by way of explanation, when I refer to status offences I am adopting the following definition: “one which attaches criminal responsibility to a person merely by way of his status, capacity or physical situation, apparently dispensing with the need for either act or omission as a prerequisite for conviction”.¹¹ This means that “a status offence is one which imposes liability by reason of “status” of the accused, dispensing with the need for act or omission on his part, but not necessarily dispensing with a mental element”.¹² Status offences single out an individual for different treatment by making their status, capacity or physical situation criminal. A contemporary example is the Australian terrorism laws which make it a criminal offence to be a member of a terrorist organisation.¹³

⁸ Bernadette McSherry, ‘Terrorism Offences in the *Criminal Code*: Broadening the Boundaries of Australian Criminal Laws’ (2004) 27(2) *University of New South Wales Law Journal* 354, 364.

⁹ *Australian Constitution* ss 51, 107.

¹⁰ See Council of Australian Governments (COAG), *Commonwealth and States and Territories Agreement on Terrorism and Multi-Jurisdictional Crime*, 5 April 2002 (1 September 2008) COAG Archive < http://archive.coag.gov.au/coag_meeting_outcomes/2002-04-05/docs/terrorism.cfm#other_formats>.

¹¹ Colin Howard, *Strict Responsibility* (Sweet & Maxwell, 1963) 46-47 referred to in Randerson, above n 7, 38.

¹² Randerson, above n 7, 38.

¹³ *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code*) s 102.3(1).

Another set of laws which single out individuals or groups are consorting laws. Consorting offences prohibit association with a person or persons on the basis of some characteristic of that person or persons. Their primary object is “to punish and thereby discourage inchoate criminality ... by ... the imposition of criminal liability for keeping company with disreputable individuals”.¹⁴ The discrimination attaches to the group of people/type of persons with whom one is prohibited from associating and thereby also discriminates against those associates by criminalising their behaviour. Australian states have recently introduced new anti-consorting laws, known colloquially as “bikie” laws, because they largely target criminal enterprises in motorcycle gangs, which criminalise association with members of particular gangs.

This paper considers certain Australian federal terrorism offences and state consorting offences in the light of their history and some examples from the Asia-Pacific region and other common law countries. Although these laws are a typical response of Australian jurisdictions to the serious threat of the day, they are laws that by their nature risk infringing the rule of law, because they single out individuals for different treatment. Issues for the legal profession arise because it is the responsibility of members of our profession to uphold the rule of law and to act when the rule of law is threatened – even if the consequence of so doing is unpopularity or worse.

A former High Court judge, HV Evatt, experienced this when, as Deputy Leader of the Opposition, he opposed the passage of a bill for the dissolution of the Communist Party in Australia and represented the Waterside Workers’ Federation in litigation invalidating that legislation. The success of his efforts to protect the rule of law (by opposing legislation to impose penalties on a particular group based solely on political ideology) contributed to his defeat in the 1954 election, ensuring that he would never become Prime Minister.¹⁵

New South Wales and New Zealand

“[D]ifferent ‘undesirable’ groups have been targeted at different times.”¹⁶
In the 19th century, status offences in New South Wales focussed on

¹⁴ Andrew McLeod, ‘On the Origins of Consorting Laws’ (2013) 37(103) *Melbourne University Law Review* 103, 104.

¹⁵ *Australian Communist Party v The Commonwealth* [1951] HCA 5; (1951) 83 CLR 1. See commentary by Justice Michael Kirby, ‘H V Evatt, The Anti-Communist Referendum and Liberty in Australia’ (1991) 7 *Australian Bar Review* 93.

¹⁶ McSherry, above n 8, 365.

vagrants, drunks and habitual criminals.¹⁷ In the 1820s, New South Wales was increasingly plagued by attacks from escaped convicts who ran into the bush and lived by stealing from local properties (what is now known as “bushranging”).¹⁸ Justified by the “emergency of the occasion”,¹⁹ legislation was introduced which authorised any person to apprehend any other person when they had reasonable cause to suspect and believe the other person was a transported felon unlawfully at large.²⁰ Those apprehended could be detained until they proved to the reasonable satisfaction of a justice of the peace that they were not transported felons.²¹ This kind of reverse onus is a feature of later status offences in Australia.²²

Bushrangers are thus an early example of a group singled out by a status offence, in order to attempt to reduce the high levels of crime committed attributed to them.

Early consorting offences were directed at criminals, prostitutes and vagrants. The first law, which is recognisable as a consorting offence in the form of those laws which apply in Australia today, was legislated in New Zealand in 1901.²³ It created the offence of habitually consorting “with reputed thieves or prostitutes or persons who have no lawful means of support”.²⁴ The New Zealand legislation formed the model for consorting laws subsequently introduced in all Australian states and territories.²⁵

New South Wales introduced consorting offences in response to crime associated with so-called “razor gangs” in East Sydney.²⁶ Legislation

¹⁷ Mark Finnane, *Police and Government: Histories of Policing in Australia* (1994) ch 1 in McSherry, above n 8, 364.

¹⁸ McLeod, above n 14, 116.

¹⁹ *Ibid.*

²⁰ *Robbers and Housebreakers Act 1830* (NSW) s 1. See also discussion in McLeod, above n 14, 116.

²¹ *Robbers and Housebreakers Act 1830* (NSW) s 2.

²² See Simon Bronitt, ‘Australia’s Legal Response to Terrorism: Neither Novel nor Extraordinary?’ (Paper presented at the Casten Centre for Human Rights Conference, Human Rights 2003: The Year in Review, Melbourne, 4 December 2003)

<<http://www.law.monash.edu.au/castancentre/events/2003/bronitt-paper.pdf>> at 15 November 2004, in McSherry, above n 8, 365.

²³ For a comprehensive overview of consorting laws in New South Wales before this time see McLeod, above n 14, 126.

²⁴ *Police Offences Amendment Act 1901* (NZ) s 4.

²⁵ McLeod, above n 14, 126-128. Although it is often touted as a novel criminal offence, McLeod points out that there is evidence 30 years earlier of at least two municipal authorities criminalising acts of association in the United States. Both laws were challenged and struck down by state Supreme Courts as unconstitutional, something which was to exemplify a broader trend across the United States.

²⁶ Alex Steel, ‘Consorting in New South Wales: Substantive Offence or Police Power?’ (2003) 26(3) *University of New South Wales Law Journal* 567, 582ff.

was introduced providing gaol terms for carrying unlicensed pistols,²⁷ which prompted gang members to use cut-throat razors as weapons rather than guns (hence “razor gangs”).²⁸ This created a dilemma for the authorities, as it was difficult to prove that someone carried a razor as a weapon, rather than to shave.²⁹ Contemporary newspapers carried headlines such as “Wipe Out Gang Terrorism” (a headline which would not be out of place in Australian newspapers today).³⁰

In response, New South Wales introduced the offence of habitually consorting with reputed criminals, known prostitutes or persons who have been convicted of having no visible lawful means of support.³¹ The language of “reputed” criminals (which is the same as the New Zealand statute) was deliberately chosen over “convicted criminals” or “felons” in order not to discriminate against reformed criminals.³²

In 1979, substantive changes were made to the New South Wales consorting offence to provide:

Any person who habitually consorts with persons who have been convicted of indictable offences, if he or she knows that the persons have been convicted of indictable offences, shall be liable on conviction...³³

Professor Alex Steel has pointed out that the offence was clearly never consistently applied or broadly enforced because it applied to associating with such large numbers of individuals. If the laws had been consistently enforced, “anyone convicted of an indictable offence could [have been] subjected to a lifetime of solitude”.³⁴

Between July 2002 and June 2012 in New South Wales, 5.86 per cent of the male population and 1.29 per cent of the female population had been convicted between of an indictable offence.³⁵ In reality, it was a matter

²⁷ See *Pistol Licencing Act 1927* (NSW) discussed in Steel, above n 26, 582.

²⁸ Steel, above n 26, 582.

²⁹ Larry Writer, *Razor: A true Story of Slashers, Gangsters, Prostitutes and Sly Grog* (2001) 48 in Steel, above n 26, 582.

³⁰ ‘Wipe Out Gang Terrorism’, *Truth* (Sydney), 15 January 1928, 23 in Steel, above n 26, 583.

³¹ *Vagrancy (Amendment) Act 1929* (NSW) s 2 amended the *Vagrancy Act 1902* (NSW).

³² Steel, above n 26, 576-577 and 586.

³³ *Crimes (Summary Offences) Amendment Act 1979* (NSW) s 4, sch 5, item 3 inserted *Crimes Act 1900* (NSW) s 546A. *Summary Offences Act 1970* (NSW) s 25 repealed by *Summary Offences (Repeal) Act 1979* (NSW) passed at the same time.

³⁴ Steel, above n 26, 599.

³⁵ Ombudsman New South Wales, *Review of the use of the consorting provisions by the NSW Police Force; Division 7, Part 3A of the Crimes Act 1900*, Issues Paper (2013) [5.1.3].

for police discretion when and against whom charges should be laid under this offence.³⁶

New Zealand introduced a new consorting offence in 1981 concerning habitually associating with a person convicted on at least three separate occasions of a crime involving dishonesty, in circumstances which would support a reasonable inference that the subsequent commission of a crime involving dishonesty was likely and the police had to give warnings on three separate occasions before laying charges.³⁷ In 1997, similar offences were legislated directed at violent crimes and serious drug offences.³⁸

The current New South Wales offence was recast in 2012, so as to “modernise” it³⁹ and now provides that it is an offence habitually to consort with persons convicted of indictable offences, after having been given an official warning that the person is a convicted offender and that it is an offence to consort with them, in relation to each of those convicted offenders.⁴⁰ There is no requirement that such a warning be in writing. There is a defence if the defendant satisfies the court that the consorting was reasonable in circumstances of family members, consorting in the course of lawful employment or operation of a business, training or education, provision of a health service or legal advice or consorting in lawful custody or in the course of complying with a court order.⁴¹

At the recent World Bar Association conference, the President of the New South Wales Court of Appeal noted the potential for concern at the import of such legislation on the rule of law given the level of discretion exercisable by the police force.⁴² Insofar as there is not accountability for

³⁶ Steel, above n 26, 580 and 588ff. Steel argues that from its inception, the consorting offence had not had conviction as its major aim.

³⁷ *Summary Offences Act 1981* (NZ) s 51, sch 2, inserting *Summary Offences Act 1981* (NZ) ss 6(1), 6(2) & 6(3).

³⁸ *Summary Offences Amendment Act 1997* (NZ) s 4, inserting *Summary Offences Act 1981* (NZ) ss 6A and 6B. Note: *Criminal Procedure Act 2011* s 413 has since amended *Summary Offences Act 1981* (NZ) ss 6(2), 6A(2), 6B(3). These provisions relate to the requirement that no charge be laid unless the defendant has been warned by any constable on at least 3 separate occasions that his or her continued association with the convicted thief/violent offender/serious drug offender might lead to a charge being brought against him or her under this section.

³⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 February 2012, 8131 (Greg Smith, Attorney-General) referred to in McLeod, above n 14, 150.

⁴⁰ The *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW) repealed *Crimes Act 1900* (NSW) s 546A and inserted *Crimes Act 1900* (NSW) ss 93W-93X.

⁴¹ *Crimes Act 1900* (NSW) ss 93Y.

⁴² The Hon Justice Beazley AO, ‘Discretion and the rule of law in the criminal justice system’ (Speech delivered at the World Bar Conference, Queenstown, New Zealand, 5-6 September 2014).

the exercise of that discretion, there is potential for the laws to be used disproportionately amongst particular individuals or groups.

Hong Kong Triad Laws

Another former British colony has also used status offences to respond to criminal gangs. In Hong Kong, there is an offence of being a member of a triad society.⁴³ Triad societies are hierarchically organised “secret or conspiratorial organizations involved in a wide range of criminal activities”.⁴⁴ Although triad societies are shrouded in mystery, it is generally understood that they have a long history and continue to operate today.⁴⁵ The offence was first introduced as early as 1845,⁴⁶ three years after the establishment of the British colonial government in Hong Kong. Today, all societies, clubs and associations in Hong Kong must be registered and it is an offence to be a member of or attend a meeting of an unlawful society or a triad society.⁴⁷

Australia’s Federal Terrorism Laws

In response to the terrorist attacks of September 11, 2001, federal terrorism offences were introduced in Australia in 2002.⁴⁸ Under the laws, the federal Attorney-General has the power to specify that an organisation is a terrorist organisation.⁴⁹ At the time of writing, there were 19 specified terrorist organisations,⁵⁰ the most recent being “Islamic State”, which was specified as a terrorist organisation on 11 July 2014.⁵¹

One category of terrorism offences is that of “membership” offences, which make it a crime intentionally and knowingly to be a member of a terrorist organisation.⁵² There is a defence available where the accused

⁴³ For a discussion of historical laws between 1845 and 1996 see Kingsley Bolton, Christopher Hutton and Peter Ip Pau-Fuk, ‘The Speech-Act Offence: Claiming and Professing Membership of a Triad Society in Hong Kong’ (1996) 16(3) *Language & Communication* 263, 264-266.

⁴⁴ Bolton, Hutton and Pau-Fuk, above n 43, 263.

⁴⁵ *Ibid.*

⁴⁶ *Ordinance No 1 of 1845* (Hong Kong). A defence for ignorance or duress was created in the same year by *Ordinance No 15 of 1845* (Hong Kong) s I.

⁴⁷ *Societies Ordinance* (Hong Kong) Cap 151, s 20(1) & (2).

⁴⁸ *Security Legislation Amendment (Terrorism) Act 2002* sch 1, item 3 and 4 inserted *Criminal Code* part 5.3. One Australia jurisdiction, the Northern Territory, already had terrorism offences in place prior to 2001. For a comprehensive overview of Australia’s terrorism offences see George Williams, ‘A Decade of Australian Anti-Terror Laws’ [2011] (35) *Melbourne University Law Review* 1136, 1140.

⁴⁹ *Criminal Code* div 102.

⁵⁰ See Australian Government, *Listed terrorist organisations* Australian National Security <<http://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/default.aspx>>.

⁵¹ *Criminal Code (Terrorist Organisation—Islamic State) Regulation 2014* reg 4. Regulation 4 also includes a list of additional names by which “Islamic State” is known.

⁵² *Criminal Code* s 102.3(1).

proves that he or she took all reasonable steps to cease being a member of the terrorist organisation as soon as practicable after he or she knew that the organisation was a terrorist organisation.⁵³ The onus is on the accused to prove this defence on the balance of probabilities.

The parallels between this type of offence and the status offences directed at bushrangers in the 19th century are clear. As Professor Simon Bronitt has pointed out, the current legislative responses to terrorism are neither novel nor extraordinary.⁵⁴

The membership offence is also similar to Hong Kong's status offence of being a member of a triad society.

In addition to the crime of membership of a terrorist organisation, in 2004 a number of consorting offences were created for association with terrorist organisations. So:

- (1) A person commits an offence if:
 - (a) on 2 or more occasions:
 - (i) the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, an organisation; and
 - (ii) the person knows that the organisation is a terrorist organisation; and
 - (iii) the association provides support to the organisation; and
 - (iv) the person intends that the support assist the organisation to expand or to continue to exist; and
 - (v) the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation; and
 - (b) the organisation is a terrorist organisation...⁵⁵

There is a defence for family members, places of public worship, providing humanitarian aid, providing legal advice or representation⁵⁶ and to the extent (if any) that the section would infringe any constitutional doctrine of implied freedom of political communication.⁵⁷ Professor Bernadette McSherry has noted the similarities between this offence and the New South Wales crime of habitually consorting discussed above.⁵⁸

Canadian and United Kingdom Terrorism Laws

⁵³ *Criminal Code* s 102.3(2).

⁵⁴ Bronitt, above n 22, in McSherry, above n 8, 365.

⁵⁵ *Anti-terrorism Act (No 2) 2004* (Cth) inserted *Criminal Code* s 102.8(1).

⁵⁶ *Criminal Code* s 102.8(4).

⁵⁷ *Criminal Code* s 102.8(6).

⁵⁸ These comments were made in relation to the NSW offence as at 2004. McSherry, above n 8, 365.

Canadian terrorism legislation does not include offences of membership or association, because of concerns that they were not a reasonable limit of the freedom of association and expression under the *Canadian Charter of Rights and Freedoms*.⁵⁹ Professor Kent Roach argues that the reverse onus requiring the accused to prove that he or she took all reasonable steps to cease being a member of a terrorist organisation would also violate the presumption of innocence and would have to be justified as a proportionate and least restrictive limit on that right.⁶⁰ A reverse onus of the kind applying under the Australian terrorism offences was legislated in New South Wales as long ago as in relation to bushrangers in the 19th century.

In the United Kingdom, terrorism offences have recently been the subject of judicial scrutiny. Professor Andrew Lynch describes the United Kingdom as undoubtedly “the primary source of inspiration” for Australia’s terrorism offences.⁶¹ Although it is beyond the scope of this paper to consider control order powers in depth,⁶² it is worth noting that these powers (of the kind which have now been enacted into Australian federal and state criminal law) have been the subject of a challenge in the House of Lords.⁶³ There, however, the challenge to those laws has been against the background of the United Kingdom’s adoption of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

The UK non-derogating control orders made pursuant to s 2 of the *Prevention of Terrorism Act 2005* (UK) were the subject of challenge on the basis that the procedure that resulted in those orders violated the appellants’ right to a fair hearing guaranteed by the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.⁶⁴ That procedure prohibited disclosure to the appellants or their lawyers of certain “closed material”. This material was instead given to special advocates who argued on behalf of the appellants, but who after seeing

⁵⁹ Kent Roach, ‘A Comparison of Australian and Canadian Anti-Terrorism Laws’ (2007) 30(1) *University of New South Wales Law Journal* 53, 63-64. The closest offence under the Canadian *Criminal Code* is knowingly participating or contributing to any activity of a terrorist group for the purpose of enhancing its ability to facilitate or carry out terrorist activities, see *Criminal Code*, RSC 1985 c C-46 s 83.13.

⁶⁰ *Canadian Charter of Rights and Freedoms* s11(d) in Roach, above n 59, 63.

⁶¹ Andrew Lynch, ‘Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law’ (2008) 8(2) *Oxford University Commonwealth Law Journal* 159, 159.

⁶² For consideration of Australian and United Kingdom control orders see Lynch, above n 61.

⁶³ *Secretary of State for the Home Department v AF* [2010] 2 AC 269.

⁶⁴ *Ibid.*

the material were not permitted to have any further contact with the appellants.

Lord Phillips of Worth Matravers gave the lead judgment and the appeals were allowed on the basis that the judgment of the Grand Chamber of the Strasbourg Court in *A v United Kingdom* had already resolved the issue.⁶⁵ There, it was accepted that, regardless of the demands of national security, a person will not have a fair hearing for the purposes of article 6 of the *European Convention* unless given sufficient information about the case against him or her to give effective instructions to the advocate representing his or her interests; though it may be acceptable not to disclose the source of some of the evidence.⁶⁶

Lord Scott of Foscote expressly left open the possibility that the executive could be given by Parliament power to impose control orders on individuals accompanied by judicial procedures that do not comply with the *European Convention* or with the common law fair hearing requirements.⁶⁷

Lord Hoffman, concurring in the result, referred to the acute tension between the urgent need to protect the public from terrorist attack and the fundamental rights of the individual; and to the Court's duty, amongst others, to protect and safeguard the rights of the individual.⁶⁸ His Lordship was of the opinion that the fact that in theory there is always some chance that a person might have been able to contradict closed evidence was not a sufficient reason for saying in effect that control orders can never be made against dangerous people if the case against them is based "to a decisive degree" upon material which cannot in the public interest be disclosed – but that this was, nevertheless, what the court was obliged to declare to be the law.⁶⁹

"Bikie" Laws in New South Wales

Although consorting offences have a long history in Australia, a number of state consorting offences have been the subject of recent successful challenges to the High Court.⁷⁰

⁶⁵ Ibid 349-356.

⁶⁶ Ibid 349; referring to *A v United Kingdom* (2009) 49 EHRR 625, GC, [195].

⁶⁷ *Secretary of State for the Home Department v AF* [2010] 2 AC 269, 365.

⁶⁸ Ibid 357.

⁶⁹ Ibid 357-358.

⁷⁰ *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1; *Wainohu v New South Wales* [2011] HCA 24; (2011) 243 CLR 181.

In 2009, New South Wales created a scheme (in addition to its existing consorting laws) to address organised crime purportedly committed by motorcycle or “bikie” gangs, whereby police could obtain a declaration as to particular organisations and then apply for control orders to restrict the movement and communication of members or suspected members of the said organisations.⁷¹ This legislative scheme for the control of “bikie” gangs was the subject of a successful High Court challenge, in which the Court held the entire Act to be invalid, because the judges responsible for making the declarations were not obliged to provide reasons for the declaration, which was repugnant to, or incompatible with, the integrity of the Supreme Court of New South Wales.⁷²

In its second attempt, New South Wales introduced a revised legislative scheme in 2012,⁷³ which included a requirement for the judge to provide reasons for any declaration made,⁷⁴ and provide that:

(1) A controlled member of a declared organisation who associates with another controlled member of the declared organisation is guilty of an offence.

...

(1A) A controlled member of a declared organisation who, at any time within a period of 3 months, associates with another controlled member of the declared organisation on 3 or more occasions is guilty of an offence.

...

(1B) A controlled member of a declared organisation who associates with another controlled member of the declared organisation after being convicted of an offence under this section is guilty of an offence.⁷⁵

Similarly to the general consorting offence, there is a defence available if the defendant proves that the association was reasonable in the circumstances of close family members, associations occurring in the course of a lawful occupation, business or profession, at a course of certain training or education between persons enrolled in the course, at certain rehabilitation, counselling or therapy sessions, in lawful custody or in the course of complying with a court order or certain other associations prescribed by the regulations.⁷⁶ There is also a defence if the person satisfies the Court that there is a good reason why he or she should be allowed to associate with a particular controlled member.⁷⁷

⁷¹ *Crimes (Criminal Organisations Control) Act 2009* (NSW).

⁷² *Wainohu v New South Wales* [2011] HCA 24; (2011) 243 CLR 181.

⁷³ *Crimes (Criminal Organisations Control) Act 2012* (NSW). Part 2, which provides the process by which judges can declare an organisation, has since been amended by the *Crimes (Criminal Organisations Control) Amendment Act 2013* (NSW).

⁷⁴ *Crimes (Criminal Organisations Control) Act 2012* (NSW) s 13.

⁷⁵ *Ibid* s 26.

⁷⁶ *Ibid* s 26(5).

⁷⁷ *Ibid* ss 19(7)(a) & 26(4).

Current and future High Court challenges?

Writing in 2013, Andrew McLeod accurately predicted that further litigation seemed likely.⁷⁸ In the early hours of 16 October 2013, the Queensland state Parliament passed laws in response to a Gold Coast brawl which occurred 19 days earlier,⁷⁹ justified as necessary for the “war on organised crime”.⁸⁰ The new s 60A of the *Criminal Code 1899* (QLD) provides:

(1) Any person who is a participant in a criminal organisation and is knowingly present in a public place with 2 or more other persons who are participants in a criminal organisation commits an offence.

(2) It is a defence to a charge of an offence against subsection (1) to prove that the criminal organisation is not an organisation that has, as 1 of its purposes, the purpose of engaging in, or conspiring to engage in, criminal activity.⁸¹

Those laws are currently the subject of a constitutional challenge in the original jurisdiction of the High Court, on the basis of whether the legislation is inconsistent with an implied freedom of political communication in the *Constitution*.⁸²

As to terrorism offences, like the House of Lords, the High Court, may need to grapple with this issue again soon, given that new legislative counter-terrorism measures have recently been proposed to address the threat of foreign fighters returning to Australia from Syria and Iraq.⁸³

⁷⁸ McLeod, above n 14, 138.

⁷⁹ Jeremy Gans, *News: Old bikie laws challenge set for lengthy hearing in September* (30 June 2014), Melbourne Law School: Opinions on High <<http://blogs.unimelb.edu.au/opinionsonhigh/2014/06/30/news-qld-bikie-laws-challenge-set-for-lengthy-hearing-in-september/>>.

⁸⁰ Stefan Armbruster, *High Court challenge to Queensland anti-bikie laws* (2 September 2014) World News Radio <<http://www.sbs.com.au/news/article/2014/09/02/high-court-challenge-queensland-anti-bikie-laws>>. See also Explanatory Note, Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013, which explains the policy objectives:

are to combat the threat of criminal motorcycle gangs (CMCGs) to public safety and certain licensed industries and authorised activities, through enhanced information-sharing, licensing, interrogatory and correctional powers. These objectives align with the Queensland Government's commitment to address serious community concern about recent incidents of violent, intimidating and criminal behaviour of members of CMCGs, as well as the infiltration of criminal organisations within legitimate businesses and industries in the community.

⁸¹ Inserted by *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (QLD) cl 42.

⁸² See Transcript of Proceedings, *Kuczborski v The State of Queensland* [2014] HCATrans 187 (2 September 2014); *Kuczborski v The State of Queensland* [2014] HCATrans 188 (3 September 2014). The Court has reserved its decision.

⁸³ The Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 was introduced into the Senate on 24 September 2014.

Indeed, on 12 September of this year, the Australian government raised its National Terrorism Public Alert level from medium to high.⁸⁴

Issues for the legal profession

The issues for the legal profession arising from the above are apparent. In a speech delivered in November 2000, the Hon Murray Gleeson emphasised that the rule of law is not enforced by an army; it depends on public confidence in lawfully constituted authority.⁸⁵ An essential feature of an adversarial legal system such as that in Australia, is that the legal profession will be instrumental in framing the issues and formulating the arguments to be tested in Constitutional and other challenges brought to protect the rule of law.

It must be recognised that encroachments on the rule of law will not always arise in an obvious fashion: threats to fundamental common law principles will equally be capable of infringing the rule of law. Furthermore, while the content of the rule of law is a common thread between many countries, the way in which it may be threatened and the way in which it may be necessary to uphold it will vary from country to country.

Conclusion

Professor Bernadette McSherry has noted that:

The physical act of most offences consists of the commission of an act or series of acts by the accused. This reflects the principle of legality or, as it is more traditionally known, the rule of law which requires that there should be no punishment without law (*nulla poena sine lege*). An important premise behind the rule of law is that governments should punish criminal conduct not criminal types.⁸⁶

As I have sought to explain, status and consorting offences fall outside the realm of typical criminal laws, despite their long history in Australia. Early status offences sought to prevent crimes committed by escaped convict bushrangers in New South Wales; now they are directed at a more insidious threat – of international terrorism.

⁸⁴ See Prime Minister of Australia, *National Terrorism Public Alert Level Raised to High* (12 September 2014) <<https://www.pm.gov.au/media/2014-09-12/national-terrorism-public-alert-level-raised-high>>.

⁸⁵ Gleeson, above n 2.

⁸⁶ McSherry, above n 8, 364.

Both offences reverse the onus insofar as they require the accused to establish that his or her status was or is not that of a convict or member of a terrorist organisation, respectively. Membership offences are not part of Canada's anti-terrorism legislation, precisely because of the reversal of onus that this would involve.

New South Wales' history of consorting offences imported from New Zealand has in the past been directed variously at thieves, vagrants, prostitutes and razor gangs. Statutory provisions of this kind now focus on organised crime, and in particular bikie gangs. Many prominent features of consorting offences remain the same in Australian jurisdictions.⁸⁷

The explanation proffered for their continued existence is the same rationale relied on by the governments that introduced them. These offences, it is said, are intended as prophylactics, targeting activities that lie outside the reach of the traditional criminal law but that nevertheless conduce criminal conduct. In that sense, they form an important part of the ongoing narrative of the law's concern with inchoate criminality.⁸⁸

New South Wales consorting offences today also carry a reverse onus for the defendant to prove that the association was for certain specified purposes which form an exception to the offence.

These kinds of offences create a number of difficulties for the rule of law. First, they criminalise a person based on his or her status or associates rather than on his or her acts or omissions. Although it may be that some justification can be made for such provisions as preventative measures, they necessarily infringe the elements of the rule of law as articulated earlier. Second, insofar as there is a reverse onus cast on an accused person to prove that he or she does not have the status of a prohibited person or is not a member of the prohibited group, the provisions trespass on the presumption of innocence. Third, if there is an unchecked discretion as to those against whom the offences are enforced, and there is no one accountable for the exercise of discretion, again this runs contrary to the rule of law.

It is not my purpose today to enter into a debate about the merits or otherwise of specific consorting and status offences in Australia. However, these offences are examples of criminal laws which have at their heart the purpose of discrimination in order to address the threat of

⁸⁷ McLeod, above n 14, 141.

⁸⁸ Ibid.

crime or terrorism. They are laws which purposely single out certain individuals or associating with certain individuals or groups. McSherry notes that “[t]here is an inevitable tension between the use of the criminal law to prevent harm to others and the risk of over-criminalising certain behaviour.”⁸⁹ This raises real issues for the legal profession as to where the line should be drawn in criminalising status or association in order to strike a balance which both prevents crime and upholds the rule of law.

It can be anticipated that not only the High Court in my country but constitutional courts in other countries will be required to consider the validity of status and consorting offences over the next few years; and will have to confront the tension recognised by Lord Hoffman between the duty to uphold the rule of law, the duty to recognise laws for the protection of society and the duty to protect the rights of the individual. Importantly, the legal profession will have a critical role to play as defenders of and advocates for the rule of law.

⁸⁹ McSherry, above n 8, 364.