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Submission to statutory review of the *Criminal Organisation Act 2009* (Qld)

This submission focuses on issues flowing from the use of 'criminal intelligence' in declaring criminal organisations, as endorsed by the High Court of Australia in *Assistant Commissioner Condon v Pompano Pty Ltd* ('*Pompano*') (2013) 295 ALR 638.[1]

Curial fairness

> The case is too trifling to need a lawyer, but I could do very well with an advisor.' 'Yes, but if I am to be an advisor I must know what it's all about,' said Fräulein Bürstner. 'That's just the snag,' said K. 'I don't know that myself.'[2]

A fundamental issue with the use of criminal intelligence is that it confronts an accused person with an essentially Kafkaesque scenario, such as the one confronting Josef K. in *The Trial* (quoted above), whereby they may stand accused of a crime but have no idea of the nature of the allegations made against them. The problem here is heightened by the fact that a person's liberty is at stake. And it is partly for this reason that the law provides procedural protections to defendants in criminal cases. The use of criminal intelligence, on the other hand, undermines some of the protections traditionally afforded defendants in cases where their liberty may be at stake, such as in the use of control orders under the *Criminal Organisation Act 2009* (Qld).

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[1]See also Greg Martin, 'Outlaw Motorcycle Gangs and Secret Evidence: Reflections on the Use of Criminal Intelligence in the Control of Serious Organised Crime in Australia' (2014) 36(3) *Sydney Law Review* 501, available at: <http://sydney.edu.au/law/slr/slr_36/slr36_3/SLRv36n3Martin.pdf>; Greg Martin, '*Pompano* and the Short March to Curial Fairness' (2013) 38(2) *Alternative Law Journal* 118; Greg Martin, 'Jurisprudence of Secrecy: *Wainohu* and Beyond' (2012) 14(2) *Flinders Law Journal* 189.
[2] Franz Kafka, *The Trial* (Vintage, 2009 [1925]) 29.

In *Pompano*, the High Court upheld the judicial use of criminal intelligence, which can be relied upon by the Police Commissioner in an application to declare an organisation a criminal organisation. Further, the High Court held that it is incumbent upon the Supreme Court to decide whether any unfairness may arise in the use of criminal intelligence, i.e. unfairness that might result from accused persons not knowing the substance of allegations made against them. Legal scholars have argued this constitutes a state of affairs whereby the doctrine of 'curial fairness' has emerged to replace the requirements of procedural fairness.[3]

Previously, however, the High Court held the view that 'the essential character of a court […] necessitates that a court not be required or authorised to proceed in a manner that does not ensure […] the right of a party to meet the case made against him or her',[4] and that the judicial process 'requires that the parties be given the opportunity to present their evidence and to challenge the evidence led against them'.[5] Hence, it has been said that the High Court's former concern with curial unfairness, evident in the late twentieth century, has given way, in the twenty-first century, to the concept of curial fairness,[6] where 'fairness might be achieved by allowing one-sided evidence before the court, with the court self-regulating its use of the material'.[7] This is an approach therefore that relies heavily upon 'the bankroll of goodwill towards courts as arbiters of fairness'.[8]

Analogy with public interest immunity

The approach adopted in Australian criminal intelligence cases[9] not only relies upon the good faith of courts to act fairly and impartially, but, as Steven Churches argues, it also depends on 'a fallacious analogy with public interest immunity procedures',[10] which involve the non-disclosure of sensitive material that, if a claim of public interest immunity is successfully made, is excluded altogether from any decision-making processes of the court.[11] In *Pompano*, for example, French CJ stated that, '[t]he process [of declaring criminal intelligence] is analogous in some respects to that used in the determination of public immunity claims in the exercise of the inherent power of the Supreme Court'.[12]

Courts in the United Kingdom ('UK') have also considered the relationship between information used in a 'closed material procedure' and material excluded on the basis of public interest

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[3] Steven Churches, 'Paradise Lost: But the Station is Always There' (2010) 12(1) *Flinders Law Journal* 1, 20.
[4] *Nicholas v The Queen* (1996) 193 CLR 173, [74] (Gaudron J).
[5] *Bass v Permanent Trustee Co* (1999) 198 CLR 334, [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
[6] Churches, above n 3, 9-10, 12, citing *Nicholas v The Queen* (1996) 193 CLR 173, [74] (Gaudron J).
[7] Steven Churches, 'How Closed Can a Court be and Still Remain a Common Law Court?' (2013) 20(3) *Australian Journal of Administrative Law* 117, 120.
[8] Ibid.
[9] See also *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532*; K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.
[10] Churches, above n 7, 120.
[11] Ibid; see also Andrew Lynch, Tamara Tulich and Rebecca Welsh, 'Secrecy and Control Orders: The Role and Vulnerability of Constitutional Values in the United Kingdom and Australia' in David Cole, Federico Fabbrini and Arianna Vedaschi (eds), *Secrecy, National Security and the Vindication of Constitutional Law* (Edward Elgar Publishing, 2013) 156.
[12] *Assistant Commissioner Condon v Pompano Pty Ltd* ('*Pompano*') (2013) 295 ALR 638, [78] (French CJ).

immunity ('PII'). For instance, in the leading judgment in *Al Rawi*, Lord Dyson held that 'unlike the law relating to PII, a closed material procedure involves a departure from both the open justice and natural justice principles',[13] adding that 'a closed procedure is the antithesis of a PII procedure', and that '[t]hey are fundamentally different from each other'.[14] However, a major problem confronted in the UK courts is that public interest immunity tends to be a 'blunt instrument', since it excludes evidence altogether,[15] which might mean so much material is excluded on a public interest immunity certificate so as to prevent litigation proceeding. And that is a key reason the UK Government extended the use of closed material procedures to civil cases under the *Justice and Security Act 2013* (UK). Nevertheless, the line of reasoning in criminal intelligence cases in Australia is that:

> … evidence that formerly would not have been available to the affected party, pursuant to public interest immunity, on which basis it was not utilised by the court, may now still not be available to the affected party but *can* be used by the court.[16]

Minimum disclosure requirements and 'gisting'

Recently, George Williams has identified 350 instances of current Commonwealth, State and Territory legislation that infringe democratic rights and freedoms, 209 (approximately 60 per cent) of which have been introduced since the terror attacks of 11 September 2001.[17] Many of the legal measures introduced in the control of criminal organisations ape those introduced as part of the 'war on terror', including those infringing basic legal rights, such as rights to a fair trial and procedural fairness when sensitive material is admitted in a closed hearing, which may exclude a defendant and his or her legal representative. Accordingly, Williams concludes, '[a] dynamic has been created whereby extraordinary anti-terrorism laws have created new understandings and precedents that have made possible an even broader range of rights infringing legislation'.[18]

Clive Walker has written that, in this context, 'it is generally accepted that the recourse to sensitive evidence is increasing in forensic settings and that this trend has resulted in legal anomalies and obscurities'.[19] One consequence of this development is a tendency to blur intelligence and evidence. Walker says there are 'no fundamental objections to the melding of intelligence into the evidence-led legal process', so long as intelligence is properly tested (as we expect evidence to be properly tested), and it is assessed for reliability and relevance, 'which must be weighed in the overall context of infringement of liberty, just as if "evidence" was being taken into account'.[20]

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[13] *Al Rawi* (SC) [2012] 1 AC 531, [14] (Lord Dyson).
[14] Ibid [41].
[15] Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98, (2004), [8.209].
[16] Churches, above n 3, 20 (original emphasis).
[17] George Williams, 'The Legal Assault in Australian Democracy', Sir Richard Blackburn Lecture, ACT Law Society, 12 May 2015, available at: <https://www.actlawsociety.asn.au/documents/item/1304>.
[18] Ibid.
[19] Clive Walker, 'Submission to the Ministry of Justice, Justice and Security Green Paper' (29 December 2011) 1, 10-11, quoted in Martin, above n 1, 208.
[20] Clive Walker, 'Intelligence and Anti-terrorism Legislation in the United Kingdom' (2005) 44 *Crime, Law and Social Change* 387, 409.

Similarly, Adam Tomkins believes there must be an evidential basis for intelligence and national security claims whereby evidence should be produced of serious risk if secret intelligence is revealed, which was the approach adopted by the UK Divisional Court in *Binyam Mohamed*,[21] where it was determined 'there must be an evidential basis for the Secretary of State's view as to what is required in the interests of national security'.[22] Essentially, what this amounts to is a requirement that there be a minimum level of disclosure sufficient to allow accusations to be heard and challenged. In the UK, this has been discussed in terms of 'gisting'.

The position in the UK was initially impacted by the decision in *A v United Kingdom*, where, having regard to Article 6 of the European Convention on Human Rights (right to a fair trial), the European Court of Human Rights held that parties to legal proceedings need be provided with 'sufficient information about the allegations against them' so as to give 'effective instructions in relation to those allegations'.[23] That decision was followed by the House of Lords in *Secretary of State for the Home Department v AF*[24] ('*AF*'), where it was held unanimously that even where statutory authority exists for closed material procedures, a person must be given sufficient information about the allegations against them;[25] although that 'gisting' requirement is restricted to cases where a person's liberty is affected, and does not extend, for instance, to cases where a person's livelihood is involved.[26]

The case of *AF* was preceded by *Secretary of State for the Home Department v MB*[27] ('*MB*'), which raised the issue of the compatibility of Article 6 with the special advocate procedure under the *Prevention of Terrorism Act 2005* (UK). Indeed, the ratio in *AF* flows from Lord Bingham's speech in *MB*, which regarded Article 6 as importing a 'core, irreducible minimum of procedural protection' that cannot be satisfied if the case against an affected party contains closed material.[28] To satisfy Article 6 requirements, Lord Bingham held a person potentially subject to a control order must be told the 'gist' or 'essence' of the case against him; however, in his Lordship's view, *MB* was 'confronted with a bare, unsubstantiated assertion which he could do no more than deny'.[29] Thus, according to Lord Bingham, while the presence of 'special advocates enhanced the measure of procedural justice available to controlled persons, it could not remedy that fundamental defect in the hearing'.[30]

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[21] *R* (*Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 5)* [2009] 1 WLR 2653, [67], [95].
[22] Adam Tomkins, 'National Security and the Due Process of Law' (2011) 64(1) *Current Legal Problems* 215, 240.
[23] *A v United Kingdom* (2009) 49 EHRR 29, [220].
[24] *Secretary of State for the Home Department v AF* ('*AF (No 3)*') [2010] 2 AC 269.
[25] Rebecca Scott Bray, 'Executive Impunity and Parallel Justice? The United Kingdom Debate on Secret Inquests and Inquiries' (2012) 19(1) *Journal of Law and Medicine* 569, 592.
[26] *Home Office v Tariq* [2012] 1 AC 452. See also Ryan Goss, 'Balancing Away Article 6 in *Home Office v Tariq*: Fair Trial Rights in Closed Material Proceedings' in Greg Martin, Rebecca Scott Bray and Miiko Kumar (eds), *Secrecy, Law and Society* (Routledge, 2015).
[27] *Secretary of State for the Home Department v MB* ('*MB*') [2008] 1 AC 440.
[28] Aileen Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73(5) *Modern Law Review* 824, 839.
[29] *MB*, [41] (Lord Bingham).
[30] Kavanagh, above n 28, 839.

More recently, in the case of *Bank Mellat v HM Treasury*, Lord Neuberger MR added what Tomkins sees as 'an important gloss to *AF*',[31] holding that information given by the British Government must not merely enable a party to deny the case against it, but the party must be provided with 'sufficient information to enable it actually to refute, insofar as that is possible, the case made out against it'.[32] Notwithstanding the hard fought advances to preserve a core 'irreducible minimum'[33] of procedural fairness in the law of national security, Tomkins argues, the situation in the UK 'remains precarious'.[34] For him, contemporary views expressed by the UK Parliament's Joint Committee on Human Rights, the Court of Appeal of England and Wales, and the European Court of Justice about the indispensability of procedural fairness in national security and the due process of law are evidence that 'grave concerns as to the fairness of closed material exist at the very highest levels both of law and of politics and that these concerns are only partly tempered by the use of special advocates'.[35]

Special advocates

Courts and legal commentators in the UK have observed that the special advocate system there goes only some way to remedying the incursions into procedural fairness and due process rights brought about by the increased 'creep' of secret procedures in curial settings. Under the *Criminal Organisation Act 2009* (Qld), a criminal organisation public interest monitor ('COPIM') may attend a 'special closed hearing' to declare certain information criminal intelligence. However, as the High Court made clear in *Pompano*, the role of the COPIM is not to represent the interests of accused persons, and, accordingly, French CJ held that any analogy between the COPIM and special advocates used in closed hearings in the UK and Canada is 'imperfect'[36] and 'very limited'.[37]

Like the Queensland legislation, the *Crimes (Criminal Organisations Control) Act 2012* (NSW) provides for the appointment of a 'criminal intelligence monitor', who will be 'a retired judicial officer, or a person qualified to be appointed as a judicial officer' (s 28C). However, and also like the function of the COPIM under the Queensland legislation, the criminal intelligence monitor's role is not to represent or advocate for respondents. Accordingly, the NSW Act provides that, 'the monitor must not make a submission to the Court while a respondent or a legal representative of a respondent is present' (s 28F(3)), and that, in its discretion, the Supreme Court may 'exclude the monitor from the hearing while a respondent or a legal representative of a respondent is present' (s 28F(4)).

In the UK, the special advocate system has been criticised by special advocates themselves, as well as by legal scholars. For instance, Tomkins identifies three particular problems with special advocates, which makes the exercise of their functions 'extremely difficult in practice'.[38] First, 'special advocates have no ability in practice to adduce evidence to rebut allegations made in the

[31] Tomkins, above n 22, 219.
[32] *Bank Mellat v HM Treasury* [2012] QB 91, [21] (Lord Neuberger MR).
[33] Ibid [18].
[34] Tomkins, above n 22, 251.
[35] Tomkins, above n 22, 223.
[36] *Pompano*, [50] (French CJ).
[37] Ibid [54].
[38] Tomkins, above n 22, 217.

closed material'.[39] Secondly, 'special advocates struggle to find ways of mounting effective challenges to government objections to disclosure of material'.[40] And, thirdly, 'special advocates are gravely hampered by the rules which severely restrict communications between the special advocate and the party they "represent" once the closed material has been served'.[41]

In terms of upholding fairness to an accused person, arguably the Canadian model is best since it permits communication between subject and special counsel *after* the secret evidence has been seen. As Kent Roach says, it allows 'counsel to have contact with the affected person after counsel has reviewed the closed or secret evidence without anything but self-imposed restrictions on the risk of inadvertent disclosure of secret information'.[42] Consequently, special counsel in Canada are able to make effective adversarial challenges to secret evidence, and Canadian judges have actually become aware of the dangers of government overclaiming secrecy and national security partly as a result of effective challenges by special counsel who have had access to secret material.[43] Some limitations on the function of special counsel in Canada include restrictions on being able to call witnesses, seek further disclosure, and contact a detainee and others after seeing secret evidence.[44]

There seems no reason why special advocates who properly represent the interests of accused persons ought not be included in proceedings to declare criminal intelligence in criminal organisation control legislation across Australia, especially given that under Victoria's *Criminal Organisations Control Act 2012* (Vic), the Supreme Court may appoint a special counsel to represent the interests of the respondent to a substantive application (s 79), including a substantive application in relation to which the Chief Commissioner of Police has applied for a 'criminal intelligence protection order' (s 71).

COAG recommendations

In Australia, the prospect of appointing special advocates to represent the interests of defendants and assist courts in determining national security claims was raised by Whealy J in *R v Lodhi*.[45] More recently, his Honour chaired the Council of Australian Governments ('COAG') Committee charged with reviewing federal counterterrorism legislation, which, among other things, provides for the issuance of control orders. Two of the Committee's recommendations are significant for the purpose of this submission insofar as they seek to protect the right to a fair trial. First, the Committee recommended the Federal Government consider amending the *Criminal Code* (Cth) to provide for the introduction of a national system of special advocates to participate in control order hearings.

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[39] Ibid.
[40] Ibid, 217-8.
[41] Ibid 218. See also Kavanagh, above n 28, 838.
[42] Kent Roach, 'Secret Evidence and its Alternatives' in Aniceto Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer, 2012) 186.
[43] Ibid 188.
[44] Ibid 189.
[45] (2006) 163 A Crim R 475. See also Anthony G Whealy, 'Difficulty in Obtaining a Fair Trial in Terrorism Cases' (2007) 81(9) *Australian Law Journal* 743, 750.

While the Committee recognised defence lawyers 'dislike the notion of a security clearance and the personal intrusion it entails',[46] as well as 'the intelligence agencies and the Government wish to restrict disclosure of that information as much as possible and consistently with its obligations to other countries',[47] it nevertheless stated that, 'an appropriate moderate compromise is the use of the Special Advocates system'.[48] Such a system, the Committee said, could enable States and Territories to have a panel of security-cleared barristers and solicitors who may participate in closed material procedures, including, but not limited to, matters involving control orders.[49] Moreover, a special advocate system is preferable to a national system of public interest monitors, which, the Committee thought 'would be a more difficult, less effective, and more expensive system to implement on a practical level'.[50]

Secondly, the Committee recommended the legislation provide a minimum standard of disclosure of information to controlees. This protection is quite separate from the recommendation for a nationwide special advocate system, because it is intended to enable a person and his or her 'ordinary legal representative of choice' to insist upon a minimum level of disclosure to them.[51] The Committee recommended the minimum standard as: '*the applicant must be given sufficient information about the allegations against him or her to enable effective instructions to be given in relation to those allegations*'.[52] Essentially, this is a recommendation that an *AF*-style 'gisting' requirement be introduced in cases involving control orders under federal counter-terrorism legislation. But this could quite feasibly be extended to apply to other control order regimes, such as the one currently under review in Queensland, since a common feature of control order proceedings is that prospective controlled persons and their legal representatives are excluded from court during crucial parts of the hearing; thus being oblivious to the detail of the case against them, they are unable to contest intelligence being relied upon. Indeed, the COAG Committee hoped 'the use of Special Advocates may become more commonplace, and hence more effective, in other litigation where national security matters arise'.[53]

However, putting these principles into practice is not so easy, for special advocates themselves have argued minimum disclosure may encompass more than the term 'gisting' implies,[54] stating, 'the disclosure that may require to be given pursuant to *AF (No 3)* may go well beyond "gisting"'.[55] Indeed, as Lord Hope held in that case, 'detail must be met with detail'.[56] Accordingly, while providing summarised information may appear a viable means of meeting minimum disclosure requirements, as the COAG Committee points out, it also 'has the capacity to threaten the right of a fair trial', as it 'may once again be limited because of national security

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[46] Australian Government, Council of Australian Governments ('COAG'), *Review of Counter-Terrorism Legislation* (2013), [237].
[47] Ibid.
[48] Ibid [238].
[49] Ibid xiv.
[50] Ibid [238].
[51] Ibid xiv.
[52] Ibid (original emphasis).
[53] Ibid [239].
[54] Tamara Tulich, 'Adversarial Intelligence? Control Orders, TPIMs and Secret Evidence in Australia and the United Kingdom' (2013) 12(2) *Oxford University Commonwealth Law Journal* 341, 362.
[55] Special Advocates, *Justice and Security Green Paper: Response to Consultation from Special Advocates*, 16 December 2011, [33].
[56] *AF (No 3)* [2010] 2 AC 269, [87] (Lord Hope).

concerns'.[57] Such was the case in *Kadi v Commission*, where the European Union's General Court held that providing Kadi with an outline narrative summary of reasons as to why his assets should be frozen 'cannot reasonably be regarded as satisfying the requirements of a fair hearing and effective judicial protection'.[58]

Equality of arms

It has been observed that while 'the minimum disclosure requirement injects the closed material procedure with basic fairness, it does not overcome the inequality of the parties nor remedy the fairness-inhibiting features of the closed material procedure',[59] such as, in the case of *Al Rawi*, the handing 'over to one party considerable control over the production of relevant material and the manner in which it is to be presented'.[60] This goes to the equality of arms principle (a limb of natural justice), which is offended by the judicial endorsement of the use of criminal intelligence, since, as Churches contends, this 'deep lying principle in the law', which assumes 'the parties in court should be armed with equal weaponry, and that the judge should keep equidistant from them',[61] has been 'displaced in favour of court controlled "fairness"'.[62]

Law and order politics

While the courts have responsibility for administering law, ultimate responsibility for making law rests with parliamentarians. Many legal commentators in Australia have observed an escalation in 'law and order politics' in recent times, and have accordingly called for politicians to exercise self-restraint, highlighting the dangers of 'overcriminalisation',[63] whereby there is increased recourse to criminal law and penal sanctions to solve particular problems that may be better addressed via alternative means, such as increasing resources or allocating them more efficiently. In his review of laws infringing democratic rights and freedoms, Williams says not only have these increased in number since September 2001, but so has their severity: where legislation previously made conduct unlawful, and therefore had a low impact upon freedoms, legislation now criminalises conduct, which can also be subject to long periods of imprisonment.[64] Legislation enacted by the Queensland Government, lead by Campbell Newman, provides examples here.

For instance, to combat bikie gang related crime, the Newman Government introduced legislation imposing mandatory sentences of 15 years in addition to the original sentence for a declared offence on a 'vicious lawless associate',[65] such as a bikie club member, and an extra 10 years (i.e. 25 years on top of the original sentence) for a vicious lawless associate who was an office bearer

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[57] COAG, above n 46, [233].
[58] Case T-85/09 *Kadi v Commission* [2010] ECR II-0000 (30 September 2010), [157].
[59] Tulich, above n 54, 362.
[60] *Al Rawi* (SC) [2012] 1 AC 531, [93] (Lord Kerr).
[61] Churches, above n 3, 29-30.
[62] Ibid 30.
[63] Douglas Husak, *Overcriminalization: The Limits of Criminal Law* (Oxford University Press, 2008).
[64] Williams, above n 17.
[65] One is struck by the similarity between this as an exceptional category of person in Queensland's 'war on organised crime' and the designation of 'enemy combatants' in the US's 'war on terror'.

of the relevant association at the time or during the commission of the offence.[66] Sentences for these offences are to be served in a maximum security 'super jail' where, among other things, inmates are subject to constant monitoring, including monitoring of personal calls and mail, spend 22 hours a day in solitary confinement, are allowed only one hour of non-contact visits with family per week, and are required to wear fluorescent pink jumpsuits,[67] in a move presumably intended to mimic Arizona Sheriff Joe Arpaio's policy of emasculating male prisoners by having them wear pink underwear.[68] As this extreme punishment regime is aimed at 'encouraging vicious lawless associates to cooperate with law enforcement agencies',[69] it has been suggested it is medieval in nature: 'The threat of 15 or 25 years extra imprisonment unless the prisoner produces information is not much more subtle than the extraction of such information by torture in England before 1640'.[70]

To Williams, the problem regarding laws infringing democratic rights and freedoms may well run much deeper than meets the eye, since the 350 infringements he identifies on the face of the law do not include infringements that might occur via indirect means. Again, Queensland provides an example where commentators have expressed concern at the potential for the *G20 Safety and Security Act 2013* (Qld) to interact with legislation directed at bikies:

> If for example an otherwise peaceful (and lawful) assembly turns violent, there is the possibility for people to be charged with affray, one of the offences listed as a trigger for operation of the *VLAD* [*Vicious Lawless Association Disestablishment*] *Act*. Carrying out such an act with three others deemed to be participants in a serious crime then renders the accused a participant in a criminal organisation. This would attract the additional mandatory sentences.[71]

Conclusion

Over recent years, there has been a tendency for politicians to act with impunity when enacting laws in respect of populist issues involving claims of threats to national security or public safety, such as in the areas of terrorism, organised crime, and immigration and border protection. Instead, however, our elected representatives ought to act responsibly and with restraint, especially when the laws they make contain substantial departures from established legal principles and practice. As this submission makes clear, reliance on criminal intelligence when a person's liberty is at stake constitutes one such departure, which threatens the rule of law by undermining doctrine around procedural fairness in court hearings when allegations are made, the substance of which are not known to an accused person and their legal representative.

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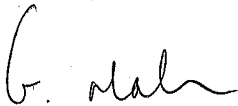
[66] *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 7(1).
[67] Andrew Trotter and Harry Hobbs, 'The Great Leap Backward: Criminal Law Reform with the Hon Jarrod Bleijie' (2014) 36(1) *Sydney Law Review* 1, 20-1.
[68] Catherine A Traywick, 'Australia's Angels', *Miami Herald* (online), 23 October 2013, available at: <http://www.miamiherald.com/2013/10/23/3706507/australias-angels.html>.
[69] *Vicious Lawless Association Disestablishment Act 2013* (Qld) s 2(2)(c).
[70] Trotter and Hobbs, above n 67, 38.
[71] Kate Galloway and Allan Ardill, 'Queensland: A Return to the Moonlight State?' (2014) 39(1) *Alternative Law Journal* 3, 6.

Accordingly, commentary, scholarship and jurisprudence in Australia, as well as from other jurisdictions where similar incursions into normal court processes have also occurred, such as in the UK and Canada, highlight the need for protections and safeguards to mitigate any potential unfairness that may result when intelligence is relied upon to issue control orders and other liberty-restricting measures. Most prominent among those recommendations are: (i) the use of special advocates to represent the interests of accused persons; and (ii) a minimum disclosure requirement enabling accused persons to know the substance of allegations made against them so as to give effective instruction to challenge those allegations.

Given the infringement of due process rights relating to fairness that the use of criminal intelligence poses not only in criminal organisation legislation but also other areas of law across Australia, it is with the utmost solemnity that I respectfully make this submission to the statutory review of the *Criminal Organisation Act 2009* (Qld). Please do not hesitate to contact me if you wish to discuss any aspect of this submission.



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