JURISPRUDENCE OF SECRECY: *WAINOHU* AND BEYOND

GREG MARTIN†

This article uses the case of *Wainohu v New South Wales* ('*Wainohu*') as a springboard to reflect upon the increasing recourse to secrecy in forensic settings that is apparent in Australia and elsewhere. While the case represents the latest successful constitutional challenge to state legislation aimed at the control of criminal organisations, it is argued that *Wainohu*, and cases like it, have significance beyond strict matters of constitutional law. The article focuses on concerns about the increased use of secret evidence and criminal intelligence in areas, such as organised crime, where a premium is placed on security. It considers key features of a creeping culture of secrecy, and examines some of the corresponding jurisprudence of secrecy that has emerged across jurisdictions in response to these developments. As jurisprudence and scholarly commentary in this area is still relatively limited in Australia, the article aims to encourage debate and discussion by highlighting problems posed to principles of fairness and open justice by the normalisation of secrecy, which, in turn, highlights dilemmas relating to intelligence-led policing and responsible government in a law and order context.

I INTRODUCTION

> Control is short-term and of rapid rates of turnover, but also continuous and without limit.[1]

---

† BA (Hons) PhD PGCE LLB, Senior Lecturer in Socio-Legal Studies, University of Sydney. For correspondence please email: greg.martin@sydney.edu.au. The article benefitted immensely from the constructive feedback I received after I presented a version of it to the ARC Laureate Fellowship: Anti-Terror Laws and the Democratic Challenge, while a Visiting Fellow at the University of New South Wales, January – June 2012. I thank my colleagues at the University of Sydney, Rebecca Scott Bray and Robert van Krieken, for offering advice and comments on drafts of the article. I am also grateful to the anonymous reviewers for sharing their insights. Any errors or omissions are entirely mine.

1 Gilles Deleuze, 'Postscript on the Societies of Control' (1992) 59 *October* 3, 6.

It would be fair to say that most commentary on cases involving the control of criminal organisations in Australia has focused on matters of constitutional law. The cases of *South Australia v Totani* ('*Totani*')[2] and *Wainohu v New South Wales* ('*Wainohu*')[3] have been among the first since *Kable v Director of Public Prosecutions (NSW)* ('*Kable*')[4] in which the High Court of Australia has invalidated state legislation for undermining the 'institutional integrity' of a state court contrary to Chapter III of the *Constitution*.[5] In *Totani*, a majority of the Court 'held that a State legislative provision undermined institutional integrity as it required the South Australian Magistrates Court to issue control orders in a process contrary to procedural fairness, and in which the outcome was to a large extent determined by the Attorney-General'.[6] More recently, in *Wainohu*, the majority 'similarly held that State legislation was invalid because it impaired the essential and defining characteristics of a State court by providing that the court's jurisdiction to make control orders would be enlivened by a decision of a judge, after an adversarial proceeding on complex and important matters of fact for which the legislation provided that no reasons need be given'.[7]

While the arguments contained in this article do not discount the significance of these cases for constitutional law, the focus is on some of the broader implications of the decisions and the laws to which they relate. In particular, the article points to ongoing problems associated with legislative provision for the use of secret police intelligence in the control of criminal organisations, as well as in other areas of the law, and the fact that there is a relatively underdeveloped jurisprudence of secrecy in Australia as compared with other jurisdictions.

---

2 *South Australia v Totani* (2010) 242 CLR 1 ('*Totani*').
3 *Wainohu v New South Wales* (2011) 243 CLR 181 ('*Wainohu*').
4 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
5 Chris Steytler and Iain Field, 'The "Institutional Integrity" Principle: Where are we now, and Where are we Headed?' (2011) 35 *University of Western Australia Law Review* 227, 227-8.
6 Ibid 228.
7 Ibid.

Nicola McGarrity shows that apart from the relatively narrow constitutional perspective, legislation aimed at the control of criminal organisations, or 'bikie control order laws', as they are commonly known, has emerged in a law and order context reflecting three other perspectives: (i) a parliamentary perspective; (ii) a criminal law perspective; and (iii) a normalisation perspective.[8] Briefly, the parliamentary perspective is critical of the view that in the absence of a national Bill of Rights we might rely upon the parliamentary process and doctrines of representative and responsible government to protect human rights. Recent history has taught us that in the law and order context, parliamentarians are only too willing to sacrifice citizen rights and freedoms for political expediency.[9]

Among other things, the criminal law perspective questions the need for new laws such as those directed at the control of what are called pejoratively, 'outlaw motorcycle gangs' or OMGs. Like other commentators, McGarrity says extant criminal law might be applied in the organised crime context, including use of criminal group offences, consorting laws, and preparatory and facilitating offences.[10] 'In this complex and overlapping criminal framework', she states, 'it is difficult to identify any gap that necessitated the enactment of the bikie control order laws'.[11]

The normalisation perspective most relevant to bikie control order laws concerns the sense in which extraordinary measures (originating in the fields of immigration law and counter-terrorism) have gradually 'seeped' into the ordinary criminal law. Other than the bikie control order laws, McGarrity identifies three more

---

8 Nicola McGarrity, 'From Terrorism to Bikies: Control Orders in Australia' (2012) 37(3) *Alternative Law Journal* 166.

9 Ibid 168. See also Greg Martin, 'No Worries? Yes Worries! How New South Wales is Creeping Towards a Police State' (2010) 35(3) *Alternative Law Journal* 163.

10 McGarrity, above n 8, 169. See also Arlie Loughnan, 'Drink Spiking and Rock Throwing: The Creation and Construction of Criminal Offences in the Current Era' (2010) 35(1) *Alternative Law Journal* 18.

11 McGarrity, above n 8, 169.

instances of this development. First, in the industrial context, there has been 'the creation of a new statutory office, the Australian Building and Construction Commission, with coercive questioning powers that extend to non-suspects and exclude civil liberties such as the right to silence and privilege against self-incrimination'.[12] Second, Australian governments have given police powers to conduct covert, warrantless property searches.[13] Finally, '[t]he increasing reliance upon criminal intelligence as the basis for criminal proceedings [such as in the control of criminal organisations] is another example of the normalisation of extraordinary measures'.[14]

Although both parliamentary and criminal law perspectives inform some of what is said in this article, the substantive focus is on this last instance of normalisation. What the article intends to do, however, is place the increasing reliance on criminal intelligence in a wider, cross-jurisdictional context to show how it is symptomatic of broader changes afoot in modern societies that are increasingly predominated by a culture of secrecy, security and control.[15] While these developments have intensified since the terror attacks of 11 September 2001 and subsequent 'war on terror', they existed long before 9/11. This has been highlighted recently by comments made in the wake of the Hillsborough Independent Panel's revelations about police cover-up and doctoring of evidence, including Lord Macdonald's observation that the Panel's findings illustrate the '"absolutely suffocating" culture of secrecy in British public life'.[16]

---

12 Ibid 170.

13 Ibid. See also Martin, above n 9.

14 McGarrity, above n 8, 170.

15 David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001); Andrew Lynch, Nicola McGarrity and George Williams, 'The Emergence of a "Culture of Control"' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, 2010) 3.

16 Andrew Sparrow, 'Politics Live with Andrew Sparrow' *Guardian* (13 September 2012) <http://www.guardian.co.uk/politics/blog/2012/sep/13/hillsborough-report-reaction-politics-live>.

It is hoped that by drawing upon debates about the increased use of intelligence, secret evidence and closed procedures, the material presented in this article will illuminate and inform discussion in Australia. While the law on the reception of criminal intelligence – a species of secret evidence[17] – in judicial proceedings in Australia is settled, after the High Court's decision in *K-Generation Pty Ltd v Liquor Licensing Court* ('*K-Generation*'),[18] this remains a controversial area of the law, although, as will be shown, scholarly work in Australia is somewhat scant: except for a few diffuse comments raising concerns about the increased use of criminal intelligence, confidentiality and secrecy,[19] no systematic, critical account of the developments discussed here appears in the Australian academic literature. Moreover, while the Legislative Review Committee of the Parliament of South Australia has inquired into the use of criminal intelligence (following the *Totani* and *Wainohu* decisions), its recommendations tend to support a utilitarian view that if through the use of criminal intelligence a few people lose the right to a fair hearing because they are not told of allegations made against them, that is a price worth paying, as a senior police officer has put it, 'for the greater good or for

[17] Andrew Lynch, Tamara Tulich, Rebecca Welsh, 'Secrecy and Control Orders: The Role and Vulnerability of Constitutional Values' (Paper presented at the Conference on Secrecy, National Security and the Vindication of Constitutional Law, International Association of Constitutional Law – Research Group on Constitutional Responses to Terrorism, Bocconi University, Milan, Italy, 1-2 December 2011). Lynch et al define 'secret evidence' as 'material adduced in judicial proceedings that is not disclosed to an affected party and their legal representative. It may be heard in closed hearings from which the affected party and their representative (unless the latter enjoys a security clearance) are excluded, or it may be in the form of documentary evidence that is not made available to them in whole or part': at 9.

[18] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 ('*K-Generation*').

[19] McGarrity, above n 8, 170; Gabrielle Appleby, 'South Australia and New South Wales React to High Court Rulings on Bikies' on Gabrielle Appleby, *The University of Adelaide: Public Law, Research Community* (23 March 2012) <http://blogs.adelaide.edu.au/public-law-rc/>; Marinella Marmo, 'SA Anti-bikies Law Reviewed' (2010) 35(3) *Alternative Law Journal* 184.

community safety'.[20]

The argument proffered in this article is essentially a principled or deontological one. It is accepted there are some circumstances in which secrecy and confidentiality need be maintained to protect sources and prevent risk to life and so on. Indeed, this has been recognised by the European Court of Human Rights, which has held that the entitlement to disclosure is not an absolute right in criminal proceedings where 'there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused'.[21] However, when confronted by the task of balancing the inevitable conflicts that will arise between societal and individual interests, it is contended, we ought to prioritise individual rights and freedoms, or 'pursue the choices that promote, rather than destroy, fundamental rights and constitutional values'.[22] In short, there is a 'need to maintain legal standards of fair treatment and to ensure the just and accurate determination of individual responsibility'.[23]

Ultimately, the article subscribes to the normalisation view, and holds that if the 'seepage' of secrecy across more and more areas of the law is not halted, fundamental principles and standards at the heart of the justice system will continue to be eroded. Moreover, if evidence from the recent past is anything to go by, it is argued, we

---

[20] Parliament of South Australia, Legislative Review Committee, *Inquiry into Criminal Intelligence*, 52nd Parliament, 1st Session (18 October 2011) 65 (Assistant Commissioner Tony Harrison).

[21] *Edwards and Lewis v United Kingdom* 27 October 2004, [46].

[22] Simon Bronitt, 'Constitutional Rhetoric v. Criminal Realities: Unbalanced Responses to Terrorism?' (2003) 14 *Public Law Review* 70, 80. See also Ben Golder and George Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8(1) *Journal of Comparative Policy Analysis* 43; Christopher Michaelsen, 'Balancing Civil Liberties Against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29(2) *University of New South Wales Law Journal* 1.

[23] Kent Roach and Gary Trotter, 'Miscarriages of Justice in the War Against Terror' (2005) 109(4) *Penn State Law Review* 967, 968.

cannot rely on parliaments to 'exercise restraint'[24] in the context of 'law and order politics', which involves 'the pursuit of a set of penal policies to win votes rather than reduce crime or to promote justice'.[25] Indeed, while the community might continue to expect governments to act responsibly and not enact unfair laws, it would appear they are quite capable of doing so, and within constitutional limits.[26] Hence, a major criticism of state and territory government responses to the High Court's decisions in *Totani* and *Wainohu* is that legislation has been amended, or introduced,[27] to accommodate only the narrow matters of constitutionality raised in the cases.[28] However, remaining concerns about the provision for and use of criminal intelligence require we go beyond strict matters of constitutional law to develop a jurisprudence of secrecy.

Before considering this, a brief summary of the High Court's decisions in the two state control order cases, *Totani* and *Wainohu*, will be provided. After that, the article discusses some of the concerns raised prior to these judgments, and subsequently, with regard to the use of secret evidence and criminal intelligence. While these matters were not determinative in the cases, it is argued they require attention given the increasing recourse to secrecy in forensic settings that is identified in the article. The article then considers some key features from across jurisdictions of this creeping culture of secrecy. The concluding discussion explores some issues that remain pertinent and worthy of future research and debate –

---

24 McGarrity, above n 8, 170.

25 Julian V Roberts, Loretta J Stalans, David Indermaur and Mike Hough, *Penal Populism and Public Opinion* (Oxford University Press, 2003) 5.

26 Parliament of South Australia, above n 20, 60 (Dr Steven Churches).

27 *Criminal Organisation Act 2009* (Qld); *Serious Crime Control Act 2009* (NT); *Crimes (Criminal Organisations Control) Act 2012* (NSW); Serious and Organised Crime (Control) (Miscellaneous) Amendment Bill 2012 (SA); Katherine Storey, 'Long Battle Predicted Over Criminal Organisations Control Bill 2011 (WA)' (2012) 37(1) *Alternative Law Journal* 66.

28 Appleby, above n 19; McGarrity, above n 8, 168. See also Lorana Bartels, *The Status of Laws on Outlaw Motorcycle Gangs in Australia* (Australian Institute of Criminology, 2010); New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 February 2012, 8279-82 (Greg Smith); New South Wales, *Parliamentary Debates*, Legislative Council, 14 March 2012, 9482-5 (David Clarke).

including problems relating to criminal intelligence provisions in amended legislation, dilemmas of intelligence-led policing – and suggests it is imperative parliaments exercise restraint in the current era to prevent the further erosion of civil liberties and human rights and damage to the rule of law and democratic values caused by the normalisation of extraordinary measures.

II AUSTRALIAN HIGH COURT JUDGMENTS ON THE CONTROL OF CRIMINAL ORGANISATIONS

On 6 July 2010, the Acting Commissioner of Police for New South Wales applied to a judge of the Supreme Court for a declaration under Pt 2 of the *Crimes (Criminal Organisations Control) Act 2009* (NSW) ('CCOC Act') in respect of an unincorporated association known as the Hells Angels Motorcycle Club of New South Wales. Derek James Wainohu is a member of the Club, which he joined as a full member on 3 November 1989. He has been a member since that date and is a former President of the Sydney Chapter of the Club. He associates regularly with other members and supporters of the Club. If the Club were to be declared as an organisation, Mr Wainohu would risk being made subject to a control order.

The plaintiff commenced proceedings in the High Court of Australia seeking a declaration that the CCOC Act is, or particular provisions of it, are invalid. He challenged the validity of the Act on the ground 'it confers functions upon eligible judges and upon the Supreme Court which undermine the institutional integrity of that Court in a way that is inconsistent with the national integrated judicial system for which Ch III of the *Constitution* of the Commonwealth provides'.[29] Accordingly, the case posed the question 'whether the Act or any part of it is invalid on the grounds that it undermines the institutional integrity of the Supreme Court of New South Wales or otherwise is beyond the legislative power of

[29] *Wainohu* (2011) 243 CLR 181, [3] (French CJ and Kiefel J).

that State'.[30] The plaintiff also submitted the Act infringes the freedom of political communication and political association implied from the *Constitution*.

On 23 June 2011, the High Court handed down its judgment. By a 6-1 majority, the Court found the CCOC Act invalid. The majority held that the making of a declaration under Pt 2 is an administrative, not a judicial act. They also recognised that non-judicial or administrative functions can be conferred upon federal and state judges, persona designata, in their capacity as individuals, rather than as judicial officers of the court of which they are members. However, the majority held, because the duty to give reasons is generally a defining characteristic of a court, the exemption of eligible judges from any duty to give reasons for a determination under s 13(2) of the Act infringes the constitutional principle identified in *Kable*, namely that 'a State legislature cannot confer upon a State court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Ch III of the *Constitution*, as a repository of federal jurisdiction and as a part of the integrated Australian court system'.[31] Since the validity of other parts of the CCOC Act assumed the valid operation of Pt 2, and Pt 2 of the Act was held invalid, the majority of the High Court declared the entire Act invalid. However, the majority rejected the plaintiff's contention that the making of interim control orders and control orders is beyond the legislative power of the state because it infringes the freedom of political communication and political association implied from the *Constitution*.[32]

While Heydon J dissented, his Honour agreed with the majority on that point, stating 'there is no general freedom of political communication in the *Constitution* beyond that necessary for the effective operation of the system of representative and responsible government', and, in any case, 'the Act is not concerned with

---

30 Ibid [76] (Gummow, Hayne, Crennan and Bell JJ).

31 *Wainohu* (2011) 243 CLR 181, [44] (French CJ and Kiefel J).

32 Ibid [72] (French CJ and Kiefel J) [110]-[114] (Gummow, Hayne, Crennan and Bell JJ).

political communication, but with preventing serious criminal activity'.[33] Heydon J's dissent was based, among other things, on the view that administrators have no duty to provide reasons for decisions.[34] Ordinarily, however, members of the judiciary do give reasons for decisions.[35] Accordingly, his Honour held there is 'no reason to believe that, except in isolated instances, eligible judges will preserve secrecy about their reasoning processes in cases where they ought to be revealed'; in fact, 'there is every reason to suppose that they will give reasons wherever the interests of justice require it'.[36]

Wainohu is the latest case concerning state legislation designed to control the activities of criminal organisations in which the French High Court has invalidated the legislation by applying the doctrine in *Kable*. Previously, in *Totani*,[37] the majority of the Court relied upon the principle in *Kable* to invalidate s 14(1) of the *Serious and Organised Crime (Control) Act 2008* (SA) ('SOCC Act') because 'it obliged the Magistrates Court of South Australia to make a control order against a person at the behest of the executive branch of government, which is a task repugnant to the exercise of the judicial power of the Commonwealth and incompatible with the institutional integrity, independence and impartiality of a "court" within the meaning of Ch III of the *Constitution*'.[38]

While these two state control order cases have significant implications for the development of constitutional law in Australia, and in particular the rejuvenated *Kable* doctrine, they are also indicative of what was described in the introduction as the normalisation of exceptional measures; in this case, the creep of

---

[33] Ibid [186].
[34] Ibid [147], citing *Public Service Board of NSW v Osmond* (1986) 159 CLR 656.
[35] Ibid [148].
[36] *Wainohu* (2011) 243 CLR 181, [154] (Heydon J).
[37] *Totani* (2010) 242 CLR 1.
[38] Greg Martin, 'Control Orders: Out of Control? High Court Rules South Australian "Bikie" Legislation Unconstitutional' (2011) 35(2) *Criminal Law Journal* 116, 116.

secrecy via affirmation of previous High Court decisions accepting the use of criminal intelligence.[39] The next section of the article focuses on how this development has been considered in Australia, including in the area of constitutional law.

III TOWARDS A JURISPRUDENCE OF SECRECY

> '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.'[40]

Following the *Wainohu* and *Totani* decisions, much attention has focused on the High Court's reinvigoration of *Kable*, as well as other implications of the cases for Australian constitutional law.[41] Although it is not the main focus of this article, some constitutional law analysis is broadly relevant to a discussion of criminal intelligence and secrecy. For instance, Steytler and Field consider whether Chapter III of the *Constitution* provides any protection for 'due process' rights.[42] They conclude that High Court jurisprudence clearly acknowledges Chapter III affords procedural fairness protections, including some incidents of the judicial process believed by many to be inconsistent with the use of criminal intelligence, secret evidence and closed proceedings, such as:

> ... a public hearing […] application of the rules of evidence; the ascertainment of the facts as they are and as they bear on the right or

---

[39] Lynch et al above n 17, 45, citing *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 ('*Gypsy Jokers*'); *K-Generation* (2009) 237 CLR 501.

[40] Franz Kafka, *The Trial* (Vintage, 2009 [1925]) 29.

[41] Mirko Bagaric, 'The High Court on Crime in 2010: Analysis and Jurisprudence' (2011) 35(1) *Criminal Law Journal* 5; Elizabeth Southwood, 'Extending the *Kable* Doctrine: *South Australia v Totani*' (2011) 22(2) *Public Law Review* 89; Rebecca Welsh, '"Incompatibility" Rising? Some Potential Consequences of *Wainohu v New South Wales*' (2011) 22(4) *Public Law Review* 259.

[42] Steytler and Field, above n 5, 255-9.

> liability in issue and the identification of the applicable law, followed by an application of that law to those facts […] an obligation to afford natural justice; an obligation to make proper disclosure; an obligation (and ability) to give reasons.[43]

Paradoxically, it would seem, the High Court endorsed the reception of intelligence in *K-Generation*. In that case, the application of K-Generation Pty Ltd for an entertainment venue licence was refused by the South Australian Liquor and Gambling Commissioner, who in refusing the application relied upon criminal intelligence supplied by the Commissioner of Police, which was not disclosed to the proprietor of K-Generation or his legal representative. On appeal to the High Court, the majority held that s 28A(1) of the *Liquor Licensing Act 1997* (SA) passed the institutional integrity test in *Kable* because the section 'does not itself prevent a court from making disclosure to the parties of classified criminal intelligence information'.[44] Courts thus have discretion to determine the weight to be given criminal intelligence, or indeed dismiss it altogether.

But the provision for and use of criminal intelligence in Australia is far from uncontroversial, even if it has been determined to be constitutionally valid by the High Court. In his judgment in *K-Generation*, French CJ conceived that the applicant could counter claims made against him in criminal intelligence, stating, '[t]here is nothing to prevent an applicant faced with unseen "criminal intelligence" from tendering comprehensive evidence about his or her own good character and associations'.[45] Arguably, however, this reverses the onus of proof, which along with others listed above by Stetyler and Field, is a core due process right, and regarded by the High Court as a fundamental element of Chapter III procedural fairness protections.[46] Other related problems surrounding the use of criminal intelligence have been highlighted recently in submissions to the South Australian Parliament's Legislative Review Committee inquiry into criminal intelligence.

---

43 Ibid 249.
44 *K-Generation* (2009) 237 CLR 501, [67] (French CJ).
45 Ibid [78].
46 Steytler and Field, above n 5, 249, 257.

In one submission, the President of the Law Society of South Australia stated that because a control order may be made under the SOCC Act on the basis of criminal intelligence and thus without a person knowing the case against them, the legislation has a 'coercive effect […] which requires a person to otherwise speak up to defend their name when they would otherwise have a right to silence'.[47] For the Committee, that suggested 'a person, not knowing the information held against them would almost over-compensate in putting evidence they would not ordinarily put in order to refute the information'.[48] Another member of the Law Society went further to suggest the use of criminal intelligence has potential to derogate from the privilege against self-incrimination whereby 'a statement made by a person which they wouldn't have made but for criminal intelligence may be used against them later in a criminal trial'.[49]

When the Serious and Organised Crime (Control) Bill 2007 (SA) was introduced, the South Australian Bar Association raised similar concerns, submitting the legislation undermines '[t]he presumption of innocence, restricts or removes the right to silence, lacks proper procedural fairness, and removes access to the courts to challenge possibly biased, unfounded, or unreasonable decisions of the Attorney-General or the Commissioner of Police'.[50] These worries have since been echoed by the New South Wales Bar Association, which, like academic commentators, has questioned the need for bikie control order laws,[51] and criticised the New South Wales government for amending the legislation only to remedy the defects identified by the High Court in *Wainohu*, without addressing continued concerns 'that control orders can be made based on confidential police "intelligence" rather than publicly proven criminality'.[52]

---

47 Parliament of South Australia, above n 20, 68 (Mr Ralph Bönig).
48 Ibid.
49 Ibid (Mr Rocco Perotta).
50 Parliament of South Australia, above n 20, 61.
51 Bernard Coles QC, President, The New South Wales Bar Association, Letter to Attorney-General, The Hon Greg Smith SC MP, 21 February 2012, 2. See also McGarrity, above n 8; Loughnan, above n 10.
52 Coles, above n 51, 1.

Previously, commentators and critics focused on the ways the criminal law is being used as a coercive method of social control, which infringes upon freedom of association,[53] and which is not restricted to 'bikie gangs'.[54] Some, although not many, also voiced concern about secrecy and the use of criminal intelligence. Thus, even before the High Court reached its decision in *Totani*, Marinella Marmo expressed concern about the use of secret evidence in the control of criminal organisations, suggesting the case 'may be a watershed moment in favour of or against penal populism, criminal intelligence and the rise of police power':[55]

> While waiting for the High Court to make its decision, we can take this opportunity to reflect on the continuing expansion of police powers, and use of criminal intelligence disguised as evidence. Secrecy of highly important intelligence is a key factor in the fight against organised crime. However, one should ask where the limits of secrecy lie, and whether punitive reaction to organised criminal activities is a preferable alternative to rule of law.[56]

It is a key contention of this article that questions and concerns raised in this remark remain live. Indeed, while *Wainohu* and *Totani* indicate, to some extent, at least, the High Court's resistance to political interference (from state governments) with the independence and integrity of the Australian courts and court system in accordance with Chapter III of the *Constitution*, the cases arguably represent missed opportunities to develop a jurisprudence of secrecy in Australia. In *Wainohu*, for instance, the Court confined its decision to the duty to give reasons, even though in argument it was submitted that the undermining of the institutional integrity and independence of the Supreme Court of New South Wales was done partly by the requirement that 'an eligible judge undertake the work of an executive on the Supreme Court's time and in secret sessions with regard to criminal intelligence and protected submissions'.[57] Since the decisions in *Wainohu* and *Totani*, Gabrielle Appleby has

---

53 Loughnan, above n 10, 19-20.
54 Martin, above n 9, 164.
55 Marmo, above n 19, 184.
56 Ibid.
57 Transcript of Proceedings, *Wainohu v New South Wales* [2010] HCATrans 319 (2 December 2010) 31 (M A Robinson).

also expressed concern over 'the continued use of provisions that maintain the confidentiality of criminal intelligence', for 'while such provisions may have been held to be constitutional, they infringe upon the foundational principles of open justice, and an individual's right to hear allegations made against them', and, she says, '[t]he High Court has noted this repugnancy, even though it may not reach the level of unconstitutionality'.[58]

The apparent reluctance to develop jurisprudence around secrecy and in relation to criminal intelligence is no doubt due in large part to the fact that the law in Australia is settled after the High Court rulings that confidential criminal intelligence may be admitted in judicial proceedings;[59] it might also be because intercept evidence can be accepted in criminal proceedings.[60] However, that is not to say the use of secret criminal intelligence is uncontentious. Indeed, legal scholars have pointed out that the reception of criminal intelligence is problematic especially because there is no corresponding requirement in Australia that there be a system – such as a special advocate system – in place to protect persons potentially adversely affected by the non-disclosure of material deemed sensitive by the authorities;[61] a situation compounded by the absence of a national human rights instrument, such as a Bill of Rights, which means Australians have to rely for their human rights protections upon 'the parliamentary process and doctrines of representative and responsible government'.[62]

Lynch et al have recently compared the use of secret evidence in control order proceedings in Australia and the United Kingdom ('UK'), where there are special advocates and express human rights protections; and where there is currently extensive debate over government proposals to extend closed hearings to civil proceedings

---

58 Appleby, above n 19.

59 *Gypsy Jokers* (2008) 234 CLR 532; *K-Generation* (2009) 237 CLR 501.

60 *Telecommunications (Interception and Access) Act 1979* (Cth).

61 Gabrielle Appleby and John Williams, 'The Anti-terror Creep: Law and Order, the States and the High Court of Australia' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, 2010) 150, 151.

62 McGarrity, above n 8, 168.

involving sensitive material.[63] They describe how in the Australian counter-terrorism context (which paved the way for the introduction of bikie control order laws), Commonwealth laws provide that in balancing the risk of prejudice to national security and the defendant's right to a fair hearing, greater weight is given to national security considerations, and that information likely to prejudice national security need not be disclosed.[64] However, they argue that when the constitutionality of federal control order provisions was considered in *Thomas v Mowbray* ('*Thomas*'),[65] just as happened in *Wainohu*, the majority judges 'refused to focus on the secrecy aspects of Division 104 [of the *Criminal Code* (Cth)]' and 'chose to confine their decision to the interim orders without delving too deeply at all into the restrictions on information as they extended through to the confirmation process'.[66]

While restrictions on information were not at issue before the High Court because those provisions were not used against Thomas, as Gray points out, some in the majority did acknowledge in dicta the right of accused persons to make full arguments (except in cases 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'.[67] Only Kirby J (dissenting) would have invalidated the provisions challenged in *Thomas*, not least because 'the individual subject to an application or order may not be informed of particular evidence raised in the case against them'.[68]

---

[63] Lynch et al, above n 17. See HM Government, *Justice and Security Green Paper*, Cm 8194 (October 2011) [2.4] <www.official-documents.gov.uk/document/cm81/8194/8194. pdf>; Justice and Security Bill 2012 (UK). See also Rebecca Scott Bray and Greg Martin, 'Closing Down Open Justice in the United Kingdom?' (2012) 37(2) *Alternative Law Journal* 126.

[64] *Criminal Code Act 1995* (Cth) s 104.2(3A); *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 38L(8).

[65] *Thomas v Mowbray* (2007) 233 CLR 307 ('*Thomas*').

[66] Lynch et al, above n 17, 43.

[67] Anthony Gray, 'Australian "Bikie" Laws in the Absence of an Express Bill of Rights' (2009) 4(4) *Journal of International Commercial Law and Technology* 274, 278.

[68] *Thomas* (2007) 233 CLR 307, 434.

Nonetheless, for Lynch et al, in a jurisdiction such as Australia where 'the common law tradition rests on the principle that open justice is the default position',[69] the decision in *Thomas* 'underscores the relative weakness, at least in a formal sense, of open justice as a constitutional value in the Australian system'.[70] Furthermore, this is characteristic of the general approach of Australian courts to Chapter III issues whereby the courts are 'extremely accommodating to the state' when determining whether the integrity of the judicial process has been 'usurped' by legislation requiring matters of national security be balanced with individual rights.[71] Accordingly, 'values that we might see as central to the protection of individuals – namely disclosure of the case against them when its suppression substantially impairs their right to a fair hearing – cannot be taken for granted'.[72]

In jurisdictions elsewhere, however, the judiciary is increasingly resistant to the use of intelligence. In Canada, for instance, judges have become sceptical of government's overclaiming of secrecy and national security and overclassification of documents, partly 'because of effective challenges by counsel who have access to secret information'.[73] Similarly, in the UK, although there remain traces of the long tradition of judicial deference to the executive on matters of national security,[74] in cases challenging the control order regime, 'overall the courts have displayed a relative boldness that contrasts strongly with the approach taken in much earlier

---

69 Lynch et al, above n 17, 37.

70 Ibid 42.

71 Lynch et al, above n 17, 41.

72 Ibid.

73 Kent Roach, 'Secret Evidence and its Alternatives' in Aniceto Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emerging: Security and Human Rights in Countering Terrorism* (Springer, 2012) 179, 188.

74 For instance, in the case of *R (Binyam Mohammed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, [191], Lord Neuberger MR made it clear that even 'a pretty slender risk' to national security would prevent disclosure of intelligence material. See Lawrence McNamara, Submission to Joint Committee on Human Rights, UK Parliament, *Inquiry into the Government's Justice and Security Green Paper*, 20 January 2012, 5.

decisions'.[75] In Australia, when similar matters to those dealt with in *Thomas* have been judicially considered at state level the question has been resolved, Lynch et al say, rather unsurprisingly, by focusing on the discretions of the courts rather than the rights of controlees:

> … the tension between reliance upon criminal intelligence and fair trial principles has been resolved in favour of secrecy under the sole proviso that the courts' ability to independently assess the restricted classification of the evidence is maintained.[76]

Critics, including members of the judiciary, have sometimes commented on the Kafkaesque nature of these and other legal developments that have intensified since the terror attacks of 11 September 2001. In a Canadian case, for instance, Justice Zinn criticised the use of intelligence as evidence in the United Nations ('UN') process of listing persons associated with Al Qaeda. His Honour said the regime created by UN Security Council Resolution 1267 involves 'a situation for a listed person not unlike that of Josef K. in Franz Kafka's *The Trial*, who awakens one morning and, for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime'.[77] Similarly, Bachmann and Burt point to the 'truly Kafkaesque situation' created by control orders, which have no definite end date, meaning an individual could be subject to one for an indefinite period of time, with no realistic prospect of either prosecution or release.[78] In its report opposing proposals to increase 'secret justice' measures in Britain under the Justice and Security Bill 2012 (UK), Amnesty International has provided critical testimony from some 25 barristers and lawyers, one

---

[75] Helen Fenwick and Gavin Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' (2011) 56(4) *McGill Law Journal* 863, 916.

[76] Lynch et al, above n 17, 45, citing *Gypsy Jokers* (2008) 234 CLR 532, 560 (Gummow, Hayne, Heydon and Kiefel JJ); *K-Generation* (2009) 237 CLR 501, 542-3 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), which were affirmed in *Totani* and *Wainohu*.

[77] *Abdelrazik v Canada* 2009 FC 530, [53] (Zinn J).

[78] Sascha-Dominik Bachmann and Matthew Burt, 'Control Orders Post-9/11 and Human Rights in the United Kingdom, Australia and Canada: A Kafkaesque Dilemma?' (2010) 15(2) *Deakin Law Review* 131, 166.

of which describes a scenario reminiscent of a Kafka novel:

> The idea that you could go to court having had the most terrible things happen to you to sue for justice and be excluded from the proceedings and at the end just be told you've lost without being given the reasons for that decision runs contrary to all notions of fairness, the rule of law and open justice.[79]

Indeed, what was Kafkaesque about the situation in *Wainohu* was that under to the CCOC Act, eligible Supreme Court judges could keep secret their reasons for making decisions, in contravention of accepted principles of law; principles acknowledged, by among others, Lady Justice Hallett during the inquests into the 7 July 2005 London bombings in the UK, when she said:

> … judges are accustomed and expected to provide judgments or rulings in which they set out the material they have considered and give reasons for accepting or rejecting it. It would be a very considerable derogation from the principles of natural justice for me to admit into evidence material which at least one interested person, with an identified interest in the proceedings, had not seen and of which they were completely unaware and in the absence of their consent.[80]

In accordance with the sentiment expressed in that comment, this article seeks to contribute to the growing body of scholarship, and jurisprudence, which attempts to shed critical light on the 'creep' of secrecy beyond the counter-terrorism context in societies that are otherwise open, free and democratic. The focus of the discussion is not on the use of intelligence in making control orders in terrorist prosecutions,[81] but on how secrecy and the use of secret evidence

---

79 Amnesty International, *Left in the Dark: The Use of Secret Evidence in the United Kingdom* (2012) 34 (Richard Hermer QC).

80 Ruling of Hallett LJ, Inner West London (Westminster) Coroner's Court, *Coroner's Inquests into the London Bombings of 7 July 2005* (3 November 2010) 44-5 <http://7julyinquests.independent.gov.uk/directions_decs/index.htm>.

81 Andrew Lynch, '*Thomas v Mowbray*: Australia's "War on Terror" Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182; Greg Martin, '"Anti-terrorism" Laws Upheld in High Court Challenge' (2008) 32(2) *Criminal Law Journal* 114. Commonwealth secrecy and security laws have

(including criminal intelligence), has gradually gained acceptance in contexts other than counter-terrorism, including, as was the case in *Wainohu*, the control of criminal organisations or organised crime. The seeming reluctance of courts in Australia to confront key matters relating to these developments head on and produce jurisprudence around criminal intelligence and other forms of secret evidence should be a cause for concern given that in areas where a premium is placed on security, parliaments increasingly push for more secrecy and less transparency.[82]

IV A CREEPING CULTURE OF SECRECY

> … 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.[83]

While the creep of secrecy identified in this article has undoubted ramifications for constitutional law (some of which were discussed above), most critical commentary has highlighted the negative impact increased secrecy will have upon civil liberties, human rights and the rule of law. Indeed, when the CCOC Act was first introduced, the then Director of Public Prosecutions for New South Wales, Nicholas Cowdery QC, regarded it as 'another giant leap backward for human rights and the separation of powers – in short,

---

been subject to review, see: Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004); Australia Law Reform Commission, *Review of Secrecy Laws*, Report Nos IP34 (2008) and DP74 (2009); Australia Law Reform Commission, *Laws and Open Government in Australia,* Report No 112 (2010); Bret Walker, Independent National Security Legislation Monitor, Australian Government, *Annual Report: 16 December 2011* (2012).

82 Scott Bray and Martin, above n 63.

83 Clive Walker, 'Submission to the Ministry of Justice, Justice and Security Green Paper' (29 December 2011) 1, 10-11 <http://consultation.cabinetoffice.gov.uk/justiceandsecurity/responses-to-the-consultation>.

the rule of law in NSW',[84] not least because 'the powers of eligible Supreme Court judges are linked to those of the New South Wales Police Commissioner who […] is responsible for initially identifying organisations that should be declared'.[85]

Nevertheless, in Australia, as elsewhere, we have since 9/11 continued to witness the 'seepage' of extraordinary legal measures, including enhanced police powers,[86] into areas of law and policy beyond the counter-terrorism context.[87] Moreover, just as other extraordinary legal measures introduced post-9/11 have become normalised,[88] so we now see the creep and normalisation of a culture of secrecy in criminal investigations and curial proceedings. The use of intelligence as a proxy for evidence in criminal cases is one such measure. And it is a central argument of this article that, particularly in Australia, the use of criminal intelligence, and other secret evidence, in criminal prosecutions remains the elephant in the room, if not for the High Court, then for critics, who are mindful of the High Court 'sidestepping or downplaying the threat that use of secret evidence' may pose 'to the fairness and integrity of trial procedures'.[89]

For others, it is concerning that the High Court has endorsed 'the

---

[84] Nicholas Cowdery, 'A Threat to the Rule of Law: The New South Wales *Crimes (Criminal Organisations Control) Act 2009*' (2009) 21(2) *Current Issues in Criminal Justice* 321, 321.

[85] Martin, above n 38, 121.

[86] Martin, above n 9; Greg Martin, 'Showcasing Security: The Politics of Policing Space at the 2007 Sydney APEC Meeting' (2011) 21(1) *Policing & Society* 27.

[87] Lynch et al, above n 15, 4.

[88] Nicola McGarrity and George Williams, 'When Extraordinary Measures Become Normal: Pre-emption in Counter-terrorism and Other Laws' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, 2010) 131. See also Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's *Criminal Code* Since September 11, 2001' (2007) 16(1) *Griffith Law Review* 27, 51.

[89] Lynch et al, above n 17, 52.

judicial use of intelligence',[90] and accepted secrecy in certain circumstances (including in the case of *Wainohu*),[91] without the need for special advocates or some other process to help safeguard 'a party's right to a fair trial, and particularly the rights to a judicial determination on the facts and the law and to know and meet the case against him or her'.[92] Accordingly, for Appleby and Williams, criminal intelligence provisions 'have the capacity to breach the requirements of procedural fairness and therefore potentially undermine the independence and impartiality of the courts in a manner which the public interest immunity does not'.[93]

This most often happens in counter-terrorism prosecutions, where maintaining secrecy, it is argued, is required to protect national security.[94] However, as legal scholarship on counter-terrorism

---

90 Appleby and Williams, above n 61, 151.

91 See *Wainohu* (2011) 243 CLR 181, [108] (Gummow, Hayne, Crennan and Bell JJ) [154], [181] (Heydon J). See also *Gypsy Jokers* (2008) 234 CLR 532; *K-Generation* (2009) 252 ALR 471.

92 Appleby and Williams, above n 61, 157. See also Lynch et al, above n 15, 7.

93 Appleby and Williams, above n 61, 156.

94 Similar arguments may be made in respect of organised crime and the control of criminal organisations. For, although 'bikie gangs' might not threaten *national* security, the authorities do see them posing a threat to community safety and security, and, indeed, bikies have been likened to terrorists by politicians and senior police. For instance, on commenting about the threat posed by 'organised criminal gangs', former South Australian Premier, Mike Rann, stated, 'We're allowing similar legislation to that that applies to terrorists, because these people are terrorists within our community': ABC Radio National, 'South Australia's Plans to Obliterate Outlaw Bikie Gangs', *The Law Report*, 6 May 2008 (Mike Rann) <http://www.abc.net.au/radionational/programs/lawreport/south-australias-plans-to-obliterate-outlaw-bikie/3254212>. Similarly, in a television interview, New South Wales Police Commissioner, Andrew Scipione, called for the State government to enact legislation to give police powers to limit association between bikie 'gang' members who, he said, were terrorists and deserved to be treated as such: George Morgan, Selda Dagistanli and Greg Martin, 'Global Fears, Local Anxiety: Policing, Counterterrorism and Moral Panic Over "Bikie Gang Wars" in New South Wales' (2010) 43(3) *The Australian and New Zealand Journal of Criminology* 580, 585. More recently, federal Attorney-General, Nicola Roxon, has said, 'We must stay one step ahead of terrorists and organised criminals who threaten our national security': The Hon Nicola Roxon MP, 'Public Consultation for National Security Legislation Reform' (Media Release, 4 May 2012).

demonstrates, the judiciary overwhelmingly defer to the executive in matters of national security, primarily because the executive is privy to information the judiciary is not privy to, and is therefore better positioned to evaluate the risks posed by terrorism, and related threats, and consider appropriate responses.[95] It would seem then that in these instances the need to maintain the integrity of ongoing investigations and to protect intelligence sources and methods outweighs the right of accused persons to natural justice and a fair trial.

According to John Ip this situation has given rise to the *fait accompli* of balancing liberty against security whereby the courts have an 'almost inevitable tendency to err on the side of security'.[96] Thus, given the High Court's endorsement of the judicial use of criminal intelligence in non-terrorist contexts, is there any reason to suppose, or indeed any way of knowing (as sensitive information is kept secret), when Australian courts defer or not to senior police officers in cases concerning the control of criminal organisations? While this question goes beyond the scope of the relatively narrow matters of law dealt with in *Wainohu*, it nevertheless has implications for such cases, as it concerns the contentious use of intelligence as evidence in criminal proceedings. That, along with other developments discussed in the following parts of this section, is a significant feature of the culture of secrecy discussed in this article.

A *Judicialisation of Intelligence*

> The point that I wish to stress is that the uncontrolled profligacy in storing crime and crime-related information is liable to transform the nature of policing. By its sheer weight, criminal intelligence gathering, whose scope is very loosely, if at all, regulated by law, can progressively give birth to general surveillance – the equivalent of high

[95] Lynch et al, above n 15, 7; John Ip, 'Suspicionless Searches and the Prevention of Terrorism' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, 2010) 88, 100.

[96] Ip, above n 95, 99.

or political policing.[97]

A key characteristic of laws aimed at organised crime is that they 'grant police investigative powers into the activities of criminal organisations [which] cover areas such as search warrants, surveillance, telecommunications interception, and undercover work'.[98] Sometimes this will involve 'evidence collection', although increasingly it entails 'intelligence collation'.[99] A major difficulty here, as identified by Kent Roach, is that while police forces have experience and expertise in handling evidence, they tend to struggle with intelligence, and at times have been criticised for mishandling intelligence, such as in the Haneef and Arar affairs in Australia and Canada respectively.[100] Furthermore, because the paradigms of evidence and intelligence are based on competing values, norms and assumptions, the worry is that 'a secretive intelligence-driven process can be seen as utterly incompatible with the demands of evidence, due process, the presumption of innocence and proof of guilt'.[101]

Indeed, it is valuable to note that a secretive intelligence-led process is contrary to the 'open court' principle identified by French CJ and Kiefel J in *Wainohu*,[102] and is inconsistent with Gaudron J's statements of principle in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,[103] which Gummow, Hayne, Crennan and Bell JJ held were determinative of the validity of s 13(2) of the

---

97 Jean-Paul Brodeur, 'High Policing and Low Policing: Remarks About the Policing of Political Activities' (1983) 30(5) *Social Problems* 507, 516.

98 Julie Ayling, 'Criminalizing Organizations: Towards Deliberative Lawmaking' (2011) 33(2) *Law & Policy* 149, 160.

99 Ibid.

100 Kent Roach, 'The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, 2010) 48, 56. Conversely, Roach argues, security intelligence agencies tend to struggle with evidence: at 57-9.

101 Ibid 63.

102 *Wainohu* (2011) 243 CLR 181, [58]. See also Appleby, above n 19.

103 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 ('*Wilson*').

CCOC Act;[104] and, in particular, that court proceedings be conducted openly and in public.[105] Moreover, in their joint judgment,[106] French CJ and Kiefel J referred with approval to Gleeson CJ's extra-curial statement that the duty of judges to give reasons, 'promotes good decision-making [and] the general acceptability of judicial decisions', and 'is consistent with the idea of democratic institutional responsibility to the public'.[107] Moreover, while courts, including the European Court of Human Rights, have acknowledged there are certain permissible derogations from the open court principle whereby, for example, the rights of accused persons, such as disclosure rights, need to be weighed against competing interests, such as national security and witness protection,[108] some members of the judiciary remain uneasy about 'an ever increasing appearance of secrecy which, if not suitably contained, may substantially entrench upon the principles of open justice and significantly dislocate the appearance and the reality of a fair trial'.[109]

Statements such as this that are sceptical about the increased use of secrecy in forensic settings are associated with what former head of the Canadian Security Intelligence Service, Jim Judd, has described as the 'judicialization of intelligence'.[110] A prominent example of a court challenging the legitimacy of secrecy in this way is contained in the judgment of the European Court of Human Rights in *A v United Kingdom*, which stands for the proposition that where the liberty of the subject is at stake, Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial, requires they know the gist of the case against them.[111] In that

---

[104] *Wainohu* (2011) 243 CLR 181, [94].
[105] *Wilson* (1996) 189 CLR 1, 22, 25-6 (Gaudron J).
[106] *Wainohu* (2011) 243 CLR 181, [56] (French CJ and Kiefel J).
[107] Murray Gleeson, 'Judicial Accountability' (1995) 2 *The Judicial Review* 117, 122.
[108] *Edwards and Lewis v United Kingdom* 27 October 2004, [46]. See Roach, above n 73, 193-4.
[109] Anthony G Whealy, 'Difficulty in Obtaining a Fair Trial in Terrorism Cases' (2007) 81(9) *Australian Law Journal* 743, 757.
[110] Roach, above n 100, 56.
[111] *A v United Kingdom* [2009] ECHR 301.

case, the European Court held that in closed material proceedings, the special advocate could not counteract 'the lack of full disclosure and lack of a full, open, adversarial hearing […] unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate'.[112] In *AF v Secretary of State for the Home Department* ('*AF*'),[113] the House of Lords followed that ruling, with Lord Hope of Craighead adopting the words of Lord Scott of Foscote that 'a denunciation on grounds that are not disclosed is the stuff of nightmares'.[114]

By contrast, the case of *Home Office v Tariq* ('*Tariq*') involved an immigration officer who claimed unfair dismissal after being suspended from his job following the arrest of his brother and cousin for involvement in a suspected transatlantic airline terrorist plot. In that case, the UK Supreme Court held the 'gisting' requirement in *AF* did not apply, as only Tariq's livelihood, not his liberty, was involved.[115] Interestingly, in its recommendations about the use of criminal intelligence, the South Australian Parliament's Legislative Review Committee recognised that 'even though the loss of opportunity of a livelihood is not as serious as the possibility of imprisonment, it is still a serious and potentially life changing consequence as a result of the use of criminal intelligence'.[116]

Notwithstanding the case of *Tariq*, the UK courts have generally tended to resist government attempts to introduce closed hearings and provision for secret evidence, '[a]nd even where statutory authority exists for closed material procedures, the judiciary has ruled that a person must be given sufficient information about the allegations against them'.[117] As suggested by Lynch et al,[118] the

[112] Ibid [220].
[113] *AF v Secretary of State for the Home Department* [2009] UKHL 28 ('*AF*').
[114] Ibid [38].
[115] *Home Office v Tariq* [2011] UKSC 35.
[116] Parliament of South Australia, above n 20, 85.
[117] 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. See also Fenwick and Phillipson, above n 75.

reception of secret evidence has met with less resistance in Australian courts, which is concerning given there has been a proliferating number of legislative schemes providing for criminal intelligence that are no longer confined to federal anti-terrorism legislation,[119] but include the control of organised crime and criminal organisations,[120] and applications for liquor licences.[121]

Moreover, unlike in the UK (and Canada), where there exists a special advocate system intended to ensure the accused gets a fair trial, in Australia there are few safeguards to help protect persons who might be affected adversely by the non-disclosure of sensitive information.[122] A possible exception is contained in Queensland's organised crime legislation, which provides for the appointment of a person (preferably a retired judge) as the criminal organisation public interest monitor (COPIM), whose functions include 'to monitor each criminal intelligence application; and to test, and make submissions to the court about, the appropriateness and validity of the monitored application'.[123] However, the functions of the COPIM are limited in similar ways to special advocates in the UK, as the COPIM 'must not make a submission to the court while a respondent or a legal representative of a respondent is present',[124] and 'the court may, in its discretion, exclude the COPIM from the hearing while a respondent or a legal representative of a respondent is present'.[125]

---

[118] Lynch et al, above n 17.
[119] *Thomas* (2007) 233 CLR 307.
[120] *Gypsy Jokers* (2008) 234 CLR 532. See also Lynch et al, above n 17, 45-6.
[121] *K-Generation* (2009) 237 CLR 501. Simon Hallsworth and John Lea, 'Reconstructing Leviathan: Emerging Contours of the Security State' (2011) 15(1) *Theoretical Criminology* 141; Lynch et al, above n 15. This confirms the view that measures to combat terrorism and organised crime are key to what Hallsworth and Lea describe as an emergent 'security state', above n 121, 141, or what Lynch et al identify as an emerging 'culture of security', above n 15, 4-5. See also Andrew Lynch, 'Terrorists and Bikies: The Constitutional Licence for Laws of Control' (2009) 34(4) *Alternative Law Journal* 237.
[122] Appleby and Williams, above n 61, 151.
[123] *Criminal Organisation Act 2009* (Qld) ss 86(b), (c).
[124] Ibid s 89(3).
[125] Ibid s 89(4).

Also worthy of mention is Whealy J's proposal in *R v Lodhi*[126] for 'the appointment of special counsel to represent the interests of the defendant and assist the court in the area of national security claims', which he also noted was not prohibited under the *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth).[127] However, while the special advocate system is supposed to guarantee accused persons fairness in close material proceedings, many, including special advocates themselves, are critical of system because, they say, it is essentially unfair, contrary to the rule of law, and creates 'a legal grey hole in which the culture of legality is lost though the appearance of legality may be preserved'.[128]

B *Legal Grey Holes*

Although some say a special advocate system has the advantage that 'both the governmental objective of maintaining the confidentiality of police operations and investigations and the rights of the other party to a fair trial are met to some degree',[129] others argue special advocates encounter problems, which make the exercise of their functions 'extremely difficult in practice'.[130] One problem is that 'even though the relevant procedural rules now allow it, special advocates have no ability in practice to adduce evidence to rebut allegations made in the closed material'.[131] Another is that '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'.[132]

Notwithstanding the fact that judges in some jurisdictions have

[126] *R v Lodhi* [2006] NSWSC 586.
[127] Whealy, above n 109, 750.
[128] Cian C Murphy, 'Counter-Terrorism and the Culture of Legality: The Case of Special Advocates' (23 February 2012) 18 <http://ssrn.com/abstract=2009902> or <http://dx.doi.org/10.2139/ssrn.2009902>.
[129] Appleby and Williams, above n 61, 157.
[130] Adam Tomkins, 'National Security and the Due Process of Law' (2011) 64(1) *Current Legal Problems* 1, 3.
[131] Ibid.
[132] Ibid 4.

become aware of the dangers of government overclaiming secrecy to avoid accountability because of effective challenges mounted by counsel with access to confidential information,[133] Cian Murphy sees the role played by special advocates in closed proceedings as fundamentally flawed. That is because, 'precisely at the point at which the accused's participation is most important […] he is excluded', and 'no matter how skilled or conscientious the special advocate is, he has become part of the system to which the accused is subject rather than in which the accused participates'.[134]

For Murphy, special advocates acting in closed material proceedings is an example of a 'legal grey hole',[135] or 'a situation in which the state seeks to use legal or quasi-legal rules, processes and institutions to disguise the erosion of the rule of law and the culture of legality in the exercise of state power'.[136] Legal grey holes occur where the culture of control meets the rule of law,[137] and only then if the legal system is complicit in their creation: '[i]f only one organ of the state, or one state agency, sought to violate the rules of law or erode the culture of legality it might be checked by another'.[138] Thus, in parliamentary democracies such as the UK, Canada and Australia, the doctrine of parliamentary sovereignty means the executive will require the co-operation of parliament to create legal grey holes. The position of the judiciary however is more complex. While the judiciary will endeavour to uphold the rule of law, Murphy argues, 'the prohibition of a particular state action may involve the permission of action short of that which is prohibited'.[139] The perils faced by human rights advocates provide a poignant example:

> The dangers of such advocacy were most vividly displayed in the *Chahal* case when an amicus brief directed the European Court of Human Rights towards the Canadian model. A key feature of the

[133] Roach, above n 73, 188.
[134] Murphy, above n 128, 14.
[135] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006).
[136] Murphy, above n 128, 19.
[137] Ibid 4, 19.
[138] Ibid 19.
[139] Ibid 20.

> Canadian model, permitted communication between subject and counsel after the secret evidence had been seen, was overlooked. Thus the European Court of Human Rights' ill-informed description of the Canadian model allowed the UK to create closed material proceedings.[140]

Similarly, it could be argued that a failure on the part of the Australian High Court to engage in an expansive discussion of secrecy and criminal intelligence, and instead determine the cases of *Totani* and *Wainohu* on narrow matters of constitutional law, has opened the way for state and territory governments to enact legislation that prominent members of the legal profession and academic community have consistently argued conflicts with established principles and standards of fairness. Moreover, the recommendations of South Australia's Legislative Review Committee inquiry into criminal intelligence provide evidence of the co-optation of parliament, described by Murphy.

In its recommendations, the Committee sided overwhelmingly with the police view that the use of criminal intelligence is needed to protect informants and keep the community safe, and that a departure from the principles of natural justice 'is warranted, given the need to eliminate criminal elements from industry and to curtail the serious and sophisticated operations of organised crime gangs'.[141] Furthermore, the Committee accepted assurances made by police and the Crown Solicitor's Office that criminal intelligence is only rarely used and that existing internal safeguards are sufficient 'to alleviate some of the concerns expressed by witnesses regarding the propensity for error and unfairness inherent in the use of criminal intelligence'.[142]

The Committee was also convinced that 'a person against whom criminal intelligence is used, will […] have sufficient knowledge of the general nature of the allegations against them',[143] even though

[140] Ibid.
[141] Parliament of South Australia, above n 20, 81.
[142] Ibid.
[143] Ibid.

Assistant Commissioner Harrison suggested a person would only know whether criminal intelligence was involved (rather than know the essence or 'gist' of the case against them), and even then they would only be privy to that knowledge on appeal (when it may be too late to undo the 'coercive effect' of criminal intelligence and other problems associated with its use discussed above, such as derogation from the privilege against self-incrimination and reversal of the onus of proof). In response to questioning about whether a person would even know whether or not criminal intelligence was used against them, the Assistant Commissioner said, 'if a decision went on appeal to a court, a person would definitely known [sic] that criminal intelligence was involved'.[144]

Suffice it to say that in a climate where law and order politics informs crime policy and a culture of control colonises more and more areas of social and legal life,[145] we ought to be sceptical of claims made by politicians and police as to the need for greater secrecy and sufficiency of internal checks and balances. The exposure of police misconduct during at the Hillsborough disaster, mentioned in the introduction of this article, provides a recent cautionary tale in this regard.[146]

C *Blurring Intelligence and Evidence*

The erosion of the distinction between intelligence and evidence is a consequence of the increasing turn to intelligence-led policing (discussed above), and the convergence of the work of police forces and security intelligence agencies, especially since 9/11, which is driven by the demands of prevention[147] and a 'preventative paradigm' that 'has dominated counter-terrorism efforts in the

---

[144] Ibid 76.

[145] Garland, above n 15.

[146] See Greg Martin and Rebecca Scott Bray, 'Discolouring Democracy: The Creep of "Secret Justice" in the United Kingdom and its Coronial Jurisdiction' (Paper presented at the Australian and New Zealand Society of Criminology (ANZSOC) 25th Annual Conference, The University of Auckland & Auckland University of Technology, Auckland, New Zealand, 27-29 November 2012) 4.

[147] Roach, above n 100, 49. See also Martin, above n 86.

twenty-first century'.[148] While these developments mean 'the work of intelligence agencies will be more frequently subject to adversarial challenge and publicity', it is likely they will also have implications for police trust, accountability, and reputation management.[149] Nevertheless, some argue that whenever the law is used as a pre-emptive tool, the role of evidence is radically transformed, and that 'the blurring of the distinction between intelligence and evidence' ensures 'the traditional protection of individuals by the rules of evidence is undoubtedly diminished'.[150]

However, Clive Walker has proposed 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'.[151] For Roach, though, a fundamental problem remains, because the paradigms of evidence and intelligence are based on competing values, norms and assumptions.

Generally speaking, 'intelligence refers to secret material collected by intelligence agencies and increasingly by the police to provide background information and advance warning about people who are thought to be a risk to commit acts of terrorism or other threats to national security'.[152] Evidence, on the other hand, 'refers to information used in legal proceedings to impose legal consequences on a person'.[153] Moreover, evidentiary restrictions, such as limits on the use of hearsay evidence, opinion and bad character information, 'are typically not observed in the collection of intelligence about individuals'.[154] Hence, there are concerns that the

[148] Lynch et al, above n 15, 5.
[149] Martin and Scott Bray, above n 146.
[150] Lynch et al, above n 15, 5.
[151] Clive Walker 'Intelligence and Anti-terrorism Legislation in the United Kingdom' (2005) 44 *Crime, Law and Social Change* 387, 409.
[152] Roach, above n 73, 180.
[153] Ibid.
[154] Roach, above n 73, 181.

increasing use of intelligence in legal proceedings will derogate from the common law principle that an accused person has a right to a fair trial.

Although, as discussed earlier, the special advocate system does not guarantee fairness, aggrieved persons in the UK at least have recourse to the *Human Rights Act 1998* (UK), and, ultimately, the European Court of Human Rights.[155] However, British government proposals in the Justice and Security Bill 2012 (UK), intend expanding closed material proceedings (CMPs) to civil proceedings, which has elicited criticism from, among others, special advocates. They argue that 'CMPs remain fundamentally unfair', even with the involvement of special advocates to 'attenuate the procedural unfairness entailed by CMPs' and compliance with Article 6 of the European Convention on Human Rights, which 'requires open disclosure of *some* (but not all) of the closed case and/or evidence'.[156] This is not the first time special advocates have voiced disquiet. In 2005, two resigned from the then panel of 19 special advocates in an act of refusing to co-operate with an unfair system regarded by one of the outgoing special advocates as 'an odious blot on our legal landscape'.[157]

How the latest developments in Britain will bode for other jurisdictions, including Australia, where of course there is no federal human rights act, remains to be seen, although it would not be inconceivable that, like other extraordinary measures, similar innovations may eventually migrate to other parts of the world,

---

[155] *A v United Kingdom* [2009] ECHR 301. See also Keiran Hardy, 'Bright Lines and Open Prisons: The Effect of a Statutory Human Rights Instrument on Control Order Regimes' (2011) 36(1) *Alternative Law Journal* 4.

[156] Special Advocates, 'Justice and Security Green Paper: Response to Consultation From Special Advocates' (16 December 2011) 2 (original emphasis) <http://consultation.cabinetoffice.gov.uk/justiceandsecurity/responses-to-the-consultation>.

[157] Ian MacDonald QC, quoted in Murphy, above n 128, 21.

including Australia.[158] Certainly, when similar measures have been introduced in Australia, they have soon become normalised:

> In Australia, the experience under the *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) has been that once the options were available to limit the openness of proceedings then this happened consistently. As an Australian lawyer put it in research interviews, 'The routine order being sought … is that all security sensitive information be heard in closed court. That is now the default set of orders'.[159]

D *Responsible Government*

Some point to the 'judicialization of intelligence' as a means of courts holding lawmakers to account when prosecutors adduce patchy, fragile and fragmentary intelligence as evidence of guilt.[160] Others have called for greater parliamentary debate[161] and the fostering of a 'culture of restraint' to stem the 'slide' to intensified secrecy and surveillance, the unnecessary and inappropriate expansion of police powers, such as authority to conduct clandestine searches of premises without warrants,[162] and the enactment of laws out of political expediency.[163] For criminologists Hallsworth and Lea, these are features of the new 'punitive turn', which, contrary to the *laissez faire* view of the contemporary neoliberal state, actually involves a 'tooling up' of Leviathan, especially in the realm of security and crime control where, among other things, there has been a general move away from due process and the rights of suspects:

> Measures such as the dilution and reversal of the burden of proof, reduction in the role of jury trial, qualifications to the right to silence,

---

[158] Christina Pantazis and Simon Pemberton, 'Policy Transfer and the UK's "War on Terror": A Political Economy Approach' (2009) 37(3) *Policy & Politics* 363.

[159] Lawrence McNamara and Sam McIntosh, 'Justice and Security Green Paper: Response' (6 January 2012) [3.9] <http://consultation.cabinetoffice.gov.uk/justiceandsecurity/responses-to-the-consultation>.

[160] See Roach, above n 100, 64.

[161] McGarrity and Williams, above n 88, 138.

[162] See Ip, above n 95; Martin, above n 9, 86; McGarrity, above n 8.

[163] McGarrity and Williams, above n 88, 145; McGarrity, above n 8, 170.

> admission of hearsay evidence in court, as well as numerous changes in police powers recast the criminal justice system as an effective crime-fighting machine.[164]

Given then we are witnessing a 'return of the state' in the areas of security and criminal justice, it would seem imperative that there be greater parliamentary scrutiny of extraordinary legal innovations in the post-9/11 era. Moreover, this and the notion that the judiciary have tended to defer to the executive branch of government, especially in matters relating to security (national or otherwise), chimes with the view articulated by Fergal Davis that the courts provide a weak means of controlling the executive in times of emergency, and that perhaps a better approach would be to strengthen 'the popular democratic controls of the executive through parliament and through actively engaging the public with the need to promote and defend civil liberties'.[165] Thus, in the end, Davis argues, 'the only effective means of upholding civil liberties will be through politics, not the courts',[166] which is similar to what has been said about the related topic of enhanced police powers in the current era:

> … solemn responsibility lies with politicians (the elected representatives of the people and the lawmakers) – the executive as well as the parliament – to be less eager to cede power to the police and more keen to maintain the integrity of the legal system and protect fundamental freedoms.[167]

As stated in the introduction, in a law and order context, parliaments are quite willing to enact unfair laws that derogate from established rights and freedoms. And they are able to do so within constitutional limits. The British government's recent announcement that it intends to increase the state's ability to 'snoop' on its citizens by increasing

---

[164] Hallsworth and Lea, above n 121, 147.

[165] Fergal Davis, 'Extra-constitutionalism, Dr Mohamed Haneef and Controlling Executive Power in Times of Emergency' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, 2010) 219, 221. See also Loughnan, above n 10; Martin, above n 9.

[166] Davis, above n 165, 223.

[167] Martin, above n 9, 166.

email and social network surveillance provides an example,[168] which seems finally to realise claims that the UK is becoming a police state.[169] More worrying perhaps is the prospect that legislatures will find ever more artful ways and means of introducing secrecy by stealth. Witness, for example, the recent exclusion of secret inquest proposals from the Justice and Security Bill 2012 (UK), yet the concern of the House of Lords Select Committee on the Constitution that the government may use the Bill's inbuilt 'Henry VIII' power to add inquests to the definition on 'relevant civil proceedings', thereby introducing greater secrecy into coronial inquests by the backdoor.[170]

V CONCLUDING DISCUSSION

This article has placed the case of *Wainohu* in the context of the ever increasing turn to secrecy in forensic settings. It is not the intention of the article to argue that confidentiality or the use criminal intelligence is questionable in all circumstances: clearly, it is important that criminal investigations are not jeopardised by the disclosure of information that may enable the discovery of the existence or identity of a confidential source or informant or may endanger a person's life or physical safety. However, this article does argue that more and more areas of social and legal life are becoming subject to clandestine processes and procedures, which has the effect of undermining long-accepted and well-established legal principles and protections. The underlying concern here is that the rule of law is weakened, while the powers of the police and politicians are strengthened in ways that are inappropriate and disproportionate.

---

[168] Robert Booth, 'Government Plans Increased Email and Social Network Surveillance' *Guardian* (1 April 2012) <http://www.guardian.co.uk/world/2012/apr/01/government-email-social-network-surveillance>.

[169] Martin, above n 9, 163.

[170] UK House of Lords, Select Committee on the Constitution, *Justice and Security Bill [HL] Report, 3rd Report of Session 2012-13*, HL Paper 18 (15 June 2012) 11 [32]-[33].

However, as noted earlier, critics have argued the recently enacted *Crimes (Criminal Organisations Control) Act 2012* (NSW), which was assented to on 21 March 2012, has been subject only to minimal amendment to deal with the narrow focus of the decision in *Wainohu*.[171] Accordingly, the latest incarnation of the COCC Act specifies that 'where an eligible judge makes a declaration, revokes a decision or refuses an application, the eligible judge is required to provide reasons for doing so'.[172] Moreover, in order to accommodate Gummow, Hayne, Crennan and Bell JJ's specific recommendation for amendment,[173] the New South Wales Attorney-General said s 28 was being amended 'to clarify that the requirement to take steps to maintain the confidentiality of the criminal intelligence will extend to the eligible judge's determination and, therefore, the reasons for the decision'.[174] The Attorney-General stated that in many cases the steps taken to maintain the confidentiality of criminal intelligence would mean preparing two sets of reasons: 'a full set of reasons containing criminal intelligence and access to it would be limited to those persons specified in the Act', and a second set of reasons 'from which the criminal intelligence has been redacted'.[175]

Although the New South Wales government has remedied one particular defect of the original Act, ruled unconstitutional by the High Court, by including a provision in the new Act requiring

---

[171] See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 February 2012, 8323-4 (John Robertson); Appleby, above n 19; McGarrity, above n 8, 168. Writing about Australian federal security laws, Independent National Security Legislation Monitor, Bret Walker, has said being constitutional does not of itself resolve difficulties associated with certain Acts, such as ensuring fairness in criminal trials, above n 81, 61.

[172] New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 February 2012, 8279 (Greg Smith).

[173] Their Honours stated that by reference to what was said in *Gypsy Jokers*, 'in the preparation of reasons for decisions under s 9 and s 12 of the Act, steps could be taken to maintain the confidentiality of material properly classified as "criminal intelligence" within the meaning of s 3(1) of the Act': *Wainohu* (2011) 243 CLR 181, [108]; see also [92] (Gummow, Hayne, Crennan and Bell JJ). See *Gypsy Jokers* (2008) 234 CLR 532 at 560-1 [40]-[44], 596-7 [183]-[191].

[174] New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 February 2012, 8280 (Greg Smith).

[175] Ibid.

eligible judges provide reasons (s 31(2)), it has clearly refused to engage with wider concerns, raised here in this article, about the normalisation of secrecy provisions in criminal law. For instance, it is the Commissioner of Police, not the courts, who authorises disclosure of criminal intelligence to regulatory authorities (e.g. the Ombudsman), the Attorney-General and individuals who may need to see it,[176] which effectively means the Commissioner decides who is and who is not able to receive a full copy of an eligible judge's reasons for declaring an organisation. Moreover, while the court may decide that information cannot be properly classified as criminal intelligence, and ask the Commissioner whether he or she wishes to withdraw it from consideration (s 28(4)), the Commissioner may also object to persons specified in an application for a declaration being present during any part of the hearing in which information classified by the Commissioner as criminal intelligence is disclosed (s 8(3)). A number of issues flow from this.

First, as highlighted above, police forces have tended to struggle with, and have sometimes mishandled, intelligence. One very real danger here is that people may be wrongfully convicted as a consequence. Indeed, in his report into the wrongful convictions that followed police reliance on intelligence, which linked some of the Guildford Four to anti-army activities in Northern Ireland in the 1970s, Lord May warned, 'it is in the nature of intelligence obtained from informants that it often cannot be verified. There is also a risk that information may be invented or embellished to gain greater rewards or to inculpate an innocent person for ulterior motives'.[177]

Second, unlike the situation in overseas jurisdictions, such as in

[176] Ibid. See also the *Crimes (Criminal Organisations Control) Act 2012* (NSW) ss 30A, 31, 39.

[177] Lord May, quoted in Roach and Trotter, above n 23, 992. Such are the high stakes involved that in light of these miscarriages of justice, and those of the Birmingham Six, Lord Denning expressed the extreme view that 'it would have been better to hang them all' than risk damage to public confidence in the justice system that would be caused by acknowledging 'people were in prison because of police lies': Mark Aronson, 'Some Australian Reflections on *Roncarelli v. Duplessis*' (2010) 55(3) *McGill Law Journal* 615, 626.

Canada where the special advocate system has enabled special advocates and other security cleared counsel to successfully challenge secret evidence,[178] as well as in the UK and Europe where court rulings have limited secrecy when the liberty of the subject is involved,[179] in New South Wales at least, people who are potentially subject to control orders, and will therefore necessarily have restrictions placed on their liberty, will not be privy to secret intelligence and possibly may not even know the gist of the case against them. However, as this article has shown, critics both inside and outside of Australia continue to express consternation at the seemingly inexorable push for secrecy across legal systems. Thus, commentators critical of British government proposals to extend closed material procedures to civil proceedings involving sensitive material[180] have echoed Lord May's comment, made above, about intelligence being hard to verify. They have said that greater use of secret evidence beyond exceptional circumstances involving national security, including in criminal and other cases, is problematic on the basis such evidence is essentially unreliable because, among other things, information frequently comes from remote second or third hand hearsay, which cannot be challenged for inadmissibility as it is deemed too sensitive to disclose.[181]

All of these factors, combined with the relative weakness of the common law principle of open justice and constitutional values for protecting the rights of individuals to a fair hearing in Australia, as highlighted earlier by Lynch et al,[182] would seem to make it all the more important that appropriate safeguards be incorporated into legislation which provides for the use of criminal intelligence or

---

[178] Roach, above n 73, 188.

[179] *A v United Kingdom* [2009] ECHR 301; *AF* [2009] UKHL 28.

[180] HM Government, above n 63, [2.4]; Justice and Security Bill 2012 (UK).

[181] Special Advocates, above n 156, 7; Walker, above n 83, 9; JUSTICE, 'Justice and Security Green Paper (Cm 8194): Consultation Response' (January 2012) 5-6 <http://consultation.cabinetoffice.gov.uk/justiceandsecurity/responses-to-the-consultation>; Public Interest Lawyers, 'Response to the Justice and Security Green Paper' (6 January 2012) 4 <http://consultation.cabinetoffice.gov.uk/justiceandsecurity/responses-to-the-consultation>.

[182] Lynch et al, above n 17.

other secret evidence. Indeed, Appleby has expressed disappointment that the States of South Australia and New South Wales have not followed the example of Queensland where legislation provides for the appointment of a person as the criminal organisation public interest monitor or COPIM.[183] However, as mentioned above the COPIM has restricted functions similar to special advocates in the UK, whereby they must not make a submission to the court while a respondent or legal representative of a respondent is present,[184] and the court has discretion to exclude the COPIM from a hearing when a respondent or a legal representative of the respondent is present.[185] It would seem therefore that, as the name suggests, the purpose of the COPIM is purely to represent the public interest rather than to represent the interests of accused persons.

A third point relates to what was earlier identified as the emergence of a preventative paradigm and the concomitant blurring of intelligence and evidence. One problem with a pre-emptive approach is that prejudices and stereotypes, as opposed to objective facts, have the potential to enliven law enforcement action:

> Prejudice and stereotypes may more easily creep into secret 'criminal intelligence' than into information that must merit the description of 'evidence' for a prosecution by conforming to court rules and proving plentiful and strong enough to withstand testing in a transparent curial process.[186]

Part of the creep of secrecy identified in this article also involves the spread of surveillance and what Haggerty and Ericson have termed the 'surveillant assemblage', which, among other things, means the police have increasing access to a variety of information, from personal insurance to consumer profiling information. And '[w]hen these sources are combined through computerized data matching,

---

[183] Appleby, above n 19. See *Criminal Organisation Act 2009* (Qld) Pt 7.
[184] *Criminal Organisation Act 2009* (Qld) s 89(3).
[185] Ibid s 89(4).
[186] Julie Ayling, 'Pre-emptive Strike: How Australia is Tackling Outlaw Motorcycle Gangs' (2011) 36(3) *American Journal of Criminal Justice* 250, 259.

they allow for exponential increases in the amount of information the police have at their disposal'.[187] Indeed, a month after the *Wainohu* ruling, the authorities seemed intent on pursuing an intelligence-based approach, with police squad commanders from across the country holding a two-day conference in Parramatta to push for uniform national laws and FBI-style 'fusion' centres, which would include police officers from each Australian state and territory and combine resources and investigators from the Australian Crime Commission, the Australian Tax Office, the Department of Corrective Services, the Australian Securities and Investments Commission, Customs, and Austrac to investigate the illicit activities of bikie gangs and track down organised crime figures through financial records.[188] In spite of the fact that intelligence-led policing is itself becoming increasingly normalised, commentary on the use of secret evidence has tended to concentrate on reform of security intelligence agency institutions and practices,[189] although a few are beginning to consider some implications for police reform, trust and accountability.[190]

Originally, the CCOC Act was rushed through the New South Wales Parliament as a knee-jerk reaction to the brawl between members of two rival bikie gangs at Sydney Airport on 22 March

---

[187] Kevin D Haggerty and Richard V Ericson, 'The Surveillant Assemblage' (2000) 51(4) *British Journal of Sociology* 605, 617. For examples of how police powers increasingly resemble those of the security intelligence services, see: Martin, above n 9, 86; Willem de Lint and Alan Hall, *Intelligent Control: Developments in Public Order Policing in Canada* (University of Toronto Press, 2009). de Lint and Hall argue that 'information control policing' has become a standard police practice, and the blurring, blending or fusion of police and security provision is now part and parcel of 'pre-emptive surveillance': at 266, 270.

[188] Jodie Minus, 'Police Join Forces to Wage War on Outlaw Bikie Gangs', *The Australian* (online), 28 July 2011 <http://www.theaustralian.com.au/news/nation/police-join-forces-to-wage-war-on-outlaw-bikie-gangs/story-e6frg6nf-1226103022295>; Nick Ralston and Saffron Howden, 'Police Gang up Nationally to Catch "Nike Bikies"', *Sydney Morning Herald* (online), 28 July 2011 <http://www.smh.com.au/national/police-gang-up-nationally-to-catch-nike-bikies-20110727-1i0bc.html>.

[189] Roach, above n 73.

[190] Martin and Scott Bray, above n 146.

2009, which resulted in the killing of the brother of one of the gang members.[191] Given that two successive 'laws of control'[192] have now been struck down by the High Court, it is perhaps time for parliaments to adopt an attitude that is not so cavalier in respect of enacting criminal laws as a means of social control.[193] A fresh, rejuvenated stance along with a more measured and considered response to the management of threat and risk is surely preferable, such as the one displayed by the Norwegian Prime Minister, Jens Stoltenberg, who in the wake of Anders Behring Breivik's murderous rampage on 22 July 2011 promised, 'more democracy, more openness, and more humanity, but never naivety'.[194]

[191] Morgan et al, above n 94.
[192] Lynch, above n 121.
[193] See Loughnan, above n 10, 18.
[194] Quoted in Simon Reid-Henry, 'Norway: The Mourning After', *New Statesman* (online), 1 August 2011 <http://www.newstatesman.com/europe/2011/08/wing-extremism-norway-breivik>.