



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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22 October 2009

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A/Assistant Director
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Department of Justice and Attorney-General
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BRISBANE QLD 4001

By email: louise.shephard@justice.qld.gov.au

Dear Ms Shephard

RE: **CRIMINAL ORGANISATION BILL**

I refer to the consultation draft in respect of this Bill and to the initial deadline for submissions namely the 28 September 2009.

I understand that other relevant stakeholders were given until last Friday as an extension for making submissions on this Bill and it is hoped that a similar indulgence will be extended to the QCCL.

Introductory comments

It is unlikely to come as any surprise for us to make the observation that we are totally opposed to this Bill.

The apparent genesis for the Bill was the Bikie brawl that occurred at Sydney Airport in March of 2009.

This initially caused the Queensland Premier Ms Bligh to assert that the need for national anti-bikie legislation would be considered by SCAG. However, within a week of the Premier making this announcement she then indicated that Queensland would bring forward its own legislation on the supposed basis that New South Wales had indicated it was going to introduce legislation quickly and therefore

Watching them while they are watching you!

there was a need for legislation to be introduced quickly to stop bikie groups fleeing the hostile New South Wales environment and coming to Queensland.

One looks in vain for any research based evidence justifying the concepts underlying this Bill let alone any research based evidence demonstrating that existing Queensland criminal laws and police powers are inadequate to deal with any organised criminal activities of so-called Criminal Organisations generally or so-called outlaw motorcycle gangs in particular.

It is to be noted that the violent brawling between rival groups of bikies at Sydney Airport which resulted in the death of one man did not come about because of the inadequacy of existing criminal laws in that state. That incident was purely a failure in policing and, more particularly, a failure by the AFP and the New South Wales Police Service to be sufficiently organised and proactive to deal with a situation which, according to flight attendants on the relevant flight from which at least one of the bike groups was leaving, was already brewing before one of the bikie groups disembarked from the plane.

We see this legislation as being rooted in sheer political opportunism.

The proposed legislation is so radical and far reaching that it should have been subject to the stringent Law Reform Commission process of an Issues Paper, a Discussion Paper and then a Final Report.

There is no urgency that justifies the incredibly radical proposals as are contained in this Bill being rushed through parliament without the public policy benefit of the concept being the subject of a rigorous Queensland Law Reform Commission examination.

We make the further introductory point that we are making submissions in respect of the Bill in the hope of ameliorating some of its worse provisions.

It should not be considered that our participation in the consultation draft signifies this Council's agreement with the philosophy behind the Bill.

As ought to be obvious, we are totally opposed to the Bill. It is a Bill of which the former Premier Sir Joh Bjelke-Petersen would have been proud introducing as it does concepts of terrorism law control orders into the general criminal law, reviving the much discredited law of consorting and introducing the thoroughly obnoxious concept of secret evidence which effectively cannot be challenged in court.

The title of the Bill

The Bill is referred to as the Criminal Organisation Act.

It is noted that while the Premier indicated the Bill was supposedly directed at outlaw bikie gangs but nowhere in the 111 pages of the Bill does the word bikie even appear.

This Bill's radical provisions will therefore apply to all Queenslanders, not just bikie groups.

Definition of serious criminal activity

The concept of "serious criminal activity" underlies the major concepts of the Bill namely:

- The outlawing of declared criminal organisations;
- The making of Control Orders;
- The making of Public Safety Orders some of which can be done by a commissioned officer of police;
- Fortification removal orders;
- The concept of Criminal Intelligence and the use of Criminal Intelligence for substantive hearings;
- The Criminal Organisation Public Interest Monitor; and
- The Offence of Criminal Association.

The concept of a serious criminal offence is said to be an indictable offence punishable by at least 7 years imprisonment or an offence against a section of the Criminal Code mentioned in Schedule 1.

As is increasingly the case, the definition of serious criminal activity in the Act is a prostitution of the popular meaning of the word "serious". Some of the offences described as a serious criminal offence include operating a place for unlawful gaming, possession of a thing used to play an unlawful game, stalking, obtaining goods or credit by false pretence, cheating and personation.

These excerpts from the Bill show that yet again in Queensland legislation the term "serious criminal activity" is so defined downwards in terms of what the public would regard as serious as to result in a complete mangling of the concept.

Most of the offences in the Criminal Code carry a maximum sentence of at least 7 years and accordingly most criminal offences in Queensland are covered in the definition of "serious criminal offences" in this Bill.

Declaration that a particular organisation is a criminal organisation

Part 2 of the Act provides that the Police Commissioner may apply to a court for a declaration that a particular organisation is a criminal organisation. Once an

organisation is so declared various criminal consequences flow for persons to have contact with members of that organisation.

Section 9 provides that a court may make a declaration that a group is a criminal organisation if members of the organisation associate for the purpose of engaging in or conspiring to engage in serious criminal activity **and** the organisation is an unacceptable risk to the safety, welfare or order of the community.

It follows that since only one of these descriptive categories have to be met for the organisation to be declared a criminal organisation an organisation can be so declared if a court finds it is an unacceptable risk to the “welfare” or “order” of the community. In this regard it is noted that neither “order” nor “welfare” is defined in the Act.

Further, contrary to the public imagery the Premier and the Police Minister have engaged in concerning this legislation it is to be noted that for an “organisation” to be declared a criminal organisation the Act defines “organisation” to be a group of three or more persons! Part 2 of the Act dealing with criminal organisations provides that a court in deciding whether to label a group of three or more people a criminal organisation must have regard to information “suggesting” even former members of the group of three or more have been involved in serious criminal activity (defined to include gaming) whether or not this involvement resulted in convictions.

Section 9 provides that a court in deciding to make a declaration that a group of three or more is a criminal organisation must have regard to information “suggesting” a link exists between this organisation and serious criminal activity.

What does the phrase “suggesting a link” mean particularly as to the level of proof that has to be achieved by the use of this phrase.

It is noted that the phrase “suggesting a link” is not defined in the Act.

The dictionary definition of “suggests” is “hint at”.

This is an unacceptably low standard of proof which the police have to reach before a group of three or more persons can be declared a criminal organisation.

The Sections dealing with declaring an organisation a criminal organisation also provide that the court in deciding to make a declaration may be satisfied that members of an organisation “associate” for the purpose of engaging in serious criminal activities whether all the members associate for that purpose or only some do and whether or not the members also associate for other purposes.¹

¹ See Section 9(4)(a)

While it is acknowledged that Section 9(5) provides that a court may act on the basis of satisfaction that only some members associate for the purpose of serious criminal activity only if the court is satisfied that those members constitute a significant group within the organisation, nevertheless the standard of proof in this area by the use of such a low level of proof as “suggesting a link” is objectionable.

It is noted that once an organisation is declared a criminal organisation that declaration remains in force for a period of 5 years with all the criminal and penal consequences that flow from such a declaration.

The fact that an organisation declared to be a criminal organisation can apply for revocation of that declaration after the expiration of 3 years of the 5 year period is meaningless. In the Minister’s covering letter distributing the consultation draft to this Council it was noted that one of the differences of the Queensland legislation which is described as a “significant difference” from the New South Wales and South Australian model is the ability to make an application to revoke a criminal organisation declaration. The fact that such a declaration cannot be made until two thirds of the five year period has elapsed makes such a “protection” illusory.

Part 3 - Control Orders

To lift a concept such as a control order from terrorist legislation and insert the concept into the general criminal law of Queensland is obnoxious and objectionable.

When the concept of control orders were introduced into the federal terrorism law post 2001 Australians were given solemn assurances that such a concept would be restricted to terrorism only.

Only a small number of years after the concept of Control Orders was introduced into Australian terrorism related criminal law we now see it lifted from terrorism law where we were promised it would be quarantined and it will be part of the Criminal Organisation Act.

Part 3 provides that a court may make a Control Order in the following circumstances:

- If the court is satisfied (on the balance of probabilities) that the Respondent is, or has been, a member of a criminal organisation.

Remembering that the definition of an organisation is a group of three or more people, under the *Criminal Organisation Act* a Control Order can be made against a person if that person **has been** a member of the organisation (now declared a criminal organisation) for an indeterminate period in the past if that person has engaged in serious criminal activity for an indeterminate period in the past and

currently associates with any person for the purpose of engaging in serious criminal activity.

In deciding whether to make a control order against a person it is provided that a court must have regard to any activity or behaviour of the respondent that **tends to prove** that a person has engaged in serious criminal activity (at any time in the indeterminate past) **and** associates with any person for the purpose of engaging in serious criminal activity.

As with the objection to the low level of proof inherent in the word “suggesting” (as outlined above) the phrase “tends to prove” is an objectionable lowering of the overall standard of proof.

The phrase “tends to prove” should be deleted from the Bill.

In so far as the conditions which apply to a Control Order are concerned apart from specific mandatory conditions which must apply if a Respondent to a control order is a member of a criminal organisation, there are a range of conditions which a court **may** impose.

Interim Control Order

Section 20 provides for an interim control order to be taken out without notice against a respondent.

The circumstances under which an interim control order is able to be taken out should be clearly spelt out in the legislation and there needs to be an onus on the Applicant/Police to establish urgency so as to justify an interim control order particularly if such an order is to be made ex parte.

Enforcement of control orders

Section 23 provides for contravention of a Control Order particularly in (4) where it provides that a person knowingly contravenes a Control Order if the person does an act which the person knows or ought reasonably to know is a contravention of the Order.

The phrase “ought reasonably to know” should be deleted as it represents an unacceptable lowering of the standard of proof of a criminal charge.

Part 4 – Public Safety Orders

The concept underlying this new type of Order is not spelt out in the Act.

Section 28 of the Bill provides that in making a Public Safety Order a commissioned officer or court may impose conditions on the Respondent which is

considered necessary having regard to the prescribed grounds for making the order.

The prescribed grounds are outlined in Section 27 namely that a commissioned officer or court has to be satisfied that the presence of the Respondent at premises or an event, or within the area, poses a serious risk to public safety or security.

Neither of these two terms, namely “safety” or “security” are defined in the act and accordingly the standard dictionary meaning should be applied to these terms.

Safety is defined as “the condition of being safe: freedom from danger or risks”.²

Security is defined as a secure condition or feeling or the safety of a state against a danger.³

The concept of a Public Safety Order being made let alone the consequences of such an Order are extraordinary and this concept knows no other equivalent in the general criminal law.

In the absence of an explanation and justification for this concept the necessity for such a concept is rejected particularly having regard to the consequences which flow from a Public Safety Order namely the Respondent can be prohibited from attending a stated event, entering stated premises or entering a stated area.⁴

If the supposed justification for a Public Safety Order is the fight which occurred between two separate motorcycle groups at Sydney Airport in March 2009 it is again observed that that event was not due to any deficiencies in the existing criminal law but rather arose from the inability of the Australian Federal Police and the New South Wales Police Service which have joint responsibility for policing Sydney Airport to get their act together in relation to that event, notice of the development of which was obvious to flight attendant staff on the relevant aircraft prior to a group of bikies leaving the aircraft.

Not only is the concept of the necessity of a Public Safety Order rejected but it is observed with concern that a Public Safety Order with the restriction of freedom of movement and association which flows from such an order can apparently be made against anyone.

The concept of a Public Safety Order is defined as relating to a person or a group of persons where the person does not have to be a member of a declared criminal organisation nor does the group of persons have to be a member of such a group.

² See Australian Concise Oxford Dictionary Fourth Edition, page 1246

³ *ibid*

⁴ See Section 28

There is provision for a commissioned officer to make a Public Safety Order if it is not reasonably practicable for the commissioner to apply to the court for an order.⁵

The concept of a commissioned officer (that is a police officer with the rank of Inspector or above) being able to make an order prohibiting a person from entering stated premises or a stated event is obnoxious and should be abandoned.

If the concept of a Public Safety Order is to be implemented despite our objections to the concept, an Order should only be able to be made by a court.

It is able to be easily envisaged that a commissioned officer will make a Public Safety Order with ease having regard to the fact that the Order expires 72 hours after it is made⁶ where that will effectively make it impossible for a commissioned officer Order to be appellable.

Indeed there does not even appear to be provision for a commissioned officer's Order to be appealed.

Comparison is made with the role of a commissioned officer under the PPRA to authorise the taking of a DNA sample. It is the experience of most criminal defence lawyers that that Order is made as a matter of course by a commissioned officer at the request of an officer of a lower rank.

The fact that a rank called commissioned officer is supposed to confer some balance or even independence in respect of the making of a 72 hour Public Safety Order is rejected. The fact that a particular police officer attains the rank of Inspector does not clothe that officer with a degree of impartiality and balance simply by dint of having reached that rank.

The concept of a commissioned officer being able to make such an order should be removed from the Bill not least because a situation can be envisaged where the police will deliberately hold off making an application to a court for a Public Safety Order so as to allow the Order to be more easily if not automatically made by a commissioned officer.

As well, the observation can be made that Duty Magistrates and Judges sit after hours and it is our contention that any short term or supposedly emergency Order should only be made after application to a Supreme Court Judge.

We would oppose applications being made to a Magistrate because our experience with Magistrates historically are that they tend to grant this sort of ex parte Orders much more readily and with less scepticism than a Supreme Court Judge.

⁵ See Section 30

⁶ See Section 30

We therefore contend that the concept of a commissioned officer making a Public Safety Order should be dropped from the Bill.

Nevertheless we still object even to a court being given the power to make a Public Safety Order as we contend that the necessity for the insertion of such a radical concept into Queensland Criminal Law has not been made out.

The fact that a court or commissioned officer must have regard, among other things, to whether the Respondent has been a member of a criminal organisation or has been the subject of a Control Order is in our submission an objectionable feature of even a court ordered Public Safety Order. Particularly is this so where there is no period of time specified in relation to how far back a person has been either a member of a criminal organisation or the subject of a Control Order.

If however the concept of a Public Safety Order is to go ahead as part of this legislation it is submitted that any interim or so called urgent application should be on notice to the relevant Respondent.

A situation can be envisaged where a potential Respondent has paid a lot of money for a ticket to a public event, be it a concert or otherwise, and the imposition of a Public Safety Order by a commissioned officer will in effect mean that that person not only loses the ability to attend the concert or event but also loses the cost of the ticket.

If, against our objections, the concept of an interim Public Safety Order is to go ahead then it should be a condition of that Order that the State reimburse the Respondent for out of pocket expenses and other loss suffered as a result of not being able to attend the relevant event.

Part 5 – Fortification Removal Orders

We object to this concept. We contend that no evidence has been put forward to demonstrate that Fortification Removal Orders need to be inserted into the general criminal law.

We are not aware of any proveable instance where police have been unable to access a bikie club or other non bikie place for the purpose of executing a warrant or reasonably carrying out specific powers under the PPRA.

In Western Australia and South Australia where similar fortification orders have been in existence for a period of 12 months or more the frequency of their use appears to be of a small order, if at all.

If our submission in this regard is rejected then the following objections should be noted and relevant changes made to various provisions within Part 5.

It is contended that the definition of **Fortification** in Section 41 is too wide and that the terms “hinder” and “or to provide any other form of step against” should be removed. Particularly the term “step against” should be deleted as this concept is not defined and is both meaningless and too broad.

Further, the fact that a video surveillance system or a security camera is specifically defined as “part of a system” within the definition of fortification is far too wide and should be deleted.

Section 45 outlines the matters to which a court must have regard in making a Fortification Order.

Section 45(1)(b)(ii) provides that a court can take into account in making a Fortification Removal Order the fact that premises are used by what is defined as a “prospective member” of a criminal organisation.

The term prospective member is not defined, is too broad and should be deleted.

In relation to the enforcement powers for Fortification Removal Orders it is noted that the considerable enforcement powers outlined in Section 52 can be exercised at any time and as often as is required to achieve the removal. As well police have the power to remove any person from the fortified premises if it is said to be “desirable” to do so.

Keeping in mind that a Fortification Removal Order can be made in respect of premises which are the Respondent’s residence the use of the term “desirable” in the context of removing any person from the fortified premises is too broad and should be deleted.

Further the fact of allowing the exercise of the enforcement powers in respect of Fortification Removal Orders “at any time” is objectionable. Enforcement times should be prohibited between 9:00pm and 6:00am.

In relation to Section 59 which provides for compensation from the State to particular owners it is objectionable that a regulation is to prescribe the matters that “may” or “must”, be taken into account by the court when considering whether it is just to make a compensation order.

The matters that, separately, “may” or “must” be so taken into account should be specifically outlined in the Bill and not left to a later regulation.

Part 6 – Criminal Intelligence

The definition of criminal intelligence in Section 61 is far too wide particularly in respect of the concept of prejudicing a criminal investigation or enabling the discovery or identify of a confidential source of information.

It will be seen that this submission totally rejects the necessity for and the concept of criminal intelligence being used in respect of closed hearings and for declared criminal intelligence when that evidence is being used in substantive hearings.

Section 61(a) should be amended to refer to a current or imminent Criminal Investigation. The current definition that criminal intelligence is something the disclosure of which could be expected to prejudice a criminal investigation is far too time elastic in that that phrase could be interpreted by a court to refer to prejudicing a criminal investigation which may (or may not) occur in the indeterminate future.

Further, the use of the term “confidential source” in Section 61(b) is far too wide and should be withdrawn.

It is bad enough that informants in Part 6 are elevated to a level of secrecy so that in effect nothing an informant says in respect of the operation of this act is practically able to be challenged in court. It is worse that information which is said to be merely confidential should be protected under the definition of criminal intelligence.

“Confidential” is dictionary defined as (1) spoken or written in confidence or (2) entrusted with secrets.⁷

The term “in confidence” is defined as “the telling of private matters with mutual trust”.⁸

There have been instances in particularly the Magistrate Court where police feel that they can get away with making nonsense claims of police methodology under the PPRA which a particular police officer would not be game to make in front of a Supreme or District Court Judge. Whether a police officer was carrying a tape recorder from point of first contact either in respect of a witness or a target is often the subject of a claim of police methodology privilege in the Magistrates Court.

The level of secrecy that attaches to the overwhelming bulk of facts that will be used in court pursuant to this Bill is fundamentally objectionable. Elevating that level of secrecy by including confidential information within the definition of criminal intelligence is unacceptable.

⁷ See Australian Concise Oxford Dictionary Fourth Edition, page 289

⁸ *ibid*

It is noted that the objects of Part 6 is to allow evidence that contains criminal intelligence to be admitted on an application for the declaration of criminal organisations, Control Orders, Public Safety Orders and arguably Fortification Removal Orders. This evidence will be able to be used without the defence being able even to discover the details of confidential sources of information.

Extending the law in this way is totally opposed.

The combined effect of methodology privilege, the longstanding law relating to informants both under the common law and the *Drugs Misuse Act* and the general law relating to public interest immunity ought to be more than sufficient to protect appropriate sources of information particularly having regard to the longstanding jurisprudence that attaches to the balancing exercise in relation to public interest immunity that has been enunciated by the High Court of Australia as far back as in **Alister**.

To introduce a new and obsessively secretive concept of criminal intelligence as outlined in Part 6 of the Bill completely skews the balance between legitimate law enforcement needs on the one hand and proper protection of a defendant against police excesses, on the other.

While we have made it clear in this submission that we object in the strongest terms to the new concept of criminal intelligence combined as it is with closed courts, we consider that if this thoroughly objectionable new concept is to be introduced into the mainstream criminal law that the definition of criminal intelligence be significantly tightened from the definition that now stands in Section 61.

So far as **Section 63** dealing with **Affidavit contents** is concerned it clearly is envisaged that the sources of information and the grounds for belief referred to in Affidavits are going to be expressed in general and generic terms so as to take advantage of the facts and sources of information as contained within the excessively broad definition of criminal intelligence in Section 61. This is objected to.

Declaration of criminal intelligence

Section 65 provides that the Commissioner may apply to the court in a proceeding described as a criminal intelligence application for a court declaration that particular information is criminal intelligence and such a declaration is to be known as declared criminal intelligence.

Section 65(2) provides that the Commissioner may make the application only if the Commissioner reasonably believes the information is criminal intelligence.

This "protection" is illusory to the extent of being nonsensical. Clearly the Commissioner is not going to be personally involved in making such an application. The Commissioner is likely to have no role or only a general sign off role on a particular affidavit where that Affidavit will be prepared by a much lower ranking police officer.

However, once the delegate of the Commissioner makes an assertion that information is criminal intelligence the Respondent who will then be the subject of a substantive application based on that criminal intelligence will not know the facts underlying the so called criminal intelligence and will not be able to cross examine anyone on what constitutes criminal intelligence in a particular case.

Therefore the so called protection in Section 65(2) is in reality no protection at all.

Additionally, if an informant is relied upon Section 66 provides that an informant cannot even be called to give evidence but what an informant asserts is to be the subject of an affidavit for a criminal intelligence declaration.

A supposed protection against this informant evidence is a requirement that an affidavit relating to an informant must contain the informant's full criminal history, allegations of professional misconduct against the informant and any inducements or rewards offered to the informant.

It is to be expected that the informant's full criminal history will be so redacted that it will provide only the most skeletal information. It is questioned as to what the meaning of "professional misconduct" is when it relates to an informant as that term is not defined in the dictionary.

Separately, how is it proposed that all allegations of professional misconduct against an informant will be sufficiently recorded and stored centrally so as to ensure that all of the so called allegations of professional misconduct are included in the affidavit.

Further how is it to be enforced that any inducements that have been offered to an informant (as opposed to rewards) will in fact be fully and truthfully recorded in the relevant informant related affidavit.

It is notorious that ever since the protection against police interview verbals was established in 1990 namely the mandatory police station based tape recorded record of interview, inducements are increasingly being made off tape but are unable to be substantiated to the satisfaction of a court when a record of interview is being challenged because of the interviewee's answer to a standard question at the end of a record of interview that no inducement has been offered.

We are totally opposed to the provisions of Section 66 but if the Section is to go ahead then there should be a mandatory requirement that all contact between police

and a particular informant where that informant is being used in a criminal intelligence application should be tape recorded and transcribed and such transcripts should at least be made available to the COPIM.

It is notorious that the criminal law in this country and in other Western countries that have a similar common law tradition has historically and with good reason viewed the informant with a great deal of scepticism and, indeed, mistrust because of the ability of an informant to make up lies against his target with often disastrous consequences for the person so adversely affected by what the informant says.

Section 66 and the allied Sections within Part 6 happily and blithely ignore the history of the common law's scepticism about the role of informants. Part 6 both elevates to an unprecedented level the role of informants in the overall Act but strips away any ability for a court let alone a respondent to make enquiries to ascertain whether the informant in a given case might be telling outright lies.

This position is made worse in the Act in that even the COPIM is prohibited from inspecting any part of the documents that could lead to the disclosure of an informant⁹.

It is ludicrous to pretend that the COPIM is able to play a meaningful role in identifying and bringing to the court's attention excesses or even downright lies of an informant if a COPIM cannot inspect any part of documents that **could** (not **would**) lead to the disclosure of an informant.

One can readily predict that the COPIM will regularly be restricted from inspecting documents on the untested say so of a police officer who is either bringing a criminal intelligence application or a substantive application on the supposed basis that inspecting a particular document merely **could** lead to the disclosure of an informant.

If the objectionable Part 6 Division 2 is to proceed at least Section 67(4) should be amended to delete the word "**could**" and insert the word "**would**".

Section 74 contains the curious, and in our view unjustified provision that if the court on a criminal intelligence application is not satisfied information is criminal intelligence, the court must give the Commissioner an opportunity to withdraw the application.

In the absence of some explanation which is not obvious at this stage, to give the Commissioner such a power is curious. The point of inserting this subsection is not at all understood and in the absence of a satisfactory explanation this subsection should be removed.

⁹ See Section 68/67(4)

Part 6 - Division 3 Protection Of Declared Criminal Intelligence For Substantive Hearings

Substantive hearings appear to relate to applications for a declaration that an organisation is a criminal organisation, for an application for a control order, for a court based public safety order and a fortification removal order.

It is noted that in any of these applications the court must order any part of a hearing in which the declared criminal intelligence is to be considered to be a closed hearing which means that with the exception of police, the Commissioner's lawyer and COPIM, no one else can be present.

In relation to **Section 82 admissibility not affected by declaration**, the purpose meaning and intent of this Section is not understood. An explanation should be provided as to what is intended by this Section.

Part 6 Division 4 is misleadingly headed Protection from Unlawful Disclose. In fact Section 83(2) provides that a person must not disclose information that is **or has ever been** the subject of a criminal intelligence application or declared criminal intelligence.

This is an extraordinary provision particularly the **phrase "or has ever been"** in that it prohibits in perpetuity anything that has ever even been the subject of a criminal intelligence application from being disclosed.

The so called "protection from unlawful disclosure" is contained in Section 83(2) which is to the effect that a person must not disclose information that has been the subject of a criminal intelligence application unless the disclosure is made with lawful authority or is required under Section 133 (which deals with criminal intelligence being given to a Reviewer under this Act).

Lawful authority is not defined and it is doubtful whether any situation could be envisaged where the lawful authority so called protection would come into effect.

Part 7 - Criminal Organisation Public Interest Monitor

The concept of the public interest monitor first became part of Queensland law in or about 1996 when the concept was created to deal with perceived excesses then existing in relation to the use of listening devices.

The public interest monitor was created to enable a Supreme Court Judge who was hearing an application for a listening device warrant in the privacy of his/her Chambers where hitherto the only other person who was present was the police or CMC lawyer to decide on an application with at least some input from the PIM.

To put it differently, the PIM was to address the problem which many Supreme Court Judges came to criticise namely the one sided nature of an application for a listening device where prior to the establishment of the PIM there was no opportunity for an alternative point of view other than that of the police or the CMC applicant to be put before the Sentencing Judge.

What the COPIM does in relation to this Act is attempt to respectableise a regime of secret evidence and unaccountable informants by involving a new structure called COPIM.

Having COPIM perform this role is a quantum leap from the role which the PIM has heretofore performed in relation to listening device applications or the more recent telephone tap legislation.

The role of the concept of the Special Advocate is now well advanced in criminal jurisprudence in the UK both in relation to Special Immigration Appeal Commission (SIAC) hearings and in relation to control orders and allied fields of terrorism law.

The role of the Special Advocate (of which PIM is the sole example outside terrorism laws in Australia) has come under increasing criticism in the United Kingdom primarily because it relies upon a State appointed lawyer to make submissions in secret criminal or allied hearings where the respondent and his/her lawyer are excluded from that part of the hearing where the Special Advocate appears and where the Special Advocate is unable to get instructions from or even tell the respondent any aspect at all of the hearing in which the Special Advocate appears.

We object to the role of COPIM especially to the extent that it is put forward as some illusion of a protective mechanism against the abuse of the extraordinary powers contained in the Criminal Organisation Bill.

We also observe that making a COPIM a retired Judge is another illusion perpetrated by the framers of this Act to pretend that the COPIM role will effectively deal with any of the anticipated excesses that will occur under this Act.

A retired Judge is precisely that, namely a Judge who is no longer a Judge.

At least when unsuitable persons are appointed as Judges partiality and one sidedness can be corrected on appeal on the basis of the transcript which is available for close examination by the Appeal Court and the lawyers involved in any appeal.

While there are a number of retired Judges who could be expected to perform the role of COPIM with care and due consideration there are also a number of retired

Judges who were well known for their prosecution and law and order views when they were on the Bench.

Therefore, in effect, the role of COPIM and its effectiveness at any given time will depend on the character and make up of the individual who is the COPIM. Such a hit and miss procedure which depends upon something as subjective as the personality, views and attitude of a COPIM at any given time hardly represents a protection against the obvious excesses which can occur under this Act.

We therefore reject out of hand the concept of a COPIM as being some sort of corrective mechanism against excesses under this Act.

If our rejection of the concept of COPIM along with our rejection of the Act as a whole is not accepted then changes should be made to the role of COPIM.

Section 86 deals with the procedure for appointment as a COPIM and it proposes that the only body which would be consulted about the suitability of a particular appointee is the Law Justice & Safety Committee by the Queensland Parliament.

With the greatest of respect, how would this Committee be able to decide the suitability of a particular person being appointed as a COPIM. A Member of this Committee would have absolutely no idea as to the suitability of a proposed appointee.

At the very least the appointment panel should comprise the President of the Queensland Law Society or his or her senior delegate, The President of the Bar Association or his or her senior delegate and the President of the Queensland Council for Civil Liberties or his or her senior delegate. We recommend an appointment body to be comprised of these persons having regard to the fact that the COPIM supposedly is to be alert to abuses that are committed under this most extraordinary Act and these bodies have a traditional role in that regard in the criminal justice system generally.

COPIM'S Functions

In relation to the material to be given to COPIM it is noted that Section 89 provides that the applicant does not have to give material to COPIM that discloses an informant's name or a position held by the informant in an organisation.

This provision in Section 89(2) should be removed in that if the police are to be "trusted" with the name of an informant then for the COPIM to do his/her job properly the COPIM should be provided with that information as well particularly when it is provided that material given to the COPIM may refer to an informant by way of unique identifier.

We again sound a warning about the excessively protected role given to an informant in the regime of this Act, particularly having regard to the fact that an informant cannot be revealed even to the extent of a position held by an informant in an organisation nor can the informant be cross-examined.

The excessively secretive role given to informants in this legislation and the total inability of an informant to be cross-examined is bad enough but to deny COPIM an informant's name as well as the position held by an informant in an organisation renders it impossible for COPIM to do its job.

One can envisage a situation where if the COPIM were to know the name of an informant (say a disaffected member of a motor cycle club) COPIM could at least be in the position of requiring further information to be put before a court as to the full background and history of an informant including occasions where it may be able to be identified that an informant has been unreliable or has even lied in the past.

Section 90 provides that the court may in its discretion exclude the COPIM from the hearing while a respondent or a legal representative of a respondent is present.

This appears to be a ludicrous proposal in that if a COPIM is to properly perform his/her role to exclude a COPIM from a hearing at any stage is utterly unacceptable. Therefore Section 90(4) should be appealed.

Function of Law, Justice & Safety Committee

The Law, Justice & Safety Committee has the power to monitor and review COPIM's functions under the Act and to examine each annual report tabled under the Act but the Committee is not to be given any access to any criminal intelligence. This makes the monitoring role of the Committee in effect close to useless particularly if the Committee is aware of a controversy which has developed during the period of the annual report under review where it is alleged that an informant has lied or that police have been responsible for putting untruthful material before a court in either a criminal intelligence application or in a substantive hearing.

If the Committee is not to have access to criminal intelligence then the Committee may as well not have any role at all in the monitoring of the Act.

Part 9 - Criminal Association

Part 9 of the Act provides for an offence of a person associating on three or more occasions during a period of 12 months where the person is a member of a criminal organisation (as declared) or a controlled person.

The offence carries with it a maximum penalty of three years which can be expected over time as is the case in the criminal law generally to be increased to a higher maximum.

As with other Sections of this Bill we are totally opposed to this offence which in effect resurrects the much discredited law of consorting.

We express particular concern about a child (as defined under the *Juvenile Justice Act 1992*) being caught up in the criminal association offence under Part 9 and accordingly we object to the provisions of Section 103 of the Bill.

We also object to the provisions of Section 104 which appears to envisage that despite a person being acquitted of a charge of criminal association, other occasions of association that may emerge in the hearing of the prosecution of an offence of criminal association can be used in what appears to be a permissible further prosecution for the offence of criminal association.

Section 112- Hearing Attendance

It is oppressive to allow only one individual member of an organisation or group to be present in a proceeding for a criminal intelligence declaration or for a substantive hearing.

While it is accepted that it would be impractical to have dozens or hundreds of people who are members of the organisation present there has to be a representative number permitted and to capriciously restrict that number to one is unacceptable.

The number of persons present should be left to the discretion of the court.

Further Section 112(3) provides that the hearing of an application to a court cannot proceed without the COPIM appearing **unless the court otherwise decides**.

Our submission about the role of COPIM has been critical of that Special Advocate being used to respectableise an otherwise appalling set of extraordinary provisions in this Bill.

We are also critical of some of the individual Sections that provide how COPIM is to operate in practice.

But to allow COPIM to be excluded on the direction of a court is utterly unjustifiable and accordingly we urge that Section 112(3) be deleted.

Costs

The provision in Section 114 that each party must bear the party's own costs for the proceeding is unjustified.

The State in bringing proceedings has enormous resources at its disposal and accordingly Section 114 should be amended to bring the costs provision into line with those that apply in the Magistrates Court in summary criminal proceedings.

Proceedings for Offences

It is noted that in a proceeding for a charge the prosecution shall be permitted to elect whether the hearing is to proceed either by way of summary proceedings or on indictment.

For a Bill which is without doubt the most appalling piece of legislation that this State has seen for decades to provide that it is up to the prosecutor to decide whether a person can be tried by a jury is utterly unacceptable.

The election to be tried by a jury should be left entirely to the person charged not the prosecutor.

Section 124 - Exemption from Disclosing Police Officer's Name

Section 124(2) should be deleted. This provides that an officer need not disclose the officer's name or address to anyone the subject of the investigation.

It is never the case in practice that a police officer ever has to disclose his/her address, particularly their residential address.

However for a police officer to be engaged in carrying out the remarkably draconian provisions of this Act where the police officer does not have to identify himself on request is surely one of the indicators of a police State. This subsection should be deleted.

Limitations on Appeals in Relation to a Declaration

Section 128 provides that only one appeal from a declaration order lies to the Court of Appeal from the respondent even if fresh evidence emerges.

To so circumscribe the right of appeal without any attempt to justify or explain the limitation is an indication of the mindset which underpins this Bill. The mindset is to grant maximum police powers to agents of the State and then to minimise the role of Courts let alone a respondent's legal representative from challenging an order made under the Act.

To exclude a further appeal on the basis of fresh evidence is an amazing proposition.

Further to provide that the court may not make an order extending time for filing is capricious in the extreme.

Section 128(2), (4) and (5) should be deleted from the Act.

Reviews of the Act

It is proposed that a review of the Act should occur five years after the Act begins.

It is our submission that the Act should be reviewed every three years and that the reviewer should have no bars or restrictions on any access to material.

The initial review of the Act should be carried out after the first 12 months of operation so as to bring any early difficulties or problems to light and thereafter review should take place every 3 years.

The review should be conducted under the Commissions of Inquiry Act and there should be specific provision in the Criminal Organisation Act that there should be no restrictions whatsoever in the material that the reviewer should be able to examine in each and every periodic review of the Act.

A Committee comprised of the President of the Queensland Law Society, the Bar Association and the Queensland Council for Civil Liberties should choose the identity of each and every reviewer who is to conduct a periodic review of the Act.

Disclosure of Secret Information about the Identity of Informant

Section 150 provides that a person who, without lawful justification or excuse, publishes or communicates secret information obtained from a law enforcement agency about the identity of a criminal organisation informant commits a crime.

There is nothing in the Act which might indicate what factors are to be taken into account in respect of the caveat “without lawful justification or excuse”.

A situation could be envisaged where one particular criminal defence lawyer obtains information that an informant has lied but if that criminal defence lawyer seeks to pass that information on to another criminal defence lawyer for the purpose of use in a later case where the information has originally been obtained from a law enforcement agency that criminal defence lawyer commits an offence punishable by a maximum of 10 years imprisonment.

One can envisage a scenario of the type recently portrayed in a Judge Deed program where a criminal informant can in fact actively and falsely set up an accused person to be charged with an offence under the Criminal Organisation Act or under the Criminal Code.

It surely cannot be right that if the identity of that informant is ascertained by a particular criminal defence lawyer that that information cannot be used to establish in a subsequent case that a particular accused is being set up by false accusations.

CONCLUSION

We have made our objections to the entire Act abundantly clear in this submission and we again assert that the Bill should not be introduced into Parliament.

There is no demonstrated deficiency in the existing criminal law which justifies the introduction of the Act.

The Act has been introduced for base reasons of law and order populism as a reaction against the fight between two groups of bikies at Sydney Airport in March 2009 which was a fundamental failure of policing as opposed to inadequacies in the criminal law.

If, however, our objections are not agreed to and the Bill is introduced, we request that our specific objections to discrete and particular provisions be accepted. Further it should be a requirement written into the Act that all dealings by police with both informants and all witnesses under this Act and generally must from start to finish be tape recorded including field dealings.

It is now the case that police frequently wear around their neck digital recorders during the course of raids and it is not an unrealistic requirement that all police dealings with informants should be tape recorded and the product of that tape recording made available to both the COPIM and the court in relevant proceedings.

Yours faithfully

QUEENSLAND COUNCIL FOR CIVIL LIBERTIES



TERRY O'GORMAN
VICE-PRESIDENT