



Crime and Corruption Commission
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Submission to the Legal Affairs and Community Safety Committee

**Serious and Organised Crime Legislation Amendment
Bill 2016**

Submission by the
Crime and Corruption Commission

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Introduction

The Crime and Corruption Commission (CCC) welcomes the opportunity to deliver its submission on the Serious and Organised Crime Legislation Amendment Bill 2016 (the Bill) to the Legal Affairs and Community Safety Committee (the Committee). The Bill was introduced into Parliament on 13 September 2016. The Committee has requested that submissions which inform its considerations of the Bill be provided by 6 October 2016 so that it may report to the Parliament by 1 November 2016. The CCC has considered the Bill which contains 445 pages and the accompanying Explanatory Notes to the Bill which contain a further 179 pages. Out of necessity and to assist the Committee meet these strict time-lines the CCC has limited its submission to key matters directly related to functions and powers under the *Crime and Corruption Act 2001* (CC Act) or related to other legislation which might indirectly affect the CCC's functions and powers.

Parts 5 and 6 of the Bill — Amendment of CC Act and the *Crime and Corruption Regulation 2015*

Subject to the matters expressed below, the CCC supports the amendments to the CC Act and the *Crime and Corruption Regulation 2015* proposed by Parts 5 and 6 of the Bill.

Clauses 35 – 38 and CC Act, ss 55A-F: the connection to 'Criminal Organisations'

Both in the Bill's proposed amendments to the CC Act, and in its current form, ss 55A-F require a connection between the activity to be investigated and a 'criminal organisation'. The CCC submits that this required connection is unsuitable to the meaningful exercise of those functions.

The CCC has previously submitted to the Organised Crime Commission of Inquiry, the PCCC three-yearly review¹ and the Wilson Taskforce on Organised Crime Legislation² (see attached extracts), that the required connection to a 'criminal organisation' unduly restricts the CCC's ability to exercise these functions.

This submission is intended to highlight the main points of these concerns.

'Criminal organisation' requirement

Under the Bill, the term:

- 'criminal organisation' is defined by reference to the *Penalties and Sentences Act 1992* (PS Act), 161O
- 'participant' in a criminal organisation is defined by reference to the PS Act, 161P
- 'office holder' of an organisation, 'honorary member' of an organisation, 'prospective member' of an organisation and 'serious criminal activity' are defined by PS Act, 161N.

The CCC's comments regarding these definitions appear in the later discussion of the Bill's proposed amendments to the *Penalties and Sentences Act 1992*.

As mentioned above, the functions in CC Act, Chapter 2, Part 4, Divisions 2A and 2B require a connection to a criminal organisation. Section 55A provides that the Crime Reference Committee (CRC) may authorise a special intelligence operation in the following circumstances:

¹ CCC Submission to the PCCC review of the Crime and Corruption Commission, July 2015, pp. 19-20, 28-30 and 37-39
<https://www.parliament.qld.gov.au/documents/committees/PCCC/2015/five-year-review/submissions/014.pdf>

² CCC Submission to Taskforce on Organised Crime legislation — Inquiry Area 6, August 2015, pp 12-15
<http://www.ccc.qld.gov.au/research-and-publications/publications/ccc/taskforce-submissions/ccc-submissions-to-taskforce-on-organised-crime.pdf>

55A Authorising the commission

- (1) The section applies if the reference committee is satisfied that there are reasonable grounds to suspect that—
 - (a) a criminal organisation, or a participant in a criminal organisation, has engaged in, is engaging in, or is planning to engage in, criminal activity; or
 - (b) a person, regardless of whether the person holds an appointment, has engaged in, is engaging in, or is planning to engage in corruption to support or help a criminal organisation or a participant in a criminal organisation.
- (2) The reference committee may authorise the commission to undertake a specific intelligence operation, including by holding hearings.
- (3) The authorisation must be in writing and identify—
 - (a) the criminal organisation or participant to be investigated by the commission; and
 - (b) the suspected criminal activity or corruption; and
 - (c) the purpose of the intelligence operation.
- (4) The authorisation may relate to any circumstances implying, or any allegations, that particular criminal activity or corruption, is reasonably suspected.
- (5) The authorisation may be made by the reference committee—
 - (a) on its own initiative; or
 - (b) if asked by the senior executive officer (crime) or the senior executive officer (corruption).
- (6) In this section—

criminal activity means any act or omission that involves the commission of an offence.

hold an appointment means hold an appointment in a unit of public administration.

As has been noted in the CCC's **attached** previous submissions to other forums on this matter, CC Act, s 55A(3), requires identification of the criminal organisation (or participant in a criminal organisation) to be investigated. This requires a focus on the specific criminal organisation. This is the case for intelligence operations in relation to both crime and corruption.

At present s 55F is the authorising provision for the CCC's immediate response function (these sections are to be renumbered under the Bill). It provides:

55F Authorising the commission

- (1) This section applies if the chairperson is satisfied—
 - (a) there are reasonable grounds to suspect a criminal organisation or a participant in a criminal organisation has engaged in, or is planning to engage in, an incident that threatened or may threaten public safety; and
 - (b) it is in the public interest for the commission to conduct a crime investigation or hold an intelligence function hearing in response to, or to prevent, the threat to public safety.
- (2) The chairperson may authorise the crime investigation or the holding of an intelligence hearing (or both) in response to, or to prevent, the threat to public safety.

- (3) The authorisation must be in writing and identify—
- (a) the incident or anticipated incident; and
 - (b) the criminal organisation or participant; and
 - (c) the purpose of the crime investigation or intelligence function hearing.

Again, as is made clear by the current CC Act, s 55F(3)(b), the authorisation must identify the criminal organisation or participant. Whether the investigation or intelligence hearing is in relation to a participant or an organisation, the authorisation still requires satisfaction of a reasonable suspicion of the involvement of a criminal organisation.

For reasons to be explored further below, it is submitted that this requirement may present difficulties which may frustrate the intended operation of this function.

Amendments to 'criminal organisation' definition

The definition of 'criminal organisation' currently in effect is to be amended under the Bill in three ways. At present, a 'criminal organisation' is identified as either a group declared by a regulation to be a criminal organisation, a group declared a criminal organisation under the *Criminal Organisation Act 2009*, or a group which meets the statutory definition.

The Bill proposes to remove two of these three criteria. The CCC does not oppose this.

In repealing the *Criminal Organisation Act 2009*, it will no longer be possible for a group to be declared a criminal organisation by the Supreme Court. The CCC does not oppose the repeal of this Act, and notes that no applications were successfully brought in its seven years in force.

The Bill also proposes to remove the power to declare a group a criminal organisation. Again, the CCC does not oppose this course, given the uncertainty about the scope of this power as raised (but not decided) in *Kuczborski*.³

Under the proposed amendments, then, there will be only one route to identifying a criminal organisation – the statutory criteria to be set down in the *Penalties and Sentences Act 1992*. It is noted that one of the recommendations of the Wilson Taskforce was for a unified definition of 'criminal organisation' which would apply across various legislative schemes which dealt with organised crime. This was in part in response to the different definitions across the *Criminal Organisations Act 2009* and within the various pieces of legislation which came to be known as the 'VLAD Laws'. Unification of the various definitions is commendable, and appropriate to avoid confusion or ambiguity.

The issue from the CCC's perspective is not in the definition of a 'criminal organisation' (although some slight changes are suggested below), but its appropriateness as the sole criterion for invoking the CCC's jurisdiction regarding specific intelligence operations and the immediate response function.

The amended definition seeks to address issues which arose in two recent court decisions, where ambiguity in the existing definitions were used to 'read down' those provisions. The amended definition goes some substantial way to clarifying the definition of a 'criminal organisation'. This is important given its role in various aspects of the criminal law, such as sentencing.

Intelligence hearings

As set out above, it is not proposed to re-state that which has been submitted previously to various bodies charged with reviewing the state of legislation and law enforcement dealing with crime in Queensland. Those submissions have been **attached** should more detail be required.

³ *Kuczborski v Queensland* (2014) 254 CLR 51; [2014] HCA 46.

It is submitted that the criteria for approval of a specific intelligence operation should be broadened to allow two routes to approval. The connection to the activities of a 'criminal organisation' should be retained, but a second basis should also be made available, relying on the existing definition of 'organised crime' contained in the CC Act.

Currently, Schedule 2 of the CC Act defines 'organised crime' to mean criminal activity that involves:

- (a) indictable offences punishable on conviction by a term of imprisonment not less than 7 years; and
- (b) 2 or more persons; and
- (c) substantial planning and organisation or systematic and continuing activity; and
- (d) a purpose to obtain profit, gain, power or influence.

Intelligence-gathering, by its very nature, proceeds from a position of limited information. In some cases it will be known by law enforcement which entities are engaged in the particular criminal activity about which further intelligence is sought. However, this will not always be the case.

The most obvious example is that it may be sought, through intelligence-gathering activities, to identify who the players are in an illicit commodity marketplace (the methylamphetamine market in Southeast-Queensland, for example). While information may be available as to some of the participants in the marketplace, the overall structure, hierarchy, relationships between singular participants, sources and destinations of precursor chemicals may all be meaningfully explored.

An operation authorised to explore such a marketplace would allow for these matters to be explored through the hearings process. It would allow, for example, a 'cook' to be examined, to identify the various syndicates with which he or she has worked, who their connections are, what technical processes they undertook and so on.

To require the connection to an identified criminal organisation as the only means of approval for an intelligence operation runs the risk of putting the proverbial 'cart before the horse'. The very nature of an intelligence operation may be to identify which criminal organisations and which people within those organisations are active within a given marketplace.

This is consistent with the Report of the Organised Crime Commission of Inquiry, Recommendation 2.1, which considered it important that the CCC extend the focus of its intelligence and research functions beyond outlaw motorcycle gangs to other areas of organised crime that pose a risk to Queensland.⁴

The Wilson Taskforce considered that⁵ the expanded definition of 'participant in a criminal organisation' it proposed would *'complement the CCC's expanded powers, while appropriately harnessing the parameters of what it means to be a participant'*. While it is true that the definition of 'participant' is arguably broader than under the existing definition, the continued need for the connection to an identified criminal organisation does little, with respect, to assist the CCC to take its focus beyond the highly visible, easily identified criminal organisations targeted so far (OMCGs, and cold-call investment fraud syndicates, which are underpinned by actual corporate entities).

As has been submitted elsewhere, other entities with a similar intelligence-gathering function (including holding hearings) such as the Australian Criminal Intelligence Commission (ACIC) (formerly the Australian Crime Commission) are not so constrained. Their intelligence-gathering powers are widely drawn, allowing significant scope to proactively seek intelligence.

⁴ http://www.organisedcrimeinquiry.qld.gov.au/data/assets/pdf_file/0017/935/QOCCI15287-ORGANISED-CRIME-INQUIRY_Final_Report.pdf, p 10

⁵ Taskforce on Organised Crime Legislation Report, p343
http://www.justice.qld.gov.au/data/assets/pdf_file/0017/463022/report-of-the-taskforce-on-organised-crime-legislation.pdf

For example ACIC determinations are broad enough to allow the ACIC to focus investigative or intelligence hearings on organised crime groups, offence types, illicit commodity types as well as organised crime themes, such as organised crime in the transport sector.

It is submitted that the proposed amendment would substantially assist the CCC to meaningfully gather intelligence in an appropriate, flexible and responsive manner.

It is submitted that, in requiring approval of the CRC, appropriate safeguards are in place to ensure that the intelligence gathering activities under CC Act, s 55A are sufficiently constrained. It is submitted that any amendment could draw on the existing statutory framework for 'general referrals' to ensure that such operations were appropriately defined. A general referral (CC Act, s27(5)) must identify the major crime to be investigated, and either the persons involved, or suspected of being involved, or the activities constituting, or suspected of constituting the major crime.

An intelligence referral into an aspect of 'organised crime' (which already carries with it certain matters of which the CRC would need to be satisfied) could be similarly constrained, and require articulation of the activities constituting the organised crime, the geographical region in which the organised crime is to be investigated, and/or the persons suspected of participating in the organised crime. In approving such an operation, the committee would need to be satisfied that authorising the operation was in the public interest, perhaps having regard to the likely impact of the criminal activity on the safety, welfare or order of the community, or members of the community.

Any such operation would, by necessity, need to be drawn in sufficiently specific terms, and identified with sufficient precision, to allow for those statutory factors to be meaningfully considered by the committee.

Such an amendment would appropriately balance the need to ensure proper safeguards relating to the use of the powers with the need for intelligence gathering to be responsive, agile and flexible, and capable of addressing the changing dynamics of organised crime.

Immediate response function

Again it is submitted that constraining the immediate response function by the need for identification of a criminal organisation may be a matter of putting the cart before the horse.

The immediate response function gives the CCC the power to respond rapidly to an actual or anticipated threat to public safety. The provision was introduced in response to the now infamous Broadbeach riot.⁶ However, the most obvious application of the immediate response function in the present context is, regrettably, a terrorist attack. It is in that context that the present submission is framed, but the comments apply equally to any public safety incident, whether terrorist-related or not.

Given the current legislative climate, a public confrontation involving a large number of OMCG members in colours seems unlikely. Thus question of identification of the criminal organisation involved in a public safety incident may not be readily answerable.

In recent times there has been a spate of 'lone wolf' attacks. We have seen such activities in France, Germany and the United States. In each case, one of the earliest questions asked is 'is this a terrorist attack'? Questions which closely follow include 'was this one person acting alone, or are there other attackers out there?', 'was this person connected to a terrorist organisation?', and 'are there likely to be more attacks, or are there other devices already in place?' These are all critical pieces of information, sought at a time when such information may be crucial for law enforcement to know to prevent further harm.

The above example highlights how problematic the need for a connection to a 'criminal organisation' is for the effective utilisation of these powers in such a scenario.

⁶ The incident on 27 September 2013 in which a large number of members and associates of the Bandidos MC engaged in a very public fight with associates of the Finks MC, and then a public standoff with police.

Immediate Response

The Immediate Response Function, provided for in Division 2B, enables the CCC to respond rapidly to a matter which jeopardises public safety. The chief means by which this is to be done is through the use of the CCC's coercive hearings powers (noting that this is the only area in which there is a marked difference in the CCC's powers). These provisions were introduced to allow the CCC to convene hearings rapidly in relation to an incident, or anticipated incident, which posed a threat to public safety.

Under s 82 of the CC Act, the Chairperson can issue a notice requiring attendance of a witness at a hearing. By implication, such notice must provide reasonable time for compliance, and cannot require immediate attendance at a CCC hearing. This is because s85 governs the process by which authorisation must be obtained from the Supreme Court for permission to issue a notice requiring immediate attendance. By contrast, for an operation authorised under (at present) s55F, the Chairperson may issue an immediate attendance notice without permission of the Supreme Court. This clearly recognises the need for a timely response to the incident or threatened incident.

The commission notes that the capacity to require immediate attendance of a witness may provide substantial opportunity for a rapid response to an incident in its immediate aftermath or, better still, some scope for disruption or prevention of planned or anticipated activity.

Legal Requirements

Under the existing legislative regime the Chairperson must be satisfied that there are reasonable grounds to suspect that a criminal organisation or a participant in a criminal organisation has engaged in, or is planning to engage in, an incident that threatened or may threaten public safety. Under the proposed amendments it is the CRC (rather than the Chairperson) which is required to be satisfied of those same criteria. That is, in each case, the decision-maker must be satisfied that there are reasonable grounds to suspect the incident is connected to a criminal organisation.

A terrorist group such as Islamic State (IS) may, in some circumstances, meet the definition of a criminal organisation. This is consequent on establishing that the group, or a part of it, plans to, or does, undertake certain criminal activity within Queensland. A group such as IS relies both on structured groups which undertake organised activity on its behalf (for example the co-ordinated attacks in Paris in 2015), but also on 'weaponising' vulnerable individuals to undertake 'lone wolf' attacks on its behalf (such as the attack in Nice in 2016).

In the course of an investigation into such a public safety event, it is often the case that it is not until the investigation is well advanced that the question of firm links to a terrorist group can be confidently answered. The Lindt café attack in Sydney in December 2014 was an example – an individual who was not, himself, a part of a terrorist group, but who pledged allegiance to that organisation when undertaking the attack. This *may* be sufficient to identify the individual as a participant, but the fact that this is one of the questions remaining for determination in the inquest demonstrates how difficult this task can be.⁷

It is arguable that an authorisation could be made on the basis that, in such a situation, it is logical to suspect that a person who undertakes such activity may be involved in a criminal organisation. Certainly in a number of those situations referred to above, it has been discovered that the person in question had at least some connection to a terrorist group. However, it is submitted that it would be legally questionable at best to proceed on such an assumption. It could be reasoned that, because terrorist attacks (or matters which may turn out to be terrorist attacks) are generally conducted by those connected with terrorist groups, the committee may be satisfied that there are reasonable grounds to suspect that the activity was conducted by a criminal organisation or a participant in a criminal organisation. One of the matters for investigation, then, is whether this suspicion was substantiated. It is submitted that this may not be the most legally sound approach.

⁷ Query whether, for example, displaying an 'Islamic-type flag', or making a claim during an attack that it was done on behalf of IS, despite there being no prior connection with the group, would identify the person as 'belonging to', rather than simply 'supporting' that organisation?

It would be gravely unfortunate if, in a situation where such an attack were mounted (or anticipated), the legislative scheme intended to give law enforcement the capacity to rapidly respond to acquire critical information was unable to be put into effect due to the lack of that very information. It is submitted that, for this reason, the requirement for the connection to a 'criminal organisation' should be removed.

Clause 38, proposed CC Act, s 55E(2)

The CCC notes the introduction of two important safeguards surrounding these powers, not present in the current form of the Act. The CCC supports these safeguards with one qualification.

Firstly that the CRC, which is constituted, not just by persons involved in law enforcement, but also community representatives, approve any such authorisations.

The second safeguard is to introduce a requirement (s55E(2)) that one of the public interest factors which the committee must consider is the likely effectiveness of an investigation into criminal activity or corruption without the use of powers available to the CCC under this division. Two matters should be observed in relation to this. First, it is assumed that the reference to the likely effectiveness of an investigation into corruption without the use of powers under this division is intended to ensure that all possible CCC threat responses are taken into account before an immediate response is authorised. It is difficult, however, to conceive what type of threat to public safety may otherwise be more appropriately or practicably explored as an investigation into corruption. In this respect, the CCC notes that, whereas the existing s55F provides for the authorisation of a 'crime investigation' or 'intelligence function hearing', the proposed amendment simply provides for authorisation to 'undertake an investigation' and 'conduct a hearing' in relation to the incident. It is submitted that the shift from a 'crime investigation' or 'intelligence function hearing' to simply 'an investigation' or 'a hearing' is a sensible amendment. In such circumstances, though, it is difficult to conceive what utility there is in considering whether a corruption investigation may be appropriate.

Secondly, the requirement that the CRC have regard to the effectiveness of an investigation into criminal activity or corruption **without the use of powers available to the CCC under this division**. It is submitted that this caveat could be better expressed. There are no powers under this division which are unique. Once an authorisation under s55D (presently s55F) is granted, the Chairperson can issue a notice to a witness requiring immediate attendance to give evidence at a hearing [s82(7), to be renumbered 82(6)] without the approval of a Supreme Court judge, as would otherwise be necessary. However that is not a separate power under the division in which s55E is contained. This could be clarified, perhaps with words to the effect "by an investigation under s27" or "by an investigation under Ch 2, Pt 2". It is inferred that what is intended is for the CRC to turn its attention specifically to whether the immediacy of response available under this division is necessary.

Subject to the reservations above, the CCC otherwise supports these amendments.

Clauses 42 – 44 and new CC Act, ss 85A, 88A-C and amended s 91

The CCC supports the proposed introduction of ss 85A, 88A, 88B, 88C and amended s 91 to improve CC Act search warrant powers to access and read information stored electronically. It is appropriate that these powers align with equivalent powers available to the Queensland Police Service under the *Police Powers and Responsibilities Act 2000* (including amendments proposed by the Bill).

In particular the CCC considers that the proposed ss 88A (order for access information in a search warrant) and 88B (order for access information after storage device has been seized) will be able to be effectively enforced having regard to clause 75 which proposes to insert into the *Criminal Code* the following offence:

205A Contravening order about information necessary to access information stored electronically

A person who contravenes—

- (a) an order made under the *Police Powers and Responsibilities Act 2000*, section 154(1) or (2) or 154A(2); or

(b) an order made under the *Crime and Corruption Act 2001*, section 88A(1) or (2) or 88B(2);
commits a crime.

Maximum penalty—5 years imprisonment.

The proposed *Criminal Code*, s 205A has been drafted to ensure that the penalty applies to a breach of an order contained in a search warrant and also a breach of a subsequent order of the court.

The CCC welcomes these long sought amendments.

Clauses 46 and 47 and CC Act, ss 185 and 190

The CCC does not support in-principle the proposed removal of the current ss 185(3A) and (10) and ss 190(4) and (5). The CCC reiterates its submission to the Taskforce into Organised Crime Legislation (August 2015) which supported the retention of provisions removing claims of reasonable excuse founded on fear of retribution to persons or property. The CCC considers that the current provisions effectively address the issues targeted and promote the public interest in a timely way.

In their current form these clauses apply not only to actual members of, or participants in criminal organisations, but to a hearing in relation to a criminal organisation. Thus they capture anyone being asked about someone in a criminal organisation.

If the proposed amendment is enacted it is likely that most refusals to produce or answer at a relevant CCC hearing on grounds of fear of retribution would ultimately be determined by the courts having regard to various public interest considerations. The Taskforce on Organised Crime Legislation Report acknowledged the very high threshold required in order to successfully raise reasonable excuse on the basis of fear of retribution. The Report did not, however, reveal any body of case law demonstrating the success of claims made on this ground. The CCC understands that the amendment is not intended to give any stronger ground for a viable claim of reasonable excuse founded on fear of retribution than existed before the current laws were introduced. The CCC would welcome an explanatory note being included in this regard.

If enacted the operation of the amendment could be reviewed to determine whether any reasonable excuse claims on grounds of retribution have been efficacious or merely resulted in unnecessary delay to the CCC in promoting the public interest in a timely way.

Clause 48 and CC Act, s 199(8C)(e)

The provisions regarding the punishment regime for contempt of the CCC have been substantially altered. The CCC generally supports these amendments. In particular the CCC supports the efforts to address the legal issues which arose from the decision of the Queensland Court of Appeal in *Witness JA v Scott*.⁸

The proposed CC Act, s 199(8C)(e) provides:

(e) the failure by a person of a type mentioned in subsection (8A) that constitutes the person's second contempt, or third or subsequent contempt, may be the same failure by the person of a type mentioned in subsection (8A) that constituted the person's first contempt or other preceding contempt.

It is submitted that the language in the underlined passage may be insufficiently clear to fully address some matters raised in the *Witness JA* litigation.

⁸ 2015 [QCA] 285

Witness JA

The facts in *Witness JA* are somewhat unique. Aspects of them are unlikely to be repeated, given when the events took place chronologically.

Witness JA gave evidence in relation to a homicide investigation, in May 2013 (prior to October 2013 when the current contempt punishment provisions were introduced). He was asked a question to the effect of “where is the money?” which he refused to answer. He was sentenced on the basis that he would not purge his contempt to a specified term of imprisonment. He was recalled to a hearing in September 2014, when the current regime was in place, under the authority of the same attendance notice which had compelled his previous attendance. He was asked the same question, regarding the location of the money. Again he refused to answer the question, and proceedings were brought for a ‘second contempt’.

At first instance it was argued on his behalf that, given that he was originally punished under the previous regime, and sentenced on the basis that his contempt would never be remedied, the subsequent proceedings amounted to an attempt to controvert the original decision. It was also argued that the legislative provisions contravened the prohibition on ‘double punishment’. Third it was argued that, as the first contempt pre-dated the October 2013 reforms, he was not captured by that regime, and any contempt thereafter should be regarded as a ‘first contempt’. It was expressly not argued that the subsequent proceedings were an abuse of process. Byrne SJA dismissed these arguments, holding that it was a ‘second contempt’, and sentenced the witness to a mandatory 2 ½ years’ imprisonment.⁹

On appeal, a number of further arguments were made, some of which turned on the drafting of the particular provisions, and some of which turned on the particular timing of the matters in question. The arguments centred around whether there was a different hearing from that in which the first contempt was committed, whether the provisions were unconstitutional because they mandated a sentence and because they adopted the Supreme Court’s processes for dealing with contempt, and whether the provisions amounted to an abuse of process. The court upheld these arguments on appeal (except for the constitutional argument).

The Court of Appeal held that, as the witness had been punished on the basis that he, by his contempt, would deprive the CCC for all time of that information, the further proceedings were an abuse of process. The Court also considered (although it was unnecessary to decide) that, as the previous contempt was dealt with under a regime that contemplated only a single act of contempt, it was outside the ambit of the legislative provisions to treat this as a ‘second contempt’. Finally, the court considered that the drafting of the provisions led to ambiguity as to whether a subsequent contempt required a different hearing. That must be resolved in favour of the witness.

Statutory correction of *Witness JA* issues

As set out above, the amendments to s 199 are directed (in addition to those dealing with the sentencing regime) to addressing the matters considered in *Witness JA*. By and large this has been achieved.

However, the amendment underlined above in s 199(8C)(e) may still be problematic. It is inferred that the intention was to make clear that a subsequent contempt could be committed by a repetition of the same conduct which constituted the first. Whether that be a refusal to answer a question, a refusal to produce a document as required, or a refusal to be sworn when directed, a repetition to do that on a subsequent occasion would amount to a second, third or subsequent contempt.

In describing that as ‘the same failure’, it is submitted that ambiguity arises about whether the conduct which is punished is the failure or refusal to comply with a statutory obligation in each case or, as was ventilated in *Witness JA*, a failure to provide information. It is arguable that ‘the same failure’ may be regarded as a continuation of the initial failure, rather than a further failure. In that case, the provision may be regarded as bad for breaching the rule against double punishment.

⁹ *Scott v Witness JA* [2014] QSC 048

It is submitted that, in those circumstances, further clarification of this issue may be beneficial.

Related to this is the confusing interchangeability of language in respect of the various provisions that underpin the statutory offences and contempt provisions in the Act. While the heading of s183, for example, is 'refusal to be sworn', the actual offence is characterised by a 'failure to take an oath when required'. While a failure might indicate a refusal, arguably one is a positive act and the other is a passive omission. Equally in s190, a person must answer a question unless they have a reasonable excuse. There the gravamen of the conduct is a failure to answer the question, although the section heading is 'refusal to answer question'. Section 190(4) (which is to be repealed in any event) refers to a reasonable excuse to 'fail to answer a question'. Section 198(4) specifies certain statutory provisions, contravention of which would be an offence, which is also contempt. These provisions are all characterised as 'failure' provisions, even though the title of each section is actually described as a 'refusal'.

Consideration could be given to amending these various provisions for the sake of uniformity. This has not been addressed in previous submissions regarding amendments to the Act as it is the proposed amendment to s199(8C)(e) which has highlighted this problem.

Clause 49, Removal of CC Act, s 201(1A)

The CCC notes the proposal to give relevant evidence obtained at an intelligence function hearing to a defendant or their lawyer unless a court considers it would be unfair to a person or contrary to the public interest to do so. The proposed amendment goes against the CCC's submission to the Wilson Taskforce. If enacted the CCC recommends the operation of the amendment be reviewed to determine whether any use of the evidence disclosed to the defendant or their lawyer was unfair to any person or contrary to the public interest.

Clause 50, CC Act, s 205(1)(a) and (1)(b)

The CCC notes the proposal to extend the scope of legal assistance to persons appearing before a CCC coercive hearing. The proposed amendment goes against the CCC's submission to the Wilson Taskforce.

However, the full scope and extent of the proposed amendment to s 205 is not clear in light of the heading (Legal assistance for crime investigations).

The CCC requests clarification whether or not the amendments relate to the crime and intelligence function hearings only or are intended to have application for all persons required to attend CCC hearings.

The Taskforce on Organised Crime Legislation Report concluded that the ability to apply for financial assistance for legal representation should be extended to all persons appearing before the CCC in a coercive hearing. The Explanatory Notes to the Bill indicate that s 205(1)(a) and (1)(b) are to be broadened to provide that the section applies to all evidence obtained by the CCC at a commission hearing. Further, that subsection (1A) will be repealed to ensure that crime investigations authorised under s 55F are no longer excluded from the ambit of the section.

The CCC strongly opposes the inclusion of the immediate response function hearings within the ambit of s205. The CCC does not object to witnesses in an immediate response function hearing, who have been compelled under an immediate attendance notice, having legal representation, as is their entitlement under s182. However, the process for approving funding for legal representatives under s205 (even with the proposed delegation of the function) will take time. It is conceivable that hearings under this Division may take place other than on business days, and outside business hours.

The CCC's experience is that many legal representatives will not appear on a speculative basis in the hope that a funding application is approved. Hearings are routinely adjourned to allow for such applications to be processed. While the presiding officer may approve or refuse an adjournment depending on the circumstances, it may frustrate the intended immediacy of the response function if proceedings were delayed because of such adjournment, or wound up 'bogged down' in litigation over whether such a refusal was reasonable. Such delay is entirely inconsistent with the proper performance of the immediate response function.

The Bill does not contain any provision amending the current heading for s 205 (Legal assistance for crime investigations). Despite this, a cogent argument might be successfully made that the proposed amendment extends the scope of the subsection to include not only applications for financial assistance in response to attendance notices for crime investigations and intelligence function hearings but also in response to notices requiring attendance at corruption investigation hearings and witness protection function hearings to establish reasonable excuse or claims of privilege.

The CCC would welcome clarification in this regard as ultimately the cost of any financial assistance for impecunious persons must be met by the CCC (s 205(5)).

Part 19 of the Bill — Amendment of *Penalties and Sentences Act 1992* — Part 9D Serious and Organised Crime

Clause 279 inserts Part 9D (Serious and organised crime) into the *Penalties and Sentences Act 1992* (PS Act).

Definitions

Key features of these provisions include the definitions for a ‘criminal organisation’ under proposed s 161O and a ‘participant’ in criminal organisation, under proposed 161P. Other related definitions which may be found in the proposed 161N include: ‘honorary member’ of an organisation, ‘office holder’ of an organisation, ‘prospective member’ of an organisation, and ‘serious criminal activity’.

Some of these definitions apparently draw upon established concepts associated with historical Outlaw Motor Cycle Gang (OMCG) organisational models. While the CCC acknowledges the Bill’s efforts toward addressing the continuing adaptation of the operations of criminal organisations, there is scope for these terms to be further broadened in order to be effective.

For example, the scope of sub-paragraph (c) for the definition of ‘office holder’ in 161N could be broadened in the following way:

*“(c) a person **who is or appears to be** in control of all or a substantial part of the activities of the organisation”*

The example given for subparagraph (d) of the definition of ‘office holder’ has been drafted in a way intended to extend beyond organisational models based on established OMCG concepts. The CCC welcomes the use of examples demonstrating that the scope of application extends to the operations of child exploitation websites, cold-call investment fraud operations and other organisational structures which may be less hierarchical and more flexible than traditional OMCG models.

The definition of ‘serious criminal activity’, has been simplified from the existing definition of the same phrase in the *Criminal Organisation Act 2009* and now only applies to conduct constituting an indictable offence punishable by at least seven years imprisonment. Presently, the definition incorporates a reference to indictable offences punishable by at least seven years imprisonment plus a series of offences set out in schedule 1 of that Act (many of those offences, were less than seven year offences). Of course the introduction into the PS Act of a serious organised crime circumstance of aggravation (161Q) and the associated sentencing of offenders to terms of imprisonment imposed (under 161R) may resolve any concerns that the scope of the definition of ‘serious criminal activity’ might have been diminished by this change. If enacted, the operation of these provisions may be an appropriate area for future review to determine whether there has been any unintended consequences.

PS Act, new 161O

In regard to the definition of ‘criminal organisation’ under proposed 161O it is noted that subparagraphs (a) and (b) retain an identical form to the previous provisions.

Note also the above submissions that the existence of a criminal organisation is critical to the CCC's specific intelligence operations jurisdiction. Before a specific intelligence operation can be authorised under the CC Act, the existence of an identified or identifiable criminal organisation is required. Accordingly, if the suggested amendments to the process for authorisation of intelligence operations and the immediate response functions are not to be adopted, then the CCC considers that the definition could benefit from some greater flexibility.

So far as the drafting is concerned, we suggest that subparagraph 161O(1)(b) be amended to read:

'...who, by their association, represent a **threat** to the safety, welfare, or order of the community...'

The CCC considers that a reduction of the threshold from 'unacceptable risk' to 'threat' could be justified in subparagraph (b) given that the gravity of the conduct has already been addressed in subparagraph 1(a) and, we infer, that the object of subparagraph (1)(b) is merely to criminalise the association. It is also consistent with the use of the word 'threat' in the existing CC Act, s 55F which is to be retained in the proposed new 55D.

Further, we also suggest that the phrase could be broadened by including a reference to the safety, welfare and order of the community **or members of the community**.

The CCC has no particular concerns with subparagraph (2) in the definition.

PS Act, new s 161P

In relation to the definition of 'participant' in 161P, the CCC recommends that the section be framed in the following way:

1. a person is a **participant** in a criminal organisation if –
 - (a) the person is a member of a criminal organisation; or
 - (b) the person is an office holder of the organisation; or
 - (c) the person identifies himself or herself in any way as belonging to the organisation; or
 - (d) the person's conduct in relation to the organisation would reasonably lead someone else to consider the person to be a participant in the organisation; or
 - (e) the person's conduct knowingly furthers, directly or indirectly, the serious criminal activity that the organisation has as one or more of its purposes.
2. We recommend that the following be included in the definitions section (161N):

member includes:

- (a) a person who has been accepted as a member of the organisation and has not ceased to be a member of the organisation; or
- (b) the person is an honorary member of the association; or
- (c) the person is a prospective member of the organisation.

Finally, the CCC considers that for its powers to be most effective the current requirement (161O) that a group comprise 3 or more persons should be amended to include a group of 2 or more persons. This is justifiable for the following reasons:

- It is necessary to rely on the criminal organisation definition to have an urgent intelligence hearing response to an imminent terrorism situation under s.55F. Reducing the threshold to 2 persons would be beneficial in circumstances where terrorism intelligence indicates that lone wolf or small groups are the more likely scenarios;
- any conspiracy only requires at least 2 persons to be involved; and
- is consistent with the current definition of 'organised crime' in Schedule 2 of the CC Act which includes the element of criminal activity involving, among other things, 2 or more persons.

Other Parts of the Bill

Subject to the matters expressed below, the CCC does not intend to make any comment in regard to amendments to other legislation proposed by the Bill.

Information sharing arrangements

The Bill proposes that the heads of certain agencies will be able to enter into an information sharing arrangement with relevant agencies to allow for the exchange and disclosure of information among them *despite another Act or law*.

The CCC does not support this proposal in so far as it would allow the parties to the information sharing arrangement to share confidential CCC information despite the CCC having imposed strict conditions limiting the use of the information in question. The effective loss of the existing power to place conditions upon the further dissemination of confidential information could result in an agency unknowingly releasing information which is relevant to a current CCC investigation. This could seriously compromise CCC investigations (including cooperative investigations) and its monitoring of complaints being dealt with by other public officials. The proposal, if enacted, would likely result in a substantial reduction in the CCC sharing its confidential information because it would no longer be able to apply appropriate risk management controls over the use of information for specific purposes.

The relevant parts of the Bill are:

- Part 25 — Amendment of *Racing Integrity Act 2016*, Clause 348 (insert a new s 98A)
- Part 26 — Amendment of *Second-hand Dealers and Pawnbrokers Act 2003*, Clause 373 (insert s 111)
- Part 27 — Amendment of *Security Providers Act 1993*, Clause 391 (replace s 48)
- Part 30 — Amendment of *Tattoo Parlours Act 2013*, Clause 440 (replace s 61)
- Part 31 — Amendment of *Tow Truck Act 1973*, Clause 464 (replace s 36B)

For example, Bill clause 348 proposes to insert a new s 98A into the *Racing Integrity Act 2016*. If enacted, s 98A would allow the Queensland Racing Integrity Commission (QRIC) to enter into an information sharing arrangement with a relevant agency allowing for the exchange and disclosure of information among them *despite another Act or law*.

A relevant agency is defined to mean the Police Commissioner, the chief executive of a department, a local government, or a person prescribed by regulation. The CCC does not support the potential unilateral sharing of its confidential information provided to the Police Commissioner, the chief executive of a department, a local government, or another person on the express or implied understanding or condition that the information is confidential or is only to be used for purposes related to the CC Act.

With respect any person or other entity which proposes to enter an information sharing agreement must be required to obtain the written consent of the CCC before sharing confidential CCC information which has not otherwise been made available as intelligence under s 55(2) of the CC Act.

Conclusion

Subject to the matters expressed above the CCC generally supports the amendments proposed by the Serious and Organised Crime Legislation Amendment Bill 2016 which have been specifically discussed by this submission.

Attachments

Submission to the PCCC review of the Crime and Corruption Commission (p19 – 20, 28 – 30, 37 – 39)

- A higher reporting threshold for public sector agencies who are now only required to notify the CCC when they reasonably suspect that a matter involves or may involve corrupt conduct. This differs from the previous threshold where public officials notified the CMC when they had a mere suspicion of official misconduct.
- A requirement for complaints to the CCC to be made by way of a statutory declaration. The CCC can apply an exemption in exceptional circumstances.
- A requirement for public officials to prepare (and to consult with the Chairman of the CCC on) a policy about how to deal with complaints about themselves.
- A requirement for the CCC to focus its corruption function on more serious cases of serious conduct and cases of systemic corrupt conduct within a unit of public administration.
- The re-instatement of the requirement for the Minister to consult with the Parliamentary Crime and Corruption Committee (PCCC) before nominating a person for a role on the Commission. The PCCC may veto appointments.
- A provision for the Parliamentary Crime and Corruption Commissioner to commence own-motion investigations into the CCC.
- Legislative provision for disciplinary action against CCC officers.
- A broader and lower threshold for notifying the PCCC of improper conduct by CCC officers.

Other changes to structure and appointments

In August 2014, amendments were made to the appointment process for Commissioners, to require bipartisan support of the parliamentary committee for nomination to the position of a Commissioner, other than the Chief Executive Officer. Further, as a result of the amendments, only the Chief Executive Officer's appointment is subject to veto by the parliamentary committee. Amendments to the CC Act in May 2015 introduced an entitlement for the CCC Chairman to a judicial pension similar to pensions paid to judges under the *Judges (Pensions and Long Leave) Act 1957*.

Amendments to respond to Outlaw Motor Cycle Gangs

In September 2013, an incident of violence involving outlaw motor cycle gangs (OMCGs) occurred on the Gold Coast, resulting in a broad law enforcement and government response. Amendments to the CCC's legislation were enacted in October 2013 to increase its powers in the context of OMCG activity. These included:

- Providing for the CCC to hold private hearings to gather intelligence regarding criminal activity by criminal organisations or associated misconduct by public officials (specific intelligence operations hearings under s. 55A are discussed in more detail at p. 33).
- Providing for the CCC to have an immediate response function relating to a criminal organisation engaging in an incident that threatened public safety or an anticipated incident that may threaten public safety through the issue of notices requiring witnesses to attend immediately at a private hearing.
- Removing the ability of criminal organisation participants to claim a reasonable excuse to refuse to be sworn or to answer a question on the basis of a fear of retribution to themselves or others.
- Increasing penalties for contempt at a hearing by refusing to answer a question. For a first offence the witness must be imprisoned for the term decided by the courts. However, for a second offence witnesses must serve a minimum two years and six months' imprisonment and, for a third or subsequent offence, a minimum of five years' imprisonment.
- Under this legislation persons served with a notice to attend a criminal intelligence hearing are not eligible to seek financial assistance from the Attorney-General for legal representation.

In November 2013, further amendments were made to the CM Act to enhance the CMC's ability to effectively deal with criminal organisations. These included:

- Providing that a "participant" in a criminal organisation includes a person who was a participant at any time in the previous two years.
- Clarifying an existing legislative provision that the CMC may continue to investigate the affairs of a person, including by calling the person to a hearing, when that person has been charged with a criminal offence.
- Increasing statutory penalties for non-compliance by witnesses at hearings with requirements to attend, take an oath, produce documents or give answers.
- Maintaining confidentiality of material filed in the Supreme Court in contempt and other hearings-related proceedings.

All amendments undertaken in response to OMCG's are currently the subject of review by the Queensland Organised Crime Commission of inquiry.

Comment on the current legislation

As a result of our changing operations, and our experience over the last year in observing the impacts of the legislative reforms referred above, we have identified some challenges which impact on our corporate governance model and crime, corruption and research functions. These challenges are addressed in the following chapters.

Major crime

Our functions and powers

One of our primary functions is to combat and reduce the incidence of major crime. Major crime, as described in Schedule 2 of the CC Act, is defined as:

- (a) criminal activity that involves an indictable offence punishable on conviction by a term of imprisonment not less than 14 years; or
- (b) criminal paedophilia; or
- (c) organised crime; or
- (d) terrorism; or
- (e) something that is—
 - (i) preparatory to the Commission of criminal paedophilia, organised crime or terrorism; or
 - (ii) undertaken to avoid detection of, or prosecution for, criminal paedophilia, organised crime or terrorism.

The CCC also has a prevention function of helping to prevent major crime (section 23).

The CC Act gives the CCC investigative powers, primarily coercive hearings powers, that are not available to the QPS. The scope of our activities is limited to referred major crime.¹⁹ As the agency is not funded or resourced as a police service, our effectiveness depends on its partnerships with the QPS and other law enforcement agencies, its specialist multidisciplinary approach to investigations, and the focused use of its special powers.

Referral process

How crime matters are referred to us

A statutory committee, as the Crime Reference Committee (CRC), considers all referrals of work to us and provides independent oversight of our use of powers and crime operations.

The referral process involves specific referrals of particular incidents of major crime and a system of general referrals that enables us to investigate general areas of major crime. The referral system allows us to both investigate matters identified through our own intelligence target development, or support major crime investigations undertaken by other law enforcement agencies, particularly the QPS.

Section 30A of the CC Act requires the CRC to review each general referral within five years of it being made or last confirmed. The CRC has reviewed and or reconsidered all of the CCC's general referrals in 2015. As a consequence of this review the CRC has reduced the number of general referrals from eight to five²⁰. The CRC has made the following general referrals to the CCC.

- Terrorism
- Organised crime

¹⁹ Major crime refers to criminal activity involving an indictable offence punishable by a term of imprisonment of not less than 14 years, or criminal paedophilia, organised crime or terrorism and referred major crime means major crime referred by the Crime Reference Committee to the CCC for investigation.

²⁰ The CCC's previous general referral scheme was made up of 8 general referrals covering: terrorism, organised crime, weapons, OMCG's, vulnerable victims, money laundering and two criminal paedophilia referrals.

- Organised crime (facilitators)
- Criminal paedophilia
- Serious crime (vulnerable victims)

It is proposed that the CRC consider a new general referral into serious crime (serial and significant sexual offending) at its next meeting.

Key areas of activity

Our major crime function covers the following areas of activity:

- Organised crime
- Serious crime
- Paedophilia
- Terrorism
- Proceeds of crime
- Intelligence
- Operations support
- Research
- Major crime prevention

Organised crime

In combating organised crime, we focus on investigations calculated to dismantle or disrupt the activities of criminal identities and networks engaged in the criminal markets of greatest harm to Queenslanders.

Our strategies include the use of multi-disciplinary teams comprising police officers, financial investigators, legal officers, intelligence analysts and administrative staff. Investigations are also supported by our staff with specialist capability in relation to coercive hearings, physical surveillance, covert surveillance, witness protection, computer forensic analysis, strategic intelligence and the confiscation of proceeds of crime.

Most of our organised crime investigations are conducted in partnership with other State and Commonwealth law enforcement agencies, and, on occasion, with international agencies.

Our objective is to dismantle or disrupt organised-crime networks and prevent crime, using traditional investigative and proceeds of crime approaches or lateral disruption strategies where appropriate.

Serious crime

A substantial portion of our work is conducted in support of investigations referred from partner agencies. Predominantly this work arises from requests from the QPS.

We receive requests for assistance through the use of our coercive hearings powers, and in particular our coercive hearings power. The investigations can relate to any category of major crime, but are most often employed for serious crime such as murder, drug trafficking and weapons offences. These externally requested investigations necessarily entail the engagement of our legal and administrative staff, with some intelligence support, but do not typically involve other disciplines.

Intelligence hearings

Following legislative changes that were enacted in October 2013, we also conduct intelligence hearings. Since the introduction of the power, we have undertaken extensive intelligence hearings to build a comprehensive picture of OMCG activity in Queensland.

The intelligence hearings power is currently limited to "criminal organisations" as defined in the CC Act (s. 55A–C CC Act). The CCC recommends that the government give consideration to broadening the definition of criminal organisations to allow the gathering of a more comprehensive understanding of organised crime in Queensland beyond OMCGs.

Paedophilia

Criminal paedophilia is a diverse and target-rich environment. Our Cerberus unit comprises experienced police investigators, forensic computing experts and an intelligence analyst. The unit targets high-level child exploitation material offences such as those that involve sophisticated encryption or methodology and child exploitation matters where children are at risk of contact offending. The unit works closely with QPS's Task Force Argos and its regional Child Protection Investigation Units, the Offices of the Commonwealth and Queensland Office of the Director of Public Prosecutions (ODPP), and interstate and international law enforcement agencies. It disseminates information uncovered by our investigations to other jurisdictions worldwide to identify child victims as well as identify offenders in advance of any contact offending with children.

To protect children from harm by paedophiles, our efforts are directed to:

- proactively examining various platforms and software
- prioritising investigations and taking action in cases that involve a risk of contact offending
- using covert investigative strategies where appropriate to build strong briefs of evidence
- using its coercive hearings powers either to progress its own investigations or to support QPS investigations.

We focus wherever possible on offenders based in Queensland who are engaging in aggravated networking offences (a Commonwealth offence). This offence attracts a higher penalty (25 years' imprisonment under Commonwealth legislation introduced in 2010) and is significantly more resource-intensive, requiring a substantial degree of forensic analysis from the beginning of the investigation.

Terrorism

Our role in terrorism investigation is one of rapid response capability, primarily in the form of hearings support.

It remains the case that any CCC investigation of terrorism, acts preparatory to the commission of terrorism or acts undertaken to avoid detection of or prosecution for terrorism, occur on receipt of a request from the QPS.

Proceeds of crime

Our proceeds of crime activity enables the recovery of illegal gains and other property from criminals for the benefit of the people of Queensland.

The CC Act provides that the CCC has a confiscation function that facilitates our investigation of confiscation-related activity for the enforcement of the *Criminal Proceeds Confiscation Act 2002* (CPCA).

Under the CPCA the CCC has responsibility for the non-conviction based scheme (Chapter 2) and the Serious Drug Offender Confiscation Order scheme (Chapter 2A), which is a conviction-based scheme.

Sex offenders: Review of the Child Protection (Offender Prohibition Order) Act 2008

In December 2014, we published a report on our review of the *Child Protection (Offender Prohibition Order) Act 2008*. The report made 17 recommendations aimed at improving the way offender prohibition orders are used to protect children from people who have been convicted of sexual or other serious crimes against children and are living in the community.

The recommendations detailed in the final report are being considered by the Queensland Police Service, in consultation with Queensland Corrective Services and the Public Safety Business Agency. A formal response to the recommendations will be tabled in parliament.

Internet-enabled crime: darknets and virtual currencies

In 2012, we conducted research into the "new generation" of internet technologies that enable serious criminal activity. The project aimed to raise awareness of the growing threat posed by serious crimes enabled by and embedded in highly sophisticated internet technologies and to inform the development of new and innovative law enforcement, prevention and investigation methods.

At the time, the law enforcement-only paper, entitled "Hidden in Plain Sight: darknets and virtual currencies – the challenge for law enforcement", was one of the first of its kind, and was disseminated in Australia and internationally. In addition, numerous briefings on the topic were delivered to key government and law enforcement agencies, including the Australian Crime Commission (ACC), Australian Federal Police (AFP) and the US Federal Bureau of Investigation (FBI).

The former Queensland Premier noted the CMC paper at the July 2012 meeting of the Council of Australian Governments (COAG). At the request of the Queensland Premier, the Queensland Minister for Police and Community Safety tabled the paper at the Standing Council for Police and Emergency Management (SCPEM) Ministers' meeting on 23 November 2012. SCPEM endorsed the CMC's proposal that SCPEM refer the paper to the National Cybercrime Working Group. It is requested that the group develop proposals for coordinated policy and law enforcement responses to the darknets threat, and report back to both SCPEM and the Council of Attorneys-General.

Research to support the investigation of cases involving vulnerable victims

In support of the major crime general referral made in 2013, targeting the victimisation of vulnerable people, research was conducted to support this new capability. Two research and issues papers have been produced: one on homicide of older people and one on infanticide.

Discussion on legislation and challenges

There are a number of potential changes that would enable us to better fulfil our responsibilities within the Crime function. We seek the Committee's support for these, which are as follows.

Reconsideration of the ongoing need for both specific and general referrals

As discussed on page 28, the CRC is responsible for referring particular incidents of major crime (referred to as "specific referrals") and major crime identified by reference to the type of criminal activity or the persons suspected of being involved in it (referred to as "general referrals"). Particular incidents of major crime that fall within the ambit of one of the general referrals may be commenced as particular investigations under that general referral. Once a general referral is in existence, particular investigations under such a referral may be approved more quickly. The matter is assessed by a separate committee (the Crime and Intelligence Research and Review Committee), which makes

a recommendation to the Senior Executive Officer (Crime), who then decides whether to authorise a particular investigation under that general referral, based on that recommendation. The process for approval of a particular investigation under a general referral allows for a more timely response to requests for investigation. A particular crime investigation commenced under a general referral nevertheless remains subject to significant oversight (see s. 29 CC Act) as the CRC can direct the investigation be limited or ended in certain circumstances, including when the investigation is not in the public interest.

It is timely, therefore, to review the CCC's current referral process by reference to similar functions in other jurisdictions. For example, the ACC has a slightly more refined system for the criminal activity it investigates. The ACC operates within a series of "Determinations", which reflect the work priorities for the ACC as determined by the ACC board. The current Determinations reflect a broad range of criminal conduct, and are comparable to the CCC's general referrals. The ACC has no specific referrals.

In addition to the above changes to rely on general referrals alone, the CCC recommends that consideration be given to providing for the Chairman of the CCC to be the Chair of the CRC, but with the ability to delegate Chairmanship of the CRC to the Senior Executive Officer, Crime as and when required – similar to the procedure which operates in other statutory bodies such as the Prostitution Licensing Authority.

The CRC and its referrals are important matters that would benefit from consideration when the substantive appointments to the positions of Commission Chairman, CEO and Commissioner are made. The Commission requests, an opportunity to make a supplementary submission on these matters by 30 October 2015, prior to the commencement of the Committee's public hearings.

Change definition of criminal organisation

As discussed on pages 19 and 30, in response to the OMCG issue the CCC was given the power to conduct specific intelligence operations including holding hearings (s. 55A-C). The authorised intelligence operations must be tied to a particular "criminal organisation". However, the current definition is limited and cannot be applied with ease to any criminal organisation other than OMCGs.

Under the CC Act, there are three ways to identify a criminal organisation (s. 12, Schedule 2). Firstly, an organisation may be declared a criminal organisation (at this stage, only "outlaw" motorcycle clubs) under a regulation. Secondly, an organisation may be declared a criminal organisation under the *Criminal Organisations Act 2009* (of which there are none currently) and, finally, a criminal organisation may otherwise meet the criteria in paragraph (a) of the Schedule 2 definition. This defines a criminal organisation as "an organisation of three or more persons who have as one or more of their purposes engaging in certain kinds of specified criminal activity and who, by their association, represent a serious risk to the safety and welfare of the public".

It is this third category of criminal organisation that poses problems:

- The evolution of organised crime into dynamic groups with flat hierarchies, makes identification of an "organisation" rather than a "network" problematical.
- Tying the intelligence function to criminal organisations so defined means that intelligence operations cannot be authorised in respect of "themes" or topics of intelligence value to the CCC or law enforcement more generally.

Intelligence is of most value when it can be gathered as issues emerge. In particular, coercive intelligence hearings can be of great benefit if employed for the timely examination of "themes" or "trends" rather than the activities of particular individuals. In such circumstances, the need to articulate an identified criminal organisation can impede the gathering of the best intelligence.

The CCC submits that intelligence collection capability should be broad enough to allow intelligence to be collected on:

- A specified network/type of organised crime (e.g. OMCs)
- A commodity-based approach to intelligence collection (e.g. a priority drug market)
- An offence-based approach (e.g. intelligence collection into a high-risk type of fraud activity)
- An industry-based approach (e.g. organised crime infiltration of the transport sector).

Constrained by the requirement for an identified "criminal organisation", intelligence hearings cannot be held to explore these emerging threats.

The CCC is of the view that a preferable approach would be the ability to identify and examine organised crime threats, markets and issues as they emerge. As mentioned previously, the ACC's standing Determinations are an example of a mechanism which would permit an "area" or "theme" of organised criminal activity to be examined in a timely way. Importantly, this reform would more effectively allow the CCC to fill current intelligence gaps in criminal organisations active in Queensland, other than OMCs.

Recommendation 3: Change the definition of criminal organisation

That a review of the definition of criminal organisation be undertaken to ensure the CCC is not unduly constrained in the exercise of its intelligence functions and can respond more effectively to address Queensland law enforcement's intelligence priorities in respect of organised crime.

Review categories of CEM files

Currently all child exploitation material (CEM) obtained by investigators within our Criminal Paedophilia Unit (Cerberus) are categorised on the Australian National Victim Image Library (ANVIL) scale, consisting of nine categories (five CEM categories and four related categories). Although there is no legislative requirement, in Queensland it is accepted practice that CEM material will be categorised according to the ANVIL scale to assist the courts in determining sentences based on the severity of the images and the extent of the offending.

The process of categorisation is very lengthy and is estimated to take about 90% of the total time of an investigation. It also has the potential to cause psychological injury to the investigating or forensic officer. Once an exhibit has been seized, a forensic image of the original material is produced and then uploaded to forensic software to be categorised. These files are then run through a database in an attempt to exclude common files that are known to our system. Then, every single file on the computer is examined to determine if it is a child exploitation material image, movie or text file (story). At the conclusion of this process, the evidence is then exported into tables to be produced to a court.

The amount of time required to categorise evidence means there is little time to spend on victim identification from new or unknown images that are found on the files. Victim identification work has the potential to rescue a child or victim from harm or abuse. If categorisation did not exist or was minimised then a significant amount of time could be saved and dedicated to either victim identification or at the very least give police the opportunity to target and arrest more offenders by moving more quickly through the investigation and court preparation process. Further, there is some question as to whether the benefit to the trial or sentencing process outweighs the use of resources, particularly in the case of very large CEM collections. The issue has been the subject of review and change in other jurisdictions.

IN-CONFIDENCE

Confidential proceedings

56. Section 200A was introduced to make certain proceedings before the Supreme Court confidential.
57. This provision adopted and clarified the practice under Practice Direction 33 of 2012 regarding certain provisions under the Act.
58. The provision is consistent with the general legislative presumption of confidentiality in relation to CCC hearings. The CCC supports its retention.

Clarification of s. 331

59. Section 331 was amended to clarify the powers of the CCC in respect of a witness who was facing charges.
60. This amendment was not directed specifically at addressing OMCG issues, but was in response to the High Court's decision in *X7*, delivered earlier that year.
61. The amendment clarified the CCC's powers in light of the High Court's decision,¹⁷ and the CCC supports retention of the amendment.

Potential future use of crime intelligence hearings

62. OMCGs represent only a small fraction of the organised crime landscape in Queensland. The dynamic nature of organised crime, and the contemporary shift away from ethnic or cultural groupings and organisations which have a hierarchy, have meant that the definition of criminal organisations in relation to which the CCC's intelligence functions are available, has posed challenges for the CCC's expansion of its intelligence function hearings beyond OMCGs.
63. Further, the clear hierarchical structure, identifiable processes for entry and exit, self-identification of membership and group 'branding' of OMCGs are not apparent in most other organised crime entities or networks.
64. The key difficulties for the CCC in targeting criminal organisations for intelligence hearings are firstly in identifying and defining the criminal organisation involved in the activity and, secondly, in establishing that these organisations represent an unacceptable risk to the safety, welfare or order of the community.
65. The existence of a criminal organisation is a jurisdictional requirement to found the CCC's power to authorise a specific intelligence operation. The only operations authorised to date relate to declared entities. It does not appear that any consideration is being given to declaring other or further entities 'criminal organisations' under regulations. Nor are there any applications on foot under the *Criminal Organisation Act 2009*.
66. Thus, as the legislation presently stands, it is necessary to identify further criminal organisations to found the jurisdiction of further intelligence operations.
67. The CCC is currently developing a strategy for the identification of further criminal organisations (beyond OMCGs) which may in future be the subject of specific intelligence operations.

¹⁷ Although the iteration of s. 331 in effect prior to the amendment was held effective to address the issue raised in *X7* (per Dalton J in *Yeaman v Crime Reference Committee & Anor; Hamdan v Crime Reference Committee & Anor* [2014] QSC 024 at [47] to [51]).

68. It is expected that this will substantially assist the OCC and its law enforcement partners in Queensland in improving law enforcement intelligence holdings in respect of broader organised crime in Queensland. The current definition of criminal organisations however will limit such intelligence collection to organised crime groups who are already well known in law enforcement and will require significant intelligence work-up and resources to attempt to meet the definition of a criminal organisation in respect of each identified organised crime syndicate. For this reason the OCC seeks amendments to the current definition of a criminal organisation.

Legislative reform in relation to crime intelligence hearings

Background

69. The CCC's Crime Reference Committee (CRC) may authorise a specific intelligence operation if certain conditions are met. In essence, the CCC must be satisfied that a criminal organisation, or a participant, engages in criminal activity, or that a person has engaged in corrupt conduct to help a criminal organisation.

70. The existence of a criminal organisation is a jurisdictional fact required for the authorisation of a specific intelligence operation. Thus, the CCC's intelligence function jurisdiction is tied (both for crime and corruption purposes) to the existence of an identified (or identifiable) criminal organisation.

71. Section 12 of the Act defines a 'criminal organisation' as:

- (a) an organization of 3 or more persons -
 - (i) who have as their purpose, or 1 of their purposes, engaging in, organising, planning, facilitating, supporting, or otherwise conspiring to engage in, serious criminal activity as defined under the Criminal Organisation Act 2009; and
 - (ii) who, by their association, represent an unacceptable risk to the safety, welfare or order of the community; or
- (b) a criminal organisation under the Criminal Organisation Act 2009; or
- (c) an entity declared under a regulation to be a criminal organisation.

72. The need for identification of a criminal organisation has posed practical problems for the CCC in targeting its intelligence function hearings beyond OMAGG activity.

73. Hearings were, for example, undertaken in relation to OMAGG involvement in the performance and image enhancing drugs (PIEDs) market. This was in aid of an intelligence project undertaken by the CCC exploring the emerging PIEDs market.

74. The utility of these hearings was limited by the need for a connection to OMAGGs to fall within the CCC's intelligence reference. It is tolerably clear that OMAGG use of PIEDs, and involvement in the PIEDs market, was increasing. Club members have also been identified as 'standing over' or extorting persons within the fitness industry involved in the distribution of PIEDs. However, for a variety of reasons OMAGG influence in this marketplace is not as dominant as it is in the tattoo industry. Thus there were jurisdictional limitations which prevented widespread examination of the marketplace.

75. The CCC submits that the Australian Crime Commission (ACC) model may be of assistance in identifying opportunities for law reform.

IN-CONFIDENCE

76. The ACC is empowered under its Act¹⁸ to undertake Special Investigations and Special (Intelligence) Operations in relation to federally relevant criminal activity. These must be approved by the board of the ACC. Parallels may be observed between the board of the ACC and the CCC's CRC, which is empowered to approve or ratify CCC investigations.
77. Special operations under the ACC Act are analogous to the CCC's specific intelligence operations.
78. The ACC may conduct intelligence operations in relation to federally relevant criminal activity. An intelligence operation is an operation that is primarily directed towards the collection, correlation, analysis or dissemination of criminal information and intelligence relating to federally relevant criminal activity, but that may involve the investigation of matters relating to federally relevant criminal activity.¹⁹
79. The board of the ACC may determine an intelligence operation is a special operation,²⁰ which then allows for the ACC to exercise its coercive powers in performance of that operation.²¹
80. The jurisdiction for intelligence operations that may be conducted by the ACC is therefore much broader than the CCC's, and is not tied to the requirement for an identified 'criminal organisation'.
81. It is submitted that the ACC model may provide useful guidance for any alteration to the CCC's intelligence operations jurisdiction.

Scope of suggested form

82. It is submitted that an alternative basis on which a specific intelligence operation may be approved should be available. In this case, it is proposed that the CRC could approve the commencement of a specific intelligence operation in relation to a defined topic or theme. This could focus on a type of offending, or individuals involved in organised crime with certain characteristics.
83. In this regard, the ACC's special operations provide some guidance as to how this could operate. There are currently numerous determinations, including in relation to:
- a. Child sex offending
 - b. High risk and emerging drug threats
 - c. National security impacts of serious organised crime
 - d. Outlaw motorcycle gangs.
84. Equally, the existing demarcation in the *Crime and Corruption Act 2001* for crime references between general referrals and specific referrals may give some guidance as to how a specific intelligence operation could be framed without reference to a criminal organisation.
85. Currently, there are general referrals in relation to:
- a. Organised crime
 - b. Professional facilitators
 - c. Terrorism
 - d. Serious crimes against vulnerable victims
 - e. Criminal paedophilia
 - f. Serious crime in relation to sexual offences.

¹⁸ Australian Crime Commission Act 2002 (Cwth) (ACC Act).

¹⁹ ACC Act, s. 4

²⁰ ACC Act, s. 7C(2).

²¹ ACC Act, Div 2.

86. Section 27(5) of the Act sets out the requirements for a general referral. It must identify the major crime to be investigated by the OCC, and then may identify either or both of the persons suspected of being involved and/or the activities constituting the major crime.
87. An intelligence authorisation could operate on a similar basis if tied to 'organised crime', as defined in the Act. This could be achieved by introducing an alternative to s. 55A(1), allowing for an authorisation to be granted if the committee were satisfied that it is in the public interest for an intelligence operation to be authorised in relation to an aspect of 'organised crime'.
88. The authorisation could identify the 'organised crime' by reference to the persons involved, or suspected of being involved, in the organised crime, including by reference to classes of persons, an identified 'market' in which organised crime entities are active, activities or offences suspected of constituting the organised crime, or nominated criminal activity within a geographical area, or industry sector.
89. For example, an intelligence operation could be authorised in relation to the methylamphetamine market in south-east Queensland. This is the market assessed by the OCC as representing the greatest threat to Queensland based on the prevalence of the commodity, the strong presence of organised crime in the market and the social harms caused by the commodity. The major crime would be defined by reference to the organised crime jurisdiction as offences of trafficking, producing, supplying and possessing methylamphetamine (a schedule 1 drug), involving two or more persons, with substantial planning and organisation or systematic and continuing activity, and a purpose to profit.
90. This would allow the OCC to explore the activity on a market-wide basis, rather than by reference to particular or individual networks which operate within it. Such an approach would still allow for oversight by the Crime Reference Committee, which would have to be satisfied that such an operation was in the public interest, having regard to the factors set out in s. 55A.
91. Allowing for alternative bases for authorisation, either by reference to a criminal organisation, or by reference to organised crime, would allow for the OCC to address intelligence issues in a more flexible and responsive manner.
92. Intelligence is of most value when it can be gathered as issues emerge. In particular, coercive intelligence hearings can be of great benefit if employed for the timely examination of themes or trends rather than the activities of particular individuals. In such circumstances, the need to articulate an identified criminal organisation can impede the gathering of the best intelligence.

Recommendation

The OCC recommends that intelligence collection capability should be broad enough to allow intelligence to be collected on:

1. A specified network/type of organised crime (inclusive of but extending beyond OMACOs)
2. A commodity-based approach to intelligence collection (e.g. a priority drug market)
3. An offence-based approach (e.g. intelligence collection into a high-risk type of fraud activity)
4. An industry-based approach (e.g. organised crime infiltration of the transport sector)

Conclusion

93. The OCC considers that amendments introduced into the Act have assisted it to achieve its statutory objective of reducing and combating organised crime.
94. In respect of the OCC's intelligence authorisations, the OCC submits that the requirement for an identified 'criminal organisation' be amended to allow the OCC to explore arrests or themes of organised in a timely way. This would further assist the OCC to continue to combat organised crime in Queensland, and expand beyond the currently narrow focus on OMACOs.



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