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11 November 2011

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Parliamentary Crime and Misconduct Committee
Parliament House
George Street
BRISBANE QLD 4000

By email: pcmc@parliament.qld.gov.au

Dear Sir/Madam

RE: **CRIMINAL ORGANISATION AMENDMENT BILL 2011**

SECRET EVIDENCE

As observed, an application by the Police Commissioner that certain evidence be declared criminal intelligence is a procedure whereby the Supreme Court is asked to examine Secret Evidence.

The problems with Secret Evidence were considered in a report by Justice, which is the British section of the International Commission of Jurists.

In a major report in June 2009 Justice observed in its Executive Summary:

- It is a basic principle of a fair hearing that a person must know the evidence against him.
- This core principle of British justice has been undermined as the use of secret evidence in UK courts has grown dramatically in the past ten years.
- This report calls for an end to the use of secret evidence. Secret evidence is unreliable, unfair, undemocratic, unnecessary and damaging to both national security and the integrity of Britain's courts.¹

In considering the case against secret evidence, the Justice report quoted the noted British Jurist Jeremy Bentham. Bentham was a vicious critic of secrecy in the courts and he wrote that:

"In the darkness of secrecy ... sinister interest and evil in every shape, have full swing. Only in proportion as publicity has placed can any of the checks, applicable to

¹ See "Secret Evidence", a Justice report June 2009 p.5

Watching them while they are watching you!

judicial injustice, operate. Where there is no publicity, there is no justice".²

The Justice report makes the following observations as to secret evidence:

- Secret evidence is unreliable.³
- Secret evidence is unfair.⁴
- Secret evidence is undemocratic.⁵
- Secret evidence damages the integrity of the courts.⁶
- Secret evidence weakens security.⁷
- Secret evidence is unnecessary.⁸

These criticisms will briefly be considered individually.

SECRET EVIDENCE IS UNRELIABLE

The Justice report notes that:

"The reliability of evidence matters greatly to the courts because they have an interest, independent of fairness to the parties, to arrive at conclusions that are accurate ... If it is a principle of rationality that a tribunal must act upon evidence, it is surely rational to conclude that evidence that has been tested by all the parties is more likely to lead to accurate conclusions than a one-sided account".⁹

Justice also notes that:

"Because of the inherent limitations upon special advocates (equally applicable to COPIM) secret evidence is not subject to rigorous cross-examination. The inability of special advocates to put the defendant's side of the case means that much apparently compelling evidence goes effectively unchallenged".¹⁰

Justice refers to the recent UK case of *AF and others v Secretary of State* [2009] UKHL where Lord Justice Sedley noted, quoting Mark Twain, 'The difference between reality and fiction is that fiction has to be credible'. Justice notes that in the absence of the defendant's side of the story, a court may well arrive at what seems to be a credible conclusion but, as long as it is based upon secret evidence, it will never arrive at the correct one.¹¹

² See "Secret Evidence" p.214

³ See "Secret Evidence" pp.215-220

⁴ Ibid pp.220-221

⁵ Ibid pp.222-223

⁶ Ibid pp.224-225

⁷ Ibid pp.226-227

⁸ Ibid pp.227-228

⁹ Ibid pp.215-216

¹⁰ Ibid p.218

¹¹ Ibid p.219

SECRET EVIDENCE IS UNFAIR

Justice notes that:

“It is not only that evidence that has been tested by all the parties will be a more reliable basis for the court to make its judgment, but that it is fundamentally *fairer* to give both parties an equal opportunity to present evidence as well as to comment on the evidence given by the other side. Each of the principles that make up the right to a fair hearing - the right to be heard, the right to confront one’s accuser and the right to an adversarial hearing and equality of arms - is denied to the defendant when secret evidence is used”.¹²

In particular, the principle of equality of arms - the idea that both parties must be on an equal footing before the court – illustrates how stark the mismatch is between the parties in cases (where secret evidence is used). The government has full disclosure of all the evidence, is free to withhold its evidence from the defendant, has unfettered communication with its own lawyers, and can be present at all stages of the hearing. The defendant, by contrast, is not entitled to be present throughout, to know the secret evidence against him or to give instructions to the special advocate on the basis of the secret evidence.¹³

SECRET EVIDENCE IS UNDEMOCRATIC

Justice notes that in a democracy the public have a right to know not only that the law is being applied, but that it is being applied properly.¹⁴

Further, Justice notes in the UK context where Parliament has passed a Human Rights Act that the courts also have a deeper responsibility to prevent their own functions from being used in a way that is damaging to democracy and fundamental rights, even where directed to do so by Parliament.¹⁵

SECRET EVIDENCE DAMAGES THE INTEGRITY OF THE COURTS

The Justice report notes that not only is it an affront to basic principles of fairness for the courts to determine issues of fact by reference to evidence not disclosed to a party, but the courts are in addition obliged to give their reasoning in closed judgments kept secret from the public.¹⁶

The damage caused by the use of secret evidence is not limited to the violation of the rights of the individual defendants affected by it. Lack of fairness also damages the public good of the justice system itself. It is of course inevitable that, in an adversarial system of justice, a court’s decision is unlikely to please both parties equally. But the integrity of the courts depends on the perception that the courts have at least adopted a

¹² Ibid p.220

¹³ Ibid p.220

¹⁴ Ibid p.222

¹⁵ Ibid p.223

¹⁶ Ibid p.224

fair process. The maxim that justice must not only be done but seen to be done goes deeper than is first apparent. For, despite the importance of open justice, it remains possible to have a fair hearing behind closed doors, so long as all the parties have had an equal opportunity to make their case. Whatever the outcome, the participants themselves will understand that the procedure adopted was fair. But in a hearing in which secret evidence is used, it is not merely that justice is not being seen to be done, it is actually that justice itself is not being done. It is not simply the *perception* of fairness that matters, but the practice of fairness too.¹⁷

SECRET EVIDENCE WEAKENS SECURITY

The Justice report notes that by relying on evidence that has not been properly tested, procedures that involve secret evidence carry with them a much greater degree of error than those which do not. Consequently, they are more likely to fail in their objective of protecting the public.¹⁸

SECRET EVIDENCE IS UNNECESSARY

The Justice report notes that the resort to secret evidence is not necessary. This claim covers two different points. First, the government sometimes claims secrecy in respect of things which, it later emerges, are already in the public domain. Or the government wrongly claims that the disclosure of some item of information would damage some vital public interest when it would not. Secondly, the resort to secret evidence is unnecessary in the larger sense that there are inevitably better means of protecting the relevant public interest in a way that is compatible with the defendant's right to a fair hearing.¹⁹

COPIM'S ROLE AND CRITICISM OF THE USE OF SPECIAL ADVOCATES

As noted in the Council's initial submission on the principal Act, COPIM is a more recent development of the concept of the Public Interest Monitor which was introduced in Queensland in the mid 1990s. The Public Interest Monitor is a Special Advocate by another name.

The use of Special Advocates has come in for significant criticism in the UK.

In a report of the Joint Committee on Human Rights in February 2010 a number of very pertinent criticisms of the limitations of Special Advocates were made.²⁰ Those criticisms are equally applicable to the Queensland concept of Special Advocates, especially COPIM.

¹⁷ Ibid p.224

¹⁸ Ibid p.226

¹⁹ Ibid p.227

²⁰ See House of Lords and House of Commons Joint Committee on Human Rights 9th Report of Session 2009-2010 HL Paper 64 and HC 395 published 26 February 2010

The criticism by the Joint Committee on the role of Special Advocates is instructive, namely:

- ...it remains the case that Special Advocates continue to have no access in practice to evidence or expertise which would enable them to challenge the expert assessments of the Security Service (here read the Police Commissioner), assessments to which the court is therefore almost bound to defer in the absence of any evidence or expert opinion to the contrary. The unfairness identified by the Constitutional Affairs Committee as long ago as 2005 therefore still persists: in practice, Special Advocates have no means of adducing any evidence which contradicts the evidence relied upon by the Secretary of State (here read the Police Commissioner) in closed proceedings, which give rise to a serious inequality of arms in those proceedings.²¹
- The inability of Special Advocates to communicate with the controlee (in the current context substitute the term "member of the organisation") after seeing the closed material, identified as a source of unfairness by the Constitutional Affairs Committee in 2005, remains unchanged, notwithstanding the clear evidence that it seriously affects the Special Advocates' ability to discharge their function of representing the controlee's interests in the closed proceedings ... This inability of Special Advocates to take instructions on the closed case seriously limits the extent to which they are able to represent the interests of the controlled person and therefore the extent to which they are capable of mitigating the unfairness to the controlled person in the closed proceedings.²²

The Joint Committee's comments in its 2010 report have to be read in conjunction with its comments in its earlier 2007 report dealing with the use of Special Advocates.²³

In that report in dealing with concerns about Special Advocates the Joint Committee made the following observations:

- We were concerned to find that the Special Advocates from whom we heard had a number of very serious reservations about the fairness of the system to the people whose interests they are appointed to represent. Indeed, we found their evidence most disquieting, as they portrayed a picture of a system in operation which is very far removed from what we would consider to be anything like a fair procedure. We were left in no doubt by their evidence that proceedings involving Special Advocates fail to afford a substantial measure of procedural justice.²⁴
- Our consideration of the way in which the Special Advocate system operates in practice has confirmed our concerns about the difficulty a controlled person (substitute the term "member of a criminal organisation" in respect of the Criminal Organisation Act amendments currently under consideration) may have contesting

²¹ Ibid p.20

²² Ibid p.24

²³ See 19th Report of the UK Joint Committee on Human Rights July 2007

²⁴ Ibid paragraph 192

the allegations made against him. In the absence of any requirement to provide the individual with even the gist of the case against him in the closed material, he is at the enormous disadvantage of not knowing what is alleged against him and therefore not only unable to provide explanations himself in the open hearing, but unable to provide any explanations to the Special Advocate whose task it is to represent his interests in the closed proceedings. We recommend that there be a clear statutory obligation on the Secretary of State (here read Queensland Police Commissioner) always to provide a statement of the gist of the closed material. We also recommend that consideration be given urgently to allowing the court to carry out a balancing between the interests of justice and the risk to the public interest when deciding whether closed material should be disclosed.²⁵

- In our view it is essential, if Special Advocates are to be able to perform their function, that there is greater opportunity than currently exists for communication between the Special Advocate and the controlled person (here read “member of the criminal organisation”). We were impressed by the preparedness of the Special Advocates to take responsibility for using their professional judgment to decide what they could or could not safely ask the controlled person after seeing the closed material. With appropriate guidance and safeguards, we think it is possible to relax the current prohibition whilst ensuring that sensitive national security information (here read “criminal intelligence”) is not disclosed. We therefore recommend a relaxation of the current prohibition on any communication between the Special Advocate and the person concerned or their legal representative after the Special Advocate has seen the closed material.²⁶
- After listening to the evidence of the Special Advocates, we found it hard not to reach for well worn descriptions of it as “Kafkaesque” or like the Star Chamber. The Special Advocates agreed when it was put to them that, in light of the concerns they had raised, “the public should be left in absolutely no doubt that what is happening ... has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.” Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against basic notions of fair play as the lay public would understand them.²⁷
- In response to the relevant UK Minister’s comments in relation to the use of secret evidence that he thought that the procedure is “as fair as it can be”, the Committee noted that “The evidence of the Special Advocates has confirmed us in our previously expressed view that the Special Advocate system, as currently conducted, does not afford the individual the fair hearing, or the substantial measure of procedural justice, to which he or she is entitled under both the common law and human rights law. In short, as we heard in evidence, the system frustrates those who have been through it who do not feel they have had anything like a fair crack of the whip because they still do not really know the essence of the case against them”.²⁸

²⁵ Ibid paragraph 199

²⁶ Ibid paragraph 205

²⁷ Ibid paragraph 210

²⁸ Ibid paragraph 212

OBSERVATION

It is pertinent to observe that the criticisms of the inadequacies of the role of the Special Advocate in the UK have not come from a committee of judges but rather from a joint committee of politicians, namely from the House of Lords and the House of Commons.

In view of the fact that the Special Advocate system in Australia is nowhere near as entrenched as it is in the UK, the UK criticisms are especially relevant in the consideration of the amendments to the Criminal Organisation Act.

AUSTRALIAN COURTS CONSIDERATION OF SECRET EVIDENCE/CRIMINAL INTELLIGENCE

Three articles have considered this issue and relevant extracts from those articles are outlined below.

In an article entitled "Due Process, Natural Justice, Kable and Organisational Control Legislation"²⁹ the following pertinent points are made:

- The use of criminal intelligence in relation to an application (under similar South Australian legislation to that of the Criminal Organisation Act) infringes the right to a fair trial/right to due process.³⁰
- Information meeting the definition of "criminal intelligence" cannot be disclosed to the accused or his or her legal representative. This means, of course, that a control order may be made, with serious consequences, against a person without that person having the opportunity to see or test the evidence being used against him or her.³¹
- The application of the criminal intelligence exception (to a person not having the opportunity to see or test the evidence being used against him or her) can, in practice, mean that a person might not have the right to "meet the case against him or her" considered by Gaudron J to be fundamental in *Nicholas v The Queen* (1998) 193 CLR p.173. Gaudron J saw it as being essential that a process be adopted whereby the facts must be ascertained - traditionally this occurs through sometimes robust cross-examination, an avenue again denied to a person in respect of evidence said to be "criminal intelligence" in these (bikie-type legislation) cases.³²
- Dicta in the majority judgments in *Thomas v Mowbray* (2007) 233 CLR 307 acknowledged the importance of the right of an accused to make full arguments, a departure from which might be justified only on grounds of national security, and even in the context of terrorism offences some Judges have expressed at least some ambivalence towards a lack of cross-examination on evidence. In that case Gummow and Crennan JJ said "There may remain a question whether in the terms

²⁹ Associate Professor Anthony Gray, School of Law, University of Southern Queensland

³⁰ Ibid p.3

³¹ Ibid p.3

³² Ibid p.4

used in the Security Information Act the Parliament has sought to over-reach the bounds of the understanding of 'national security'" and at [31], Gleeson CJ said "We are not concerned in this case with particular issues as to procedural fairness that could arise where, for example, particular information is not made available to the subject of a control order or his or her lawyers".³³

In a further article by Dr Gray entitled "Constitutionality of Criminal Organisation Legislation"³⁴ the following points are made:

- In arguing against the Queensland ... legislation it can be argued ... that any legitimate concerns that the legislation does in fact represent can or are being addressed in other ways. This can be asked in relation to criminalising association of declared organisations arising from a fear that members may be engaged in criminal behaviour ... or on proof that they are or have been engaged in criminal behaviour. The Queensland Criminal Code already contains a chapter dealing with conspiracy offences. Why is this not sufficient to address the question of individuals (whether they are members of a declared organisation or not) conspiring to engage in criminal behaviour ... As others have noted, governments introducing these laws have not produced empirical evidence as to how these laws will effectively reduce organised crime.³⁵
- There are serious consequences for individuals found to be members of a declared organisation, apart from criminalising association. They include bans on weapon ownership, and restrictions on the right to work in particular fields ... Why is it necessary to provide, as the Queensland/New South Wales legislation does, that members of declared organisations then lose their right to carry out particular occupations that require a licence? It is expected that anyone wishing to obtain or renew such a licence will already be subject to particular rules and requirements in relation to behaviour, lack of criminal behaviour etc. The need to connect eligibility to engage in such activities to non-membership of a particular group has not been established. To the extent that groups are involved in criminal activity, where is the evidence that current laws regarding drugs, money laundering, proceeds of crime legislation, and criminal conspiracy are not sufficient to tackle the ends to which this legislation is said to be aimed. If there were published evidence that existing rules were for some reason not effective in curbing the types of behaviour to which this legislation is said to have been addressed, one would be more comfortable that the legislation was a reasonably appropriate and adapted method of achieving a legitimate end consistent with representative and responsible government. However such evidence has not been provided by advocates of these regimes.³⁶
- It is foreseeable that under the Act an individual who is gainfully employed in the security industry, and is a member of a "bikie" gang that becomes a "declared organisation" will not be able to associate with his or her colleagues nor be able to work, even though he may have had nothing to do with "any serious criminal activity".

³³ Ibid pp.5 and 14

³⁴ (2010) 17AJ A L213

³⁵ Ibid p.8

³⁶ Ibid p.9

In this respect the new laws expose a troublesome collapse of the individual into the organisation.³⁷

- When one considers legislation aimed at dissolving organisations thought to be a threat to public safety, it is natural to recall *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 where Dixon J spoke (at 187) of the need for vigilance in terms of over-reach of power by members of the Executive, in terms considered broadly apposite to the legislation currently being considered where Dixon J said “History, and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected”.³⁸
- (In relation to) the provision of “criminal intelligence” to be used in relation to the making of a control order against an individual, if the court believes the material fits the definition, the person against whom the control order will be made does not have the right to be aware of the nature of this information and does not have the right to challenge it or cross-examine, if it is based on the evidence of an individual. I do not press this aspect of the challenge in extended detail here because I must concede that such provisions were validated in the two recent High Court decisions, *K-Generation* and *Gypsy Jokers*, provided it was the court that decided whether the material met the definition, and provided the court could assess the weighting to be accorded to it.

However, were it not for these very recent High Court decisions, I would have challenged the making of a control order against a person possibly based on evidence that the person has not seen or heard, and without an opportunity for their legal representatives to cross-examine or otherwise test the evidence. Clearly, such provisions impact on an individual’s right to natural justice. This has been recognised by various authorities. Justice Heydon, for example, concludes in his textbook that “No evidence given by one party affecting another party in the same litigation can be made admissible against the other party, unless there is a right to cross-examine”. Yet the definition of criminal intelligence in this legislation does allow evidence to be used against a member of a proscribed organisation in assessing a control order against that member, without the member having the right to cross-examine ... It is hard to see how allowing a court to make a control order based on evidence that the person affected may not have seen, and who may not have been personally notified of the application, is consistent with the requirements of natural justice. However, realistically it is unlikely that the High Court is going to change its position in the near future on the constitutionality of the use of “criminal intelligence” in relation to these kinds of proceedings.³⁹

The most recent consideration of the use of criminal intelligence in legislation roughly similar to the Criminal Organisation Act 2009 appears in an article entitled “Kable, K-Generation, Kirk and Totani: Validation of Criminal Intelligence at the Expense of

³⁷ Ibid p.9

³⁸ Ibid p.9

³⁹ Ibid pp.10 and 11

Natural Justice in Chapter III Courts".⁴⁰

The following relevant comments are extracted from this article:

- (There are) an increasing number of statutes emerging from Australian Parliaments providing for the production of "criminal intelligence" to courts. Such criminal intelligence is classified as to its status by the Commissioner of Police of the relevant jurisdiction and is, at least on a first acquaintance with the statutory provisions, protected against disclosure other than to the Bench. The standard prohibition on disclosure makes plain an intention that the person affected by whatever court proceedings are on foot will not have access to the criminal intelligence which will be produced to the court. This must result in a challenge to the established notions of natural justice as a sine qua non of court proceedings for if allegations in the criminal intelligence may not be disclosed to the affected person then they cannot meaningfully prepare a rebuttal to the allegations.⁴¹
- The appellants in K-Generation were seeking access to the criminal intelligence that had been presented by the police to the Liquor Licensing Court and withheld from them. The High Court decision in favour of the Liquor Act's validity meant that the appellants never did find out what had been alleged against them in their failed attempt to obtain a liquor licence.⁴²
- The plurality judgment in K-Generation addressed the manner in which the definition of "criminal intelligence" allowed for curial review of the classification process undertaken by the Police Commissioner, such review being relevant to the question of whether the courts in question were being denied "the constitutional character of an independent and impartial tribunal". The authors of this article note that the argument is curiously brief in the light of the implications for the affected party who may be left with the difficult task of challenging the undisclosed evidence.⁴³
- In the K-Generation situation there was no **informed** contradictor to produce evidence challenging the classification process. Only one party, the Police Commissioner, will adduce meaningful evidence before the reviewing court. On the other hand, the applicant for review will have no idea of the case against him or her and will be reduced to playing "pin the tail on the donkey".⁴⁴
- In considering what is said to be the very different paths of British and Australian law on the necessity for procedural fairness in courts, the authors note that the British cases will be said to have no relevance in Australia because of their dependence on the Human Rights Act 1988 (UK) but the authors note that while in Australia we have no enshrined statement of the fundamental place of procedural fairness in courts, the common law has been stating this idea for at least 400 years since Coke CJ had a first tilt at the idea of limiting Parliamentary sovereignty by reference to legislative

⁴⁰ By Steven Churches and Sue Milne, University of South Australia Law School (2010) 18AJ A L29

⁴¹ Ibid p.1

⁴² Ibid p.2

⁴³ Ibid p.3

⁴⁴ Ibid p.8

breach of natural justice ... Australian courts tend to begin from the standpoint of legislative omnipotence so that if the relevant statute can be read as workable within vague constitutional demands, then it will remain valid, despite obvious and glaring practical unfairness being the likely result for an affected party.⁴⁵

- The failure in K-Generation to even cite 1990s High Court case law on the necessity for natural justice in Chapter III Courts was not intellectual dishonesty, it was an implicit statement of lack of necessity. Absent a clear constitutional command for procedural fairness, spelt out in a definitive manner, the tendency will be deference to the dictates of the legislature.⁴⁶
- The last word might go to Professor Gray. In his article "Due Process, Natural Justice, Kable and Organisational Control Legislation", Gray sets out a powerful case for the constitutional importance of natural justice, including a reference to *Dietrich v The Queen* (1992) 177 CLR 292 (in particular at 363 per Gaudron J) as authority for the proposition that evidence should be discarded if its weight and credibility cannot be effectively tested, a reference not often cited. Gray then notes that a current member of the High Court concludes, in relation to cross-examination, that "No evidence given by one party affecting another party in the same litigation can be made admissible against the other party unless there is a right to cross-examine".⁴⁷

COMMENTS ON THE AMENDMENTS UNDER CONSIDERATION

There has been absolutely no consultation in relation to the subject amendments in a situation where the amendments have clearly not been conceived and produced overnight.

This is a totally intolerable situation and the lack of consultation stands to be roundly criticised.

Further, the time frame for consideration of the legislation by the Parliamentary Crime and Misconduct Committee is unacceptably brief.

Yet again this is a situation where a very significant series of changes to a controversial piece of criminal law legislation have been conceived and drafted entirely within the bureaucracy with relevant non-law enforcement stakeholders not only being denied the opportunity for consultation during the formative stages of the preparation of the Bill but being forced to respond to the Bill when tabled in an impossibly short time frame.

Put differently, this is another instance where persons whose full-time employment within the QPS, is to work on policy and then legislative drafting in relation to a substantial criminal law change have had months to do so in a situation of one-sided secrecy where non-law enforcement stakeholders are given a risible short period of time for so-called consultation.

⁴⁵ Ibid p.13

⁴⁶ Ibid p.14

⁴⁷ Ibid p.15

It is timely to record what Fitzgerald QC had to say about the tactic of non-consultation in his landmark 1989 report as his comments are just as applicable now as they were then.

In that part of the report headed "The Reactive Approach to Law Reform"⁴⁸ Mr Fitzgerald QC made the following observations:

- ... Governments are often tempted to ... pass laws forbidding certain behaviour. This is often done without any real research ...
- Passage of such a law usually ... gives the Minister responsible a sense of accomplishment, leaves the bureaucracy in control and gives the public an impression that the Government is alert and active. The media rarely examines the issues in any depth, often endorsing the view that problems have simple solutions which can be applied by quick legislation.
- When problems are not simple, the passage of a badly drafted law ... simply compounds the problem.
- Those who conduct reviews of the law should not only present recommendations to the legislature but should also present any rational arguments against the recommended course of action. If this is done, Cabinet and Parliament will have an objective basis for proper critical assessment of the proposals.
- In the field of criminal justice, identifying the options and understanding their merits and drawbacks is technical and difficult. Individual politicians, with their limited time, resources and training, and even Party machines cannot by themselves adequately analyse complex proposed legislation. This is even more the case when the legislation is presented in an urgent reactive way by the Parliament.

One notes, with some cynicism, the announcement by the Premier a little over twelve months ago in reaction to Fitzgerald QC's then comments that Queensland was slipping back into its bad old ways, that Mr Fitzgerald's comments would be appropriately noted and acted upon. So far as consultation in relation to this Bill is concerned, that is clearly not the case.

One looks in vain in relation to the Attorney-General's introductory speech of 25 October 2011 for any explanation for the lack of consultation in the significant amendments that are currently under consideration.

Indeed, on 31 August 2011 the Criminal Organisation Public Interest Monitor produced his 2010-2011 report and noted that "During the year, no applications under the Act were made by the Queensland Police Service. Accordingly I have not been required to carry out my functions under the Act of monitoring any such applications".⁴⁹

⁴⁸ See Report of a Commission of Inquiry dated 3 July 1989 p.140

⁴⁹ See 2010-2011 Report of the Criminal Organisation Public Interest Monitor AG/11/03160 by Robert Needham

Indeed, in view of the fact that apparently there has not been any application to the Supreme Court under the Criminal Organisation Act 2009, the question has to be asked as to what the genesis of the amendments are. One looks in vain for any such explanation in the Minister's introductory speech, which is characterised by the usual law and order tub thumping as to the extent of organised crime in Australia today.

The Minister's introductory speech notes that the Criminal Organisation Act 2009 commenced on 15 April 2010 and contains the usual self-congratulatory assertion that the legislation is "the most robust legislation in the country".⁵⁰

The only hint of the necessity for the amendments are contained in the Explanatory Notes where it is stated:

- Amendments to the Act are required to clarify that the Commissioner may seek to have intelligence supplied by an agency other than the Queensland Police Service declared to be criminal intelligence and that an affidavit under Section 64 of the Act must be filed with respect to any criminal intelligence supplied by an informant of any agency. The amendments will allow for the affidavit under Section 64 to be sworn by an officer of an agency other than the Queensland Police Service (emphasis added).
- This Act is further amended to ensure the protection of the identity of informants of any agency whose information is used to support an application under the Act.
- The amendment to the Crime and Misconduct Act clarifies that the Crime and Misconduct Commission may assist the Commissioner in any application made under the Act.
- Section 86 (Obtaining of or disclosure of secret information about the identity of an informant) of the Criminal Code is aimed at ensuring that the identity of a criminal organisation informant is, and remains, protected. The amendment to Section 86 extends that protection to informants of all agencies assisting the Commissioner in an application under the Criminal Organisation Act.⁵¹

CONSISTENCY WITH FUNDAMENTAL LEGISLATIVE PRINCIPLES

The superficial and airbrushed manner in which this important principle is considered in the Explanatory Notes is extraordinary.

The hugely worrying and controversial area of secret evidence is dealt with in a mere three lines under this heading with a further two pages then given over to justifications for the amendments.

As with other Fitzgerald reforms, the obligation to have Explanatory Notes of new or amending legislation deal with Fundamental Legislative Principles has atrophied and become veritably useless.

⁵⁰ See Hansard 25 October 2011 p.3365

⁵¹ See Criminal Organisation Amendment Bill 2011 Explanatory Notes p.2

Nowhere under this heading are the substantial criticisms of the secret evidence regime which were made in submissions relating to or parliamentary debate on the principal 2009 Act even adverted to.

None of the academic articles extracted in this submission are mentioned.

A conscientious Member of Parliament in reading what is said under the heading of Consistency with Fundamental Legislative Principles would hardly be alerted to the draconian provisions of the principal Act or the amending legislation.

It is a disgrace that the lack of consistency with Fundamental Legislative Principles is dealt with in such a brief and cavalier manner in the Explanatory Notes.

As is obvious from the Council's submission dated 22 October 2009 (**enclosed**) in relation to the principal Act, we fundamentally disagree with the assertion at page 3 of the Explanatory Notes that "The Act provides significant safeguards to address the necessary abrogation of natural justice ...".

We do not agree that the abrogation of natural justice is necessary.

Where the Explanatory Notes assert that the Supreme Court is afforded full discretion in making a determination in the event that the court declares information to be criminal intelligence (see Explanatory Notes page 3), the Council's view is that in practice the so-called "full discretion" is likely to result in a court making a declaration of criminal intelligence in most if not all applications that come before it. This is particularly so where the person affected by a declaration of criminal intelligence has no right to be served with the relevant material on a criminal intelligence application, no right to be present, no right to engage a lawyer and no right to challenge the criminal intelligence in later control order proceedings. To describe such a regime as giving a court "full discretion" is an absurd proposition to put in a set of Explanatory Notes.

The Explanatory Notes observe that "The Bill widens the breadth of evidence that can be admitted as criminal intelligence by providing that such intelligence can be obtained from agencies other than the QPS".

Amazingly, what the Explanatory Notes describe as the existing safeguard of requiring the informant affidavit to contain the informant's criminal history is, under the amending legislation, to be "somewhat diluted by allowing a criminal history to be provided identifying offences only by way of 'type'".

This will have the effect that even the Supreme Court Judge who is called on to make a declaration of criminal intelligence based on a regime of secret evidence is to be denied the full criminal history of the informant. The Explanatory Notes do not proffer any explanation for denying the Presiding Judge the full detail of the informant's criminal history.

In concluding submissions on the Explanatory Notes, we repeat that the content of the Explanatory Notes are a sham, are not even-handed and in effect represent one-sided

advocacy for the QPS which the Consultation heading of the Explanatory Notes effectively admits was the only entity permitted consultation or involvement in the drafting of the amendments. That is, the QPS consulted itself.

COMMENTS ON SPECIFIC SECTIONS OF THE AMENDING LEGISLATION

SECTION 59 - WHAT IS CRIMINAL INTELLIGENCE

This amendment is described in the Explanatory Notes as “clarifying” that the Commissioner may obtain criminal intelligence from an external agency which is defined as, effectively, other law enforcement agencies within Australia but also, worryingly, extends the definition to entities outside Australia.

The obtaining of criminal intelligence from an entity outside Australia is achieved simply by tabling a Regulation under the Act that a particular entity will be an external agency.

This widens the ambit of secret evidence to include anonymous informant allegations being made from overseas countries!

It is to be remembered that the Attorney-General in introducing these amendments noted that “Under Section 59 of the Act, criminal intelligence is information which, if disclosed, could reasonably be expected to prejudice a criminal investigation, lead to the identity of confidential informants or covert police officers or endanger a person’s life or physical safety”.⁵²

The Attorney-General went on to assert that “Such an approach is justified on the basis that it is necessary to protect the identity of informants and operatives and ensure that such persons can continue to be a source of criminal intelligence information”.

So far as protecting the identity of informants is concerned, the Council noted in its original submission on the principal Act that legal history is littered with the wreckage wreaked by false and fabricated information used to launch criminal prosecutions by anonymous informants where it has later been established that such information was not only wrong but fabricated by the informant sometimes in concert with bent police to wrongly accuse a person of criminal activity which then results in serious miscarriages of justice.

Arising from the Minister’s comments in relation to Section 59 it is not only protecting the identify of informants but also of a class of people called “operatives”. This term is commonly used in criminal law to refer to undercover police but it also is used to refer to civilians working with police in so-called controlled operations.

The Attorney-General argues that keeping secret the identity of informants or covert police officers is necessary to protect their identity and ensure that such persons can continue to be a source of criminal intelligence information. (emphasis added)

However the whole scheme of the Act is such that this “protection” is manifestly

⁵² See Hansard 25 October 2011 p.3365

one-sided, that is, the protection is to hide not only the identity but the activities of informants and covert police officers.

There is no protection against informants lying and presenting malicious and fabricated so-called confidential information that would form the basis of criminal intelligence.

There is no protection against covert police officers actively working with confidential informants to manufacture false and malicious information that then becomes criminal intelligence.

The Minister argues that Part 6 of the Act provides for **significant judicial discretion** and **special safeguards** where such applications are made and asserts that one such safeguard is that an informant affidavit must be provided by a police officer under Section 76 of the Act where the affidavit has to set out the evidence provided to the police officer by the informant and the grounds on which the information is considered reliable. (emphasis added)

However when one has regard to the terms of Section 76 the so-called "special safeguards" are not particularly safe nor especially special.

Under Section 76 an informant cannot be called to give evidence and therefore the basis of the informant's evidence cannot be challenged so as to establish whether it may be a complete fabrication.

Under Section 76 it is said that the affidavit to be filed by the police officer who handles the informant must contain information about any allegations of professional misconduct against the informant and any inducements or rewards provided to the informant.

It is notorious that the relationship between a police officer who handles an informant can sometimes be fraught with misinformation and downright lies that are concocted by both the police officer and the informant. There is an inability to explore as to whether the information provided by the police officer in his affidavit as to his relationship with the informant is true so as to allow a court to come to its own independent view as to whether the factual matters put forward by the police officer as to his relationship with the informant are correct or not.

We therefore seek to make the point that we fundamentally challenge the Attorney-General's assertion that Section 76 or any other Section of the Act provides "special safeguards" where applications are made to have certain evidence declared criminal intelligence.

The Attorney-General further asserts that Section 72 of the Act "provides the court with the discretion to critically assess the weight to be given to an informant's information and provides discretion to the court to balance the interests of protecting informants with the need to ensure fairness to the respondent".

A close examination of Section 72 shows the Attorney-General's claim in this regard to be hollow and overblown.

Section 72 provides that a court may declare that information is criminal intelligence if the court is satisfied the information is criminal intelligence and in exercising its discretion in this regard the court may have regard to matters mentioned in Section 60.

Section 60 provides that the intent of the legislation is to allow evidence that contains criminal intelligence to be admitted in applications under the Act so as to prevent the discovery of the existence or identity of confidential sources of information.

Therefore Section 60 is hardly a safeguard as, in combination with Section 72, it effectively requires the court to make the Order sought by the police in a one-sided application on secret evidence where a hearing for a declaration that evidence is criminal intelligence is held in secret and in a closed court where even the role of the COPIM is limited.

Therefore it is misleading for the Attorney-General to assert that Section 72 of the Act provides the court with the **discretion to critically assess the weight** to be given to an informant's information (emphasis added).⁵³

Where an affidavit is presented to a court by a police officer under Section 64 not only is the Supreme Court Judge denied the opportunity to critically assess the informant because the informant cannot be called to give evidence but the information the court is called upon to assess the credibility of the informant is contained in an affidavit provided by the police officer who handles the informant.

CRIMINAL ORGANISATION PUBLIC INTEREST MONITOR

The Attorney-General asserts that "Another significant safeguard is the COPIM whose role is in the nature of amicus curiae".

However when one has regard to the specific provisions relating to the role of the COPIM, his role is not much of a safeguard let alone a significant safeguard.

It is pertinent to observe that the consultation engaged in prior to this amendment being introduced did not even extend to the COPIM. The Explanatory Notes (page 4) show that the Consultation consisted of the Queensland Police Service and the Department of Premier and Cabinet.

The assertion in relation to Consultation that "The Queensland Police Service and the Department of the Premier and Cabinet were consulted during the development of the Bill"⁵⁴ is an absurdity. This legislation was clearly conceived and developed in secret by and within the Queensland Police Service who then had some liaison with the Department of Premier and Cabinet. If this is Consultation then a new meaning should be found for this word.

Elsewhere in this submission the growing body of evidence from the UK critical of the role of special advocates such as COPIM is outlined in considerable detail.

⁵³ See Hansard 25 October 2011 p.3365

⁵⁴ See Explanatory Notes p.4

The COPIM suffers from all of these deficiencies but when regard is had to the actual provisions of the Act the COPIM suffers from even greater restrictions and deficiencies which are illustrated by the following:

- The existing Section 65(4) provides that the COPIM cannot inspect any part of the documents (tendered to the court) to the extent that they disclose an informant's name, location, residence or position held by the informant in an organisation. The amending legislation completely removes the existing Section 65(4) and replaces it with a Section that provides "However, the COPIM cannot inspect any part of the documents to the extent that they disclose **any** identifying information about an informant". (emphasis added)

Therefore if the COPIM is not even allowed to inspect any document to the extent that that document **may** (not will) disclose any information at all about an informant, that can hardly be said to be a safeguard let alone a significant safeguard. (emphasis added)

- Section 80 provides that a police officer who is not an informant may be called at the hearing of a substantive application but is not permitted to be questioned by the COPIM if the question could lead to the disclosure of **any** identifying information about an informant (Section 80). (emphasis added)

Quite apart from the extraordinary situation which this Section envisages where a police officer himself can be an informant for the purpose of a criminal intelligence application, the COPIM's role described by the Minister as "another significant safeguard" will in reality be severely constrained where even asking questions about the position held by an informant in an organisation which was previously permitted under Section 80 of the Act is now prohibited where the COPIM is so restricted in his questioning that he cannot ask any question that could lead to the disclosure of any identifying information about an informant (see Section 80(2)).

SECTION 64 - ADDITIONAL INFORMATION IF INFORMANT RELIED UPON

The existing Section 64 provides that the affidavit filed by the police officer who handles an informant must contain the informant's full criminal history including pending charges and any allegations of professional misconduct against the informant and any inducements or rewards offered or provided to the informant.

Inexplicably and without any explanation or justification by the Attorney-General the provision that the affidavit must contain the informant's full criminal history has now been jettisoned so that the Attorney-General in his introduction speech asserts that "The new Section 64 allows for an account of an informant's criminal history to be provided for, without providing a specific description of the offences or linking the convictions or charges to specific dates but linked to periods of time not exceeding seven years. This allows the court to have a reasonable idea of the proximity of the offending to the date of the application while preventing the history from identifying the

informant".⁵⁵

Therefore, the amendments conceived, developed and progressed in secret within the QPS prevent even the Supreme Court Judge who hears an application for criminal intelligence from being able to even examine the full criminal history of the informant. In the world view of the QPS, while police officers can be entrusted to know every skerrick and detail of an informant, a Supreme Court Judge hearing an application for criminal intelligence can't even be entrusted to be given the informant's criminal history. It will be airbrushed within the QPS and presented in a sanitised format to the Supreme Court Judge sitting in secret.

CONCLUSION

This legislation both in its principal form and in the amendments is utterly obnoxious and objectionable.

It provides for evidence of an informant (who apparently can include a police officer and who can come not only from within any part of Australia but also anywhere overseas) in an affidavit prepared by his police officer "handler" where not even the Presiding Judge can see the informant's full criminal history but the COPIM also cannot see any document or ask any question which just might lead to the identity of the informant being revealed even in a secret closed court hearing.

As observed in the submission made on the principal Act, the COPIM is wheeled in to respectable-ise an otherwise utterly distasteful and awful regime of secret evidence. The QPS, particularly in the amending legislation engaged in a law change process that was roundly criticised by Fitzgerald, namely the police preparing legislation whereby they talk only to themselves and not consult with external stakeholders. This has resulted in an even greater emasculation of the COPIM's role.

There should be no doubt that, contrary to the Attorney-General's assertion that the role of the Criminal Organisation Public Interest Monitor is "another significant safeguard", this assertion is completely wrong.

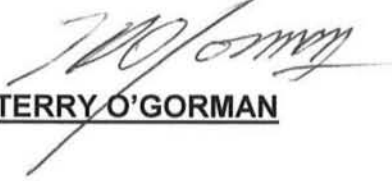
Further, it will hardly engender confidence when a member of a criminal organisation is subject to an application for a control order that the COPIM who "protected" his interests in a secret closed court hearing where gossip and scuttlebutt may be ruled to be criminal intelligence is a person who just prior to his appointment had been the Chair of the CMC for many years and had been responsible for prosecuting bikies as members of a so-called criminal organisation including authorising Star Chamber hearings in aid of such prosecutions.

⁵⁵ See Hansard 25 October 2011 p.3366

The secret evidence regime central to this legislation is so fundamentally bad and wrong that the end result is that this legislation is sleepwalking us into an era that even Kafka did not envisage.

Yours faithfully

ROBERTSON O'GORMAN

A handwritten signature in black ink, appearing to read 'Terry O'Gorman', written over a horizontal line.

TERRY O'GORMAN

LTR PCMC 111111 CRIM ORG SUBMISSION TOGRW



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22 October 2009

[REDACTED]
A/Assistant Director
Strategic Policy
Department of Justice and Attorney-General
GPO Box 149
BRISBANE QLD 4001 [REDACTED]

Dear [REDACTED]

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 respectabilise 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.

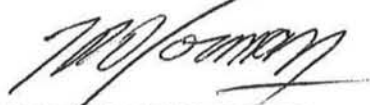
The Act has been introduced for base reasons of law and order populism as a reaction against the fight between two groups of bikies at Sydney Airport in March 2009 which was a fundamental failure of policing as opposed to inadequacies in the criminal law.

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