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

By Post and Email to: pcmc@parliament.qld.gov.au

Dear Research Director

CRIMINAL ORGANISATION AMENDMENT BILL 2011

This is a joint submission to the Parliamentary Crime and Misconduct Committee [PCMC] on the Criminal Organisation Amendment Bill 2011 prepared by the Queensland Bar Association (BAQ) and the Queensland Law Society (QLS).

SOME PRELIMINARY COMMENTS

It is not possible to deal with the proposed amendments contained within the Criminal Organisation Amendment Bill 2011 in any meaningful way without reference to the principal legislation, the **Criminal Organisation Act 2009 (Qld)** [the principal Act]. The proposed amendments do not in substance alter our profound objection to the legislative scheme provided for in the principal act which was the subject of two previous joint BAQ/QLS submissions contained in letters to the office of the Attorney-General forwarded under the hands of the Presidents of both organisations on 22 May 2009 and 22 September 2009.

As those previous two submissions set forth our principal reasons for rejecting this legislation, we have annexed copies of the same for the reference of the members of the PCMC.

Let us make clear at the outset that we have absolutely no sympathy for the violence and other serious offences committed by bikie gangs and their members. We abhor them, as should every right minded member of our community. Our interest is in maintaining the viability, balance and integrity of the criminal justice system.

In this regard, we consider that the principal Act:

- in large part abrogates of the Rule of Law and denies fundamental rights to citizens who come within the purview of the legislation;
- contains provisions which risk a return to the kind of police corruption which bedevilled Queensland before the revelations of the Fitzgerald Inquiry in 1989, in particular, by the re-introduction of an anti-consorting regime of the type so roundly condemned by Mr Fitzgerald;
- promotes lazy policing and the de-skilling of police investigators by enabling proof through the use of criminal intelligence rather than fact based admissible evidence – it is far easier to put forward intelligence material as proof, rather than garner hard admissible evidence;
- is not directed exclusively at “bikie gangs” as the political statements heralding its introduction proclaimed, but potentially applies to any minority group in the community which others are prepared to vilify and target by supplying information suggesting unlawful or anti-social behaviour. The legislation deals with what is defined as “serious criminal activity”, a concept which will inevitably become part of the general criminal law if resort is had to this legislation;
- greatly increases the prospect of the wrongful conviction of Queensland citizens for offences related to “serious criminal activity” by the use of criminal intelligence from anonymous sources. Criminal intelligence runs the full gamut from that classified as A1 to classification F6, that is, direct observation to sheer speculation. As illustrated below, this is a highly dangerous and profoundly unfair approach to law enforcement; and
- there is no demonstrated need for this legislation beyond an apparent political imperative for the Government to be seen to be tough on bikie gangs. There is no raft of reported serious unsolved “bikie crime” in Queensland.

THE NEW SOUTH WALES CATALYST

We note that one of the main catalysts for the New South Wales legislation was the brutal slaying of Anthony Zervas who, in March 2009 was bludgeoned to death in a brawl at Sydney airport between members of the Comanchero and Hells Angels motorcycle clubs. Following the incident, on 2 April 2009, then NSW Premier Rees introduced the ***Crimes (Criminal Organisations Control) Bill 2009***, which commenced on assent on 3 April 2009. The legislation was based substantially on the South Australian legislation.

However, police were able to investigate that matter using established investigative techniques, to make arrests, to place persons on trial, and to obtain the conviction of those involved using the processes of the general criminal law. There was no need to resort to the draconian provisions of the New South Wales bikie legislation and the concomitant distortion of the whole criminal justice process.

THE DANGERS TO ORDINARY CITIZENS

Our previous warnings have gone unheeded concerning the dangers of setting in train a process which risks instigating an inexorable erosion of the whole fabric of the criminal justice system: proof of offences by anonymous criminal intelligence, restricted disclosure to the putative defendant of the case against him or her, and limited testing of the Police case by an independent person [the Public Interest Monitor] who is not in a position to take instructions from the adversely affected person.

THESE LAWS DECLARED UNLAWFUL BY THE HIGH COURT

We find it profoundly disturbing that the Queensland Government would seek to strengthen a legislative regime which substantially mirrors the legislative processes recently struck down by the High Court as unlawful in respect to the South Australian legislation, the ***Serious and Organised Crime (Control) Act 2008***, in 2009, and the New South Wales legislation, the ***Crimes (Criminal Organisations Control) Act 2009***, in 2010 [see references below].

The High Court is the highest court in the Australian judicial system established by Section 71 of the Australian Constitution. The functions of the High Court are to interpret and apply the law of Australia. We would urge the members of the Parliamentary Committee, in considering the issues we have raised herein, pay due regard to the determinations of our highest court when it signals the grave implications for fundamental common law rights inherent in this type of legislation.

While the Queensland Government pushes ahead with this legislation, we understand from contact our members have had with the New South Wales authorities, serious consideration is currently being given in that State to the taking a different approach in the future in the light of the High Court's recent decisions. The enactment of Racketeer Influenced and Corrupt Organisations [RICO] legislation along similar lines to that enacted several decades ago in the United States, which laws have been used to great affect against organised crime groups in that country, is currently under consideration in New South Wales.

RICO legislation is tough but fair. It maintains the processes of trial and proof, but still empowers Police to deal effectively with organised crime groups. We submit that this is one avenue among others which should be considered before undertaking this wholesale attack upon the time honoured processes and integrity of the criminal justice system.

THE MAIN OBJECTIONS TO THE PRINCIPAL LEGISLATION

Before dealing with the amendment bill, which is not a stand-alone provision, we wish to draw to the attention of the Parliamentary Committee the main aspects of the principal Act to which we object. As these objections are set out in greater detail in the annexed submissions, it is sufficient to do so here by way of a dot point summary [some of which have been mentioned in our opening comments]:

- There is no demonstrated need for such legislation. There is no raft of reported serious unsolved crimes allegedly committed by bikie gangs and their members in Queensland.
- In large part, the legislation is an abrogation of the rule of law and a denial of the fundamental rights of citizens to a fair trial.
- The legislation promotes lazy policing and the de-skilling of police investigators by enabling proof through the use of criminal intelligence rather than fact based admissible evidence.
- The legislation is not directed exclusively at "bikie gangs", but potentially applies to any minority group in the community which others are prepared to vilify and target [possibly even politicians who run afoul of the main political power brokers] by giving legal status to intelligence information suggesting unlawful or anti-social behaviour which satisfies the definition of "serious criminal activity".
- The legislation contains provisions which risk a return to the kind of police corruption which bedevilled Queensland before the revelations of the Fitzgerald Inquiry in 1979, in particular, by the re-introduction of an anti-consorting regime of the type so roundly condemned by Mr Fitzgerald in his 1979 report. See, for example, Fitzgerald Report para 2.3.3 at page 65, where the spread of

Police corruption in the early 1980's is succinctly described as occurring, at least in part, in the setting of the "policing" of anti-consorting laws.

- The legislation appears to be completely at odds with Labor Party policy on civil liberties.
- Reference was made to the similar approaches taken by other jurisdictions such as New South Wales and South Australia. The **Crimes (Criminal Organisations Control) Act 2009** introduced in NSW was analysed in detail in our previous Joint Submission to the office of the Attorney-General forwarded dated 27 May 2009. We pointed out in that Submission, at some length, the repugnant features of that Act, which was apparently modelled on the South Australian legislation, which had been introduced in 2008. Almost every criticism we made of the New South Wales legislation applied to the then Queensland Bill.
- At that time, we pointed out that the then NSW DPP, Mr Nicholas Cowdery AM QC, had published a paper pointing out the significant flaws in the New South Wales legislation, as well as the repugnance of it to fundamental rights and the Rule of Law. Mr Cowdery referred to the "corrupting force" of the NSW legislation. We noted that all of Mr Cowdery's succinct and powerful criticisms could be applied directly to the then Queensland Bill.
- We noted that the South Australian **Serious and Organised Crime (Control) Act 2008**, had been roundly condemned as being a denial of International Conventions such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.
- We observed that in Victoria, the then Attorney General, the Hon. Rob Hulls had publicly stated that such laws would not be enacted in that State, and that the Chairman of the Federal Parliamentary Joint Committee examining organised crime legislation was reported to have said in May 2009 that "unexplained wealth laws" would be a far more effective crime fighting tool than the so-called "Anti-Bikie Legislation". He said that such laws were unlikely to be effective as they did not target individuals in the upper echelons of the organised crime world.
- We informed the office of the Attorney-General that in Canada laws that banned outlaw motorcycle gangs and clubs in the late 1990's led to a dramatic increase in bike gang violence, including attacks on State officials.
- Premier Bligh's media statement of 30 March 2009 contained the information that Task Force Hydra, begun by the Queensland Police Service in February 2007, which concerned itself with the pursuit of criminal activity among outlaw motorcycle gangs, had affected 332 arrests in relation to 931 charges, "...including attempted murder, arson, extortion, robbery and drug trafficking".
- The Premier's statement also contained the announcement of the reintroduction of the "Telephone Interception Bill" as a matter of urgency, and that was subsequently passed into law. It is clear from observations made by our members that provision of telephone interception powers to Queensland Police has resulted in additional matters coming before the Courts. There has been insufficient time to judge the effectiveness of this additional law enforcement facility on organised crime in this state, including "bikie crime".
- The two peak organised crime investigating bodies operating in Queensland, namely, the Australian Crime Commission and the Crime and Misconduct Commission have previously put on the public record their reservations about the effectiveness of this kind of legislation. The CMC in

particular has expressed concern that the re-introduction of consorting laws may encourage the return of police corruption.¹

- In short, there is no demonstrated need for this regressive and dangerous legislation. There is sufficient legislation in Queensland to deal with outlaw gangs who engage in unlawful acts. We have not seen one skerrick of research which demonstrates some shortcoming in the current mainstream Criminal Law regime in Queensland.

A BRIEF OVERVIEW OF THE MAJOR PROVISIONS OF THE PRINCIPAL ACT

The Declaration of “Criminal Organisations”

The Commissioner of Police may apply to a Court for a declaration that a particular organisation is a criminal organisation [section 8].

A Court may make a declaration of a criminal organisation if the Court is satisfied that 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 [section 10].

Inter alia, the Court must have regard to the following information placed before the Court:-

- Information suggesting a link exists between the organisation and serious criminal activity.
- Any convictions of current or former members.
- Information suggesting involvement in serious criminal activity, whether directly or indirectly and whether or not the involvement resulted in convictions.
- Information about members of an interstate or overseas chapter or branch of the organisation associating with the subject organisation for the purpose of engaging in etc. serious criminal activity.

A declaration may be made whether or not the organisation is present in Court, or makes submissions.

Serious Criminal Activity

A declaration of a criminal organisation is based upon the concept that members of the organisation associate for the purpose of engaging in, or conspiring to engage in, “serious criminal activity”.

“Serious criminal activity” means a serious criminal offence or an act done or omission made outside Queensland, including outside Australia, that, if done or made in Queensland, would have been or would be a serious criminal offence [section 6].

A “serious criminal offence” is largely encapsulated by an indictable offence punishable by at least 7 years imprisonment, including an offence against a repealed provision of an Act; an offence against the principal Act; and an offence against a section of the Criminal Code mentioned in schedule 1 [section 7].

¹ Michael McKenna, “Proposed laws could drive bikie gangs underground” (2 April 2009, The Australian)

Comment:

Broadly the same features are found in the invalidated NSW legislation, as are found in the Queensland Act. There is no “significant difference” to be found, in our view, in this operative part of the Act, from that of the New South Wales legislation which was struck down by the High Court. The Act is equally unfair and offensive to the Rule of Law and the right to Natural Justice.

Further, are we to understand that this draconian regime can be invoked for offences such as section 112 of the Criminal Code, providing false or misleading information for the purposes of an election, or section 193, making a false verified statement, both of which provisions would appear to satisfy the definition in the principal Act of “serious criminal offence”, being indictable offences punishable by 7 years imprisonment.

Control Orders

The Commissioner of Police may apply to the Court for a control order for a natural person [section 16].

An order may be made if the Court is satisfied that the person is, or has been, a member of a criminal organisation and engages in, or has engaged in serious criminal activity and associates with any person for the purpose of engaging in serious criminal activity [section 18].

A control order may be made whether or not the person is present in Court or makes submissions [section 18(4)].

Comment:

Again, the unacceptable features of the New South Wales legislation are repeated in the Queensland Bill.

Public Safety Orders

The Commissioner may apply for a public safety order for a duration of up to 72 hours for a person or a group of persons if the commissioned officer is satisfied that the presence of the respondent at the premises or at an event poses a serious risk to public safety [section 31].

Inter alia, the following matters must be taken into account by the Court in considering whether to make an order:-

- The respondent’s criminal history or “previous behaviour”.
- Whether the respondent is or has been a member of a criminal organisation or has been the subject of a control order.
- Whether the person associates or has associated with a criminal organisation or a person who is the subject of a control order.
- Whether “advocacy, protest, dissent or industrial action is the likely reason for the respondent being present at the relevant premises” [section 28].

A public safety order made by a Court may remain in force for up to 6 months [section 34].

A police officer acting in relation to a public safety order may enter a place without warrant and stop or detain and search a vehicle without a warrant [section 37].

Comment:

This part of the principal Act constitutes a direct challenge to the right of public assembly, redolent of the excesses of 1970's Queensland.

Criminal Intelligence

Criminal intelligence is information relating to actual or suspected criminal activity, whether in Queensland or elsewhere, the disclosure of which could reasonably be expected to prejudice a criminal investigation or identify a confidential source or endanger a person's life or physical safety [section 59].

The object of Part 6 of the Bill dealing with criminal intelligence is to allow such information to be admitted as "evidence" in applications made for the various Orders available under the Act, and prohibits its unlawful disclosure [section 60].

Affidavits relied upon for the operation of this Part of the Act may contain statements based on information and belief [section 61].

The Commissioner may apply to a Court for a declaration that particular information is criminal intelligence, thus making it admissible as "evidence" to support the various applications described briefly above [section 63].

There is said to be general oversight of this process by a criminal organisation public interest monitor ("COPIIM") who ordinarily will be a retired Judge [section 84]. The COPIIM cannot inspect any documents that could lead to the disclosure of an informant [section 88].

There is simply no oversight available, such as it is, over a crucial part of the process, on the mere "say-so" of a police officer that to show the "information" to the COPIIM "could" lead to the identification of the name, location, residence or position of an informant. It is misguided to believe that only the name of the informant would be obliterated in the relevant document; that is not how the legislation reads [section 88].

The application to a Court to have information declared as criminal intelligence must occur ex parte, with notice of the application only being given to the COPIIM [section 63].

Comment:

The attempt, by judicial fiat, to elevate "intelligence" to "evidence" fundamentally offends notions of justice and fairness. It is open to the worst abuse at the hands of unscrupulous informants and corrupt police.

There are numerous examples of misguided reliance upon, mismanagement of, or misuse of, "intelligence" to justify action. The "intelligence" that Iraq held weapons of mass destruction to justify the subsequent invasion has been debunked. The "Child Overboard" issue subsequently embarrassed the Howard Government.

The Haneef matter provides yet another chilling example of the dangers of reliance upon "intelligence" rather than evidence. Further, we doubt the ability of the COPIIM to be effective in any way, even with the best of goodwill. The COPIIM can be excluded from a consideration of any "intelligence" at any moment, on the mere say-so of a police officer that the "intelligence" will identify an informant.

The “COPIM”

The functions of a COPIM are to:

- Monitor each application to the Court for a criminal organisation order.
- To monitor each criminal intelligence application.
- To test and make submissions to the Court about the appropriateness and validity of a particular application [section 86].

The COPIM may "present questions for the applicant to answer" or examine or cross-examine witnesses or make submissions. Submissions by the COPIM must not take place in the presence of a respondent or a legal representative of a respondent [section 89].

Comment:

It is simply not explained how a retired Judge would suddenly possess up to date knowledge of modern law enforcement issues, after perhaps decades of presiding over criminal trials where he/she routinely applied the rules of evidence, and probably has had no experience whatever of issues relating to criminal intelligence.

Criminal Association – The Old “Consorting Laws” in new Livery

Section 24 of the principal Act establishes the offence of knowingly contravening a control order or a registered corresponding control order made for the person.

The maximum penalty for the first offence is 3 years imprisonment, and for each later offence 5 years imprisonment, with the first offence being a misdemeanour and each later offence is a crime.

It does not matter whether the association would have resulted in the commission of an offence, and it is for the defendant to prove on the balance of probabilities that “the controlled person had a personal relationship with the other person at the relevant time.” [section 24]

Comment:

This is simply a rewording of the iniquitous New South Wales legislation. It is anti-consorting legislation and is an open invitation to the corruption of police. The reversal of the onus of proof is contrary to accepted principle in criminal prosecutions.

Right of Appeal

Only one appeal lies to the Court of Appeal from the declaration of an organisation to be a criminal organisation. There is no provision for extending the time for filing of an appeal. A further appeal by the organisation "may not be heard even if fresh or new evidence is available or a ground not previously raised is sought to be raised". [section 125]

Comment:

This part of the principal Act not only overturns the citizen’s ordinary Appeal rights, but it is cynical in the extreme:

How does a citizen appeal a finding based on "intelligence" about which he knows nothing, even if he could identify an informant?

Restriction on Legal Practice

A person who has been a police officer must not act as a legal representative for a criminal organisation or a person subject to a control order. To knowingly act in that circumstance is capable of constituting unsatisfactory professional conduct [section 90].

Comment:

Such a restriction on the practise of a lawyer is arbitrary, unfair and strikes at the heart of the lawyer's ethical duties. There is no obvious reason for it. The provision smacks of police paranoia about lawyers, especially those who were once police officers themselves. It is a vicious provision, which will dissuade lawyers from representing persons who the police consider unworthy.

This provision flies in the face of the fundamental principle that every person in our society has the right to appropriate legal representation.

Challenge to the Exercise of Police Powers under the Act

The power of a police officer to do anything under the Act is presumed [section 136]. A party must give reasonable notice of an intention to challenge the police exercise of power.

Comment:

By this breathtakingly cynical provision, the police officer behaving unlawfully or improperly will be put on notice as to how to change his/her evidence to repel any challenge to his/her exercise of power under this legislation.

THE DETERMINATIONS OF THE HIGH COURT OF AUSTRALIA

State of South Australia v Totani & Anor [2010] HCA 39

The High Court held that s 14(1) of the ***Serious and Organised Crime (Control) Act 2008 (SA)*** ("the SA Act") and a control order made under it was constitutionally invalid.

In December 2008, the South Australian Commissioner of Police applied to the Attorney-General for South Australia for a declaration under s 10(1) of the SA Act in respect of the Finks Motorcycle Club Inc. Section 10(1) of the SA Act empowers the Attorney-General to make a declaration if he is satisfied that the members of an organisation associate for the purposes of organising, planning, facilitating, supporting or engaging in serious criminal activity and the organisation represents a risk to public safety and order in South Australia.

The term "serious criminal activity" is defined to mean the commission of indictable offences or certain summary offences prescribed by regulation. On 14 May 2009, the Attorney-General made the declaration sought by the Commissioner. Eleven days later, the Commissioner applied to the Magistrates Court of South Australia for a control order against Donald Hudson under s 14(1) of the Act. Mr Hudson was not notified of the application and was not required to be notified. The Attorney-General later applied

for a control order against Sandro Totani. Section 14(1) requires the Magistrates Court, on application by the Commissioner, to make a control order against a person if the Court is satisfied that the person is a member of a declared organisation.

A "member" is defined to include an associate or prospective member, a person who identifies as belonging to the organisation and a person who is treated by the organisation or persons who belong to the organisation, in some way, as if the person belongs to the organisation. By virtue of s 35 of the Act, any person who associates on six or more occasions during a period of 12 months with a member of a declared organisation or a person the subject of a control order made under s 14(1) is guilty of an offence punishable by imprisonment for up to five years. The Magistrates Court made a control order in respect of Mr Hudson, prohibiting him from associating with other persons who are members of declared organisations and from possessing a dangerous article or prohibited weapon.

Mr Hudson and Mr Totani then commenced proceedings in the Supreme Court of South Australia seeking a declaration that s 14(1) of the Act was invalid. The Supreme Court held that the sub-section was not valid and that the control order made in respect of Mr Hudson was void.

The State of South Australia appealed against this decision to the High Court. The High Court determined that s 14(1) was invalid. A majority of the Court considered that the provision authorised the executive to enlist the Magistrates Court in implementing decisions of the executive and that the manner in which that occurred was incompatible with the Magistrates Court's institutional integrity. In making a declaration under s 10(1) in respect of an organisation, the Attorney-General needed only to be satisfied that a member or members of the organisation committed a criminal offence. Those members did not necessarily include a person against whom the Commissioner of Police later sought a control order under s 14(1). As a result, s 14(1) would oblige the Magistrates Court to impose serious restraints on a person's liberty whether or not that person had committed or was ever likely to commit a criminal offence.

The Court dismissed South Australia's appeal and ordered it to pay the costs of Mr Totani and Mr Hudson.

We note that in holding the South Australian law invalid, the Chief Justice of the High Court [French CJ] said, *inter alia*:

“The control order involves a serious imposition upon the personal liberty of the individual who is the subject of the control order and subjects him or her to criminal penalties for breach of the order. It enlivens restrictions upon members of the public limiting their capacity to communicate with the person the subject of the control order. Breaches of those restrictions are criminal offences. A person exposed to such a restriction and to criminal liability for its breach may be an entirely law-abiding citizen unlikely, on any view, to engage in contravention of the law. The control order is an order of the kind which, in its effect upon personal liberty, is ordinarily within the domain of judicial power.” [para 76]

Wainohu v State of New South Wales [2011] HCA 24

The High Court held that the ***Crimes (Criminal Organisations Control) Act 2009 (NSW)*** ("the NSW Act") was invalid.

In July 2010, the Acting Commissioner of Police for New South Wales applied to a judge of the Supreme Court of New South Wales for a declaration under Part 2 of the Act in respect of the Hells Angels Motorcycle Club in New South Wales ("the Club"). Under the NSW Act, a judge who had been designated an "eligible Judge" by the Attorney-General could make a declaration in relation to an

organisation. The eligible Judge had to be satisfied that the members of the organisation associated for the purposes of organising, planning, facilitating, supporting or engaging in serious criminal activity and that the organisation represented a risk to public safety and order in New South Wales.

Section 13(2) of the NSW Act provided that an eligible Judge had no obligation to provide reasons for making or refusing to make a declaration. If a declaration was made in respect of an organisation, the Supreme Court was empowered, on the application of the Commissioner of Police, to make control orders against individual members of that organisation. A person the subject of a control order was referred to in the Act as a "controlled member". It was an offence for controlled members of an organisation to associate with one another. They were also barred from certain classes of business and certain occupations.

The plaintiff, Mr Wainohu, was a member of the Club. He applied to the High Court for a declaration that the Act was invalid on the basis that it conferred functions on the Supreme Court and its judges which undermined its institutional integrity in a way inconsistent with Ch III of the Australian Constitution. He also argued that the Act infringed the implied constitutional freedom of political communication and political association. The parties agreed a special case which was referred to the Full Court of the High Court in October 2010.

The High Court held, by majority, that the Act was invalid. The NSW Act provided that no reasons need be given for making a declaration. The jurisdiction of the Supreme Court to make control orders was enlivened by the decision of an eligible Judge to make a declaration. Six members of the High Court held that, in those circumstances, the absence of an obligation to give reasons for the declaration after what may have been a contested application was repugnant to, or incompatible with, the institutional integrity of the Supreme Court. Because the validity of other parts of the NSW Act relied on the validity of Part 2, the whole Act was declared invalid.

The State of New South Wales was ordered to pay Mr Wainohu's costs.

The Chief Justice and Justice Kiefel stated, inter alia:

*Decisions of this Court, commencing with Kable, establish the principle that a State legislature cannot confer upon a State court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Ch III of the Constitution, as a repository of federal jurisdiction and as a part of the integrated Australian court system[106]. The term "institutional integrity", applied to a court, refers to its possession of the defining or essential characteristics of a court. **Those characteristics include the reality and appearance of the court's independence and its impartiality[107]. Other defining characteristics are the application of procedural fairness[108] and adherence, as a general rule, to the open court principle[109]. As explained later, it is also a defining characteristic of a court that it generally gives reasons for its decisions.** In the case of the Supreme Courts of the States, that characteristic has a constitutional dimension by reason of the appellate jurisdiction conferred on this Court by s 73 of the Constitution. [para 44] [emphasis added]*

Further, the majority [Gummow, Hayne, Crennan and Bell JJ] cited with approval the observation in ***Hilton v Wells (1985) 157 CLR 57***, of Mason and Deane JJ that:

*"when a function is entrusted to a judge by reference to his judicial office the legislators and the community are entitled to expect that he will perform the function in that capacity. To the intelligent observer, unversed in what Dixon J accurately described – and emphatically rejected – as 'distinctions without differences' (Meyer[183]), **it would come as a surprise to learn that a judge, who is appointed to carry out a function by reference to his judicial office and who carries it out in his court with the assistance of its staff, services and facilities, is not***

acting as a judge at all, but as a private individual. Such an observer might well think, with some degree of justification, that it is all an elaborate charade. [pages 83-84] [emphasis added]

In the light of these determinations by the High Court invalidating both the South Australian and New South Wales legislation upon which the principal Act is largely based, there are grave doubts about the constitutional validity of the Queensland legislation.

We do not purport to provide an opinion on that question; it is beyond the scope of these submissions to do so. However, it may be an issue for the Parliamentary Committee to ponder and to seek advice upon, given that the proposed amendments necessarily proceed on the basis that the principal Act is a valid enactment of the Queensland Parliament.

CRIMINAL ORGANISATION AMENDMENT BILL 2011

We note that the principal Act has already been passed by the Legislative Assembly and that the Parliamentary Committee is now giving consideration to the **Criminal Organisation Amendment Bill 2011** [the Amendment Bill] under the provisions of section 4 of the **Legislative Standards Act 1992** dealing with the fundamental legislative principles provided for in that section.

Section 4 provides in part:

- (1) *For the purposes of this Act, fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.*
- (2) *The principles include requiring that legislation has sufficient regard to*
 - (a) *rights and liberties of individuals; and*
 - (b) *the institution of Parliament.*
- (3) *Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation”*
 - (a) *makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and*
 - (b) *is consistent with principles of natural justice; and*
 - (c) *allows the delegation of administrative power only in appropriate cases and to appropriate persons; and*
 - (d) *does not reverse the onus of proof in criminal proceedings without adequate justification; and*
 - (e) *confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and*
 - (f) *provides appropriate protection against self-incrimination; and*
 - (g) *does not adversely affect rights and liberties, or impose obligations, retrospectively; and*
 - (h) *does not confer immunity from proceeding or prosecution without adequate justification; and*
 - (i) *provides for the compulsory acquisition of property only with fair compensation; and*
 - (j) *has sufficient regard to Aboriginal tradition and Island custom; and*

(k) *is unambiguous and drafted in a sufficiently clear and precise way.*

(4)

In our submission, as detailed above in reviewing the main provisions of the principal Act, and as detailed below in considering the provisions of the amending bill, this legislation represents a wholesale derogation from the fundamental legislative principles set forth in section 4 above, a derogation with which we should not be faced in a parliamentary democracy based upon the rule of law.

Clause 3

Clause 3 amends s 59 (What is criminal intelligence) by inserting:

“Section 59(2) Criminal intelligence may be information that the commissioner has obtained through the police service or from an external agency.”

It is clear from this provision that not only is criminal intelligence to be sourced to the Police Service, but to external agencies outside the control of the Police Service. This makes the provenance of any criminal intelligence used to found an application for a declaration under section 8 even more dubious, and the provision of verifying applications more specious.

Clause 4

This concern is heightened by Clause 4 which makes it clear that the source of the intelligence may be serving prisoners, either in Queensland or elsewhere. Prisoners are notorious sources of information – they often have little to lose by lying or fabricating evidence, are very vulnerable to direct threats of violence or reprisals to give or refrain from giving information, or to give false or distorted information, and the notion that such material could be relied upon without forensic testing is naïve at best, cynical at worst, and productive of serious injustice.

Clauses 5, 6, 7, 9, 10, 12 and 18 and the absolute protection of so-called informants

By Clause 18 the definition in Schedule 2 of the principal Act is proposed to be amended to provide:

- ‘(a) *anyone who has given, to the police service or an external agency, information that the commissioner reasonably believes is criminal intelligence, and who is not a police officer or officer of the external agency;*’.
- (6) *Schedule 2, definition informant—*
insert—
 - ‘(d) *an officer of an external agency who has obtained information through the use of an assumed identity.*

By this amendment all persons who have provided information and who are not police officers or officers of another agency, and police who have used assumed identities, are thereby informants and consequently protected by being placed behind a virtual wall of secrecy provided for in the various amendments contained in clauses 5, 6, 7, 9, 10 and 12.

The proposed clauses:

- Obviate the need to provide any identifying information about the informant, even to the COPIM [see amendments to sections 65(4) and 77(4)].
 - Provide that if the informant's information is to be relied upon, there is a requirement under the proposed amended section 64 to provide an additional affidavit, the purpose of which is apparently to bolster the credibility of the information.
 - The additional affidavit must state that the officer reasonably believes, and has made all reasonable efforts to ensure, the officer has full knowledge of—
 - “(i) *the information held by the relevant agency about the informant; and*
 - “(ii) *the intelligence held by the relevant agency that was provided by the informant; and*
 - (c) *state that the officer reasonably believes the relevant agency has made all reasonable enquiries about the existence, and to obtain the details, of any allegations of professional misconduct against the informant; and*
 - (d) *contain the following information about the informant—*
 - (i) *the informant's full criminal history, including pending charges;*
 - (ii) *any information held by the relevant agency about allegations of professional misconduct against the informant;*
 - (iii) *any inducements or rewards offered or provided to the informant in return for assistance;*
 - (iv) *whether the informant was an adult or a child when the informant provided the relevant intelligence to the relevant agency;*
 - (v) *whether the informant was serving a term of imprisonment or otherwise being held in custody when the informant provided the relevant intelligence to the relevant agency; and*
 - (e) *state—*
 - (i) *that the officer holds an honest and reasonable belief that the relevant intelligence is reliable; and*
 - (ii) *the reasons for that belief.*
- ‘(5) *For subsection (4)(d)(i), it is sufficient description of a conviction or charge in the informant's criminal history to state that the conviction or charge related to property, violence or another stated matter, and if it involved dishonesty, without providing further particulars of the offence to which the conviction or charge relates.*
- ‘(6) *For subsection (4)(d)(ii), it is sufficient to state whether or not there have been any allegations of professional misconduct against the informant and if any misconduct or alleged misconduct involved dishonesty.*
- ‘(7) *For subsection (4)(d)(i) and (ii), the description in the affidavit of a conviction or charge in the informant's criminal history or an allegation of professional misconduct against the informant—*
- (a) *need not state the date of the conviction or charge or date on which the offence was committed or is alleged to have been committed or date on which the misconduct happened or is alleged to have happened;*
but
 - (b) *if it does not state a date as mentioned in paragraph (a), must state the time of the conviction, charge, offence, alleged offence, misconduct or alleged misconduct as being in a stated period of not more than 7 years. Other than*

information about the informant's criminal history or an allegation of professional misconduct against the informant given in the affidavit under subsections (4) to (7), information about the informant's criminal history or an allegation of professional misconduct against the informant cannot be required to be given to the court.

- At first blush it looks like an impressive list. However, a careful reading of the proposed provisions makes clear that that the protections they are supposed to enshrine are illusory.

If we are dealing with a prisoner or a criminal informant, the police or agency officer is unlikely to be in a position to test the witness, even if motivated to do so. His or her assessment is likely to add little to the information available to the COPIM and to the Court.

It is frankly mischievous naïve in the extreme to suggest that if clandestine inducements or rewards have been offered to the informant, this process is likely to lead to their disclosure, either because the officer does not know of their existence, or because such rewards or inducements have been improperly offered in the first place.

“Professional misconduct” is not defined in Schedule 2 to the principal Act and so the ambit of this obligation is simply indefinite.

The requirement to provide a full criminal history of the informant in these provisions is subsequently truncated to such an extent as to be of only marginal, if any, assistance in determining whether the informant has a motive to lie to the police or other authorities. A criminal history as vague as “one offence involving violence in a period 2007 to 2011”, as provided as an example in the amendment to section 64(7), is virtually useless in the context of trying to discerning a motive to lie, or to distort the truth.

One is left with the strong impression that this is more about appearances than substance.

Clause 8

This view is corroborated when the proposed amendment to section 72 in Clause 8 is considered:

- ‘(4) *If the information was provided to the relevant agency by an informant, the court may not declare that the information is criminal intelligence unless some or all of the information is supported in a material particular by other information before the court.*
- ‘(5) *The supporting information mentioned in subsection (4) may be other information before the court that is declared criminal intelligence or that is the subject of a criminal intelligence application.*’

The notion of corroboration in this context is again illusory - criminal intelligence supporting other criminal intelligence, or even a criminal intelligence application supporting other criminal intelligence.

As a result, anybody who gives information within the purview of this Act cannot be identified and effectively challenged concerning their motives and agendas for providing the information which may lead to the imprisonment of persons and other serious consequences to their lives and liberties.

Conclusion

As we pointed out in our previous submissions, criminal intelligence runs the full gamut from that classified as A1 to F6, that is, direct observation to sheer speculation - as illustrated below, a highly dangerous and profoundly unfair approach to law enforcement.

We pointed out in our previous submissions that the Chief Justice of the High Court was extremely critical of the use of criminal intelligence submitted to a Court by a Commissioner of Police, as infringing the open-justice principle "...that is an essential part of the functioning of Courts in Australia".

Under the new law [consorting law by any other name], Queensland police will have an enhanced capacity to franchise crime. Selected criminals can be given free reign upon corrupt payments being made by them, whilst their opponents and/or competition are made the subject of a declaration under this law. As the Fitzgerald Inquiry demonstrated, institutionalised police corruption flourished in the Licensing Branch within the Queensland Police Force between 1974 and 1987 under a similar statutory regime.

We think that the principal Act will, in time, almost guarantee the return of such corruption within the Queensland Police Service, and in a stronger and more virulent form, aided and abetted by this obvious legislation. Once again the integrity of a Police Service which has undergone many meaningful reforms since 1989, will be seriously at risk.

We submit that the low-threshold requirement upon police to obtain Declarations and Orders on the basis of intelligence, and not admissible evidence, will reward lazy policing and will promote the de-skilling of police investigators. Currently, the collection of criminal intelligence is but a forerunner to the preparation and presentation of a criminal Brief of Evidence which, in serious matters, must ultimately pass the scrutiny of the Director of Public Prosecutions. Under the principal Act and the proposed amendments, the collection of criminal intelligence will be performed as an end in itself – directly admissible at a hearing, with criminal implications.

Assertions and insinuations inevitably contained in criminal intelligence will bring back the darkest days of the Special Branch in Queensland, where ordinary citizens had intelligence files kept by anonymous figures within the Queensland Police Force.

A further effect of these proposed laws will be to force any criminal activities of any particular group such as Bikies, underground; Club insignia will no longer be worn, Club membership will not be recorded, gathering places for clandestine meetings will move from place to place, assets of any group will be held by proxies and "fringe dwellers" who in the past were frequently the sources of good criminal intelligence in relation to those who are committing offences. These sources will be put out of contact with those who are offending. The ability of police to obtain good intelligence from people who are on the fringes of Bikie groups will gradually decline, as organisations go underground.

On 31 October 2007, then Attorney General and Minister for Justice, the Hon. Kerry Shine MP, described similar legislative proposals as:

"ill conceived, unnecessary, and aims to extend the basic principles of criminal liability to guilt by association. The fundamental right of freedom of association is potentially eroded by this bill because even innocent participation in an organised criminal group as defined may, in some way, contribute to the occurrence of criminal activity by the group. No specific act or omission by the accused is necessary and no specific criminal act or activity need be contemplated by the accused for the offence to be committed.

...

A one-size fits all response is therefore not the answer to this complex problem. In any event, such an approach is unlikely to be effective in targeting organised criminal groups which may operate under the cover of legitimate business enterprises and with a high degree of sophistication".

The very same criticisms are made of the principal Act and the proposed amendments.

The fundamental criticism is that the essential thrust of the legislation and amendments is indistinguishable from that of the iniquitous New South Wales and South Australian statutes which have been struck down by the High Court.

This legislation is so bad that in our view it is not hyperbole to express the view that it is redolent of the processes of a Police State.

It abrogates the principles of natural justice, makes remote hearsay and rumour and innuendo the mode of proof, confers power to enter premises and search and seize property without a warrant, reverses the onus of proof, and introduces a regime whereby the rights and liberties of certain citizens will be grossly and routinely adversely affected.

It is legislation which reflects very poorly on a Parliamentary democracy ostensibly subject to the rule of law.

Yours faithfully

Bruce Doyle
President
Queensland Law Society

Richard Douglas SC
President
Bar Association of Queensland