

Criminal Organisation Amendment Bill 2011

Explanatory Notes

Objectives of the Bill

The primary objective of the Criminal Organisation Amendment Bill 2011 (the Bill) is to amend the *Criminal Organisation Act 2009* (the Act) to clarify that the Police Commissioner (Commissioner) may seek to have the Supreme Court declare that informant information provided by an agency other than the Queensland Police Service is criminal intelligence for the purpose of the Act.

Reasons for the Bill

The object of the Act is to disrupt and restrict the activities of organisations, and members and associates of organisations that are involved in serious criminal activity.

Organised crime does not respect state or international borders. The reality of policing organised crime is that often information is gathered from informants across a range of law enforcement agencies and this information is shared between the agencies. It is vital that the Commissioner be able to use intelligence gathered by other agencies in support of applications under the Act so as to ensure that the Act achieves its objective.

Intelligence supplied by informants will often fall within the definition of 'criminal intelligence' as provided in section 59 of the Act; that is, information that 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. Part 6 of the Act allows the Commissioner to bring an application to have certain information declared to be 'criminal intelligence'. Such an application will be heard in the absence of any respondent, or representative of a respondent. Section 64 of the Act provides that an affidavit must be filed providing information on the background of the informant and the reasons

why there is a reasonable belief that the information supplied by the informant is reliable.

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 affidavits under section 64 to be sworn by an officer of an agency other than Queensland Police Service.

The Act is further amended, consequential to the above, to ensure the protection of the identity of informants of any agency whose information is used to support an application under the Act.

The Bill also provides for consequential amendments to the *Crime and Misconduct Act 2001* and the Criminal Code. 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 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.

Achievement of the Objectives

The Bill achieves the objectives by way of amendment to the Act described below.

Alternative Ways of Achieving Objectives

There are no alternative ways to achieving the objectives. .

Estimated Cost for Government Implementation

Costs arising from the Bill will be absorbed within existing funding.

Consistency with Fundamental Legislative Principles

Information declared to be ‘criminal intelligence’ is withheld from the respondent. Further, the informant can not be required to give evidence or be

cross-examined. Therefore, the use of such evidence raises significant natural justice issues.

However, as outlined in the Explanatory Notes to the Act, 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. Also, the Act provides significant safeguards to address the necessary abrogation of natural justice being: the Supreme Court determines whether certain information should be treated as 'criminal intelligence' and is afforded full discretion in making such a determination; in the event the court declares information to be 'criminal intelligence' and the evidence is admitted, it is a matter for the court as to the weight placed upon such evidence; the Criminal Organisation Public Interest Monitor (COPIM) will be present at all hearings under the Act. The COPIM's role is in the nature of *amicus curiae* and will assist the court in making a decision as an independent and impartial tribunal.

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 Queensland Police Service. Further, the existing safeguard of requiring the informant affidavit to contain the informant's full criminal history is somewhat diluted given amendments that allow a criminal history to be provided identifying offences only by way of 'type' and that allow an agency, who does not have lawful access to an informant's full criminal history, to nonetheless provide an affidavit and for the Commissioner to seek to rely on such affidavit.

However, it will be open to the agency to provide the court with a full criminal history if they believe they can do so whilst protecting their informant. Where a full criminal history is not provided by an agency, it will open to the court to consider this matter when assessing what weight is given to information provided by the informant. Further, situations where incomplete criminal history information will be tendered will be rare as law enforcement agencies, such as the police force of another state or the Commonwealth, the Crime and Misconduct Commission and the Australian Crime Commission all have lawful access to a person's full criminal history. The safeguard of requiring the informant's full criminal history is also diluted by the amendment to section 64 to provide that the criminal history can be described in a manner that is less likely to identify an informant, that is, the date of a particular conviction, date of charge or the date that an offence is said to have been committed need not be specified.

However, the above amendments are balanced against the rights and liberties of a respondent to an application by the following:

- a new requirement in section 64 that the informant's criminal history be referenced to a period of time being not more than seven years;
- a new requirement in section 64 that the affidavit state whether an informant was in custody when the intelligence was provided by the informant;
- an example inserted into section 72 that the court may consider that an affidavit may not contain an informant's full criminal history when considering what weight to give such evidence; and
- a new provision in section 72 that provides that the court may not declare information provided by an informant to be criminal intelligence if it is not supported in a material particular by other independent information.

Consultation

The Queensland Police Service and the Department of the Premier and Cabinet were consulted during the development of the Bill. Significant stakeholder consultation occurred during the development of the *Criminal Organisation Act 2009*.

Notes on Provisions

Part 1 Preliminary

Clause 1 establishes the short title to the Act as the *Criminal Organisation Amendment Act 2011*

Part 2 **Amendment of Criminal Organisation Act 2009**

Clause 2 provides that Part 2 amends the *Criminal Organisation Act 2009*.

Clause 3 amends section 59 (What is *criminal intelligence*) with the insertion of a new subsection (2) to clarify that the Commissioner may obtain criminal intelligence from the Queensland Police Service or from an external agency.

Clause 4 inserts a new section 59A (Other definitions for pt 6) which defines the terms: ‘criminal intelligence application’, ‘external agency’, ‘identifying information’, ‘officer’ and ‘relevant agency’ with respect to their use in Part 6.

Clause 5 omits existing sections 63 and 64 and inserts new sections 63 (Applying for declaration) and 64 (Additional affidavit if informant relied on).

Subsections (1) and (2) of new section 63 enable the Commissioner to apply to the Supreme Court for a declaration that particular information is criminal intelligence if the Commissioner reasonably believes that the information is criminal intelligence. This reflects existing section 63(1) and (2) of the Act.

Subsection (3) sets out the information that must be included in the Commissioner’s application and reflects existing section 63(3).

Subsection (4) requires that any affidavit to be relied upon at the hearing must be filed with the Commissioner’s application. This reflects existing section 63(4).

Subsection (5) provides that in circumstances where information has been provided by an informant, the application and affidavits and other material filed need not include any identifying information about the informant. The provision ensures the protection of the identity of an informant. The term ‘identifying information’ is defined in the new clause 59A.

Subsection (6) requires the Commissioner to give copies of the application and all supporting material to the COPIM, subject to section 88(2). This reflects existing section 63(5).

Subsection (7) provides a definition for the term ‘intelligence assessment system’ for the purpose of this section, clarifying existing section 63(3)(c).

New section 64 applies if intelligence was provided to the Queensland Police Service or an external agency by an informant and sets out the information required to be included in the affidavit of the officer from the relevant agency. The Commission is required to file this affidavit prior to the application being heard. Subsection (2) prohibits the informant being called or otherwise being required to give evidence. This reflects existing section 64(2). New subsection (3) acknowledges the amendment to section 59 which allows the Commissioner to seek to rely on intelligence obtained from an external agency.

New subsection (4)(a) to (c) requires the officer to have made all reasonable efforts to ensure they have full knowledge of: the information held by their agency about the informant; and the intelligence held by their agency that was provided by the informant. The officer is also required to make all reasonable enquiries to obtain details of any allegations of professional misconduct against the informant.

New subsection (4)(d) reflects existing section 64(a) but with the further requirements contained in new subsection (d)(iv) and (v). The new requirement in subsection (d)(iv) reflects that the date of birth of an informant is included in the definition of 'identifying information' and therefore need not be included in the Commissioner's application, affidavit and other material. The requirement in subsection (d)(v) is necessary given new section 64(5) which allows an informant's criminal history to be listed in seven year periods without listing specific dates.

New subsections (5), (6) and (7) sets out how the informant's criminal history and any allegations of professional misconduct made against an informant may be described in the affidavit in order to protect the identity of the informant.

New Subsection (8) limits the requirement under subsection (4)(d)(i) for the officer of an external agency to disclose the informant's full criminal history. The limitation acknowledges that some external agencies may not be able to lawfully obtain the full criminal history of an informant (for example, an agency may not have lawful access to an informant's pending charges or spent convictions). The limitation also acknowledges that a request for the full criminal history may lead to disclosure of the identity of the informant.

Clause 6 amends section 65 (Registrar to secure information) by replacing section 65(4) and is consequential to the new definition of 'identifying information'.

Clause 7 replaces section 71 (Oral evidence by police officers) with new section 71 (Oral evidence by police officers and officers of external agencies). New section 71 reflects the existing section but accommodates new section 64 which allows for informant affidavits to be provided by officers of external agencies. The section also adopts the new definition of ‘identifying information’.

Clause 8 amends section 72 (Deciding application). New subsection (3) clarifies that the court is not limited by subsection (2) as to the matters it may consider in exercising its discretion to declare information to be criminal intelligence and the example particularly highlights that the court may take into consideration that an informant’s full criminal history may not be before the court.

New subsection (4) provides that informant information may not be declared to be ‘criminal intelligence’ unless some or all of the information is supported in a material particular by other information. The information can be supported by other information before the court which is, or proposed to be, criminal intelligence.

Clause 9 replaces section 76 (Additional affidavit if informant relied on) with new section 76 (Additional matters if informant relied upon). New section 76 reflects existing section 76 but accommodates new section 64 which allows for informant affidavits to be provided by officers of external agencies.

New subsection (4) provides that the substantive application and affidavits and other material need not include any identify information about the informant.

Clause 10 amends section 77 (Registrar to secure intelligence) by replacing subsection (4) with a new subsection (4). The amendment is consequential to the new definition of ‘identifying information’.

Clause 11 amends section 78 (Special closed hearing for consideration of intelligence) to enable an officer of an external agency, from which the Commissioner obtained any of the declared criminal intelligence, to be present during any closed hearing for the substantive application during which the declared criminal intelligence is to be considered.

Clause 12 replaces section 80 (Oral evidence by police officers) with new section 80 (Oral evidence by police officers and officers of external agencies) consequential to new section 64 which allows for informant

affidavits to be provided by officers of external agencies and consequential to the new definition of ‘identifying information’.

Clause 13 amends section 82 (Unlawful disclosure of criminal intelligence or information in informant affidavit) and is consequential to amendments to section 76 in relation to the affidavit requirements.

Clause 14 amends section 88 (Material to be given to COPIM) by replacing subsection (2) consequential to the new definition of ‘identifying information’.

Clause 15 amends section 122 (Criminal organisations register) consequential to the re-naming of the Juvenile Justice Act to the Youth Justice Act.

Clause 16 inserts new section 136A (Definition *informant* not to include ASIO officers) to exclude an officer of the Australian Security Intelligence Organisation (ASIO) from the amended definition of ‘informant’ in the dictionary. The exclusion acknowledges that ASIO officers use an assumed identity as a matter of course in carrying out their duties and functions.

Clause 17 is a machinery provision relating to the making of the *Criminal Organisation Regulation 2011*.

Clause 18 amends the dictionary in schedule 2 to provide meanings for new terms and amend existing definitions consequential to the substantive amendments.

Part 3 Amendment of Crime and Misconduct Act 2001

Clause 19 provides that Part 3 amends the *Crime and Misconduct Act 2001*

Clause 20 amends section 213 to provide that officers of the Crime and Misconduct Commission can disclose information and provide evidence in court in proceedings pursuant to the *Criminal Organisation Act 2009*.

Part 4 Amendment of the Criminal Code

Clause 21 provides that Part 4 amends the Criminal Code.

Clause 22 amends section 86 (Obtaining of or disclosure of secret information about the identity of informant) to reflect the amendments to the Criminal Organisation Act to allow for informant affidavits to be provided by officers of external agencies.

Part 5 Other matters

Clause 23 is a machinery provision to enable the creation of the *Criminal Organisation Regulation 2011*.

Clause 24 is a machinery provision to enable the creation of the *Criminal Organisation Regulation 2011*.

Schedule – Criminal Organisation Regulation 2011

Clause 1 provides that the Schedule is the *Criminal Organisation Regulation 2011*.

Clause 2 lists the additional entities which are declared to be external agencies for the purposes of the Criminal Organisation Act.