

CRIMES LEGISLATION AMENDMENT (POWERS AND OFFENCES) BILL 2011

Thank you for inviting the Institute to attend today to make a submission on the Bill.

1. Parliamentary Joint Committee Report

In November 2005 the Parliamentary Joint Committee on the Australian Crime Commission issued a report on its review of the operation of the Australian Crime Commission Act 2002.

The Committee considered the exchange of information between the Commission and the private sector and stated:

3.107 “There can be no objection to the ACC and the private sector engaging in task forces and research, provided that the information given is not linked to an identifiable entity. However when the matter becomes one of sharing intelligence or information as the IAG suggests in its earlier submission cited above, this raises a much more difficult and controversial problem centring around the protection of personal information – a fact acknowledged by Mr Jordana.”

The present Bill now seeks to empower the Commission to disclose information to the private sector and it is the task of this Committee to consider whether the Bill deals with that matter appropriately.

2. Cooperation between private sector and the Commission

The Institute supports cooperation between the private sector and the Commission in combating serious and organised crime.

The question before this Committee is how this should be done.

As the Parliamentary Joint Committee on the Australian Crime Commission Act 2002 stated in its 2005 Report this is a difficult and controversial problem.

As regard information disclosed by the Commission which discloses the identity of a person the Committee stated:

“There can be no objection to the ACC and the private sector engaging in task forces and research provided the information given is not linked to an identifiable entity.”

The Committee flagged the objection to disclosing the identity of a person, but the present Bill contains no prohibition on the Commission disclosing to the private sector information about an identifiable individual.

It is a matter for this Committee to consider whether this is appropriate. The Institute considers it is not.

3. The Bill gives the Commission power to disclose to the private sector secret information about an identifiable person.

The Bill provides in the proposed s59AB that the chief executive of the Commission may in his discretion provide to the private sector personal information collected by the Commission in secret (including information obtained compulsory).

Personal information is defined in the Privacy Act 1988 (C'th) to mean information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

The conditions in the Bill where such personal information may be provided by the chief executive of the Commission to the private sector are:

- (1) The chief executive must consider that it is appropriate to disclose to the private sector the information;
- (2) The chief executive must consider that disclosing to the private sector the information is necessary for the purposes of:
 - (i) preventing criminal offences or activities that might constitute criminal offences (including under a law of a foreign country); or
 - (ii) detecting criminal offences or activities that might constitute criminal offences (including under a law of a foreign country); or
 - (iii) facilitating the collection of criminal information and intelligence in relation to criminal offences or activities that might constitute criminal offences (including under a law of a foreign country);
- (3) The private sector body must have undertaken in writing not to use or further disclose the information except as referred to in s59AB(3) or as required by a law of the Commonwealth, a State or a Territory.
- (4) The private sector body must have undertaken in writing to comply with any conditions the chief executive specifies under s59AB(4) or (5).
- (5) The disclosing of the information must not be contrary to a law of the Commonwealth, a State or Territory that would otherwise apply.

Whether the disclosure is “appropriate” or “necessary” is left to the chief executive in his discretion to determine. For practical purposes this is a non-appealable discretion.

It is a criminal offence for the recipient of the information to breach (3) or (4) above.

It is clear from the Bill that the Commission may disclose to the private sector secret information about an identified individual.

4. **The persons who may be at risk**

The information which may be disclosed would include secret information compulsorily obtained by the Commission under threat of going to jail for refusing to answer. For example it would include information from a named person of his suspicions that a named fellow employee may be insider trading or from an ex-wife that her ex-husband may be guilty of defrauding the Commonwealth of tax.

It is considered that there are three categories of persons who may be at risk from the disclosure:

- The identified person who provided the information to the Commission;
- The identified person about whom the information relates;
- The persons in the private sector to whom the Commission provides the information.

5. **The identified person who provided the information to the Commission**

The first category of persons who may be at risk by the disclosure is the person who (compulsory or voluntary) provided the secret information to the Commission, i.e. the name of an accountant who disclosed the bank accounts of a drug syndicate.

It is not over dramatic to state that as a result he and his family may be at risk of being physically harmed. Their lives may be placed in the hands of the persons in the private sector to whom the Commission has disclosed the information.

Computers of the person to whom the information is disclosed are highly unlikely to be as robust as the Australian Crime Commission’s from hackers (whether internally or externally). The chance of someone accessing the information, particularly from inside the company in the private sector to whom the information is disclosed, is much greater than from the Commission.

Further most people in the private sector are not police men. They are not trained like Commission officers to keep secret such information. The chances of an accidental disclosure of the information must be substantially greater than whilst the information is only known to members of the Commission.

It is here useful to note that in a compulsory examination of a person under the existing Australian Crime Commission Act the Commission's examiner may make an order of confidentiality about a number of matters, including the non-disclosure of any information that might enable a person who has given evidence to be identified, s25A(9). This confers on the Commission's examiner a discretion whether or not to make a confidentiality order.

However s25A(9) also provides that the examiner must make a confidentiality order and has no discretion "if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been, or may be, charged with an offence".

It is clearly appropriate that Parliament thought fit to include such a statutory directive into the existing Australian Crime Commission Act in respect of examinations.

Where the information is deliberately disclosed by the Commission to the private sector to act on it is even more necessary that the Act contains a statutory directive. This directive should be clear and certain; namely that the Commission must not disclose information to the private sector which identifies the individual who provided the information to the Commission.

6. The identified person about whom the secret information relates

The intent of the Bill is not to disclose the secret information simply for the private sector to note.

The intent of the Bill is for the private sector to act on the secret information.

As was noted in an article in the Australian newspaper (9 January 2012) the intent of the Bill is for the private sector to "deal" with a "rogue employee" to whom the information may relate.

The underlying theme of the Bill is that the information provided by the Commission is correct, complete and proves beyond reasonable doubt the guilt of the so called "rogue employee". But what if the information is not correct or not complete or

does not prove beyond reasonable doubt the guilt of the person. Where are the safeguards, where is the presumption of innocence.

The simple fact that the Commission considers an identified person is guilty carries tremendous weight and makes it very difficult for an employee to persuade the employer not to fire or suspend him. In the real world the employer is likely to act on the view of the Commission.

The fatal defect in authorising the Commission to make this disclosure of information gathered in secret to the private sector is the incompatibility between the presumption of innocence of the employee and the assumption in the Bill that the view of the Commission as to the guilt of a person is conclusive and that the information disclosed is complete, accurate, admissible in court and has been independently verified.

At present the Act contains the minimum rule of law safeguards. Namely the Commission is an investigator and it is a matter for the law enforcement agencies to decide whether to act on the information collected by it. The Commission does not have power to prosecute; that is the role of the independent Commonwealth Director of Public Prosecutions. The Commission does not have the power to find a person has committed a criminal offence and send him to jail; that is the role of the independent courts whose proceedings are open to the Australian public.

Whilst under the Bill those safeguards will remain as far as a prosecution is concerned there are no safeguards on the private sector acting to the serious detriment of the person to whom it relates.

This reaffirms the necessity for a statutory directive that the information disclosed by the Commission to the private sector must not identify the alleged offender.

If the Commission is satisfied with the information it should follow the normal course of disclosing it to the relevant authorities who will decide whether to prosecute. If this happens then upon the employee being publicly charged, the employer can decide what to do about him.

7. The person or persons in the private sector to whom the Commission discloses the secret information

The person in the private sector to whom the Commission discloses information about an identified person may be put in a very difficult position. He may not know whether the information is accurate or complete, and may have no means to

independently verify it. He has responsibilities to the employee, but also has responsibilities to his company and its shareholders. If the company fires the employee how does it defend a wrongful dismissal case? If the company does nothing and the information turns about to be correct he has placed the company at risk.

It is of course not acceptable for the Bill to be amended to provide that the private sector is protected in acting on the information. The appropriate course is for the Commission to be prevented from disclosing information which identifies a named person.

8. Recommendation

The Institute recommends that s59AB of the Bill is amended to prevent disclosing of information in respect of a person whose identity is apparent or can be reasonably ascertained.

It is considered that this is necessary not only to protect the person identified but is in the interests of the Commission.

The Commission can only do its work with the cooperation and trust of the community. If the community believes the Commission cannot be trusted to keep secret information disclosed to it in secret, it is at serious risk of not being able to properly carry out its functions.

Robin Speed
Rule of Law Institute of Australia



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