



8 April 2011

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The Committee Secretary  
Legislative Review Committee  
Parliament House  
North Terrace  
ADELAIDE SA 5000

and via email: [seclrc@parliament.sa.gov.au](mailto:seclrc@parliament.sa.gov.au)

Dear Sir/Madam

### **Inquiry into Criminal Intelligence**

I refer to a letter of 15 March 2011 from the Honourable Russell Wortley, Presiding Member of the Legislative Review Committee in relation to the Committee's Inquiry into Criminal Intelligence. The Society appreciates the opportunity to make a submission to the Inquiry.

The matter has been considered by the Society's Criminal Law Committee. Accordingly, we provide the following comments.

The issues the subject of the Inquiry are complex, substantial, range over a number of pieces of legislation, policies, practices, principles and case law and are such as to render it difficult to make anything more than a brief statement.

1. Criminal intelligence is a necessary function of policing, and the investigation, detection and prevention of criminal activity.
2. There has been a significant development in the need for criminal intelligence by virtue of the growing sophistication of police methods; growing sophistication of criminal activity and suspected criminal activity; more complex methods of detection and investigation by electronic and other means; and greater organised criminal activity.
3. The means by which it is used, gathered, disseminated and, protected and the subject of immunity and confidentiality is the core concern of the legislature, the executive, the judiciary and the community. Those means need to have the highest level of integrity and efficacy.
4. The use of criminal intelligence needs to be balanced against competing considerations such as an open society, fair trial, the rule of law, accountability, integrity and community expectations. The obtaining and use of criminal intelligence often involves intrusive, coercive and draconian measures which by their nature offend basic rights and freedoms.

5. Criminal intelligence continues to be used in a wider range of activities by police and other authorities. How it is disseminated; and how it is used for the purposes of criminal proceedings, is increasingly being questioned.
6. However, more often than not the increased use of criminal intelligence is at the expense of any efficacious, coherent or adequate safeguards or protections.
7. The effect is that criminal proceedings, court proceedings, and other processes become the subject of secret hearings or processes.
8. Those secret processes mean that the persons the very subject of such proceedings or determinations cannot have access to the process by which criminal intelligence is used in the proceedings.
9. The means by which criminal intelligence is used is fundamentally inconsistent with the concepts of the rule of law, a fair trial and open justice, transparency, accountability and integrity.
10. Present practices in South Australian courts are essentially involve the decision maker (whether a judicial officer or an administrative decision maker) scrutinising the intelligence material in a closed court, and to the exclusion of the party, (and their legal representative) the subject of the process or proceedings.
11. This has its obvious compromise to the usual concepts and principles of open justice and the right of a person to know (and therefore refute if possible) the evidence held against them.
12. It is therefore difficult or impossible to know the nature, purport, effect, relevance or utility of such material and it cannot be tested in the traditional ways that are part of our system of justice or accountability.
13. These issues have been the subject of much litigation in overseas jurisdictions. As a result sophisticated and efficacious protocols have been developed for the proper use of criminal intelligence, particularly in the context of court proceedings and other processes concerned with the rights and privileges of persons or the infringement on those rights and privileges, and seeking to protect such rights and privileges or to develop methods to do so.
14. The mechanisms that have been developed in other places include prohibition of the use of such processes because the basic values of a fair trial are compromised.
15. An effective alternative model might be that when a party wishes to put forward evidence gathered via criminal intelligence in a secret hearing from which the accused and their lawyer are to be excluded, that an independent legal representative or scrutineer be appointed to attend the hearing to protect the interests of the accused and the lawyer. This independently appointed lawyer would check the integrity, admissibility and reliability of the criminal intelligence presented as evidence. They would be charged with the maintenance of confidentiality.

16. Further consideration of alternative mechanisms, protocols and models should be considered in the context of the Committee's Inquiry with a view to the development of policies, recommendations and legislation.
17. The existing legislative models for scrutiny and accountability are inadequate. There no independent mechanism for review of decisions to use the material.
18. Consideration should therefore be given to the provision of reports from administrative, judicial or other decision makers that use criminal intelligence to a central authority concerned with integrity and accountability to discern whether appropriate standards, criteria and principles have been invoked, applied and adhered to. Such a central authority would ensure that the matters concerning the use of criminal intelligence are dealt with as much as possible in accordance with the rule of law.
19. Similar mechanisms for accountability and transparencies should be put in place to enable an independent review where police and other authorities use criminal intelligence so as to review the content etc and ensure there is a mechanism for accountability.
20. Such mechanisms should be designed for the principal purpose of ensuring consistency, confidentiality, preventing abuse or misuse and increasing public confidence in the mechanisms by which criminal intelligence are utilised so that the inevitable compromises in the balance between policing on the one hand using criminal intelligence and the infringement on community values and civil liberties on the other hand is therefore subjected to proper mechanisms and protocols for accountability.
21. By reference to the particular matters identified in the Legislative Review Committee resolution:-
  - I. The extent to which South Australian legislation includes the concept of criminal intelligence, declared organisations and control orders can be readily assessed. However, the extent to which criminal intelligence is actually used and the mechanisms by which it is deployed is not readily apparent. It is authorised by various pieces of legislation. The methods by which criminal intelligence is collated, disseminated and used depends on the agency, co-operation and links between agencies (whether Federal, State or transnational) and the various pieces of legislation concerned therewith.
  - II. Concerns about the constitutional validity of such provisions have been the subject of analysis to a limited extent in the *State of South Australia v Tatani*. A High Court decision is pending from New South Wales concerning the use of such material in the context of its confiscation legislation and it is anticipated that decision will be delivered later this year.
  - III. Such provisions are essentially inconsistent with established legal principles as indicated above primarily because the mechanisms for the use of such material in the context of the decision making process (whether judicial or administrative) are ambiguous, undefined and lack transparency.
  - IV. Such provisions impact on the civil liberties of South Australians because they compromise the right to a fair hearing, the right to know and the fundamentals of the rule

of law concerned with independence and impartiality of the judiciary or the decision maker.

- V. The effectiveness of such provisions is only as good as the drafting of the legislation and its adherence to principles of fairness and reasonableness and protocols for all mechanisms for accountability – as commented upon above.

That provisions are effective, does not however mean that it is desirable that they should be retained. The end does not always justify the means. The inappropriate imposition of martial law, for example, may be effective but socially and politically undesirable.

- VI. The desirability or otherwise of expanding or contracting the use of such provisions in the legislation is a matter of policy according to developing methodologies for the use of criminal intelligence but requires codification as to independent scrutiny and supervision so as to protect the community against abuse, and supervisory mechanisms for the maintenance of confidentiality.

Declared organisations, control orders and criminal intelligence provisions have not been shown to be necessary. To the extent that they are retained, they should be much more limited in their scope and effect so as to be consistent with the rule of law. Legislation with criminal intelligence provisions should contain all appropriate safeguards to ensure that no person is condemned without an opportunity to be heard and to challenge and test the criminal intelligence;

- VII. Whether any amendments to any legislation are necessary or desirable will depend on the policy and values for such legislation. We suggest that other legislation may need to be considered including the *Ombudsman's Act*; the *Auditor-General's Act*; the *Director of Public Prosecutions Act*; the *Police Act*; the *Freedom of Information Act* and other legislation that regulates statutory or public authorities that are concerned with the use of criminal intelligence.

I trust these comments are of assistance.

Please do not hesitate to contact me, should you have any questions.

Yours sincerely



Ralph Bönig  
**PRESIDENT**