

# Crime and Misconduct and Summary Offences Amendment Bill 2009

## Explanatory Notes

### Objectives of the Bill

The primary objective of the Bill is to make amendments to the following two Acts -

- The *Crime and Misconduct Commission Act 2001* to validate past, present and future use of general ‘umbrella’ referrals for major crime investigations and subject general referrals to periodic review to ensure they remain appropriate over time; and
- The *Summary Offences Act 2005* to insert a specific offence applying to rock throwing and other specified conduct which endangers or is likely to endanger the safe use of vehicles.

### Reasons for the Bill

#### Amendments to the *Crime and Misconduct Commission Act 2001* (CMC Act)

##### Performance of the Crime and Misconduct Commission’s major crime function

The Crime and Misconduct Commission (CMC) investigates major crime (organised crime, paedophilia, terrorism and criminal activity involving an offence punishable not less than 14 years imprisonment) referred to it under Chapter 2, Part 2, Division 2 of the CMC Act by an independent body known as the Crime Reference Committee (CRC).

Through this mechanism, the CMC is authorised to exercise its investigative powers, including those not ordinarily available to the police service (e.g. powers of compulsion which abrogate the privilege against self-incrimination), to investigate major crime. The CRC’s oversight role is reflected in its power to issue directions to the CMC about a crime investigation (including placing limitations on the exercise of the CMC’s powers or directing the CMC to end a particular crime investigation) and to

obtain information from the CMC Assistant Commissioner, Crime about the CMC's operations in relation to major crime.

This mechanism effectively replicated the crime referral arrangement between the former QCC and the former QCCMC under the repealed *Crime Commission Act 1997* (the repealed Act). References made by the QCCMC to the QCC under the repealed Act were continued as referrals of major crime to the CMC by the CRC under the current Act (CMC Act, section 355).

Both the former QCC and the CMC have operated under two types of crime referrals:

- (a) specific 'stand alone' referrals that specify the particular activity being investigated and/or persons suspected of being involved in that criminal activity; and
- (b) general 'umbrella' referrals that broadly describe the major crime activity to be investigated without having to specify individuals, groups or events. In this regard, the CMC has had an administrative procedure by which an internal CMC committee assesses whether a particular investigation falls within the scope of an existing umbrella referral or whether it should be referred to the CRC for a specific referral to the CMC.

Nearly 80% of crime investigations undertaken by the former QCC and the CMC have been conducted under umbrella referrals which relate to major crime activities that are not conducive to the easy identification of participants or specific incidents. These include referrals in respect of established criminal networks ('Freshnet'), money laundering ('Gatekeeper'), outlaw motorcycle gangs ('Hydra'), terrorism, internet-based criminal paedophilia ('Atrax') and networked and/or recidivist child sex offenders ('Artemis').

#### The impact of *Scott v Witness C* (2009) QSC 35

On 4 March 2009, Jones J delivered his judgment in *Scott v Witness C* (2009) QSC 35 holding that an umbrella reference known as 'Freshnet' was not a valid referral for a specific major crime investigation and consequently, the CMC's investigative powers had not been validly invoked in that instance.

Witness C had been identified as a person likely to disclose information under compulsion about a large scale organised crime syndicate involving the trafficking of drugs between Victoria and Far North Queensland. The

CMC commenced an investigation ('Operation Destiny') and authorised hearings under an umbrella reference known as 'Freshnet', made in 1998 by the former QCCMC at the request of the former Crime Commissioner.

The Freshnet reference permitted the QCC to investigate criminal activity that may involve trafficking, supply and dealing in dangerous drugs, money laundering, violence, extortion, theft, fraud, forgery or interference with the administration of justice by established criminal networks. The CMC applied to the Supreme Court to have Witness C punished for contempt for refusing to answer questions at the CMC hearing. The respondent submitted that there could be no contempt because the hearing was not authorised by a valid referral under the CMC

Jones J held that the Freshnet reference was not a valid referral under section 46 of the repealed Act because it did not identify any particular circumstances by which the QCCMC could have considered the threshold matters specified in section 46 (since replicated in section 28 of the CMC Act). His Honour held that the CMC could not rely upon the Freshnet reference for its Operation Destiny investigation.

In the absence of a referral from the CRC or power for the CMC to launch crime investigations on its own initiative, his Honour held that the CMC's investigative powers were not validly exercised in this instance. He found there was no contempt because the hearing was not part of an investigation the CMC was authorised to undertake.

The Scott decision is considered to have the effect of limiting the CMC's major crime function to investigating specific matters referred to it by the CRC.

#### Giving effect to the intended operation of the crime referral mechanism

The Scott decision highlights concerns that the drafting of the referral provisions under both the repealed Act and the CMC Act circumvents Parliament's original intention that the crime function of the former QCC/CMC should be subject to independent scrutiny by the former QCCMC/CRC, which could use both specific and general referral mechanisms.

Parliament's original intention is evinced in transcript of parliamentary debate on the Crime Commission Bill 1997 and the Crime and Misconduct Bill 2001. In these debates, it was noted that the CRC would still have power to make broad 'standing' references to make classes of major crime

(as opposed to particularised incidents) a constant issue for ongoing monitoring and investigation by the CMC.

In *Scott v Witness C*, the court was concerned that use of the Freshnet reference circumvented Parliament's intention that the exercise of the CMC's investigative powers should be subject to independent scrutiny by the CRC. Although the drafting of section 46 of the repealed Act and section 28 of the CMC Act is somewhat unclear in this regard, it is evident from the second reading debates of both Bills that the performance of the Commission's crime function was subject to the CRC/former QCCMC being satisfied that the exercise of exceptional investigative powers was in the public interest.

Further, the Explanatory Notes for both the Crime Commission Bill 1997 and the Crime and Misconduct Commission Bill 2001 emphasise the establishment and enhancement of strict accountability mechanisms to control the use of the Commission's exceptional powers (including the role of the relevant reference committee) and neither indicate an intention that a referral request from the former Crime Commissioner/Assistant Commissioner, Crime was not to be subject to public interest considerations by the relevant reference committee.

Consequently amendments are required to remedy the impact of the Scott decision and to give effect to the intended operation of the crime referral mechanism.

### **Amendments to the *Summary Offences Act 2005***

Recent media coverage has highlighted the community's concern about the potential danger of rocks and other objects being thrown at travelling vehicles or onto roads.

Queensland has a suite of criminal offences which could apply to 'rock throwing' conduct, depending on the circumstances of the case. These offences include: endangering the safe use of a vehicle or related transport infrastructure (section 467); endangering the safety of a person in a vehicle with intent (section 319); wilful damage (section 469); acts intended to cause grievous bodily harm or other malicious acts (section 317); grievous bodily harm (section 320); or, if death results, murder or manslaughter. The maximum penalties for these offences range from 5 years imprisonment to mandatory life imprisonment.

For example, if property damage, such as a shattered windscreen, results from the ‘rock throwing’ conduct, police could charge wilful damage, which is punishable by a maximum penalty of 5 years imprisonment.

However the offences described above only apply where personal injury or property damage occurs or where there is proof of malicious intent.

Given growing community concern about this conduct, the government considers it necessary to develop a specific offence directed at ‘rock throwing’ and other dangerous conduct, such as directing a laser pointer at a vehicle, which will complement the existing suite of offences described above. The proposed offence is not reliant on proof of intent and can apply where there is no personal injury or property damage or where the conduct does not result in any actual endangerment.

### **Achievement of the Objectives**

The Bill remedies the impact of the Scott decision and gives effect to the intended operation of the crime referral mechanism by amending the CMC Act to:

- (a) generalise the reference to ‘*particular cases of major crime*’ in section 5(2);
- (b) reframe the crime referral provisions to deal expressly with specific referrals (which identify the particular incident being investigated and/or persons suspected of being involved in that incident) and general referrals (which broadly describe the general nature of major crime activity to be investigated without needing to identify individuals or groups or particular incidents);
- (c) clarify that a referral may relate to any circumstances implying or any allegations that criminal activity referenced in the current definition of ‘major crime’ may have been, may be being, or may in the future be committed;
- (d) clarify that the public interest considerations under section 28 apply to all referrals, whether requested by the Police Commissioner or the Assistant Commissioner, Crime or initiated by the CRC;
- (e) require the Assistant Commissioner, Crime, to notify the CRC as soon as practicable when a particular investigation is commenced under an existing general referral; and

- (f) require the CRC, in respect of a notification given by the Assistant Commissioner, Crime, that an investigation has commenced under an existing general referral, to consider as soon as practicable, whether directions are required in respect of that particular investigation (e.g. to limit the exercise of the CMC's powers in that instance) under section 29;
- (g) subject general referrals to periodic review by the CRC to ensure they remain appropriate over time ; and
- (h) retrospectively validate:
  - (i) 'umbrella' referrals made by the former QCCMC and the current CRC prior to commencement;
  - (ii) crime investigations conducted under these umbrella referrals; and
  - (iii) the use of information and evidence obtained by a crime investigation conducted under these umbrella referrals by the former QCC or the CMC for the performance of any QCC or CMC function or the performance of a function of a law enforcement agency or prosecuting authority to which the QCC or CMC has provided the information or evidence.

The Bill also amends the *Summary Offences Act 2005* to insert an offence which applies to a person who unlawfully: throws an object at a vehicle that is in the course of travelling; places an object in or near to the path a vehicle is using or may use in the course of travelling; or directs a beam of light from a laser at or near a vehicle that is in the course of travelling, in a way that endangers or is likely to endanger the safe use of the vehicle. The maximum penalty for this offence is 2 years imprisonment.

### **Estimated Cost for Government Implementation**

The amendments do not impose any additional obligations on Government agencies that cannot be met from existing appropriations.

### **Consistency with Fundamental Legislative Principles**

The Bill raises fundamental legislative principle issues.

The amendments to the CMC Act validate the past use of umbrella referrals made by the CRC and the former QCCMC; investigations conducted by the CMC and the former QCC under these referrals and the use of any

information or evidence obtained by these investigations for the performance of a function of the former QCC, CMC or other law enforcement agency or prosecuting authority that has been given the information or evidence by the QCC or CMC.

The validation may be considered to retrospectively affect the rights and liberties of individuals (section 4(3)(g), *Legislative Standards Act 1992*) who have been the subject of investigations not properly authorised under existing umbrella referrals. The breach, though arguably tenuous, is justified given the validation gives effect to Parliament's original intention that the CRC and the former QCCMC have discretion to make umbrella referrals.

## **Consultation**

The Department of the Premier and Cabinet, the Queensland Police Service, the Crime and Misconduct Commission, the Director of Public Prosecutions and the Chair of the Parliamentary Crime and Misconduct Committee were consulted in relation to the CMC Act amendments.

In relation to the amendments to the *Summary Offences Act 2005*, consultation was undertaken with the Department of the Premier and Cabinet, the Queensland Police Service and the Department of Transport and Main Roads.

## **Notes on Provisions**

### **Part 1                      Preliminary**

Clause 1 establishes the short title of the Act as the *Crime and Misconduct and Summary Offences Amendment Bill 2009*.

## **Part 2**                      **Amendment of *Crime and Misconduct Act 2001***

Clause 2 provides that this Part amends the *Crime and Misconduct Act 2001* ('the CMC Act').

Clause 3 amends section 5(2) of the CMC Act to generalise this reference to the commission's function to investigate major crime. This complements the amendments contained in clause 6 below, which reframe Part 2, Division 2 of the CMC Act to deal expressly with the concepts of 'specific' referrals of a particular incident of major crime and 'general' referrals of categories or sub-categories of major crime.

Clause 4 makes a minor amendment to section 25 of the CMC Act to make reference to the referral arrangements under Part 2, Division 2 of the Act, rather than a narrow reference to just section 27. This complements the amendment contained in clause 12 below.

Clause 5 makes a minor amendment to section 26 of the CMC Act to make reference to the referral arrangements under Part 2, Division 2 of the Act. Similarly to the amendment contained in clause 4 above, this complements the amendment contained in clause 12 below.

Clause 6 replaces sections 27 and 28 of the CMC Act with new sections 26A, 27 and 28. These provisions reframe Part 2, Division 2 to give effect to Parliament's original intention that the reference committee be able to make both specific referrals of particular incidents of major crime and general referrals of categories or sub-categories of major crime and further, that the reference committee is to apply public interest considerations to all referrals made by it.

New section 26A contains definitions of 'general referral', 'referral' and 'specific referral'.

New section 27 makes it clear that the CRC may make a specific referral or a general referral to the Crime and Misconduct Commission (CMC) for investigation.

The referral of a particular incident of major crime is known as a 'specific referral'. It must identify the particular incident of major crime to be investigated and at least either the persons involved or suspected of being involved in the incident/s or the activity constituting or suspected of constituting the particular incident/s. For example, the CRC may refer the



disappearance and suspected murder of John Doe in Brisbane between 1 January – 31 December 2008 to the CMC for investigation.

A broader referral of major crime is known as a ‘general referral’ and must identify the major crime to be investigated. It is intended that a general referral could relate to one or more categories of major crime, as currently defined (e.g. terrorism) or a subcategory of major crime (e.g. internet-based a criminal paedophilia). To date, general referrals have tended to relate to a subcategory of major crime. There is no requirement for this type of referral to identify the persons whose conduct is in question, describe that conduct, state when the conduct occurred or state in a detailed way (i.e. not broadly) the alleged criminal activities. However, there is nothing to prevent a general referral from identifying the persons involved, or suspected of being involved, in the major crime and/or the activities constituting, or suspected of constituting, the category or subcategory of major crime. For example, the CRC may refer the investigation of criminal activity involving drug trafficking and violence engaged in by members of outlaw motor cycle gangs and their associates.

New section 27(6) clarifies that a specific or general referral may relate to any circumstances implying or any allegations that a particular major crime or category of major crime may have already been committed, may be currently being committed or may be committed in the future.

New section 27(7) provides that a specific referral may be initiated by the CRC or requested by the Assistant Commissioner, Crime or the Police Commissioner. A general referral may be initiated by the CRC or requested by the Assistant Commissioner, Crime. This reflects current practice in that the Police Commissioner has only ever requested specific referrals.

New section 27(8) maintains the current requirement that a referral must be in writing.

New section 28 sets out the matters about which the CRC must be satisfied before making a referral and in doing so, clarifies Parliament’s original intention that public interest considerations apply to all referrals, whether initiated by the CRC or requested by the Assistant Commissioner, Crime or by the Police Commissioner.

Subsection 28(1) restates the threshold considerations for a specific referral currently set out in section 28(2) of the CMC Act. These apply to any specific referral, whether initiated by the CRC or requested by the Assistant Commissioner, Crime or by the Police Commissioner and include the

public interest. New subsection 28(3) essentially restates section 28(3) of the CMC Act and provides guidance about matters the CRC may take into account when deciding whether it is in the public interest to refer a particular incident of major crime to the CMC.

Subsection 28(2) provides that the threshold consideration for a general referral is the public interest. New subsections 28(3) and (4) provide guidance about the matters the CRC may take into account when deciding whether it is in the public interest to refer major crime to the CMC for investigation. Read together, new subsections 28(2), (3) and (4) restructure the threshold consideration for general referrals in such a way as to restate the issue of whether or not a police investigation into the subject of the referral would be effective in new subsection 28(4), as a subset of the mandatory broad public interest consideration under new subsection 28(2), rather than as a separately identified threshold consideration (as it currently appears in section 28(1) of the CMC Act). New subsections 28(2)-(4) achieve the same outcome as the assessment of whether or not the investigation is a justifiable use of the CMC's resources will invariably entail consideration of the likely effectiveness of an investigation by the police service.

Clause 7 amends subsection 29(2) of the CMC Act to enable the CRC to direct the CMC to end a particular crime investigation if the CRC considers the investigation is not in the public interest. The CRC's consideration of the public interest in this context is not limited by new subsection 28(3) or (4) because section 29(2), as amended, now deals with the relevant matters for the CRC to have regard to when considering giving directions. This amendment achieves greater consistency with the 'front end' considerations the CRC must apply under new section 28 before making a referral in the first instance.

Clause 8 inserts a new section 29A which reinforces the CRC's current oversight role in respect of the CMC's crime function. It is triggered whenever the CRC receives notification from the Assistant Commissioner, Crime that the CMC has commenced an investigation under an existing general referral. This notification requirement is dealt with under section 277 of the CMC Act, which is amended by clause 13 below. As soon as practicable after receiving such a notification, the CRC must consider whether directions are required in respect of that particular crime investigation. For example, the CRC may consider it necessary to limit the exercise of the CMC's powers in that instance.

Clause 9 makes a minor amendment to section 30 of the CMC Act to omit redundant text.

Clause 10 inserts new section 30A in Chapter 2, Part 2, Division 2. This provision establishes a mechanism to achieve periodic review of general referrals by the CRC to ensure they remain appropriate over time. The review function is a logical adjunct to the CRC's crime referral function and is consistent with its role to provide independent oversight of the CMC's performance of its crime function. It is also an efficient use of resources for the CRC to reconsider the appropriateness of a referral against the threshold considerations required to be assessed when the referral was initially made or last confirmed.

Under this review process:

- the CRC must review each general referral within five years of it being made or last confirmed under this review provision – subsection 30A(1)
- the CRC must give fresh consideration to the threshold considerations set out in new subsections 28(2) – (4) – subsection 30A(2)
- the Assistant Commissioner, Crime may make submissions in respect of a referral initially requested by him or her – subsection 30A(3)
- if asked by the CRC for information to assist in making its review decision, the Assistant Commissioner, Crime is obliged to comply with the request and give the CRC the help it needs to consider that information – subsection 30A(4)
- the CRC may decide to confirm the referral (with or without amendment), replace the referral with a referral to the Police Commissioner under section 31 of the CMC Act or discontinue the referral – subsection 30A(5)
- if the CRC does not make a review decision before the five year period, the referral lapses.

New section 391 (discussed in clause 14 below) makes transitional arrangements for the review of general referrals in place at commencement.

Clause 11 amends section 31 of the CMC Act to clarify that a referral to the Police Commissioner under that section may relate to a particular incident of major crime or major crime more broadly.

Clause 12 makes a minor amendment to section 275 of the CMC Act to make reference to the referral arrangements under Part 2, Division 2 of the

Act. This is complemented by the amendments contained in clauses 4 and 5 above. It also inserts a statement of the CRC's function to review general referrals under new section 30A. This complements the amendments contained in clause 10 above.

Clause 13 amends section 277 of the CMC Act to better position the CRC to monitor the use of general referrals for ongoing and emergent crime investigations. It requires the Assistant Commissioner, Crime to notify the CRC as soon as practicable after the CMC commences an investigation under an existing general referral. This notification triggers a requirement under new section 29A (discussed in clause 8 above) for the CRC to consider whether a direction should be given under section 29 in respect of that particular investigation. Clause 13 also amends section 277 to facilitate the provision of information by the Assistant Commissioner, Crime to the CRC about a particular crime investigation conducted or being conducted under an existing general referral. These requirements are additional to those currently placed on the Assistant Commissioner, Crime by section 277.

Clause 14 inserts a new Part 7 in Chapter 8 of the CMC Act. This Part contains provisions validating past use of general referrals for crime investigations conducted under the repealed *Crime Commission Act 1997* and the current CMC Act.

New section 386 validates referrals or purported referrals to the former Queensland Crime Commission (QCC) by the former Queensland Crime Commission Management Committee (QCCMC) under the repealed *Crime Commission Act 1997* ('the repealed Act'). It provides that section 355(1) of the CMC Act is and always was effective to declare each of these referrals to be a validly made referral of major crime to the CMC by the CRC under the CMC Act. It also validates any referrals or purported referrals made to the CMC by the CRC under the CMC Act prior to commencement of these amendments.

New section 387 declares a referral mentioned in new section 386 to be either a specific referral or a general referral (depending on the extent to which the referral identifies major crime or a particular incident of major crime) by the CRC to the CMC under section 27, as amended by clause 6 above. This declaration takes effect on the commencement of these amendments.

New section 388 preserves any limitations imposed by the former QCCMC on, or amendments made by the CRC in respect of, a referral or purported referral mentioned in new sections 386 or 387.

New section 389 validates a crime investigation conducted or being conducted under a referral mentioned in new section 386 or 387. This validation is intended to apply in respect of (a) investigations commenced and completed by the former QCC under the repealed Act; (b) investigations commenced by the former QCC under the repealed Act, transitioned to and completed by the CMC under the current CMC Act; (c) investigations commenced by the former QCC under the repealed Act, transitioned to but not yet completed by the CMC under the current CMC Act; (d) investigations commenced and completed by the CMC under the current CMC Act and (e) investigations commenced but not yet completed by the CMC under the current CMC Act. The operation of this provision does not limit the effect of a validation under new sections 386 or 387.

New section 390 validates the use of information or evidence obtained by a crime investigation conducted or being conducted under a referral or purported referral mentioned in new section 386 or 387 for the performance of a function of the former QCC under the repealed Act or of the CMC under the CMC Act (e.g. crime, prevention, intelligence or misconduct) or the performance of a function of any law enforcement agency or prosecuting authority (including, by use of the words ‘directly or indirectly’, their employees or agents) to which the former QCC or CMC has provided the information or evidence.

New section 391 makes transitional arrangements for the review of general referrals in place at the time these amendments commence. The CRC must review each of these referrals under new section 30A(2)-(5) within two years from commencement. If the CRC does not make a review decision under new section 30A(5) about an existing referral within this period, the referral lapses. The purpose of subsection 391(5) is to set the date on which an existing referral is confirmed under this transitional arrangement as the date from which the future review period starts running under new section 30A.

Clause 15 amends the dictionary in Schedule by inserting the new definitions of ‘general referral’, ‘specific referral’ and ‘referral’.

## **Part 3**                      **Amendment of *Summary Offences Act 2005***

Clause 16 provides that Part 3 of the Bill amends the *Summary Offences Act 2005*.

Clause 17 inserts new section 26 into the Act entitled ‘Endangering the safe use of a vehicle by throwing an object or by a similar activity’.

Subclause (1) provides that a person must not unlawfully -

- (a) throw an object at a vehicle that is in the course of travelling; or
- (b) place an object in or near to the path a vehicle is using or may use in the course of travelling; or
- (c) direct a beam of light from a laser at or near a vehicle that is in the course of travelling;

in a way that endangers or is likely to endanger the safe use of the vehicle. The maximum penalty for this offence is two years imprisonment.

‘Unlawfully’ is defined in Schedule 2 of the *Summary Offences Act 2005* as meaning ‘without authorisation, justification or excuse by law’, thereby ensuring the availability of the defences and excuses under the Criminal Code.

Subclause (2) outlines what conduct is captured by the phrase ‘throwing an object at a vehicle’ in subsection (1)(a). The conduct captured includes throwing or dropping an object onto or near the vehicle or into or near to the path of the vehicle.

By structuring the offence in this way it confines the basic statement of the offence to three types of conduct, with the first limb capturing a broader range of conduct pursuant to the operation of this subclause. Police will be able to charge the offence in terms of the provision as set out in subsection (1).

Subclause (3) provides that the following does not matter:

- (a) the intention with which an object is thrown, dropped or placed or a beam of light from a laser is directed (in any case, the *initial act*);
- (b) whether contact is made with a vehicle;

- (c) without limiting paragraph (a), whether a particular vehicle is involved;
- (d) in relation to the requirement that a vehicle be in the course of travelling - whether the vehicle is moving or stationary;
- (e) whether a vehicle is in the sight of the offender or present when the initial act is done.

As outlined above, subclause (1) requires the conduct to occur in relation to a vehicle in the course of travelling. This is to ensure that the offence doesn't apply to conduct directed at vehicles parked in a car park or driveway. However subsection (3)(d) provides that it doesn't matter whether the vehicle is moving or stationary. This confirms that the provision is intended to apply to vehicles which are stationary at a set of lights or sitting in heavy traffic.

Subclause (3)(e) confirms that a degree of immediacy is not required between the conduct and the vehicle. For example, the provision is intended to apply where the offender throws an object from a distant vantage point even when there are no vehicles in the immediate vicinity or where a person places an object on the road at a time when there are no vehicles in sight.

Subclause (4) contains the definitions of terms used in this section such as 'beam of light', 'laser', 'place', 'path' and 'throw'. The broad definition of 'vehicle' used in Queensland's Criminal Code, which includes a motor vehicle, train, aircraft, or vessel, is adopted for the purposes of this section.