

The Senate

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Standing Committee on  
Legal and Constitutional Affairs

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Crimes Legislation Amendment (National  
Investigative Powers and Witness Protection)  
Bill 2006

February 2007

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ISBN 978-0-642-71761-0

This document was printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra

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# ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ACC	Australian Crime Commission
ACLEI	Australian Commission for Law Enforcement Integrity
ADJR Act	<i>Administrative Decisions (Judicial Review) Act 1977</i>
AFP	Australian Federal Police
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
ATO	Australian Taxation Office
the Bill	Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006
Crimes Act	<i>Crimes Act 1914</i>
Customs	Australian Customs Service
Department	Attorney-General's Department
EM	Explanatory Memorandum
HREOC	Human Rights and Equal Opportunity Commission
Law Council	Law Council of Australia
NWWP	National Witness Protection Program
SCAG	Standing Committee on Attorneys General
SMS	Short messaging service
UN	United Nations

WP Act

*Witness Protection Act 1994*



# CHAPTER 1

## INTRODUCTION

### Background

1.1 On 7 December 2006, the Senate referred the provisions of the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006 (the Bill) to the Standing Committee on Legal and Constitutional Affairs for examination and report by 7 February 2007.

1.2 The Bill amends the law relating to the investigation of criminal activity and the protection of witnesses, by amending six Acts. These are: the *Crimes Act 1914* (the Crimes Act); the *Australian Crime Commission Act 2002* (the ACC Act); the *Witness Protection Act 1994*; the *Customs Act 1901*; *Proceeds of Crime Act 2002*; and the *Mutual Assistance in Criminal Matters Act 1987*.

1.3 The most substantive of the amendments relate to the conduct of controlled operations, including use of assumed identities, the provision of delayed notification search warrants, and arrangements relating to the operation of the National Witness Protection Program.

1.4 Many of the amendments have as their genesis the recommendations of the Joint Working Group of the Standing Committee of Attorneys-General, and the Australasian Police Ministers' Council, and have as one of their aims the alignment of provisions between jurisdictions. In relation to controlled operations, the Minister for Justice and Customs had this to say in his Second Reading Speech:

Currently, the law in each of these areas differs significantly between jurisdictions and there is no provision for recognition in one jurisdiction of authorisations or warrants issued in another jurisdiction. Where an investigation crosses State or Territory borders, the need to obtain separate authorities in each jurisdiction can result in delays, loss of evidence and other impediments to effective investigation. There was a need to create a national set of investigative powers to facilitate seamless law enforcement across jurisdictions ... [e]ach State and Territory will enact these model laws. New South Wales, Victoria, Queensland and most recently Tasmania have implemented the model laws. The proposed amendments to the Crimes Act will bring the Commonwealth into line with the agreed national model.<sup>1</sup>

1.5 In relation to delayed notification search warrants, the Minister informed the Senate that:

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1 The Hon. Senator Chris Ellison, *Senate Hansard*, 29 November 2006, p.1.

[T]he bill will introduce a delayed notification search warrants scheme. This will enable police officers to get search warrants that will allow the covert entry and search of premises to prevent or investigate Commonwealth terrorism offences and a limited range of other serious Commonwealth offences, in cases where keeping the existence of an investigation confidential could be critical to its success. The scheme will add a covert investigative tool to the suite of tools police can use to investigate terrorism and other serious criminal offences. The warrants will allow the examination of physical evidence, such as a suspect's computer, diaries and correspondence, so that police can identify associates and obtain evidence. It will be a feature of the new scheme that police will have to give notice of the search without tipping off the suspected offenders that their activities are under investigation to the occupier of premises when operational sensitivities allow.<sup>2</sup>

1.6 Finally, in relation to changes to witness protection legislation, the Minister noted that:

The proposed amendments to the Witness Protection Act will respond to issues which have arisen in the operation of the National Witness Protection program and will increase the overall effectiveness of the Program. The amendments expand the Program so that the [Australian Federal Police] can provide protection and assistance to former participants in the Program and members of their families, and to witnesses in State or Territory matters where this is necessary to protect them.<sup>3</sup>

## **Conduct of the inquiry**

1.7 The committee advertised the inquiry in *The Australian* newspaper on 12 December 2006, and wrote to 79 individuals and groups likely to be interested in the committee's deliberations inviting submissions. Details of the inquiry, the Bill, and associated documents were placed on the committee's website.

1.8 The committee received 13 submissions, which are listed at Appendix 1. All submissions were published on the committee website.

1.9 The committee held a public hearing in Canberra on 22 January 2007. A list of witnesses appearing at that hearing is at Appendix 2 and copies of the transcript for that hearing are available at <http://aph.gov.au/hansard>.

## **Acknowledgement**

1.10 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

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2 The Hon. Senator Chris Ellison, *Senate Hansard*, 29 November 2006, p.1.

3 The Hon. Senator Chris Ellison, *Senate Hansard*, 29 November 2006, p.1.

**Note on references**

1.11 References in this report are to individual submissions as received and not to bound volumes. Please also be advised that page numbers between proof and final Hansard transcripts may vary.



# CHAPTER 2

## OVERVIEW OF THE BILL

2.1 This chapter provides a brief overview of the Bill.<sup>1</sup>

### **Schedule 1 – Controlled operations, assumed identities and protection of witness identity**

#### *Controlled operations*

2.2 The contents of this Schedule replace the current controlled operations provisions in Part IAB of the Crimes Act with national model legislation that was developed by a Joint Working Group of the Standing Committee of Attorneys-General and the Australasian Police Ministers Council to authorise the use of controlled operations by law enforcement agencies in cross-border investigations. A controlled operation is defined as covert or overt activity which would normally be unlawful, but for which immunity is provided for the purposes of securing evidence of serious criminal offences. The model legislation was published in November 2003 in the *Cross-Border Investigative Powers for Law Enforcement Report*.<sup>2</sup> The intent of this legislation is to harmonise, as closely as possible, the controlled operation regimes across Australia.

2.3 The Bill enables controlled operations in the case of a serious Commonwealth offence or a serious state offence with a federal aspect. The former is defined as an offence carrying a maximum penalty of three or more years imprisonment. A state offence with a similar maximum prison term, but pertaining to a subject on which the Commonwealth has constitutional power, or an offence which is incidental to a Commonwealth investigation of a Commonwealth offence, is defined as a serious state offence with a federal aspect. Regulations may also prescribe a serious Commonwealth offence, and such an offence need not prescribe a maximum imprisonment period of three or more years.<sup>3</sup>

2.4 The Bill covers the spectrum of controlled operations, and defines the method of authorisation required for each. Formal applications are written, and signed by the applicant. Urgent applications, made by telephone or any other form of communication, are intended to be used when communication and time restraints

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1 Most of this chapter is drawn from the Explanatory Memorandum to the Bill, and from the Second Reading Speech. As this chapter aims to summarise the provisions, further detail can usually be found in the EM.

2 Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigative Powers, *Cross-Border Investigative Powers For Law Enforcement Report*, November 2003, available at [www.ag.gov.au](http://www.ag.gov.au) under 'publications'.

3 Proposed section 15GE.

mean that the delay caused by making a formal application may affect the success of the operation. Urgent applications must be followed up in writing as soon as practicable, and they can be valid for no longer than seven days. Formal applications may run for up to three months, but may be extended by up to three months per extension.<sup>4</sup> At present, extensions can be granted only once, upon application to the Administrative Appeals Tribunal.

2.5 Applications, formal or urgent, must contain sufficient information for an authorising officer (usually a Senior Executive Service officer of the Australian Federal Police (AFP) or Australian Crime Commission (ACC)) to make a decision, and include details of previous authorities applied for in relation to the operation, whether granted or not. Applications must identify the nature of criminal activity suspected (including suspected offences), the nature of the controlled conduct which may be engaged in, the identity of those targeted, and any conditions to which the operation is subject. An urgent application contains similar information, but with less detail of, for example, the kind of criminal activity which is suspected.

2.6 The authorising officer must not grant an authority unless satisfied, on reasonable grounds, that:

- any unlawful conduct will be limited to the maximum extent necessary to conduct an effective, efficient operation;
- the operation will be conducted in a way that ensures that, to the maximum extent possible, any illicit goods will be under the control of Australian law enforcement officers at the end of the operation; and
- the operation will not be conducted in a way that is likely to induce a person to commit any offence they would not otherwise commit.<sup>5</sup>

2.7 Operations cannot be authorised if they would seriously endanger the health or safety of a person, would cause death or serious injury, would involve the commission of a sexual offence, or would result in significant loss or damage to property other than illicit goods.<sup>6</sup>

2.8 Civilians may be authorised to participate in an operation, but only where the authorising officer is satisfied that a law enforcement officer could not perform the role.

2.9 Apart from applications to extend validity, other variations may be applied for either formally or urgently. In the case of urgent applications, the authorising officer

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4 Proposed section 15GG.

5 Proposed section 15GH.

6 Proposed section 15GH.

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must be satisfied that the delay caused by a formal application may affect the success of the operation.<sup>7</sup>

2.10 The Bill provides that applications and authorities are not invalidated by defects, unless the defect materially affects the application or authority.<sup>8</sup>

2.11 The Bill provides criminal and civil immunity from prosecution for participants in controlled operations for acts which would be unlawful but for their taking place as part of a controlled operation. Participants may be law enforcement officers or civilians, including informants. The immunity operates where the participant acts within the terms of the authority and, in the case of a civilian, where instructions from law enforcement officers are followed.<sup>9</sup>

2.12 The Bill provides for compensation to a person who suffers personal injury, or loss or damage to property, as a direct result of an authorised controlled operation. Current provisions cover only personal injury. Compensation is not payable where the loss or damage has been caused by the exercise of powers of criminal investigation available under different laws than those relating to controlled operations. That is, only actions which are directly connected to the controlled operation, and not conduct which is incidental, will be compensable.<sup>10</sup>

2.13 Chief officers are responsible for reporting six-monthly to the Ombudsman and Minister, in addition to annual reports to the Minister. Reports must detail the number of authorities granted, refused and varied; the nature of those authorities; any losses or damage which resulted and the number of authorities expired or cancelled. Chief Officers must report on completed operations, indicating the nature of the operation, the nature and quantity of illicit goods detained, and all foreign countries through which those goods passed. The Ombudsman is also granted comprehensive powers of inquiry and access to any records held by an agency.<sup>11</sup>

### *Assumed identities*

2.14 An assumed identity is a false identity that is used by law enforcement or security and intelligence officers, or other persons, for a period of time for the purpose of investigating an offence, gathering intelligence or for other security activities. This part of the Bill implements national model legislation to facilitate the use of assumed identities by law enforcement agencies in cross-border investigations. For the purpose of these provisions, law enforcement agencies include the AFP, the ACC, Customs,

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7 Proposed sections 15GO-GU.

8 Proposed section 15GV.

9 Proposed sections 15GW, 15GX and 15H.

10 Proposed section 15HA.

11 Proposed sections 15HH to HT.

Australian Commission for Law Enforcement Integrity (ACLEI), the Australian Taxation Office (ATO), or any other agency specified in the regulations.<sup>12</sup>

2.15 The provisions extend beyond law enforcement officers to include security and intelligence officers and other authorised people (such as foreign law enforcement officers) and allows those officers to acquire and use assumed identities for law enforcement, security and intelligence purposes. Application can be made by an enforcement or intelligence officer on behalf of themselves, a colleague, a foreign officer, or a civilian. Application can be made to the chief officer of the law enforcement or intelligence officer's agency. Officers applying for identities to be used by foreign officers or in foreign countries must apply to the chief officer of the AFP or ACC.

2.16 The authorising officer must be satisfied on reasonable grounds that the assumed identity is necessary:

- for the purposes of an investigation or for gathering intelligence in relation to criminal activity;
- for the exercise of powers and performance of functions of an intelligence agency;
- for the exercise of powers and performance of functions under the National Witness Protection Program;
- for the training of people to carry out any of these functions or powers; or
- for any administrative function in support of any of these powers or functions.

2.17 The authorising officer must also be satisfied that the risk of abuse of the identity is minimal. Specific criminal activity need not be pointed out by the applicant for the purposes of obtaining authorisation. Where an assumed identity is requested for use in a foreign country, the authorising officer must also be satisfied that such an identity is reasonably necessary in the circumstances.<sup>13</sup>

2.18 If the authority for an assumed identity relates to a civilian supervised by a law enforcement officer, the authority can remain in force for a maximum of three months.<sup>14</sup> Otherwise, authorities for assumed identity run until they are cancelled, although authorising officers are required to review the necessity of each authority annually.<sup>15</sup>

2.19 The Bill makes provision for the return of evidence of the assumed identity in case of cancellation. People operating under an assumed identity, and third parties that

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12 Proposed section 15HW.

13 Proposed section 15HY.

14 Proposed section 15HZ(2).

15 Except for authorities granted to intelligence officers which must be reviewed every three years.



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assist them in creating and maintaining the identity, are indemnified against prosecution for acts which would otherwise be illegal.<sup>16</sup>

2.20 The Bill creates offences for misuse of an assumed identity, and for improper disclosure of information about an assumed identity. Each offence carries a maximum penalty of two years imprisonment.<sup>17</sup>

2.21 A relevant chief officer must arrange for the audit of assumed identity records at least six-monthly. Audits may be carried out by a person holding an assumed identity, or a person who has issued, varied or terminated an identity, but they may not audit their own file (should they hold a false identity) or one on which they have worked.<sup>18</sup>

2.22 A report must be provided to the Minister by a relevant chief officer. Reports must include a description of any unlawful activity uncovered by audits, and statistical information about the agency's operations as they relate to assumed identities. In the case of the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service, a similar report must be made to the Inspector-General of Intelligence and Security.<sup>19</sup>

### ***Witness Identity Protection***

2.23 This part of the Bill aims to protect the true identity of covert operatives who give evidence in court. The provisions include protection for law enforcement, security and intelligence officers and other authorised people (including foreign law enforcement officers and civilians authorised to participate in controlled operations) who are granted an assumed identity.

2.24 The chief officer of a law enforcement or intelligence agency is able to give a witness identity protection certificate which enables a witness to give evidence under a pseudonym without disclosing his or her true identity, in order to protect the personal safety of the witness or his or her family.<sup>20</sup> The chief officer may delegate the decision-making power to an Assistant Commissioner (or equivalent).<sup>21</sup> The decision-maker must be satisfied that disclosing the person's true identity would endanger them, or somebody else, or would prejudice current or future investigation or security

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16 Proposed sections 15JK-JL and 15JN - JR.

17 Proposed sections 15J-JY.

18 Proposed section 15KB.

19 Proposed section 15JZ and 15K.

20 'Law enforcement agency' is defined, as above, to include the AFP, ACC, ACLEI, ATO, Customs and any other Commonwealth agency specified by regulation, while 'intelligence agency' means ASIO and ASIS (proposed section 15KD).

21 Proposed section 15KI.

activity. The operative seeking protection must complete a statutory declaration, containing the following information, to inform the decision-maker:

- whether the operative has been found guilty of an offence, and if so, particulars thereof;
- whether charges are pending or outstanding, and if so, particulars thereof;
- where the operative is an intelligence or law enforcement officer, whether they have been found guilty, or been accused of, misconduct, and the particulars thereof;
- whether, to the applicant's knowledge, a court has made adverse findings about their credibility, and the particulars thereof;
- whether the operative has made a false representation where the truth was required, and particulars thereof; and
- anything else known to the operative relevant to their own credibility.<sup>22</sup>

2.25 The witness will appear in person to give evidence, be cross-examined and have their demeanour assessed by the court. However, their real name and address will be withheld from the court as well as the defence. Details relating to the credibility of the witness, drawn from the statutory declaration, will appear on a certificate of protection issued by the decision-maker, and made available to the defence. This will mean that the defence is restricted in their ability to question the credibility of the witness, as only those details revealed on the certificate will be available.<sup>23</sup>

2.26 The decision to protect the identity of a witness is final, and cannot be appealed against or otherwise challenged in any court.<sup>24</sup> However, the court at which the protected witness appears will have the power to give leave or make an order that may lead to the disclosure of the operative's true identity or address. An application for leave must be made in closed court. However, the court may only make such an order or give leave if it is satisfied that:

- (a) there is evidence that, if accepted, would substantially call into question the operative's credibility;
- (b) it would be impractical to properly test the credibility of the operative without allowing for possible disclosure of their identity or address; and
- (c) it is in the interests of justice for the operative's credibility to be tested.<sup>25</sup>

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22 Proposed section 15KJ.

23 Proposed section 15KN.

24 Except in disciplinary proceedings against the decision-maker.

25 Proposed section 15KQ and KR.

2.27 The provisions for granting leave do not require the court to 'balance' the competing public interests in a fair and open trial (which may require disclosure) against the protection of the identity of a witness. Rather, the competing interests are taken into account by being considered separately by the law enforcement agency (which would consider the need for protection) and the court (which would consider the necessity for disclosure of identity to ensure a fair trial). The application of these provisions will mean a departure from the common law approach, where courts 'balance' these competing interests.

2.28 The Bill creates offences that relate to the disclosure of information relating to a protected operative. Where a protection certificate is current, and a person engages in conduct that results in a real identity being revealed, a maximum penalty of two years imprisonment is available. Where a person is also reckless about whether their conduct will endanger the health and safety of a person, or will prejudice the effective conduct of an investigation, the maximum penalty is 10 years imprisonment.<sup>26</sup>

2.29 Law enforcement agencies are required to provide annual reports to the Minister, which must be tabled in Parliament, containing details of the issuing and use of witness protection certificates. Intelligence agencies report to the Inspector-General of Intelligence only.<sup>27</sup>

## **Schedule 2 – Delayed notification search warrants**

2.30 This schedule provides for the establishment of a new class of search warrants. Delayed notification warrants are similar in their powers to traditional search warrants, with the exception that they do not require the occupier to be served with notice of the search for up to six months after the warrant was executed. This means that police or other eligible officers may enter and re-enter premises, conduct searches, and examine, test, record, substitute or seize contents during that period, without the knowledge of the occupier.

2.31 The executing officer is also empowered to impersonate another person, and enlist the help of a member of the public to assist with gaining entry to premises through use of force. Officers executing a search warrant are able to search not only material on computers located on the search premises but also material accessible from those computers but located elsewhere. This will also enable the tracing of a suspect's internet activity and viewing of material accessed by the suspect.<sup>28</sup>

2.32 Where reasonable grounds are found to exist, the period for notification of the occupier may be extended by periods of up to six months on any one (written) application, up to a maximum of 18 months. An extension beyond 18 months from the date of entry may only be granted if the eligible issuing officer is satisfied that there

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26 Proposed section 15KW.

27 Proposed section 15KY and KZ.

28 Proposed section 3SL.

are exceptional circumstances, and with the written approval of the Minister. This recognises that some investigations may be undertaken over an extended period.

2.33 The Bill applies to warrants issued in relation to 'relevant offences' being:

- a Commonwealth offence that is punishable on conviction by imprisonment for a period of 10 years or more;
- a state offence that has a federal aspect that is punishable on conviction by imprisonment for a period of 10 years or more;
- an offence against section 8 or 9 of the Crimes (Foreign Incursions and Recruitment) Act 1978;
- an offence against section 20 or 21 of the Charter of the United Nations Act 1945; or
- an offence against subsection 147.2(1) or (3), section 270.7, or subsection 471.11(2) or 474.15(2) of the *Criminal Code*.<sup>29</sup>

2.34 The Bill would enable the chief officer of the AFP or of the police force of a state or territory to authorise an application for a delayed notification search warrant in respect of particular premises. The applicant must be from the same police force as the chief officer. An applicant cannot apply for a delayed notification search warrant without such authorisation. The requirement for authorisation to apply for a delayed notification search warrant is an additional safeguard which is not contained in the general search warrant provisions.

2.35 In considering whether to authorise an application, a chief officer must have regard to a three-part test which must be satisfied before the authority can be issued. The applicant must apply the same test prior to requesting authorisation. The applicant, and then the chief officer, must be satisfied that:

- there are reasonable grounds to suspect that one or more relevant offences have been, are being, are about to be or are likely to be committed;
- entry to and search of the premises will substantially assist in the prevention of, or investigation into, those relevant offences; and
- there are reasonable grounds to believe that it is necessary for the entry and search of the premises to be conducted without the knowledge of any occupier of the premises.<sup>30</sup>

2.36 The chief officer may delegate his or her powers or functions under proposed Division 2A to a member of the staff of the agency. In the case of the AFP, the delegation may be to a Deputy Commissioner, a senior executive AFP employee or a person of equivalent or higher rank. In the case of the police force of a State or Territory the delegate may be a person of an equivalent rank to, or a higher rank than,

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29 Proposed section 3SA.

30 Proposed section 3SD.

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a member of the AFP referred to above. State or territory officers investigating state or territory offences, whether or not they have a federal aspect, can only use the relevant search warrant powers available in their state or territory.<sup>31</sup>

2.37 The application must include the name of the applicant, as well as the name of the officer executing the warrant. It must also include details or a copy of the authorisation by the chief officer, an address or description of the premises, and the duration of the warrant sought. The application must include a description of the kinds of things that are proposed to be searched for, and state whether entry to adjoining premises, or re-entry to the original premises, is required. The application must be supported by an affidavit setting out the grounds on which the warrant is sought, and the reasons for which any proposed entry to an adjoining premises is considered necessary.<sup>32</sup> It must also state whether the applicant knows that a similar application has been made during the past three months, and if that application was refused, the applicant will be required to justify why the delayed notification search warrant should be issued.<sup>33</sup>

2.38 Application may be made by telephone, fax, e-mail or any other means of communication where the applicant believes that it is impracticable for the application to be made in person, or that delaying the application until it can be made in person would frustrate the effective execution of the warrant. Written confirmation is required by the applicant within one day.<sup>34</sup>

2.39 Where an eligible issuing officer for a delayed notification warrant decides against issuing such a warrant, they may issue instead a regular warrant (known as a Division 2 warrant).<sup>35</sup>

2.40 Before issuing a delayed notification search warrant in relation to a relevant offence, the eligible issuing officer must be satisfied that there are reasonable grounds for the applicant's suspicion and belief that form the basis of the application, having regard to the application of the three part test outlined above. The issuing officer must then examine the application against seven further matters in considering whether to grant the warrant. These matters are:

- the extent to which the exercise of the powers would assist the prevention of or investigation into the relevant offences;
- the existence of alternative means of obtaining the evidence or information;

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31 Proposed section 3SD.

32 An application for a delayed notification search warrant without an affidavit may be made if the applicant believes that it is impracticable for an affidavit to be prepared or sworn before the application is made or that any delay would frustrate the effective execution of the warrant.

33 Proposed section 3SE.

34 Proposed section 3SF.

35 Proposed section 3SG.

- the extent to which the privacy of any person is likely to be affected;
- the nature and gravity of the alleged offence(s) for which the warrant is sought;
- if it is proposed that adjoining premises be entered for the purpose of entering the target premises whether that entry is reasonably necessary;
- whether any conditions should be included in the warrant; and
- the outcome of any known previous applications for a search warrant (delayed notification or otherwise) in connection with the same premises.<sup>36</sup>

2.41 Eligible issuing officers who are Federal judges or Administrative Appeal Tribunal members may issue a delayed notification search warrant in relation to premises located anywhere in the Commonwealth or an external Territory, but the Bill restricts eligible issuing officers who are State or Territory Judges to issuing delayed notification search warrants only in relation to premises located in that state or Territory.<sup>37</sup>

2.42 When notice of the warrant is eventually given to the occupier, a copy of the warrant will be attached and will give the occupier information regarding what was authorised. The notice will contain details of how the warrant was executed. These requirements aim to ensure that the occupier of the premises is aware of why a delayed notification search warrant was issued in respect of the premises, and what was done under the warrant.

2.43 The executing officer of a delayed notification warrant must, as soon as practicable after execution, or the expiry of an unexecuted warrant, make a report to the chief officer setting out a number of matters including:

- the address, location or other description of the warrant premises;
- whether or not the delayed notification warrant was executed;
- the method used to apply for the warrant; and
- where applicable, why the warrant was not executed.

2.44 Where the warrant was executed, the report must also address the following:

- the date of execution;
- the name of the executing officer;
- the name of any officer assisting and the kind of assistance provided;
- the name of the occupier, if known;

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36 Proposed section 3SI.

37 Proposed section 3SI.

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- whether adjoining premises were entered, and the name of the occupiers, if known;
  - the things that were done under the warrant;
  - details of items seized, substituted, copied, recorded, operated, printed, tested, or sampled;
  - whether or not the warrant assisted in the prevention of, or investigation of, a relevant offence;
  - details of compliance with conditions and directions to which the warrant was subject;
  - details of occupier's notice, where already given; and
  - details of adjoining occupier's notice, where already given.<sup>38</sup>

2.45 The chief officer of an authorising agency must report to the Minister within three months of the end of each financial year. The report must set out the number of warrants applied for and issued to officers of the authorising agency during the year, and specify the number applied for in person or by electronic means. The report must also include details of the relevant offences to which the issued delayed notification search warrants relate. The report must not only specify the number of warrants that were executed, but must also specify the number of warrants that were executed under which things were seized, placed in substitution, returned to or retrieved from the premises, and copied, operated or printed. Additional information may be requested by the Minister, and the chief officer is obliged to provide it. The Minister is required to table the report in Parliament.<sup>39</sup>

2.46 The Bill establishes an inspection regime requiring the Commonwealth Ombudsman to inspect the records kept by authorising agencies at least once every 12 months. The role of the Ombudsman is to determine whether the records kept are accurate and whether an authorising agency is complying with its obligations under proposed Division 2A. The Ombudsman is empowered to enter premises occupied by the authorising agency at any reasonable time after notifying the chief officer of the agency. The Ombudsman is then entitled to full and free access at all reasonable times to all records of the delayed notification search warrants scheme that are relevant to the inspection. Agency staff are required to co-operate with requests for assistance and to retrieve information reasonably required by the Ombudsman.<sup>40</sup>

2.47 The Ombudsman may also require written and oral information from any officer of an agency where the Ombudsman has reason to think the officer can assist with inquiries. Failure to comply with requests from the Ombudsman for information are not excused on the grounds that doing so would contravene a law, would be

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38 Proposed section 3ST.

39 Proposed section 3SU.

40 Proposed sections 3SV-SZ.

contrary to the public interest or might tend to incriminate the person or make them liable to a penalty, or to disclose certain advice of a legal nature. The Ombudsman may also pass information to an equivalent state or territory inspecting authority where it is considered necessary for that authority to carry out its functions. The maximum penalty for failure to comply with the Ombudsman's request for information is six months imprisonment.<sup>41</sup>

2.48 The Ombudsman is required to provide a written report to the Minister every six months on the results of each inspection undertaken, and a copy of the report must be tabled in Parliament.<sup>42</sup>

### **Schedule 3 – Amendment of the Australian Crime Commission Act 2002**

2.49 The amendments in Schedule 3 address some operational difficulties experienced by the ACC and make minor technical amendments. They seek to bring the provisions pertaining to search warrants into line with those in the Crimes Act model.

2.50 The term 'constable' is defined to mean members or special members of the AFP or state or territory police. The term 'constable' is used in proposed section 23A which deals with the use of force during the execution of a search warrant.<sup>43</sup>

2.51 The definition of 'eligible person' is amended to exclude examiners from the classes of people who can apply for a search or telephone warrant. Examiners do not have the authority to direct any person in the execution of a warrant and do not perform any operational functions. Accordingly, only staff members of the ACC who are also members of the AFP or a State or Territory Police force or service are to be an 'eligible person' under the ACC Act.<sup>44</sup>

2.52 Under section 22 of the ACC Act, search warrants are issued by an 'issuing officer' which is defined to include a judge of the Federal Court or of a court of a state or territory, or a Federal Magistrate. This has been restrictive in some localities. The bill adds 'a magistrate' to the current list of persons authorised to issue a search warrant to the ACC, bringing the legislation into line with the Crimes Act.

2.53 The Bill would allow an examiner to exclude a particular legal practitioner from proceedings where he or she has reason to believe that allowing the legal practitioner to appear at the examination may prejudice the effectiveness of the special ACC investigation or operation. This will allow examiners to exclude a legal practitioner who may, knowingly or unknowingly, have a conflict of interest if he or she continues to appear on behalf of a witness. For example, where the legal

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41 Proposed sections 3SZA-SZD.

42 Proposed section 3SZF.

43 Item 1.

44 Item 3.



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practitioner is unknowingly under investigation themselves. The Bill also gives to examiners a discretion to allow a break in proceedings for a witness to obtain replacement legal representation.<sup>45</sup>

2.54 Administrative decisions of an examiner may be reviewed by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act). However, decisions under this section will be exempt from the requirement to provide reasons (by virtue of Schedule 2 of the ADJR Act) in circumstances where providing reasons may prejudice either:

- the safety or reputation of a person;
- the fair trial of a person who has been, or may be, charged with an offence, or;
- the effectiveness of an ACC operation or investigation.

2.55 The ACC Act currently contains an offence of giving information that is false or misleading in a 'material particular' at an examination, which is punishable by five years imprisonment or a penalty of 200 penalty units (less if heard by a court of summary jurisdiction). The EM states that it is difficult to enforce this provision as it is often difficult to identify whether something is a 'material particular'. During an investigation, the ACC can demonstrate that information relates to a material particular by reference to the elements of the particular offence being investigated. However, when conducting an operation, the ACC is unlikely to be investigating a specific offence and, as a result, has difficulty identifying a 'material particular'. The Bill modifies the offence by reversing the burden of proof. That is to say that the defendant will bear the evidential burden of proof in proceedings for an offence of giving information that is false or misleading in a 'material particular' at an examination. The defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the information *was not* false or misleading in a material particular, rather than the prosecution having to prove beyond a reasonable doubt that the information *was* false or misleading in a material particular.<sup>46</sup>

#### **Schedule 4 – Amendment to the *Witness Protection Act 1994***

2.56 This Bill amends the Witness Protection Act, which is the basis for the National Witness Protection Program (NWPP). The program provides protection and assistance to witnesses involved in serious or high profile legal proceedings which could pose a risk to their life or the lives of their family members.

2.57 The amendments aim to provide greater protection and security to the witnesses or other people who are protected under the NWPP, members of the AFP who serve in the Witness Protection Unit and other AFP employees who are involved in the operation of the NWPP. The amendments also clarify the operation of the Witness Protection Act in relation to current and former participants, their families

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45 Item 31.

46 Item 45.

and other relevant persons who require new identities, protection or other assistance under the NWPP. The Bill extends the Witness Protection Act to cover participants who have been included in the NWPP because they were involved in state offences with a federal aspect.

2.58 The Bill also contains provisions which prohibit the disclosure of information about an individual who is a current participant, where the information disclosed is about the original identity (or former NWPP identity) of the individual. Similar provisions protect against disclosure of the fact that a person is undergoing assessment for inclusion in the NWPP. The Bill also clarifies the prohibition on potential participants who have undergone assessment for the program from disclosing any relevant information.<sup>47</sup>

2.59 The Bill specifies that the Commissioner, a Deputy Commissioner, an AFP employee or a special member of the Australian Federal Police, is not to be required to divulge or communicate to a court, tribunal, royal commission or any other commission of inquiry information that reveals the identity of an AFP employee or special member of the AFP who is involved in the operation of the NWPP. The Ombudsman and his staff are covered by a similar provision.<sup>48</sup>

## **Schedules 5 and 6 – Other amendments and transitional arrangements**

2.60 The amendments contained in Schedules 5 and 6 are primarily technical and clarify, rather than extend, the power of agencies.

2.61 The provisions relating to seized electronic equipment are noteworthy. The provisions seek to make clear that electronic equipment can be operated on to access data, including data not held on the equipment at the time of seizure, for the purpose of determining whether there is any evidentiary material held on, or accessible from, the equipment. This would negate the current requirement for a communications warrant to be served on the relevant telecommunications carrier under the *Telecommunications (Interception and Access) Act 1979*.<sup>49</sup> The Bill also empowers the examination of an electronic item after the expiration of the search warrant under which the item was seized.

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47 Items 36, 37 and 41.

48 Item 43.

49 Item 19. Unlike Short Message Service (SMS) messages which are stored on the memory contained within the handset, voicemail messages for mobile phones are stored on computer servers held with the telecommunications company. There is therefore currently a requirement to obtain a communications warrant to access voicemail messages from a telephone seized under a search warrant.

## CHAPTER 3

### KEY ISSUES

3.1 The amendments contained in the Bill aim to harmonise Commonwealth and state and territory laws in relation to controlled operations, search warrants, assumed identities and witness protection. The committee sees merit in this endeavour. Some of the benefits of achieving legal synchronicity were outlined by a representative from the AFP at the committee's hearing:

The key operational benefits for the AFP from these proposed amendments are: in the case of controlled operations, the inclusion of police informants as participants in controlled operations who can be protected from criminal responsibility and civil liability for conduct undertaken during the course of a controlled operation. [I]n the case of assumed identities, improving the arrangements between Australian jurisdictions for accessing evidence of identity to establish assumed identities and clearly including members of the Australian Federal Police National Witness Protection Program within the scheme so that there is no doubt that they can use an assumed identity to perform their functions; and, in the case of protection of witness identity, the enhancement of the current approach to protect the identity of an undercover operative who was or is using an assumed identity.<sup>1</sup>

3.2 In relation to delayed notification search warrants, the AFP representative noted that:

The ability for police to enter and search premises without notifying the occupants of the target premises is an important investigative tool. Searches of this nature—such as controlled operations, telecommunications interception and the use of electronic surveillance devices and stored communication warrants—complement the existing investigative tools available to law enforcement because they allow the examination of physical evidence such as computers, diaries and correspondence that enable police to identify the full range of people involved in suspected serious criminal activity and to obtain evidence of that activity. It is particularly important in being able to operate to prevent criminal activity. The rationale for seeking this power and the context in which it would be used is that there are investigations where keeping the existence of the investigation confidential, in particular from targets of the investigation and their associates, is often critical to the success of that investigation.<sup>2</sup>

3.3 While the features of the Bill outlined by the AFP display obvious operational benefits, the Law Council of Australia urged circumspection when dealing with some of the Bill's more invasive aspects:

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1 Federal Agent Lawler, *Committee Hansard*, 22 January 2007, p. 16.

2 Federal Agent Lawler, *Committee Hansard*, 22 January 2007, p. 16.

Harmonisation of criminal law can be a very desirable thing to try to achieve; there is no doubt about that. But harmonisation should not, in our submission, be the sole objective for providing the Australian nation with appropriate laws that deal with criminal matters, law enforcement matters and the administration of justice generally. Harmonisation alone, without more, is not a sufficient justification. There is a price to be paid if harmonisation involves derogation from the traditional freedoms of the individual that we cherish in our parliamentary democracy. Notwithstanding that ministers might from time to time agree in ministerial meetings that they would like to introduce a harmonised system of laws into the parliaments of Australia, that does not place those proposals above proper examination and criticism.<sup>3</sup>

3.4 This chapter addresses key issues of concern to the committee.

### **Controlled Operations**

3.5 One of the matters of concern to the committee was the proposed amendment relating to the suspected criminal activity in relation to which a controlled operation may be authorised. Currently, controlled operations may be authorised in cases where the suspected offence attracts at least three years imprisonment, and is of a nature described by the Crimes Act.<sup>4</sup> The Bill removes this second criterion from consideration, leaving the simpler test relating purely to the potential length of imprisonment should the offence be proved. The removal of this second criterion elicited some support from respondents, primarily on the grounds of the difficulties associated with interpreting which specific offences are embraced by the list of activities contained in the Crimes Act.<sup>5</sup>

3.6 The committee remains ambivalent about the use of the three year prison term as the sole threshold for deciding on the 'seriousness' of an offence. The committee noted a number of offences carrying a prison term of three years or greater, the suspicion of which would arguably not justify consideration of a controlled operation. For example, the committee notes that section 29 of the Crimes Act, dealing with damage and destruction of Commonwealth property, carries a maximum penalty of ten years imprisonment, which places it within the ambit of the Bill. The Law Council of Australia shared the committee's concern, arguing that the statutory limit should be set higher.<sup>6</sup> However, the committee notes the view of the Commonwealth

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3 Mr Peter Webb, *Committee Hansard*, 22 January 2007, p. 3.

4 See section 15HB(1) of the Crimes Act 1914. Types of offences encompassed by the provisions are those punishable on conviction by imprisonment for three years or more, including such offences as theft, fraud, tax evasion, currency violations, controlled substances, illegal gambling, extortion, money laundering, perverting the course of justice, espionage, sabotage or threats to national security, people smuggling, and importation of prohibited imports or exportation of prohibited exports.

5 See, for example, *Committee Hansard*, 22 January 2007, p. 12; *Committee Hansard*, 22 January 2007, p. 30.

6 Mr Peter Webb, *Committee Hansard*, 22 January 2007, p. 4.

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Ombudsman that the list of offences is already so comprehensive that it would be rare for controlled operations to be precluded by this requirement. Further, the Ombudsman noted that an officer authorising a controlled operation must still be satisfied that the nature and extent of the criminal activity justify the conduct of the operation.<sup>7</sup>

3.7 The Bill also enables other offences to be added by way of regulation to those which can be used to trigger an application for a controlled operation. This was also of concern to the Law Council of Australia:

The Act specifies a minimum standard for Commonwealth offences—punishable by three years—but the regulations are not limited in that way at all. The regulations allow any other Commonwealth offence to be promulgated as a complying Commonwealth offence for the purpose of controlled operations. That really means that any Commonwealth offence is potentially available for a controlled operation. We think that the regulation-making power has to be at least limited in the same way as the Act purports to limit those matters prescribed by the Act.<sup>8</sup>

3.8 Given the inclusion of all offences which carry a penalty of three or more years imprisonment, it can only be assumed that the regulation-making power is included for the purpose of enabling controlled operations on the suspicion of less serious offences.

3.9 Mr Webb of the Law Council of Australia also reminded the committee that this is not the first time these powers have been requested:

If one looks at the first of those matters, the range of offences for which controlled operations may be authorised, one can see that there is a history here, in that when the original framework for controlled operations was introduced in 1996 the operations were limited in their application to certain drug importation offences. In 2001 an amendment was sought to extend their operation to any Commonwealth offence. That proposal met with considerable opposition. On the basis of a recommendation from this committee, the provision was reframed. When the bill was finally passed, it provided something less than that which had been sought at the time. What we have now is a regeneration of that request by the executive to effectively allow virtually any Commonwealth offence to be the subject of a controlled operation.<sup>9</sup>

3.10 The committee also notes that, while a three month term is set for controlled operations, the Bill allows for extensions of that term *ad infinitum*. The committee questions the necessity of such an open-ended arrangement. At present, operations may run for a maximum of six months, and after three months only with the

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7 *Submission 5A*, p. 2.

8 Mr Peter Webb, *Committee Hansard*, 22 January 2007, p. 4.

9 *Committee Hansard*, 22 January 2007, pp 2-3.

endorsement of the Administrative Appeals Tribunal (AAT). On the development of the Bill, and the role of the AAT, an officer from the Attorney-General's Department submitted that:

[I]n large part we are keeping what we have now, but it was considered that members of the AAT are not best placed to form judgements about the appropriateness of the continuation of an operation, that it was not adding value to the stronger accountability mechanisms that exist through the Ombudsman and reporting; therefore, rather than complicate the scheme with that additional element that was not substantively adding to the accountability value in the mechanism, it is not there.<sup>10</sup>

3.11 Similarly, Federal Agent Lawler from the AFP stated that:

It was important to note that this particular process was not a merits review function. Rather, the AAT member could only extend the duration of the authorisation if they were reasonably satisfied that all of the criteria required for the granting of an authority remained in existence—and, indeed, not to the actual content and fact that supported the controlled operation in the first instance. There are some who may argue that having it as an internal process—actually reviewing whether the facts that make up the application in the first instance still exist, which is best done by the issuing officer, the chief officer—presents more accountability than what the current process has in play. That was one of the reasons that underpinned that particular change around the AAT officer.<sup>11</sup>

3.12 By contrast, Mr Webb from the Law Council of Australia considered that the existing provisions for independent scrutiny of controlled operations should be strengthened:

An officer in charge of an operation—not an authorising officer—can empower specific persons, including law enforcement officers and civilian informants, to engage in unlawful conduct, no matter how insignificant a Commonwealth offence is involved. We say that the current authorisation regime is inadequate as it is, and that a judge should authorise controlled operations, which should be limited to serious offences.<sup>12</sup>

3.13 The committee sees much to commend in the oversight role to be played by the Ombudsman in relation to controlled operations. However, once again the Law Council of Australia made the point that there are limits to the effectiveness of an oversight body which operates primarily in retrospect:

Our concern also is that the degree of information which is provided to the Ombudsman before a controlled operation is completed is not sufficient because it does not detail what actual unlawful conduct has taken place. Looking at the Ombudsman's reports of controlled operations—because the

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10 *Committee Hansard*, 22 January 2007, p. 19.

11 *Committee Hansard*, 22 January 2007, p. 19.

12 *Committee Hansard*, 22 January 2007, p. 3.

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Ombudsman does currently have the power to review controlled operations—the Ombudsman does not look into controlled operations which are continuing at the moment because that is deemed inappropriate. That is all right when a controlled operation can only be extended for six months but if it can be extended indefinitely that creates a different problem.<sup>13</sup>

3.14 Mr Goodrick, representing the Ombudsman, agreed that the oversight provided by the AAT was very different to that offered by the Ombudsman. Nonetheless, he considered the arrangements contained in the Bill to be satisfactory, and in some ways, an improvement on the status quo.

I think that one of the major changes that the bill has brought about is the removal of real-time oversight by the AAT. When discussions first began on this, some enhanced role for the Ombudsman was seen as somehow replacing that. I am not sure we saw it quite like that, because real-time oversight is always different from oversight after the event. Nevertheless, with a proper set of powers and a fair bit of flexibility concerning the reports that we might want to see, we do have the power to ask for further information to be included in the reports. From our point of view, that is pretty effective oversight. In fact, in the end it may be more effective oversight than an AAT member ticking an application.<sup>14</sup>

3.15 The Ombudsman also drew the committee's attention to the fact that the Minister may withhold information from being published in the annual report to Parliament on the grounds of 'public interest'.<sup>15</sup>

3.16 The committee is not persuaded that a power to prescribe offences with a maximum penalty of less than three years imprisonment, for the purposes of bringing those offences within the ambit of controlled operations, can be justified. While the committee accepts that controlled operations may need to extend beyond three months, it would seem prudent to impose a limit on the number of extensions which may be granted.

3.17 Finally, the committee does not agree with the contention that the independent scrutiny of applications for extension is not valuable. The ability for extensions to be granted through purely internal avenues, in contrast to the current system of application to the AAT, seems an unnecessary diminution of the transparency with which an enforcement tool as invasive as controlled operations should be administered.

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13 Ms Helen Donovan, *Committee Hansard*, 22 January 2007, p. 7.

14 *Committee Hansard*, 22 January 2007, p. 11.

15 *Submission 5*, p. 4.

### **Recommendation 1**

**3.18** The committee recommends that proposed subsection 15GE(3) be deleted from the Bill to prevent offences carrying a penalty of less than three years imprisonment being included in the definition of 'serious offence' by regulation.

### **Recommendation 2**

**3.19** The committee recommends that the Bill be amended to retain the requirement for extensions of controlled operations for three month periods to be approved by a member of the AAT.

### **Recommendation 3**

**3.20** The committee recommends that the Bill be amended to impose an absolute limit of 12 months on each authorised controlled operation.

### **Recommendation 4**

**3.21** The committee recommends that if controlled operations are able to be extended indefinitely, proposed subsection 15HH(4) should be amended to require enforcement agencies to report to the Commonwealth Ombudsman on the progress of current operations every six months.

### **Witness Identity Protection**

**3.22** This part of the Bill aims to protect the true identity of covert operatives who give evidence in court. The provisions include protection for law enforcement, security and intelligence officers and other authorised people (including foreign law enforcement officers and civilians authorised to participate in controlled operations) who are granted an assumed identity.

**3.23** As reported in Chapter 2, the decision to issue a witness protection certificate is not appealable.<sup>16</sup> While the court will have the power to give leave or make an order which leads to the disclosure of the operative's true identity, it will not be required to 'balance' the competing public interests in a fair and open trial against the protection of the identity of a witness. The court may only make such an order if it is satisfied that the evidence in question would substantially call into question the operative's credibility, and it would be impractical to test that credibility without disclosing the details of the operative's identity. It must also be in the interests of justice for the operative's credibility to be tested.

**3.24** In relation to these provisions, the Law Council of Australia stated that:

The assumed identity provisions will deny courts any role in evaluating whether there is a need to protect the true identity of witnesses and in balancing that need against other competing interests, like the interests of justice. The law enforcement agencies are to be granted extraordinary and

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<sup>16</sup> Except in disciplinary proceedings against the decision-maker.



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unsupervised powers on the assumption that superficial, periodic reporting requirements offer sufficient safeguard against corruption and misuse.<sup>17</sup>

3.25 The committee can see no justification for the court to be denied the opportunity to consider the matter of witness identity on its merits, and in conjunction with other relevant considerations. It is the role of the court to adjudicate on disputes which, by their nature, involve more than one party. The rights of each party must be respected for justice to be done and seen to be done, and any provision which limits the right of the defendant to question the credibility of his or her accuser, as this one does, deserves careful implementation by a court. The committee considers that this is best achieved through leaving intact the court's discretion to balance the various interests at stake in individual cases.

3.26 The committee notes that, under proposed section 15KP, a presiding officer may require that he or she be confidentially informed of the true identity of the witness. While this can be justified on the grounds of ensuring the presiding officer has no potential bias that could prejudice the proceedings, the committee notes that no provision exists to protect any documentation that might be provided to the presiding officer in the course of providing the identity to him or her. Such documentation could find its way, unprotected, into the court's records and be accessed by a range of other people. The committee considers this could be rectified through a simple amendment preventing the presiding officer from recording, copying or retaining any information or photographic evidence of the identity of the witness.<sup>18</sup>

3.27 The committee also takes the opportunity to note what it considers a significant error in the EM to the Bill. At proposed section 15KW, in relation to disclosure offences, the Bill states that a person commits an offence if [their] conduct results in the disclosure of the operative's identity, whereas the EM reports that an offence will be committed if the conduct results 'or is likely to result' in disclosure of the identity. This is a significant anomaly, and warrants special mention in the context of the increasing number of government agencies who decline to make written submissions to parliamentary inquiries, preferring instead to refer committees to the EM. The committee would be less concerned were this an isolated example, but it is not. Officers from the Attorney-General's Department acknowledged at least one other inaccuracy in the EM, in relation to the possible use of force by personnel other than police officers.<sup>19</sup> If committees are to be directed to the EM, they should be able to rely on its accuracy.

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17 Mr Peter Webb, *Committee Hansard*, 22 January 2007, p. 3.

18 Queensland Police Service, *Submission 3*, p. 1.

19 *Committee Hansard*, 22 January 2007, p. 21.

## **Recommendation 5**

**3.28 The committee recommends that proposed section 15KP be amended to prohibit the retention, copying or recording by a presiding officer of any information or documentation provided to them under that provision.**

### **Schedule 2 – Delayed notification search warrants**

3.29 The Deputy Commissioner of the Australian Federal Police spelt out for the committee the need for delayed notification search warrants by describing the difficulties associated with traditional warrants:

A limitation with the existing search warrant regime is that the execution of a search warrant involves notifying the occupant of the premises. This immediately notifies known suspects, and subsequently their associates, of law enforcement interest in their activities. It then allows associates unknown to the police to destroy or relocate evidence or activities to other premises not known to police. It often prevents the full criminality of all those involved being known.<sup>20</sup>

3.30 The threshold test of 'seriousness' for delayed notification warrants is different to that for controlled operations, and in general requires suspicion of a very serious offence prior to application for a warrant. The Ombudsman, in both its written and verbal submissions, expressed the view that provision should be made for delayed notification warrants on suspicion of only the most serious of offences:

Given the highly intrusive nature of the power it is appropriate that the delayed notification search warrant will be available for investigation of Commonwealth offences and State offences with a Federal aspect punishable on conviction by imprisonment for a period of 10 years, namely the high end of suspected serious offences. There are other offences for which a warrant may also be available, not all of which are punishable by 10 years' imprisonment. The list is diverse and includes recruitment of mercenaries and recruitment of members of organizations engaged in hostile activities towards foreign governments, politically motivated violence, dealing with assets frozen under UN sanctions, sexual slavery or use of communications services to make death threats. Other offences may in time be added to the list and it is hoped that any additions will be limited only to the most serious criminal conduct.<sup>21</sup>

3.31 The committee agrees with the Ombudsman that suspicion of only the most serious offences should be able to be used as the basis for an application for a delayed notification search warrant.

3.32 The committee notes the submission made by the New South Wales Government, comparing the delayed warrant regime in place in that jurisdiction to the

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20 *Committee Hansard*, 22 January 2007, p. 17.

21 Dr Thom and Mr Goodrick, *Committee Hansard*, 22 January 2007, pp 12-13.

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arrangements proposed by the Bill. The submission makes the point that the primary distinction between the schemes is the range of offences to which each applies: delayed notification warrants in the New South Wales jurisdiction have, as their exclusive focus, prevention and response to terrorist acts.<sup>22</sup>

3.33 Similarly, the delayed notification search warrant schemes in Victoria and the Northern Territory are limited to circumstances in which 'a terrorist act has been, is being, or is likely to be committed'.<sup>23</sup> In Queensland, the warrants are available in relation to the investigation of organised crime, terrorism or designated offences, where 'designated offences' is limited to offences involving death or serious injury with a maximum penalty of life imprisonment.<sup>24</sup>

3.34 While an officer from the Attorney-General's Department noted that the search warrant provisions were not designed to 'fit into a framework of identical laws' as is the case with some other provisions in the Bill, the committee considers that delayed notification search warrants should be utilised only in relation to the most serious offences as is the case under the state and territory schemes.

3.35 Provisions relating to impersonation by an officer of another person also drew the attention of the committee. Paragraph 3SL(1)(b) proposes to allow an executing officer and assisting constable to impersonate another person for the purposes of executing the warrant. In order to carry out an impersonation, officers would likely need to follow many of the steps already provided for in Schedule 1 relating to assumed identities, such as acquiring false documentation. It is not clear whether the power to impersonate in paragraph 3SL(1)(b) separately authorises such steps.

3.36 The specific provisions in Schedule 1 relating to assumed identities are comprehensive, and the committee can see no reason why such a broadly-framed power to impersonate is required in Schedule 2, unaccompanied as it is by the checks and balances contained in Schedule 1. The committee considers that paragraph 3SL(1)(b) should be deleted so that an executing officer wishing to impersonate someone in the course of executing the warrant will be required to make separate application for an assumed identity under the provisions contained in Schedule 1.

3.37 Finally, the committee draws attention to a practical point made by the Ombudsman in relation to reporting requirements.<sup>25</sup> Whereas, in relation to delayed notification search warrants, the Ombudsman is required to report to the Minister six-monthly on his inspection of relevant records, inspections of agency files are required only at least every twelve months.<sup>26</sup> The Ombudsman suggests that reports to the

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22 *Submission 12*, p. 1.

23 Section 6 of the *Terrorism (Community Protection) Act 2003* (Vic) and section 27D of the *Terrorism (Emergency Powers) Act* (NT).

24 Section 212 of the *Police Powers and Responsibilities Act 2000* (Qld).

25 *Submission 5*, p. 5.

26 Proposed sections 3SY and 3SZF.

Minister be made annually, which would make the requirement consistent with that for controlled operations and allow for the report to be integrated into the agency's annual report. While the committee recognises the benefit of aligning the dates of various reports, the invasiveness of the proposed regime leads the committee to recommend that inspections be conducted at least every six months, and that report be made to the Minister at the same interval.

### **Recommendation 6**

**3.38 The committee recommends that the Federal Government limit the offences in relation to which delayed notification search warrants may be issued to offences involving:**

- **terrorism or organised crime; or**
- **death or serious injury with a maximum penalty of life imprisonment.**

### **Recommendation 7**

**3.39 The committee recommends that subsection 3SL(1)(b) be deleted so that applications to impersonate a person for the purposes of executing a warrant are subject to the same approval process as for other uses of an assumed identity.**

### **Recommendation 8**

**3.40 The committee recommends that the Bill be amended to require the Ombudsman to conduct an inspection of agency files and issue a report to the Minister in relation to the administration of delayed notification search warrants at least every six months.**

## **Schedule 3 – Amendment of the Australian Crime Commission Act**

3.41 It was during discussion and a detailed comparative analysis of the 'use of force' provisions contained in Schedules 2 and 3 that the committee identified a significant anomaly. In the delayed notification search warrant provisions in Schedule 2, proposed section 3SN proscribes the use of force against persons and things by anybody other than a sworn police officer. However, in Schedule 3, which pertains to the ACC specifically, the term 'executing officer' is defined differently, and need not necessarily be a police officer. While an issuing officer is required to issue the warrant only on application by a police officer, there is no requirement that the person nominated to execute the warrant be a police officer. Furthermore, the executing officer may transfer the warrant to any other person, who may in turn execute the warrant and use force against persons and things in doing so. This may involve carrying a firearm.<sup>27</sup>

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27 See Items 3, 4, 19, 25 and 26 of Schedule 3.

3.42 The committee raised this matter with representatives from the Attorney-General's Department. In its response to the committee's questions, representatives of the department assured the committee that:

The amendments to the Australian Crime Commission Act 2002 contained in Schedule 3 of the Bill were not intended to authorise any person other than a police officer to use force against a person or to create any new powers to carry firearms.

The Bill is being examined to assess whether there is any uncertainty regarding this issue and whether amendments to the Bill are required to clarify this intention.<sup>28</sup>

3.43 The committee considers that amendments are necessary to bring the ACC provisions in line with those in the Crimes Act, and looks forward to examining the detail of those amendments in due course.

3.44 Another matter which is of concern to the committee, in relation to the amendments contained in Schedule 3, are the provisions which restrict access by a person giving evidence to a legal practitioner. Proposed section 25B provides that an examiner may refuse to permit a particular legal practitioner to represent a person giving evidence, and that in such case, the examiner has a discretion as to whether to adjourn proceedings to allow the person to retain another lawyer.

3.45 An officer from the Attorney-General's Department put forward the rationale of the provision this way:

I believe that the purpose of the provision in framing it as a discretion is to prevent a person from frustrating an examination through either the delay in the appearance of another legal practitioner or perhaps having a number of practitioners whose presence might in fact undermine the ability to conduct the examination. That is the reason that it has been framed as a discretion.<sup>29</sup>

3.46 The right to legal representation is a fundamental one, and is especially important where, as is the case here, refusal by a witness to answer a question results in a penalty.<sup>30</sup> The discretion to allow an adjournment should be removed. Should the witness decline to locate a mutually acceptable legal representative, the examiner should be required to offer to appoint an acceptable legal representative for the witness. No witness should be examined without a legal representative unless it is his or her express and informed desire to proceed without representation.

## **Recommendation 9**

**3.47 The committee recommends that the definition of 'executing officer' in Schedule 3 be confined to sworn federal, state or territory police officers.**

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28 *Submission 10*, p.1.

29 *Committee Hansard*, 22 January 2007, p. 27.

30 Subsections 30(2) and (6) of the *Australian Crime Commission Act 2002*.

**Recommendation 10**

**3.48** The committee recommends that proposed subsection 25B(2) be amended to:

- require an ACC examiner to adjourn an examination for an adequate time to enable a witness to engage an alternative legal representative; and
- ensure that a witness will only be examined without representation when his or her decision to forego representation is express and informed.

**Recommendation 11**

**3.49** Subject to the preceding recommendations, the committee recommends that the Senate pass the Bill.

**Senator Marise Payne**

**Chair**

# **APPENDIX 1**

## **SUBMISSIONS RECEIVED**

- |    |  |
|----|--|
| 1  | The Police Association (Victoria)      |
| 2  | Western Australia Police               |
| 3  | Queensland Police Service              |
| 4  | NSW Privacy Commissioner               |
| 5  | Commonwealth Ombudsman                 |
| 5A | Commonwealth Ombudsman                 |
| 6  | Law Council of Australia               |
| 7  | Police Federation of Australia         |
| 8  | Queensland Council for Civil Liberties |
| 8A | Queensland Council for Civil Liberties |
| 8B | Queensland Council for Civil Liberties |
| 9  | Victoria Police                        |
| 10 | Attorney-General's Department          |
| 11 | Tasmanian Government                   |
| 12 | NSW Government                         |
| 13 | Australian Federal Police              |

## **TABLED DOCUMENTS**

*Documents tabled at public hearing, Monday 22 January 2007*

### **Australian Federal Police**

- Opening statement





**APPENDIX 2**  
**WITNESSES WHO APPEARED**  
**BEFORE THE COMMITTEE**

**Canberra, Monday 22 January 2007**

**Law Council of Australia**

Mr Peter Webb, Secretary-General

Ms Helen Donovan, Policy Lawyer

**Commonwealth Ombudsman**

Dr Vivienne Thom, Acting Commonwealth Ombudsman

Ms Vicky Brown, Senior Assistant Ombudsman

Mr Robert Goodrick, Director, Inspections Team

**Australian Federal Police**

Mr John Lawler, Deputy Commissioner

Federal Agent Frank Prendergast, National Manager, Counter-terrorism

Mr Peter Whowell, Manager, Legislation Program

**Attorney-General's Department**

Dr Karl Alderson, Assistant Secretary, Criminal Law Branch

Ms Melinda Cockshutt, Principal Legal Officer, Criminal Law Branch

