

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter provides a brief overview of the Bill.¹

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*.² 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.³

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

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 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.⁴ 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.⁵

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.⁶

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

4 Proposed section 15GG.

5 Proposed section 15GH.

6 Proposed section 15GH.

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

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

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.⁹

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.¹⁰

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.¹¹

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,

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.¹²

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.¹³

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.¹⁴ Otherwise, authorities for assumed identity run until they are cancelled, although authorising officers are required to review the necessity of each authority annually.¹⁵

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

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.

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

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.¹⁷

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.¹⁸

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.¹⁹

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.²⁰ The chief officer may delegate the decision-making power to an Assistant Commissioner (or equivalent).²¹ 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

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.²²

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.²³

2.26 The decision to protect the identity of a witness is final, and cannot be appealed against or otherwise challenged in any court.²⁴ 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.²⁵

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.²⁶

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.²⁷

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.²⁸

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

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*.²⁹

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.³⁰

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,

29 Proposed section 3SA.

30 Proposed section 3SD.

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.³¹

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.³² 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.³³

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.³⁴

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).³⁵

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;

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.³⁶

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.³⁷

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;

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.³⁸

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.³⁹

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.⁴⁰

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

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.⁴¹

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.⁴²

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.⁴³

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.⁴⁴

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

41 Proposed sections 3SZA-SZD.

42 Proposed section 3SZF.

43 Item 1.

44 Item 3.

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.⁴⁵

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.⁴⁶

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

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.⁴⁷

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.⁴⁸

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*.⁴⁹ The Bill also empowers the examination of an electronic item after the expiration of the search warrant under which the item was seized.

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.