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.[1]

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.[2]

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.[3]

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.[4] 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.[5]

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.[6] 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.

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.[7]

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.[8]

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.[9]

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.[10]

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.[11]

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.[12]

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.

> 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.[13]

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.[14]

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'.[15]

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.[16] 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

16 Except in disciplinary proceedings against the decision-maker.

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

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.[18]

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.[19] 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.[20]

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.[21]

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.

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.[22]

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'.[23] 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.[24]

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.[25] 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.[26] 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.[27]

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.[28]

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.[29]

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.[30] 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