

Our ref: A/2005-2548031

25 January 2007

Ms Jackie Morris  
Secretary  
Senate Legal and Constitutional Affairs Legislation Committee  
Parliament House  
CANBERRA ACT 2600

**Crimes Legislative Amendment (National Investigative Powers and Witness Protection) Bill 2006 – Inquiry by Senate Legal and Constitutional Affairs Committee**

Dear Ms Morris

At the hearing on 22 January 2007 of the Committee's inquiry into the provisions of the *Crimes Legislative Amendment (National Investigative Powers and Witness Protection) Bill 2006* we undertook to expand on our comments in relation to the changes to the definition of 'serious crime', and to provide figures on complaints we have received about controlled operations and the witness protection scheme.

*Definition of 'serious crime'*

2. In his inspecting capacity, the Ombudsman's primary function is to see that procedures imposed by Parliament are followed by the agencies whose records we inspect. The Ombudsman may take the opportunity to comment on the merits of the procedures if they prove difficult to apply or if they serve no obvious purpose. The Ombudsman may also comment on the merits if the procedures seem to run counter to the principles of transparency and accountability. These comments will usually be made in discussions with Departments and law enforcement agencies. Exceptionally they may be made publicly if the problem is serious, attempts to bring about change have not been successful, and the Ombudsman sees a need to explain his or her own view of the issue.
3. Legislative proposals are treated similarly. Our comments on the proposed amendments to the Crimes Act have been made to Departments and agencies and are largely reflected in the Bill. In one instance we have drawn attention in our submission to an issue where our views were not reflected in the Bill and where we see value in stating our own position. With regard to other aspects of the Bill we have endorsed the proposed amendments or refrained from comment.
4. There are two major changes to the definition of 'serious crime' in the Bill. One is that the areas of criminal activity have been dropped; the other is that offences may be brought within the definition of 'serious crime' by regulation. Senator Mason noted that the purpose of listing the areas of criminal activity was to ensure that controlled operations and therefore

exemptions from criminal liability were available only for the investigation of criminal offences that were difficult to prove. He said that the fact that the offences were serious had historically not been the main justification for allowing investigators to act in a way that may otherwise have been illegal.

5. We said in our submission that we did not have difficulty with the proposed changes. As far as the deletion of the areas of criminal activity is concerned it has been our experience that the need to nominate a category of activity does not contribute significantly to the accountability or transparency of the authorisation process. It is true that there are some categories of criminal activity not included in the current list, although we note that homicide per se is not a Commonwealth offence. The problem is that the list is already so comprehensive that it would be a rare case that could not be categorised as 'a matter of the same general nature as one or more of the foregoing', in the terms of s 15HB of Part 1AB of the Crimes Act. There may be no doubt that the crime being investigated is a serious crime that falls within one or more of the categories listed, but law enforcement officers may err by nominating one category rather than another or by nominating one area in one document and a different area in another. The exercise of nominating one category rather than another has thus tended to become a bureaucratic exercise, sometimes distorting the agency's record of substantial compliance with the legislation. The problem may not have existed when controlled operations were confined to a very narrow range of criminal activity but there have been difficulties of this practical kind since the enlargement of the list in 2001.

6. We also note that s 15HB(1)(a) includes the words 'or that is of any other prescribed kind'. This appears to reflect an intention that the list be added to through subordinate legislation, although there does not appear to be any express regulation making power in Part 1AB. Whether the words 'or that is of any other prescribed kind' are enough to empower the executive to prescribe additions to the list is a matter for legal advice, although as we said to the Committee, we are not aware that the power, if it exists, has ever been exercised. How this occurs is a matter for the executive and the Parliament to resolve and, if it does, the Ombudsman may need to address consequential administrative issues. Our submission intentionally does not speculate on the possibility of offences being added that are punishable on conviction by a term of less than three years. If this arises the Ombudsman may wish to make further comment at that time.

7. Regardless of whether the subject of investigation is a serious Commonwealth offence in terms of proposed section 15GE, the authorising officer must still be satisfied that the nature and extent of the criminal activity are such as to justify the conduct of a controlled operation (proposed section 15GH(2)(b)). Compliance with this provision would be the subject of regular inspection by the Ombudsman.

#### *Complaints statistics*

8. The Committee also asked whether the Ombudsman keeps statistics on the number of complaints received about the witness protection program or controlled operations. The table below indicates the number of complaints received on each issue since 1 July 2003.

<b>Issue</b>	<b>2003/04</b>	<b>2004/05</b>	<b>2005/06</b>	<b>2006/07 Year-to-date</b>
Witness protection program	6	1	5	2
Controlled operations	Nil	Nil	Nil	1

9. If you would like to clarify any aspect of my response to the Committee's questions on notice, please contact Mr Robert Goodrick at [robert.goodrick@ombudsman.gov.au](mailto:robert.goodrick@ombudsman.gov.au) or on (02) 6276 0160.

Yours sincerely



Dr Vivienne Thom  
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