Law Council
OF AUSTRALIA

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

Legal and Constitutional Affairs Committee

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Executive Summary

1. The Law Council of Australia ("Law Council") is pleased to have the opportunity to provide a submission to the Legal and Constitutional Affairs Committee ("the Committee") on the *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006* ("the Bill").

2. Several provisions of the Bill seek to substantially extend the unsupervised powers of Commonwealth law enforcement agencies, in a manner which may adversely impact the rights and privacy of Australian citizens. The Law Council believes that a manifest need for these extended powers has not been demonstrated and that, in the circumstances, no further erosion of Australian citizens' rights should be sanctioned by the Australian Parliament. Issues which are of particular concern to the Law Council include:

    (a) the extension of controlled operations to potentially cover any Commonwealth offence;

    (b) the continued absence of an independent and external approval processes for controlled operations;

    (c) the removal of the role of nominated members of the Administrative Appeals Tribunal in approving any continuation of a controlled operation beyond three months;

    (d) The introduction of internal agency approval processes for extending the duration of a controlled operation;

    (e) The removal of any limits on the maximum duration of a controlled operation;

    (f) The extension of protection from criminal and civil liability to civilian informants who participate in controlled operations;

    (g) The divestment of power to authorise civilians to engage in unlawful conduct with impunity to the law enforcement officer in direct charge of a controlled operation;

    (h) The dilution of reporting requirements imposed on law enforcement agencies engaged in controlled operations;

    (i) The introduction of witness protection certificates which allow law enforcement and intelligence agencies to decide whether a covert operative can give evidence under an false identity, and which shield that decision from any form of review;

    (j) the introduction of delayed-notification search warrants which allow police officers to enter premises covertly, without giving notice to the occupier, for an extended, and potentially indefinite period;

    (k) the grant of additional powers to law enforcement officers allowing them to use seized electronic equipment, such as mobile phones, to access information which would otherwise require them to obtain a warrant under the *Telecommunications (Interception and Access) Act 1979;*

(l) the augmentation of the coercive powers of the Australian Crime Commission (ACC) including by:

(i) extending the power of an ACC examiner to allow him or her to require a person to provide evidence by sworn written statement, including in circumstances where that statement may be self-incriminating;

(ii) providing express power to an ACC examiner to exclude an examinee's legal practitioner of choice from an examination and to continue the examination notwithstanding that the examinee would then be without any legal representation;

(iii) imposing an evidential burden on a defendant charged with providing false or misleading evidence to the ACC, requiring that defendant to demonstrate that the relevant evidence was not false or misleading *in a material particular*.

Background

3. The Law Council is aware that the Australian Parliament, and the Committee in particular, have considered many of these and related matters several times in recent years. On that basis, before embarking on a more detailed discussion of the provisions of the proposed Bill, the Law Council makes the following observations.

4. The Law Council believes that in recent years a culture has developed which has increasingly inhibited the type of detailed and robust debate which, in a healthy democracy, ought to precede any extension of Executive power or interference with previously entrenched rights and liberties.

5. The pattern which has emerged is as follows:

(a) Typically, over objection and with reticence, extraordinary powers are granted to law enforcement agencies in order to meet what is asserted to be an extraordinary risk to the community. It is acknowledged that the exercise of those powers will involve an infringement of rights or invasion of privacy but is said to be justified by a countervailing threat to the community.

(b) Later, the law enforcement agency which has been the recipient of those powers reports that the powers have assisted greatly in combating crime. No one is in a position to argue whether the same result might have been achieved by a different method. No one, other than the law enforcement agency itself, is privy to detailed information about the day-to-day use of the power and its implications.

(c) Rights which are infringed in the process of exercising the power are largely invisible. This is both because those rights are regarded as ceasing to exist from the moment they are traded off in favour of more efficient law enforcement and because it is assumed that only a certain criminal class is materially affected.

6. For example, in 2002 when discussing the ACC's coercive powers and whether tougher penalties were required for those who refuse to cooperate, the Chair of the ACC Board and Commissioner of the Australian Federal Police Mick Keelty said:

> "*I know it goes against our fundamental principles of human rights and civil liberties but the reality is I have yet to see, for all the discussion and all the debate, an abuse of the powers that have been vested in the ACC*."[1]

7. Consequently it becomes irrelevant that every time a person is compelled to give self-incriminating evidence to the ACC his or her rights are infringed.

8. Once certain infringements have been sanctioned by Parliament, they change character and become ordinary and acceptable. If an organisation seeks to criticise the exercise of the relevant power, seeks its repeal or resists its expansion, it is required to show more than the infringement of rights. It must illustrate "an abuse of the power" such as the consistent targeting of someone the community perceives as innocent or the exercise of the power for private gain.

9. Often law enforcement agencies seek further expansion of previously granted, extraordinary powers. For example, controlled operation provisions, allowing police to authorise officers to engage in unlawful conduct with impunity, were introduced into the *Crimes Act* in 1996 via the *Crimes Amendment (Controlled Operations) Act 1996.* Those provisions were expanded and assumed identity provisions were inserted in 2001 via the *Measures to Combat Serious and Organised Crime Act 2001.* The powers were again expanded in 2004 via the *Australian Federal Police and Other Legislation Amendment Act 2004.* Now, with this Bill, further expansion of the controlled operations provisions is proposed.

10. The push to expand the powers of law enforcement agencies is often justified by broad claims that criminal networks are expanding or morphing or entering different areas of crime or becoming more mobile or sophisticated or difficult to penetrate or detect. Other than the agency seeking the expanded power, few people are well placed to challenge such claims authoritatively. As a result, the asserted risk becomes a fact against which the suitability of any proposed measures must be weighed.

11. Dissenting claims that the expanded power sought by law enforcement agencies is too unfettered or comes at too high a cost to citizens' rights and privacy are deflected on the basis that the power already exists and that the relevant rights have already been modified without any apparent adverse effects.

12. The onus is thus placed on those who resist any proposed amendments to demonstrate why the additional powers sought are excessive, rather than on the proposing authority to justify fully the need for expanding existing powers.

13. Sometimes any opportunity to successfully oppose or alter a Bill is even further constrained by the fact that the proposed amendments are presented as a *fait accompli.* For example, the Explanatory Memorandum and the Second Reading Speech state that the provisions dealing with controlled operations and

[1] Commonwealth of Australia – Official Committee Hansard "Joint Committee on the Australian Crime Commission" Friday 7 October 2005 p29

assumed identities have been introduced in order to bring Commonwealth legislation in line with pre-agreed national model legislation. In most cases, no further justification is offered for the provisions, even where they involve an expansion of existing powers.

14. National legislative uniformity is a worthy goal, where justified, and one that is strongly supported by the Law Council. However, on its own, such an objective should not be considered sufficient to justify an expansion of an extraordinary Executive power.

15. The Law Council greatly respects the hard work and important functions which are performed by the Committee. It is not the Law Council's intention to diminish the significance of the contribution of the Committee in reviewing and reporting on the content of Bills.

16. However, these preliminary observations are necessary because the concerns of the Law Council extend beyond the content of the current Bill, to the context in which law reform is currently formulated and executed. In addition to concerns about the operation of specific provisions, the Law Council's underlying concern is that extraordinary measures, such as those introducing delayed notification search warrants, might be introduced:

    (a) without transparent, properly informed and detailed analysis of the threat or social evil which is sought to be addressed;

    (b) without exhaustive consideration of all the methods available for addressing that threat;

    (c) without time to review and consider properly any consequences and ramifications, both intended and unintended, of proposed changes; and

    (d) without any timeframe being set for the expiry of extraordinary powers if and when they cease to be necessary.

17. Considered, balanced law reform will always be necessary. However, the case for change, particularly where it involves increased Executive power and/or encroachments on rights and liberties, must be well supported and made with some rigour. That has not occurred in relation to the current Bill.

18. For example, neither the Explanatory Memorandum nor the Second Reading speech offer any explanation as to why it is necessary to introduce delayed notification search warrants. Both documents proceed entirely on the assumption that the need for such a measure is obvious. Neither document explains whether or not the absence of such a warrant is currently frustrating law enforcement and what the consequences have been, or alternatively, explains what emerging crime pattern the warrant is designed to address or whether any other options have been considered.

19. The Law Council's specific concerns with the Bill are addressed below. However, the Law Council believes that unless and until a more comprehensive justification is provided for each new or extended power granted by the Bill, any discussion as to the operation of those powers and accompanying oversight and accountability mechanisms should be regarded as premature.

Controlled Operations

20. A controlled operation refers to a covert police investigation in which law enforcement officers and civilian informants are authorised to engage in unlawful conduct. Part 1AB of the *Crimes Act 1914 (Cth)* ("the *Crimes Act*") already contains provisions which regulate the authorisation, conduct and monitoring of controlled operations and which confer exemption from criminal liability on participating law enforcement officers and certain civilian participants. Schedule 1 of the Bill seeks to replace the existing Part 1AB with a new Part. The purported impetus for this change is the need to bring Commonwealth legislation into line with a national model law relating to cross-border controlled operations.

21. The model law was developed by the Joint Working Group of the Standing Committee of the Attorneys-General and the Australasian Police Ministers Council and was published in 2003 in the "Cross-Border Investigative Powers for Law Enforcement Report". The Law Council made submissions to the Joint Working Group which for the most part adopted the submissions of the Victorian Bar Association and the Criminal Bar Association of Australia. The Law Council believes that many of its submissions were not appropriately addressed by the Joint Working Group and to that extent they are restated here. At any rate, the provisions of the Bill diverge from the national model law in a few key respects and these current submissions also address those points of divergence.

    (a) The Law Council is keen to ensure that the full impact of the amendments proposed by the Bill is properly appreciated. Amongst other things, if the Bill is passed in its current form, it will result in the expansion of the range of offences in relation to which a controlled operation may be carried out;

    (b) the expansion of the type of people who may receive exemption for criminal liability;

    (c) the dilution of an already unsatisfactory authorisation process;

    (d) the removal of the need for external authorisation to extend a controlled operation; and

    (e) the relaxation of reporting requirements.

22. Although the Law Council has long-standing concerns about several aspects of the existing Part 1AB, in view of the purpose of the current inquiry this submission is focussed on concerns arising specifically from the changes to the Part. It should not be read as an exhaustive list of the Law Council's concerns with the regime for authorising and conducting controlled operations under the *Crimes Act*.

Range of Offences for Which Controlled Operations may be Authorised

23. The Bill provides that a controlled operation may be authorised for the purposes of obtaining evidence that may lead to the prosecution of "a serious Commonwealth offence or a serious State offence that has a federal aspect. "[2]

24. These terms are defined in proposed section 15GE as offences which are punishable on conviction by at least three years imprisonment or any other Commonwealth offence which is prescribed by regulation or that is of a kind prescribed by the regulations. The regulations are not limited by the requirement that the offence must carry a maximum penalty of at least three years imprisonment.

25. The effect of proposed section 15GE is that there are no longer any prescribed limits on the type of offence for which controlled operations may be authorised.

26. The controlled operations provisions of the *Crimes Act* confer extraordinary powers on authorising officers to license police and civilian informants to commit otherwise unlawful acts with impunity. Controlled operations should therefore be subject to strict limitations and their use confined to the investigations of the most serious crimes. In the view of the Law Council this means offences which carry a maximum penalty of at least ten years imprisonment or offences which relate to a pattern of criminal activity, the scope and nature of which justifies its treatment as exceptional.

27. On the contrary, over the course of little more than a decade the range of offences in relation to which a controlled operation may be carried out has increased exponentially.

28. When the controlled operations provisions were first introduced into the *Crimes Act* in 1996, they were limited in their application to certain drug importation offences. In 2001 an amendment was sought, via the *Measures to Combat Serious and Organised Crime Bill*, to expand their application to *any* Commonwealth offence. The proposal, which was not accompanied by any clear justification, met with considerable opposition.

29. On the basis of a recommendation from this Committee, the relevant provisions were reframed. When that Bill was finally passed it provided that controlled operations could be authorised in relation to a "serious Commonwealth offence." That term was defined as:

> *"…an offence against a law of the Commonwealth:*
>
> *(a) that involves theft, fraud, tax evasion, currency violations, illegal drug dealings, illegal gambling, obtaining financial benefit by vice engaged in by others, extortion, money laundering, perverting the course of justice, bribery or corruption of, or by, an officer of the Commonwealth, an officer of a State or an officer of a Territory, bankruptcy and company violations, harbouring of criminals, forgery including forging of passports, armament dealings, illegal importation or exportation of fauna into or out of Australia, espionage, sabotage or threats to national security, misuse of a computer or electronic communications, people smuggling, slavery, piracy, the organisation, financing or perpetration of sexual servitude or child sex tourism,*

[2] See Schedule 1, Item 1 proposed section 15GD.

dealings in child pornography or material depicting child abuse, importation of prohibited imports or exportation of prohibited exports, or that involves matters of the same general nature as one or more of the foregoing or that is of any other prescribed kind; and

(b) that is punishable on conviction by imprisonment for a period of 3 years or more. "[3]

30. A further amendment later explicitly included in the definition a number of child pornography offences, all attracting a maximum term of imprisonment of at least ten years. Yet another amendment in 2004 extended the power to authorise a controlled operation to cover the investigation of "a serious State offence with a federal aspect", which was defined as *"a State offence that has a federal aspect and that has the characteristics of a serious Commonwealth offence*."

31. With the current proposed Bill, even further expansion of the provisions is sought. The Bill seeks to repeal the list of offence types that constitute a serious offence and allows for any Commonwealth offence, regardless of the penalty it attracts, to be listed as a serious offence. In short, the Bill represents a return to the rejected 2001 proposal that it should be possible to authorise a controlled operation in relation to *any* Commonwealth offence.

32. As in 2001, little or no justification is offered for this change. The Explanatory Memorandum states that the broader definition of a serious offence:

> "*is consistent with the model laws and will ensure that the current and potential scope of ACC activities is covered. … The capacity to prescribe additional items by regulation has been included to cater for emerging categories of serious crime, reflecting both the changing criminal threat and new enforcement priorities that may emerge."*

The Explanatory Memorandum also explains that the fact that the regulations are not limited by the requirement that an offence carry a maximum penalty of at least three years or more:

> "*will enable the Australian Government and law enforcement agencies the flexibility to deal with emerging categories of serious crime*."

33. This explanation, namely that crime patterns are constantly changing and law enforcement agencies require flexibility to respond, is essentially the same argument that was advanced by the Australian Federal Police in 2001. Differently stated that argument is: "Law enforcement agencies need to have the ability to authorise and conduct controlled operations as and when they deem necessary." Advancing such an argument betrays the assumption that controlled operation should be regarded as an ordinary tool of law enforcement.

34. The Law Council submits that the range of offences in relation to which controlled operations may be conducted is already overly broad and that no further expansion is necessary.

35. However, if law enforcement agencies seek to push for such an expansion, the Law Council believes that those agencies should at least be in a position to state which criminal offences are not currently covered, but which they believe should be covered, by Part 1AB. Five years have passed since the

[3] *Measure to Combat Serious and Organised Crime Act 2001 NO. 136, 2001, Schedule 1, Item 17*. A further amendment to the relevant section (s15HB)

unsuccessful initial bid to include *all* Commonwealth offences under the controlled operations provisions. Therefore, law enforcement agencies should also be in a position to report if and how any limitation imposed on the range of offences has adversely impacted their efforts to combat serious crime. Without such information it is not clear how Parliament can consider properly the amendments proposed in the Bill, or how organisations such as the Law Council might properly respond.

36. ***The Law Council recommends that no amendment be adopted extending the range of criminal offences in relation to which a control operation may be authorised.***

Power of Principal Law Enforcement Officer to Authorise any Person to Engage in Criminal Conduct

37. Under the Bill, as under the existing provisions of the *Crimes Act*, only an "authorising officer" can hear and grant an application to conduct a controlled operation. Like the *Crimes Act,* the Bill designates certain high ranking officers of the Australian Federal Police (AFP), the Australian Crime Commission (ACC), and the Australian Commission for Law Enforcement Integrity (ACLEI) as "authorising officers" for the purpose of controlled operations conducted by their agencies or under the supervision of their agencies.

38. The Law Council has always submitted that these internal authorisation procedures prescribed by the *Crimes Act* provide inadequate safeguards against the misuse of the power to license and confer impunity for unlawful conduct. The Law Council has previously submitted that a retired judge should be appointed to authorise controlled operations in order to provide greater independent scrutiny of proposed operations and to offer an additional protection against misuse or overuse of relevant powers.

39. The Law Council is gravely concerned that under the current Bill, not only are the current internal authorisation procedures retained, but it is also proposed to delegate the power to authorise protected unlawful conduct to the principal law enforcement officer directly in charge of any controlled operation.

40. Under the authorisation regime proposed by the Bill, the "authorising officer" will issue a broad authority which merely identifies the "nature" of the unlawful conduct which may be engaged in by participants in the controlled operation. The authority will not specify who is permitted to participate in the controlled operation nor will it particularise the offences they are authorised to commit.[4] This detail will be left to the principal law enforcement officer, who is the officer directly responsible for the conduct of the controlled operation. Under the Bill, it is the principal law enforcement officer who is empowered to authorise specific persons to engage in unlawful conduct.

41. This represents a significant departure, both from the current provision of the *Crimes Act* and from the provisions of the national model laws. The *Crimes Act* currently requires that a certificate of authority issued by the authorising officer must:

    (a) state the nature of the activities covered by the certificate; and

    (b) identify each person who:

[4] Proposed section 15GJ

(i) is not a law enforcement officer; and

(ii) is permitted to be involved in the operation; and

(c) for each person identified, state the nature of the activities covered by the certificate in relation to that person.

42. The national model law requires greater precision in that participating law enforcement officers must also be named in advance. Amongst other things, an authority granted by an authorising officer must:

(a) Identify each person who may engage in unlawful activity for the purposes of the operation; and

(b) Identify

(i) With respect to law enforcement participants, the nature of the unlawful conduct in which those participants may engage; and

(ii) With respect to civilian participants, the particular unlawful conduct (if any) that each participant may engage in.

43. The Law Council strongly believes that it is inappropriate for the principal law enforcement officer, who is directly engaged in the running of the controlled operation and with participants, who has a direct interest in the operation successfully yielding results and who is therefore without the necessary objectivity and independence, to ultimately be the person tasked with authorising the participation of civilians and other law enforcement officers in unlawful conduct. This proposed change fundamentally undermines the already inadequate safeguards currently in the *Crimes Act*.

44. For example, under *the Crimes Act* at present, and under the national model law, an authorising officer must be satisfied on reasonable grounds of a number of matters before issuing an authority. An authorising officer must be satisfied:

"*(a) it is likely that a serious Commonwealth offence has been, is being or will be committed; and*

(b) the nature and extent of the offence, and any suspected criminal activity that is related to it, justifies a controlled operation; and

(c) conducting the operation would not involve intentionally inducing a person to commit a Commonwealth offence, or an offence against a law of a State or Territory, if that person would not otherwise have intended to commit:

(i) that offence; or

(ii) an offence of that kind; and

(d) any unlawful activity involved in conducting the operation will be limited to the maximum extent consistent with conducting an effective controlled operation; and

(e) the operation will be conducted in a way that ensures that, to the maximum extent possible, any illicit goods involved in the operation will be under the control of an Australian law enforcement officer at the end of the operation; and

(f) any unlawful activity involved in conducting the operation will not:

(i) seriously endanger the health or safety of any person; or

(ii) cause the death of, or serious injury to, any person; or

(iii) involve the commission of a sexual offence against any person; or

(iv) result in loss of, or serious damage to, property (other than illicit goods); and

(g) the operation will be conducted in a way that is consistent with the reporting and accountability requirements of this Part; and

(h) if a person who is not a law enforcement officer is to be involved in the operation--the role to be assigned to the person could not adequately be performed by a law enforcement officer."

45. The list of conditions which must be met before a controlled operation is authorised is intended to ensure that law enforcement agencies only conduct controlled operations when necessary and when justified by the seriousness of the circumstances. Further, these conditions are intended to ensure that the scope of criminal activity authorised as part of a controlled operation is subject to certain limitations, and that the risk of both entrapment and civilian participation is minimised where possible.

46. These mandatory pre-conditions cease to act as a form of safeguard if the ultimate responsibility for authorising participation in a controlled operation, particularly civilian participation, does not actually rest with the authorising officer, but with the principal law enforcement officer who, under the provisions of the Bill, is not required to be reasonably satisfied of any of the matters listed above.

47. The Explanatory Memorandum justifies the divestment of power to the principal law enforcement officer as follows:

"Law enforcement agencies advised that they would often not be aware of who needs to be authorised to participate in a controlled operation until during the operation. For example, where a person is bringing goods into Australia from overseas and the controlled operation involves letting that person through Customs so that they can be followed to the delivery point, the law enforcement agency will not know which Customs officers may be on duty that day or which checkpoint the person will pass through until just before it occurs. As such, they require sufficient flexibility to ensure that any person engaged in controlled conduct under the controlled operation is protected under proposed section 15GW. The variation provisions in the model laws do not provide this flexibility.

Therefore, under proposed subsection 15GL(1) the principal law enforcement officer may authorise a specified person to engage in controlled conduct for the purpose of that controlled operation. This authorisation may be given orally but must be followed up in writing setting out the matters required in proposed subsection 15GL(2)."

48. The Law Council considers the example provided in the Explanatory Memorandum insufficient to justify the vesting of extraordinary powers in an ordinary law enforcement officer.

49. An officer of the Australian Customs Service is "a law enforcement officer" for the purposes of the *Crimes Act*. Therefore the example provided in the Explanatory Memorandum offers no justification for abandoning the current requirement that at least non-law enforcement participants in a controlled operation must be identified and approved in advanced by the authorising officer, together with the nature of their involvement. The Law Council believes that it is neither necessary nor desirable to empower an ordinary law enforcement officer to authorise a civilian at short notice to engage in criminal conduct with impunity.

50. In fact, the Law Council believes that the example given in the Explanatory Memorandum also fails to provide a compelling case for failing to adopt the model law provisions, which require both law enforcement and civilian participants to be identified and approved directly by the authorising officer. Although it may cause inconvenience, under the proposed authorisation regime it is possible to obtain an urgent variation of a controlled operation authority over the phone. This would allow the name of a law enforcement officer to be included in the authority at very short notice. In many circumstances, forewarning could readily be provided to the authorising officer that such an urgent variation application was likely. At any rate, under the provision of the Bill, the principal law enforcement officer would have to issue an urgent oral authorisation to the relevant customs officer. It is difficult to imagine therefore that he or she would be in a markedly better position than the authorising officer, who can grant a variation of an authority over the phone.

51. The power to authorise persons to commit criminal offences is exceptional and should be strictly controlled, regardless of whether such controls result in inconvenience or limit flexibility.

52. A further issue which warrants mention is that the Explanatory Memorandum states that "*a principal law enforcement officer also cannot authorise themselves to engage in controlled conduct. Their role is to oversee the conduct of the controlled operation, not engage as a participant."* However, on review of proposed section 15GL it is not apparent to the Law Council that the principal law enforcement officer is clearly prohibited from authorising himself or herself to engage in criminal conduct. If the section is to remain in the Bill, such a prohibition should be clearly stated.

53. ***The Law Council recommends that the Bill be amended to ensure that the authorising officer, and not the principal law enforcement officer, be required to identify each person who may engage in unlawful activity for the purposes of the controlled operation; and to identify***

    (a) With respect to law enforcement participants, the nature of the unlawful conduct in which those participants may engage; and

    (b) With respect to civilian participants, the particular unlawful conduct (if any) in which each participant may engage.

Authorisation to Extend a Controlled Operation

54. Under the existing provision of the *Crimes Act,* a controlled operation can be authorised for a maximum period of six months. However, in order for a certificate authorising a controlled operation to remain in force longer than three months, it must be reviewed by a nominated member of the Administrative Appeals Tribunal (AAT) within two weeks of the expiry of the first three month deadline. The nominated member of the AAT may only allow the certificate to remain in force beyond three months (and only for a maximum of a further three months) if he or she is satisfied of all the matters of which the original authorising officer was required to be satisfied before initially authorising the controlled operation.[5]

55. Under the provisions of the Bill, a controlled operation may only be authorised for a maximum period of three months.[6] However, an application may be made to an authorising officer (either the same officer who initially authorised the controlled operations or another authorising officer from the same law enforcement agency) to vary the original authority, including by extending it for a further period of three months.[7] There is no involvement of an independent and external third party in the authorisation of extensions. There is no limit to the number of times that a variation, by way of extension of the controlled operation, may be granted.

No Limits on the Maximum Length of a Controlled Operation

56. The Law Council is concerned that, although a controlled operation can only be extended by an authorising officer for a period of three months at a time, it can be extended an unlimited number of times.

57. The Law Council opposes the introduction of provisions which, in theory, allow a controlled operation to be extended indefinitely. The Law Council believes that a finite time limit should be imposed on any particular controlled operation, which after all, is not intended to be a broad intelligence gathering exercise but rather "*an operation carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious Commonwealth offence or a serious State offence with a federal aspect*."[8]

58. In the absence of any substantive evidence about the impracticality of the previous six month limit, the Law Council believes it should remain; that is, the Law Council believes only one extension for a maximum of three months should be permitted.

59. ***The Law Council recommends that the Bill be amended to place a limit on the maximum length of any controlled operation.***

Internal Authorisation of Extensions offers Inadequate Safeguards

60. As noted above, the Law Council believes that the existing authorisation process for controlled operations, which is entirely internal to law enforcement agencies, provides inadequate safeguards against corruption and abuse.

[5] *Crimes Act* 1914 (Cth) s15OB

[6] Schedule 1, Item 1 proposed subsection 15GJ(g)

[7] Schedule 1, Item 1 proposed section 15GO

[8] Schedule 1, Item 1 proposed section 15GD

Therefore, the Law Council is very concerned that the Bill, in addition to retaining that process, proposes to remove the review and oversight role of the AAT.

61. The Explanatory Memorandum states that:

"Internal variation for controlled operations authorisations is appropriate as the conduct of controlled operations is essentially an internal and operational matter and this provides operational efficiency and protects the security of the investigation."

62. The Law Council is surprised by the implicit assertion that the involvement of a nominated member of the AAT in the approval of extensions provides grounds for concern about the security of the investigation. Further the Law Council is alarmed by the assertion that the conduct and extension of a controlled operation is essentially an internal and operational matter. On the contrary, the Law Council believes that only a person who is independent of an operation and has no vested interest in its outcome has the requisite objectivity to scrutinise properly an application for an extension and to evaluate whether the criteria for authorising a controlled operation continue to be met.

63. The Explanatory Memorandum seeks to allay any fears arising from the abolition of the AAT's role by adverting to the oversight and monitoring role performed by the Ombudsman, who has the power to inspect records and obtain relevant information from law enforcement officers. The Law Council does not believe that the functions of the Ombudsman, which essentially involve review of how controlled operation powers have been used after an operation concludes, are comparable to the gatekeeper role presently played by nominated members of the AAT, who are tasked with determining, at least in relation to an extension application, whether those powers should be conferred in the first place. It is these types of "front end" review and accountability mechanisms which are so conspicuously absent from the Bill.

64. At any rate, it is questionable whether the reporting obligations imposed by the Bill are adequate to facilitate rigorous review by the Ombudsman. Six monthly reports must be provided to the Ombudsman by each agency empowered to authorise a controlled operation and, amongst other things, these reports must include information about the number of variations sought, granted and rejected during the reporting period. This type of basic data is unlikely to reveal any patterns or problems relating to the extension of controlled operations.

65. Further, the Law Council believes that it is a flaw with the Bill that until a particular operation is completed, there is no requirement to report to the Ombudsman, or even internally with an agency, on the unlawful conduct authorised and engaged in as part of that operation. Given that controlled operations can be continued indefinitely under the provisions of the Bill, this reporting obligation may never arise or may be postponed several years. This is entirely unsatisfactory and contradicts any notion that the regime introduced by the Bill incorporates external oversight.

66. ***The Law Council recommends that the Bill be amended to retain the role of an independent, external authority (at present a nominated member of the AAT) in the authorisation of an extension of a controlled operation beyond three months.***

Information which Should Be Provided in Any Application to Extend a Controlled Operation

67. In the absence of any requirement that external authorisation must be sought in order to extend a controlled operation and in the absence of any limits on the number of times that an operation may be extended, the Law Council submits that, at the very least, the provisions of the Bill should be more prescriptive about the type of information that must be provided and considered before an extension is granted.

68. Under the provisions of the Bill, when a principal law enforcement officer lodges an application to vary a controlled operation authority by extending it for a period of up to three months, he or she is not automatically required to report on the conduct of the controlled operation up until that point. For example, there is no requirement that before making a decision to extend a controlled operation, possibly for the second, third or umpteenth time, the authorising officer be provided with a report detailing what, if any, offences have already been committed by participants in the controlled operation, and by whom they have been committed.

69. The Bill provides that before granting an extension the authorising officer must be satisfied, on reasonable grounds, of all the same matters about which he or she would be required to be satisfied if granting the original authority. However, the Law Council does not believe this is sufficient, particularly in circumstances where controlled operations may be extended several times and where it is proposed to divest authority to the principal law enforcement officer to authorise specific people to engage in unlawful conduct.

70. An authorising officer should not only be required to give consideration to the continuing appropriateness and necessity of the controlled operation going forward, he or she should also be required to:

    (a) assess how effective the operation has been to date in gathering evidence in relation to the offence and targeted person specified in the original authority;

    (b) assess whether any unlawful conduct authorised and/or carried out in the course of the controlled operation up until that point was outside the scope of the initial authority or went beyond what was necessary to conduct an effective controlled operation;

    (c) assess whether any conduct up until that point by a participant in the controlled operation:

        (i) seriously endangered the health or safety of any person; or

        (ii) caused the death of, or serious injury to, any person; or

        (iii) involved the commission of a sexual offence against any person; or

        (iv) resulted in loss of, or serious damage to, property (other than illicit goods);

    (d) assess the participation up until that point of any civilians in the controlled operation, particularly any authorised unlawful conduct engaged in by civilian participants, and whether the role played by any

civilian participant could have been adequately performed by law enforcement officers.

71. In order to facilitate this assessment the principal law enforcement officer applying for a variation by way of extension of the controlled operation authority, should be required to provide a progress report addressing the above matters.

72. The Law Council believes that after assessing these matters, the authorising officer should only grant the extension if he or she is satisfied that the benefits of the operation to date, with respect to gathering evidence which may lead to prosecution of a person for a specified serious offence, substantially outweigh the degree and scope of the unlawful conduct required to obtain that benefit, particularly where civilian participants are involved.

73. Further the Law Council believes that after this assessment, if the authorising officer believes that any unlawful conduct authorised and/or engaged in by the participants in a controlled operation up until that point:

    (a) has been beyond the scope of the initial authority;

    (b) has been unnecessary;

    (c) has fallen into one of the four categories set out in paragraph 50(c) above; or

    (d) has unnecessarily involved civilian participants

    he or she should not authorise the extension, unless he or she believes on reasonable grounds that there are exceptional circumstances in favour of extending the operation. In either case, the authorising officer should record his or her findings and reasons for decision and this should be provided to the Ombudsman.

74. ***The Law Council recommends that the Bill be amended to impose stringent requirements about the type of information which must be provided and considered in relation to any application to extend the period of a controlled operation.***

Urgent Applications

75. Ordinarily an application for authority to conduct a controlled application or to vary an authority must be made in writing. However, if the applicant has reason to believe that the delay caused by making a formal application may affect the success of the controlled operation; the Bill allows for an urgent application to be made orally in person or by telephone or any other means of communication.

Criteria for Granting an Urgent Authorisation or Variation

76. The Law Council appreciates that in order to respond effectively to unforeseen circumstance, law enforcement officers require a degree of flexibility and, as a result, it is necessary to include an urgent application facility. However, urgent applications should be discouraged and only resorted to when absolutely unavoidable. They deny the decision maker the opportunity to give proper and thorough consideration to a comprehensive written application.

77. On that basis the Law Council believes that applicants should have to satisfy an additional requirement in order to be granted an urgent authorisation. The Law Council believes that applicants should be required to demonstrate to the

authorising officer that, through no lack of diligence or care on their own part, they were not in a position to make a more timely formal application for authorisation.

78. The Law Council believes that it should not be enough to show that an application is urgent at the time it is made. An applicant should also have to demonstrate that the urgency has not been created by his or her own inaction or inefficiency.

79. The Law Council is aware that if an urgent application results in the grant of an urgent authority (that is authorisation provided orally in person, over the phone or by other means of communication) its period of operation will be limited to a maximum of 7 days and cannot be extended. Nonetheless, any authorisation, regardless of how long it remains in force, still has the very serious effect of authorising unlawful conduct on the part of law enforcement officers and informants. Therefore rushed processes, not documented until after the fact, should be avoided wherever possible.

80. ***The Law Council recommends that the provisions of the Bill providing for urgent authorisation applications and urgent variation applications be amended to require applicants to demonstrate that a more timely application was not possible in the circumstances.***

(The Law Council notes that the current provisions of the Crimes Act do not contain this requirement but submits that the Bill provides an opportunity to introduce such appropriate limitation on the availability of urgent application facilities.)

Contents of an Urgent Authority

81. The Law Council believes that in a situation where an urgent authorisation is provided for a controlled operation, requiring written documentation to be prepared after the event, that documentation should be no less complete than the documentation prepared in the course of an ordinary application and authorisation.

82. Under the provision of the Bill, where an urgent oral authority for a controlled operation is granted, the authorising officer must prepare a written urgent authority within seven days.[9] However, this written urgent authority is not required to address all the same matters as a formal authorisation issued in less rushed circumstances For example, a written urgent authority is not required to state the identity (to the extent known) of the person or persons targeted by the operation or the nature and quantity of any illicit goods which will be involved in the controlled operation.

83. This is inconsistent with the current provisions of the *Crimes Act* which require a certificate issued after an urgent application for authorisation to address all the same matters as a certificate issued in ordinary circumstances, including the name of the person targeted and the nature and quantity of any illicit goods to which the operation relates. It is also inconsistent with the provisions of the national model law which require a formal and urgent authority to address the same matters, notwithstanding that under the national model laws, as under the Bill, an urgent authority may only remain in force for seven days.[10]

[9] Schedule 1, Item 1 proposed section 15GK

[10] National Model Law on Cross-Border Controlled Operations Clause 7

84. Unhelpfully, the Explanatory Memorandum does not acknowledge that the relevant provision of the Bill represents a departure from the existing requirements of the *Crimes Act* or from the national model law. The Explanatory Memorandum does state that the fact that less comprehensive information needs to be included reflects "*operational realities*". It explains that, as a result of a tip-off for example, police "*may have sufficient information to suspect serious criminal activity but will not know the specific details until they commence their covert activities*."

85. The availability of an urgent application facility is intended to allow law enforcement officers to act quickly in response to circumstances. It is not, in any way, intended to lower the bar in terms of the information which is required to justify and secure authorisation for a controlled operation, as is implied by the Explanatory Memorandum.

86. Given there is no external independent scrutiny of the controlled operation applications before they are granted, the Law Council believes that all efforts should be made to ensure that available records of the process are as complete as possible.

87. ***The Law Council recommends that the Bill be amended to ensure that an authority granted in response to an urgent application must provide the same information as an ordinary authority, notwithstanding that it was produced after the fact.***

Protection from Criminal Responsibility and Indemnity from Civil Liability for Participants in Controlled Operations

88. Consistent with the existing provisions of the *Crimes Act*, under the Bill participants who engage in unlawful conduct during a controlled operation are protected from criminal responsibility.[11] Likewise, participants in a controlled operation are indemnified by the Commonwealth against civil liability incurred because of conduct in which they engage in the course of the operation.[12]

89. Under the provisions of the Bill this protection from criminal responsibility and indemnity from civil liability only applies if:

    - the participant engages in the conduct in accordance with the authority to conduct the controlled operation; and
    - the participant is authorised by the principal law enforcement officer under proposed section 15GL to engage in that conduct; and
    - the conduct does not involve the participant intentionally inducing another person to commit an offence that the person would not otherwise have intended to commit; and
    - the participant does not engage in conduct that is likely to cause the death of or serious injury to any person or involve the commission of a sexual offence against any person; and

[11] Schedule 1, Item 1, proposed section 15GW and 15HC

[12] Schedule 1, Item 1, proposed section 15GX

- if the participant is a civilian participant, he or she acts in accordance with the instructions of a law enforcement officer.[13]

90. The most significant change introduced by the Bill is that it extends protection from criminal responsibility and indemnity from civil liability to all participants in a controlled operation, whether they are civilian participants or law enforcement participants.

Protection from Criminal Responsibility for Civilian Informants

91. Under the existing provisions of the *Crimes Act*, "informants" who participate in controlled operations are not granted protection from criminal or civil liability.[14]

92. However, under the provisions of the Bill, informants, like law enforcement participants and other civilian participants in a controlled operation, are protected from both criminal and civil liability. The Law Council believes that this extension of indemnity is cause for great concern, particularly in the absence of an external, independent authorisation process for controlled operations.

93. In the Criminal Bar Association's (CBA) submission on the national model law, which was adopted by the Law Council, the following view was expressed:

> "*It is the view o the CBA that proposals to allow police to authorise criminals to continue or undertake criminal activity is a recipe for disaster. It will inevitably lead to police favouring one criminal or group of criminals whom they prefer not to prosecute against another group of criminal or suspected criminals who are the focus of a current investigation. The processes will always be subject to manipulation by criminal elements and will facilitate corruption. Should the process get to the point where the protected criminals are giving evidence against the targeted criminals, experience shows that the value of such evidence is often minimal."*

94. The Explanatory Memorandum acknowledges that the use of informers "*can be problematic"* but states:

> "*law enforcement agencies have indicated that in some circumstances the participation of informers will be crucial to the success of the operation. These provisions will not be effective unless the protections offered to informants are prospective rather than retrospective. If the protection for informants was retrospective, then informants participating in a controlled operation would commit unlawful acts without legislative protection and a court might exclude evidence obtained during a controlled operation."*

95. While conferring prospective immunity on informants *may* decrease the likelihood of their evidence being excluded, it cannot guarantee its admission nor will it bear on the weight that is given to such evidence. As noted above, experience shows that the value afforded to the evidence of criminal informants is often minimal.

96. Further the Law Council believes that, if obtaining admissible evidence from informants requires empowering police to confer immunity on known criminals, then such evidence comes at too high a price and is unlikely to be in the interest of justice in the long-term.

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[13] Schedule !1 Item 1 proposed sections 15GW, 15GX and 15HC

[14] *Crimes Act* 1914 s15I and s15IA

97. The Explanatory Memorandum seeks to offer some form of reassurance by pointing to the safeguards built in to the Bill. It states:

> *"As an additional safeguard, proposed paragraph 15GH(2)(h) operates to limit the use of informants in controlled operations by providing that the authorising officer must be satisfied that the role intended for the civilian participant (in this instance, the informant) could not be adequately performed by a law enforcement officer."*

As discussed above, the Law Council submits that this "safeguard" is of little utility.

98. The Explanatory Memorandum is correct in stating that an authorising officer is required to withhold authorisation for a controlled operation unless satisfied that civilian participation in the operation has been limited to an extent that is strictly necessary. However, under the provisions of the Bill, the authorising officer is not required to state whether any civilian participants are authorised to participate in a controlled operation nor state what conduct they may engage in. The authorising officer merely prescribes the broad nature of the unlawful conduct in which the unspecified participants in a controlled operation may engage.

99. Under the Bill, it is the principal law enforcement officer, (that is, the officer with direct responsibility for the controlled operation), who is ultimately empowered to authorise specific individuals, including informants, to engage in unlawful acts with impunity. The Bill places no obligation on the principal law enforcement officer to be satisfied that the role he or she gives to a civilian could not have been performed by a law enforcement officer.

100. The Law Council believes that if informants who participate in a controlled operation are to be granted protection from liability, an external, independent authorisation process is required. At the very least, the power to authorise civilians to engage in unlawful conduct should not be vested in an ordinary law enforcement officer of no designated rank who is directly involved in the conduct of the controlled operation.

101. ***The Law Council recommends that provisions of the Bill extending protection from criminal and civil liability to informants not be enacted, particularly in the absence of an independent and external authorisation process for controlled operations.***

Compensation and Notification Requirements

102. The Bill specifies that the Commonwealth is liable to pay compensation to a person who suffers loss or serious damage to property, or personal injury, as a direct result of a controlled operation.[15] (However, this does not apply to a person who suffered the injury, loss or damage while or because they were themselves engaged in criminal activity.)

103. As acknowledged in the Explanatory Memorandum, the covert nature of controlled operations means that people who suffer personal injury or property loss or damage as a result of such an operation are unlikely to know that the person responsible is actually a participant in a controlled operation. Therefore notice requirements are imperative.

[15] Schedule 1, item 1, proposed section 15HA.

104. The Bill provides that the principal law enforcement officer must report any loss or serious damage to property or injury to a person occurring in the course of, or as a direct result of, a controlled operation to the chief officer of his or her law enforcement agency as soon as practicable.[16]

105. In the case of loss of or serious damage to property, the Chief Officer must then take all reasonable steps to notify the owner of the loss or damage. The Chief Officer can delay that notification in certain circumstances.[17]

106. However, under the provisions of the Bill there is no obligation to notify a person who suffers personal injury that the injury was caused as a direct result of a controlled operation. In the absence of such notification it is possible, even likely, that an injured person will not be able to realise his or her compensation rights vis-à-vis the Commonwealth.

107. The Explanatory Memorandum states that "*law enforcement agencies participating in controlled operations will need to develop administrative protocols to notify where necessary those who are injured, or it is suspected may have been injured, during the course of or as a result of a controlled operation."*

108. The Law Council believes that this is inadequate. Although notification requirements are not currently addressed in the *Crimes Act,* given that they are addressed in the Bill they should be appropriately comprehensive. The purpose of the proposed Bill, namely to ensure that innocent victims of a controlled operation are adequately compensated, will be frustrated if proper notice requirements are not imposed.

109. ***The Law Council recommends that the notification requirements contained in the Bill be amended to ensure that any persons who are injured as a result of a controlled operation are made aware of their right of claim against the Commonwealth***

Unauthorised Disclosure Offence Provisions

110. The Bill creates two offences relating to the unauthorised disclosure of information about a controlled operation. Under proposed section 15HF a person is guilty of an offence if he or she intentionally discloses any information and is reckless as to whether the information relates to an authorised controlled operation. This offence carries a maximum penalty of two years.

111. Under proposed section 15HG, a more serious offence attracting a maximum penalty of ten years is created. Under that proposed section, a person is guilty of an offence if he or she discloses information relating to a controlled operation and:

(a) the person intends that the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of an authorised operation, or

(b) the person is reckless about the fact that the disclosure of the information will endanger the health or safety of any person or prejudice the effective conduct of a controlled operation.[18]

[16] Schedule 1, Item 1, proposed section 15HB(1)

[17] Schedule 1, Item 1, proposed section 15HB(2) and (3)

112. It is a defence to both offences if the disclosure was made:

(a) in connection with the administration or execution of the Part 1AB (ie the controlled operations Part of the *Crimes Act*; or

(b) for the purposes of any legal proceeding arising out of, or otherwise related to Part 1AB, or of any report of any such proceedings; or

(c) in accordance with any requirement imposed by law, or

(d) in connection with the performance of functions or duties, or the exercise of powers, of a law enforcement agency.

113. The Law Council believes that the Bill should include a fifth defence. The Bill should clarify that it is not an offence to disclose information for the purpose of obtaining legal advice.

114. The Law Council is concerned that disclosure "*for the purposes of any legal proceeding arising out of, or otherwise related to Part 1AB*" is not sufficiently broad to cover the provision of legal advice in all circumstances. For example, it is not clear whether it would cover a situation where a civilian participant wished to seek legal advice before participating in or withdrawing from a controlled operation, as there would be no legal proceedings in train.

115. As another example, it is not clear whether this defence would cover a situation where a former civilian participant in a controlled operation, who is at a later date charged with a seemingly unrelated offence, provides instructions to his solicitor to the effect that his prior participation in a controlled operation has motivated his accuser to manufacture allegations against him in the current case. Further examples come readily to mind.

116. The Law Council appreciates the need for security of information relating to controlled operation and that the unauthorised disclosure of information could place a current or former participant in a controlled operation at extreme risk. Nonetheless, this must be balanced against the need to ensure that people are able to seek and obtain legal advice about matters directly impacting on their rights and/or liabilities. Legal practitioners are bound by a duty of confidentiality and are well practised at observing that duty.

117. ***The Law Council recommends that the Bill be amended to ensure that it is not an offence to disclose information relating to a controlled operation for the purpose of obtaining legal advice.***

[18] Both offence provisions are silent on fault elements, and therefore they determined by section 5.6 of the Criminal Code.

Reporting Requirements and External Oversight

118. The Bill proposes to alter the current reporting requirements of law enforcement agencies engaged in controlled operations. For example, rather than reporting quarterly to the Minister and the Ombudsman, as is currently required under the *Crimes Act*,[19], agencies will only be required to report six monthly.[20] Under the provision of the Bill, the detail required to be included in such reports would be significantly reduced, with the focus primarily shifted to numerical data which reveals little about compliance.[21] The Law Council considers this proposed diminution of agencies' reporting obligations dangerous and inappropriate, particularly when it is accompanied by measures which seek to increase the powers of those agencies to conduct and extend the duration of controlled operations and to confer protection from liability on informants.

119. While the Bill imposes record keeping obligations on law enforcement agencies,[22] retains the Ombudsman's duty to inspect agency records at least once every twelve months[23] and increases the Ombudsman's power to obtain relevant information from law enforcement officers[24], this cannot overcome fundamental flaws with the reporting and oversight regime proposed by the Bill.

120. The Ombudsman's role will be substantially undermined if:

121. The principal law enforcement officer with responsibility for a controlled operation is not required to produce a detailed report concerning the conduct of each controlled operation; and

    (a) The principal law enforcement officer and the relevant law enforcement agencies are not required to provide crucial information about a controlled operation until after it is completed, which under the provisions of the Bill may not occur for a period of years or ever.

122. Contrary to proposed section15HH, law enforcement agencies should have to report on:

    (a) Not only the nature of the criminal activities targeted by a controlled operation but what, if any, charges resulted from the operation and, when the information is available, what if any convictions resulted. Only with information of this kind can the effectiveness of controlled operations be evaluated and the actual nature of the crimes targeted be understood;

    (b) Not only the nature of the unlawful conduct engaged in for the purposes of the controlled operations but the precise details of the unlawful conduct , who engaged in it, whether that person was a civilian and whether the conduct was authorised; and

    (c) Not only any loss of or serious damage to property or personal injuries which occurred in the course of the controlled operation but also any

[19] *Crimes Act* ss15R and 15UA

[20] Schedule 1, Item 1, proposed section 15HH

[21] The matter which must be addressed in quarterly reports at present are set out in the *Crimes Act* s15S. The matters which must be addressed in six monthly reports under the Bill are set out in proposed section 15HH.

[22] Schedule One, Item One, proposed sections 15HK and 15HL

[23] Schedule One, Item One, proposed section 15HN

[24] Schedule One, Item One, proposed sections 15HO, 15HP and 15HL

conduct which seriously endangered the health or safety of any person or involved the commission of a sexual offence against any person.

123. ***The Law Council recommends that the Bill be amended to ensure that reports provided by law enforcement agencies pursuant to proposed section 15HH are sufficiently comprehensive to allow evaluation of their compliance with the provisions and purpose of the Act. The Law Council also recommends that if controlled operations are able to be extended indefinitely, reporting obligations should not be postponed until after the completion of the operation.***

Assumed Identities and Witness Identity Protection

124. An assumed identity is a false identity that is used by law enforcement officers, intelligence officers and authorised civilians for the purposes of investigating an offence, gathering intelligence or for other security activities. Part 1AC of the *Crimes Act 1914* already contains provisions which regulate the authorisation, creation and use of assumed identities. Schedule 1 of the Bill seeks to replace the existing Part 1AC with a new Part.

125. Witness identity protection refers to the measures which are employed to protect disclosure of the true identity of an undercover operative when he or she gives evidence in court. This matter is currently regulated by section 15XT of the *Crimes Act* . Schedule 1 of the Bill seeks to replace section 15XT and introduce Part 1ACA.

126. As in the case of controlled operation, the impetus for the proposed amendments is the need to bring Commonwealth legislation into line with national model legislation developed by the Joint Working Group of the Standing Committee of the Attorneys-General and the Australasian Police Ministers Council and published in 2003 in the "Cross-Border Investigative Powers for Law Enforcement Report."

127. Although the Law Council has some concerns about the regime for authorising assumed identities, both as currently formulated in the *Crimes Act* and as proposed by the Bill, the focus of these submissions is the proposed introduction of Part 1ACA and an entirely new process for determining when and how the true identity of a witness in court proceedings may be concealed.

128. The Law Council is strongly opposed to the rationale behind the new Part, which denies courts any role in evaluating whether there is a need to protect the true identity of a witness and in balancing that need against other competing interests.

129. The proposed regime has the potential to impact substantially on the rights of an accused. This is because an accused person's ability to defend himself or herself may be significantly prejudiced if he or she is not permitted to discover the role and character of those giving or providing evidence against him or her.

130. As with the controlled operation and assumed identity provisions of the Bill, the proposed amendments grant extraordinary and unsupervised powers to law enforcement agencies, on the assumption that superficial, periodic reporting requirements offer sufficient safeguard against corruption and misuse. As with the other provisions of the Bill, the proposed amendments fail to properly mitigate against the risk that individuals' rights will be infringed.

Current provisions of the *Crimes Act*

131. Section 15XT of the *Crimes Act* currently provides as follows:

> "*1. If the real identity of an approved officer or approved person who is or was covered by an authorisation, might be disclosed in proceedings before a court, tribunal or a Royal Commission or other commission of inquiry, then the court, tribunal or commission must:*
>
> *a) ensure that the parts of the proceedings that relate to the real identity of the officer or person are held in private; and*
>
> *b) make such orders relating to the suppression of the publication of evidence given by the court, tribunal or commission as will, in its opinion, ensure that the real identity of the officer or person is not disclosed.*
>
> *2.* ***However, this section does not apply to the extent that the court, tribunal or commission considers that the interests of justice require otherwise."*** *(Emphasis Added)*

132. A key feature of this provision is that the Court retains control over the method by which evidence is given and, ultimately, all other considerations are subordinate to the interests of justice.

Regime Proposed by the Bill

133. Under the provisions of the Bill it is proposed that, if a covert operative is required to give evidence in a proceedings, he or she may be issued a witness protection certificate (WPC) by the chief officer of the relevant law enforcement agency. The effect of a WPC is that the covert operative is able to give evidence under a false identity without disclosing his or her true identity, including to the defence. A decision to issue a WPC is final and cannot be appealed against, reviewed, called into question, quashed or invalidated in any court.

134. The agencies which are authorised to issue a WPC are the same agencies as those which are authorised to issue an assumed identity. It is a disconcertingly long list made up of the AFP, the Australian Customs Service, the ACC, the ACLEI, the Australian Taxation Office, the Australian Security Intelligence Organization, the Australian Secret Intelligence Service and any other Commonwealth agency specified in the regulations.

135. The WPC must be filed in court at least 14 days (or less if leave is granted) before an operative gives evidence, and a copy must given to each party to the proceedings. According to proposed section 15KK, a WPC must contain the following information:

> (a) if the operative:
>
> (i) is known to a party to the proceedings or a party's lawyer by a name other than the operative's real name—that name (the ***assumed name***); or
>
> (ii) is not known to any party to the proceedings or any party's lawyer by a name—the operative's court name for the proceeding;

(b) The period the operative was involved in the investigation to which the proceeding relates;

(c) the name of the agency;

(d) the date of the certificate;

(e) the grounds for giving the certificate;

(f) whether the operative has been convicted or found guilty of an offence and, if so, particulars of each offence;

(g) whether any charges against the operative for an offence are pending or outstanding and, if so, particulars of each charge;

(h) if the operative is or was either a law enforcement officer or an intelligence officer:

(i) whether the operative has been found guilty of professional misconduct and, if so, particulars of each finding; and

(ii) whether any allegations of professional misconduct against the operative are outstanding and, if so, particulars of each allegation;

(i) whether, to the knowledge of the person giving the certificate, a court has made any adverse comment about the operative's credibility and, if so, particulars of the comment;

(j) whether, to the knowledge of the person giving the certificate, the operative has made a false representation when the truth was required and, if so, particulars of the representation;

(k) if there is anything else known to the person giving the certificate that may be relevant to the operative's credibility—particulars of the thing

136. Before a WPC is issued a witness is required to submit a statutory declaration to the Chief Officer or his delegate which addresses each of these issues. The Chief Officer must make all reasonable efforts to ascertain the information required to be included in the certificate.

137. During the proceedings no questions can be asked, answered, required to be given, evidence disclosed or statements made which disclose or may disclose the operative's identity or address. There is one narrow exception to this rule.

138. The Court may grant leave to ask questions or for a statement to be made which discloses the operative's true identity and/or address if satisfied that:

a) there is evidence that if accepted would substantially call into question the operative's credibility;

b) it would be impractical to test properly the credibility of the operative without allaying the risk of disclosure; and

c) it is in the interests of justice for the operative's credibility to be tested.

139. In the absence of information about the operative's true identity, defence counsel are unlikely to be able to establish the onerous first ground. This is because defence counsel will be precluded, under threat of prosecution, from

conducting the sort of pre-trial investigations and cross-examination that might alert them to raise relevant issues of credit.

140. Although much is made in the Explanatory Memorandum and in the Second Reading Speech in particular about the need to ensure operatives and their families are not placed at risk, potential danger to an operative is only one of three grounds in the Bill for issuing a WPC. A WPC may also be issued if the relevant chief officer or his or her delegate is satisfied that disclosing the operative's true identity is likely to prejudice any current or future investigation or is likely to prejudice any current or future activity relating to security.

141. These grounds are both very broad and very subjective. As noted, the Bill envisages that the decision as to whether these grounds are satisfied will be taken by the chief officer of the relevant law enforcement agency or his delegate. That decision would not be open to any form of review.

142. Any person who engages in conduct which results in the disclosure of the true identity of a person covered by a WPC commits an offence.

Model Proposed by the Australian Law Reform Commission

143. In the context of considering laws for the protection of classified and security sensitive information, the Australian Law Reform Commission (ALRC) considered the national model legislation, together with information about methods used in court to protect sources of information in other jurisdictions, including Canada, the UK, Germany and the European Court of Human Rights. The ALRC concluded that any proposal relating to a court or tribunal's power to permit evidence from an anonymous witness should be subject to the following safeguards:

a) The court or tribunal should undertake an independent assessment of the asserted need for witness anonymity and satisfy itself that the need is genuine and well-founded in the interests of national security.

b) The court or tribunal should only permit witnesses to testify anonymously if all other less restrictive protective measures have been considered and found to be inadequate in the circumstances.

c) The court or tribunal may make orders to conceal the physical appearance or identity of a witness from the public while allowing only the parties, their lawyers and the judge, magistrate or tribunal members to observe the witness. However, other than in exceptional circumstances, the court in criminal proceedings should not sanction methods which would conceal the physical appearance of a witness from an accused person (and his or her lawyers).

d) The court or tribunal should be reluctant to convict (or enter a judgment against a party) based either solely or to a decisive extent on the testimony of any anonymous witness.[25]

144. The Law Council supports the principles advanced by the Australian Law Reform Commission, which are the product of both public consultation and

[25] *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC 98, 2004) recommendation 11-11.

thorough research. The proposed regime is fundamentally at odds with these principles. It prioritises law enforcement agencies' internal, un-scrutinised assessments of their operational and security needs above all other concerns, including a defendant's right to a fair trial.

Delayed Notification Search Warrants

145. Schedule 2 of the Bill seeks to introduce Division 2A into Part 1AA of the *Crimes Act*, which deals with search, information gathering, arrest and related powers. The proposed Division 2A sets out a regime for the issue and execution of delayed notification search warrants ("covert search warrant"). These warrants are designed to allow law enforcement officers to search premises covertly and seize or copy items without notifying the occupier for a period of up to six months, or longer in certain circumstances.

146. This represents a substantial departure from the ordinary search warrant regime set out in Division 2 of the *Crimes Act*. Under that Division:

- an officer executing a search warrant must identify himself or herself to any person at the premises;
- If an occupier of premises is present when a search warrant is executed, he or she has a right to a copy of the warrant.
- If an occupier of premises is present when a search warrant is executed, he or she has a right to observe the execution of the warrant.
- The executing officer must provide a receipt for anything seized under the warrant.
- If something is seized, such as a document or storage device that can be readily copied, the occupier also has a right, on request, to be given a copy of the thing seized in most circumstances.

147. The rights are intended to ensure that a person whose premises are subject to search is aware of the basis and the authority for the search, and is in a position to challenge or make a complaint about the issue of the warrant and/or its method of execution. These rights also give a person whose premises are subject to search an opportunity to secure the presence or advice of his or her lawyer and to make a claim for legal professional privilege in respect of any item covered by the warrant.

148. Obviously, the very nature of a covert search warrant will deny individuals these rights and as a consequence introduce greater opportunity for police powers to be misused and rights to be infringed. The power to enter and search premises, and seize property is clearly intrusive. It represents a blatant invasion of privacy and directly interferes with an individual's right to the security of their premises. Such a power should be carefully confined and subject to strictly enforced conditions. This task is made very difficult if search warrants are executed in secret, without the knowledge of the person who has the greatest interest in ensuring that both the issue and execution strictly accords with the law.

No Justification Provided for Introduction of a Covert Search Warrant

149. The Law Council believes that the introduction of such an extraordinary power could only be justified by a clearly demonstrated extraordinary need. No attempt is made in the Explanatory Memorandum or Second Reading Speech to enunciate why law enforcement agencies require this new warrant.

150. It is not enough to claim, without more, that it will greatly assist police. The removal of the need for warrants entirely would also achieve this aim. Likewise it is not enough to couch the proposed new provisions in the language of balance and to offer assurances by reference to accountability and oversight mechanisms.

151. As a first step, the agencies which seek the creation of this extraordinary power, must establish, in precise terms, the need for this covert warrant regime, and the public interest goal it serves. Only then can a proper discussion follow about whether the asserted need greatly outweighs the obvious and substantial risk to individual rights and whether that risk can be sufficiently safeguarded against with appropriate accountability mechanisms.

152. Law enforcement agencies already have significant powers with which to combat serious crime, including terrorism. For example:

- Law enforcement agencies are empowered to conduct controlled operations, in which civilian informants and undercover police are authorised to engage in unlawful conduct;
- Law enforcement agencies can obtain a warrant to enter premises covertly for the purposes of installing a surveillance device;
- Law enforcement agencies can obtain a warrant to intercept telecommunications, including by way of named person warrants, device warrants and B party warrants, and can also obtain a warrant to access stored communications.
- The ACC has a range of coercive powers including the power to compel a person to provide self incriminating documents or provide self incriminating answers under examination.
- The Australian Security Intelligence Organisation (ASIO) can already obtain a warrant which allows covert entry onto premises for the purposes of accessing records or other things which will substantially assist the collection of intelligence on a matter that is important in relation to security.

153. Any proposal for a yet another intrusive executive power must necessarily address why these existing powers are inadequate. The prior existence of these or other extraordinary powers should not set a precedent which makes it easier to lobby successfully for the introduction of further like powers. On the contrary the fact that law enforcement agencies already have access to these powers should make it considerably more difficult to establish a need for the introduction of additional measures.

Range of Offences Covered by Covert Search Warrant Provisions

154. Where covert search warrants have already been introduced under State legislation, they are only available in relation to the investigation or prevention of terrorist acts. Under the Bill, a covert search warrant could be issued in relation to the investigation of:

(a) a Commonwealth offence that is punishable on conviction by imprisonment for a period of 10 years or more; or

(b) a State offence that has a federal aspect that is punishable on conviction by imprisonment for a period of 10 years or more; or

(c) an offence against section 8 or 9 of the *Crimes (Foreign Incursions and Recruitment) Act 1978*; or

(d) an offence against section 20 or 21 of the *Charter of the United Nations Act 1945*; or

(e) an offence against any of the following sections of the Criminal Code which carry a maximum penalty of less than ten years:

(i) subsection 147.2(1) or (3) (threatening to cause harm to a public official);

(ii) section 270.7 (deceptive recruiting for sexual services); or

(iii) subsection 471.11(2) or 474.15(2) (Using the postal or a carriage service to make a threat to cause serious harm).

155. This list includes a very broad range of offences from receiving stolen mail to selling a controlled plant to dishonestly appropriating or receiving stolen commonwealth property. The Explanatory Memorandum offers no illumination as to the rationale for this extensive and diverse range of offences. Most of the offences currently covered are long-standing offences which law enforcement agencies have been combating without the aid of covert search warrants for some time.

156. ***The Law Council submits that if a covert search warrant regime is to be included in the Crimes Act, it should only be available for the investigation of those offences in relation to which law enforcement agencies can demonstrate a clear need for its use****.*

Duration of Warrant

157. Under Division 2 of the *Crimes Act*, the maximum duration of a search warrant is seven days.[26] Under the Bill it is proposed that the maximum duration of a covert search warrant will be 30 days.[27] Again the Law Council has been unable to find any rationale in the Minister's speech or the Explanatory Memorandum for why it would be necessary for a covert search warrant to have such a comparatively long life. If law enforcement officers intend to re-enter premises under a covert warrant to return an item, this must be done within seven days of executing the warrant. Therefore the possible need for re-entry does not explain the thirty day duration of the warrant.

[26] *Crimes Act* section 3E(5A)

[27] Schedule 2, Item 8, Proposed Section 3SJ(h)

158. The Law Council submits that the maximum duration of the warrant should be seven days, consistent with Division 2 of the *Crimes Act*.

Search should be Videotaped

159. Proposed section 3SM of the Bill states that officers executing a covert search warrant may, for a purpose incidental to the execution of the warrant, take photographs and/or a video recording of the warrant premises or things at the warrant premises.

160. The Law Council submits that because of the nature of a covert search warrant and the risk of corruption and misuse, the Bill should stipulate that a video recording must be made and retained of the execution of any covert search warrant. The Law Council believes that this serves to protect police as much as it does the occupier of any premises which is searched.

161. The Law Council submits that when an occupier is eventually notified of the search pursuant to proposed section 3SQ, the Bill should provide that a copy of this video be provided.

Legal Professional Privilege

162. Section 3ZX of the *Crimes Act* states that Part 1AA does not affect the law relating to legal professional privilege. As a result, when law enforcement officers execute a search warrant, an occupier of the premises has a right to assert a claim of legal professional privilege over relevant items which are covered by the warrant and which police intend to seize. A list of those documents is then generally produced, and they are placed in a sealed container and delivered to the court or a third party, where they are held until the claim for privilege is resolved.

163. As proposed Division 2A will fall within Part 1AA of the *Crimes Act*, section 3ZX will also apply, in theory, to searches conducted pursuant to a covert search warrant. Of course, in practice, given that the occupier will be unaware of the search, he or she will also be unable to assert a claim of privilege. Therefore despite the express protection provided by section 3ZX, legal professional privilege will be unduly infringed by the covert search warrant regime.

164. The Explanatory Memorandum does not acknowledge this possible consequence of the covert search warrant regime and the Bill contains no provisions to address or minimise the risk.

165. Proposed subsection 3S1(2) of the Bill lists the matters that an eligible issuing officer must consider in determining whether to issue a covert search warrant. The Law Council believes that an additional consideration should be added to this list, namely whether it is likely that items seized or copied may include materials that could be subject to a claim for privilege. The constable applying for the warrant should be required to address this point in his or her application.

166. If it is likely that items seized or copied are of a type that may be subject to a claim for legal professional privilege then the warrant should not be issued or should be subject to limitation.

Notice to Occupiers

167. Although the provision of the Bill allow for covert access to premises, the Bill provides for delayed notification to be given to the occupier of searched premises and the occupier of any adjoining property, if those premises were also covertly accessed in order to facilitate entry into the target premises.[28]

168. The timing of notification provided to an occupier is an issue which bears directly on his or her rights. For example, in the event that a covert search eventually results in criminal charges being laid against the occupier, the longer the period of delay between the execution of the search and the notification of the occupier, the greater the potential prejudice to him or her in preparing his or her defence.

169. The Bill allows law enforcement agencies up to six months to notify a person that his or her premises have been searched pursuant to a covert search warrant. However, with the approval of the Chief Officer of the relevant law enforcement agency, a constable may apply to a Judge or nominated member of the AAT to extend the period for providing notice by a further six months. A Judge or nominated member of the AAT may grant such an extension on two occasions. If after 18 months, the constable seeks a further extension of the time period, it will not be granted unless the Minister issues a certificate approving an application for such a longer period and the Judge or nominated member of the AAT is satisfied that there are exceptional circumstances justifying a longer period.[29]

170. The Law Council has several concerns with the proposed notice requirement. Firstly, the Law Council believes that the initial allowance of 6 months is too long. A covert search warrant issued under proposed Division 2A is not intended to facilitate an intelligence gathering or general surveillance exercise. Rather, under proposed section 3SI a covert search warrant should only be issued where there are reasonable grounds to suspect:

    (a) that one or more relevant offences have been, are being, are about to be or are likely to be committed; and

    (b) entry and search of the premises will substantially assist in the prevention of, or investigation into those offences.

    Given the purpose of the warrant, the Law Council believes that a period of one month should be sufficient for providing notice, with any longer period requiring approval from a Judge or nominated member of the AAT. The Law Council believes that a period as long as six months may encourage misuse of the warrants for general intelligence gathering not properly directed towards the prevention or investigation of a specific offence or offences.

171. A further flaw with the proposed notice provision is that it provides no criteria to assist a Judge or nominated member of the AAT in determining whether there are reasonable grounds to extend the period for providing notice, first beyond six months and later beyond twelve months. If an extension is sought beyond 18 months, the Judge or AAT member must be satisfied that there are "exceptional circumstances" to justify the longer period. This creates further confusion as it

[28] Schedule 2, Item 8, proposed section 3SQ and 3SR

[29] Schedule 2, Item 8, proposed section 3SS

implies that something less than exceptional circumstance is required to extend the time beyond six months or twelve months.

172. The Law Council believes that the relevant provision (proposed section 3SS) should be amended to state clearly the matters about which a Judge or AAT member would need to be satisfied in order to permit a further delay in providing notice to an occupier.

173. An additional matter which should be expressly stated in the provision is that, if the occupier of the premises is charged with an offence in any way connected with the warrant, he or she should be notified immediately of the details of the search, notwithstanding that the search may not have directly yielded any material or information on which the prosecution intends to rely. This information may be provided in the brief of evidence, but it can not be assumed, particularly if the DPP itself is not aware of the search. The Law Council believes that an accused person is entitled to information about the search so that he or she may make his or her own assessment as to its relevance.

Amendments to the Australian Crime Commission Act

174. The Bill proposes a number of important amendments to the Australian Crime Commission Act. The Explanatory Memorandum states that the amendments "will address some operational difficulties experienced by the ACC and make minor technical amendments." The Law Council believes that several of the amendments proposed by the Bill are by no means as innocuous as suggested by the Explanatory Memorandum, and in fact are illustrative of the expansion of the ACC's coercive powers far beyond reasonable limits.

Extension of the Coercive Powers of the ACC

175. Under the current provisions of the ACC Act, an examiner already has the power to summons a person to appear before him or her to give evidence or to produce documents specified in the summons. Failure to comply with a summons, even where it involves providing self-incriminating information, is an offence punishable by up to 5 years imprisonment.

176. The Bill proposes to grant an additional power to ACC examiners to summons a person to give evidence by tendering a sworn written statement.[30]

177. The Law Council has consistently opposed the extensive and widely used coercive powers of the ACC examiners on the basis that they represent an unjustified abrogation of the privilege against self incrimination. The Law Council believes that the proposed amendments have the potential to operate even more harshly, by requiring persons summonsed, not only to answer self-incriminating questions or produce self-incriminating documents, but to actually proactively make the case against themselves.

178. The reason that this additional power is sought is that the scope of ACC investigations and operations, and as a result ACC examinations, can be very broad and wide-ranging. The amendment seeks to place the onus on the person summonsed to identify and narrow the range of relevant issues. In short, it places the onus on the witness to conduct the investigatory legwork for the ACC.

179. The Explanatory Memorandum confirms this assertion. It explains that the power to require a witness to collate relevant material into a statement "will enable the ACC to obtain a complete, compiled picture of relevant issues rather than piecing together a range of information. The ACC will receive information in a more orderly, more complete form rather than considering a series of documents." The Law Council believes that it is the task of the ACC to piece together information in this way and witnesses should not be compelled, under threat of prosecution, to do so themselves.

180. In the Explanatory Memorandum, "the possibility of this amendment imposing a heavy burden on witnesses" is acknowledged. However this burden is described as "offset by benefits such as possibly not being required to attend an examination, and the likelihood of providing shorter examinations." The Explanatory Memorandum suggested that the power will be particularly useful where the ACC requires information from a corporation or Government Department.

[30] Schedule 3, Item 32 – amending subsection 28(1) of the ACC Act

181. If the convenience of witnesses is genuinely part of the rationale for the amendment, then failure to give evidence to an ACC examiner by written statement when summonsed to do so, should not constitute an offence. The person summonsed should have the option to attend and answer questions and/or produce specified documents if he or she would prefer to cooperate in this way. This would ensure that witnesses have the flexibility to comply with an ACC summons in the way that they regard as least burdensome, without foreclosing the option of a written statement when it is more convenient to both parties.

182. The Law Council also submits that, if the proposed additional power is granted, the Bill should at least prescribe some limits on the nature or scope of matters that the ACC may require a witness to address in a written statement. At present, no limits are imposed beyond the fact that the requested statement would obviously have to relate to a special ACC investigation or operation. The scope of these investigations is often quite broadly defined. Therefore, without imposed limits, it is quite possible that a summons to provide a statement will be framed in very general terms, considerably increasing the burden of compliance.

Further Erosion of the Privilege against Self Incrimination

183. Under the current provisions of the ACC Act, if a witness asserts in advance that the answers or documents that he or she is asked to provide may tend to incriminate him or her, the witness can still be compelled to provide the relevant information but there are limits imposed on its use. It can not, for example, be used in a criminal proceeding against the person concerned unless those proceedings arise from the falsity of the information provided.[31]

184. The Bill proposes two changes to this regime. One is a positive development which seeks to clarify that a witness may make a general statement about self incrimination at the outset of an examination, without having to restate the claim in respect of every answer. The Law Council understands that this proposed amendment is consistent with the actual conduct of ACC examinations and would ensure that the approach adopted by ACC examiners accords with the provisions of the Act.[32]

185. The second proposed amendment is less benign and is strongly opposed by the Law Council.

186. The Bill seeks to introduce further circumstances in which the evidence a witness has been compelled to provide to the ACC may be used directly against him or her in criminal proceedings. Specifically, the Bill provides that:

- answers or documents provided by a witness may be used in evidence against him or her in criminal proceedings brought under section 35 of the *ACC Act* which relates to instructing or hindering an examiner. [33]
- answers or documents provided by a witness may be used in evidence against him or her to prove the falsity of a statement he or she made on a different occasion.[34]

[31] ACC Act section 30.

[32] Schedule 3, item 39

[33] Schedule 3 Item 42

[34] Schedule 3, item 40 and 41

187. The Law Council believes that it is the second of these proposed amendments which is most objectionable. The proposed amendment would mean, for example, that a witness could receive a summons from the ACC to provide evidence by way of sworn written statement, with which he or she complies under threat of prosecution. The same witness may then be summonsed to attend an examination before the ACC where he or she is effectively cross-examined on the contents of the sworn statement. If there are inconsistencies, the witness's own evidence, provided under compulsion at the examination, may then be used to prosecute him or her for providing false or misleading evidence in the sworn statement.

188. Similarly a witness could be compelled to answer questions during an ACC examination about a subject on which he or she has previously given evidence in court under oath. Again, if inconsistencies emerge, the evidence given by the witness to the ACC under compulsion could then be used to prosecute him or her for perjury.

189. The Law Council recognises the public interest in ensuring that people who deliberately provide false information under oath are appropriately exposed and prosecuted, particularly where their false testimony may have materially contributed to the conviction or acquittal of another person. However, without more, this does not warrant a further abrogation of the privilege against self incrimination. There is a strong public interest in the detection of all serious crimes and the successful prosecution of perpetrators. Regardless, the privilege is not set aside simply because the accused is, for example, under investigation for murder.

190. In this case, there are also additional strong public policy reasons for ensuring that a witness's evidence may not be used against him or her in the way proposed. The purpose of the ACC is to investigate and gather information about serious and organised crime. The reason the ACC has been invested with such extraordinary powers is to allow its officers access to the fullest information possible. The proposed amendments are inconsistent with this goal.

191. In the case of a person who has previously given false information to police, the ACC, a court etc, the proposed amendments will operate as a disincentive to his or her changing tack to cooperate with the ACC by providing full, frank and honest information. For this reason the proposed amendments serve nobody's interests, and come at further expense to a long established right.

Power to Exclude a Legal Practitioner from an Examination

192. The Bill proposes to introduce a provision into the ACC Act authorising an ACC examiner to exclude an examinee's legal practitioner of choice from an examination, where the examiner has reason to believe that allowing the particular legal practitioner to appear at the examination may prejudice the effectiveness of the special ACC investigation or operation.[35]

193. It is probable that an examiner already had the implied power to exclude a legal practitioner in this way under the existing provisions of the ACC Act.[36]

[35] Schedule 3, Item 31

[36] See Hogan v Australian Crime Commission [2005] FCA 913

194. The purported purpose of the power is to 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 practitioner represents more than one person in the examination, or where the legal practitioner is him/herself unknowingly under investigation.

195. An individual's right to be represented by a legal practitioner of his or her choice is a key component of access to justice. This right is particularly important when a person is compelled to attend proceedings and potentially exposed to liability. The Law Council's primary concern is that ACC examiners will fail to consider properly each case on its merits, taking due care not to unnecessarily infringe upon a witness's rights.

196. For example, the Law Council is concerned that, as in the Federal Court case of Hogan v ACC cited above, examiners will incorrectly apply a general rule that where a legal practitioner has represented one witness in an examination, that legal practitioner is automatically excluded from representing another witness summonsed to appear in the course of the same investigation.

197. Possibly a more alarming aspect to this proposed amendment is that an examiner is also granted the discretion to continue an examination, notwithstanding that the witness's legal practitioner has been excluded and the witness is subsequently unrepresented. The Explanatory Memorandum states that an examiner is given the discretion not to exercise his power to adjourn the proceedings to:

> *"prevent the safeguard from being used by witnesses as a delaying tactic. For example, it is not necessary for an examiner to adjourn the examination in circumstances where the witness has been given prior, written notice that the legal practitioner will be excluded from the examination allowing the witness sufficient time to engage alternative representation."*

198. This explanation fails to balance appropriately two countervailing risks:

(a) that a witness might use the exclusion of his or her legal practitioner as a ploy to delay an examination; and

(b) that a witness whose legal representative has been excluded and who has had inadequate opportunity to secure alternative representation, might be refused an adjournment by an examiner and forced to participate in the examination without representation.

199. The Law Council believes that the gravity of the second risk sufficiently outweighs the first. There is no comfort in the assertion that the second risk would never be realised. It is sufficient that under the Bill it is a risk which should be, but is not, foreclosed.

Imposition of an Evidential Burden on a Defendant

200. Under the current provisions of the *ACC Act* it is an offence, punishable by up to five years' imprisonment, to knowingly provide evidence to an ACC examiner which is false or misleading in a material particular.[37] The Bill proposes to amend the offence provision to place an evidential burden on the defendant to show the evidence was not false or misleading *in a material particular*.[38]

201. The Explanatory Memorandum states:

> *"It is difficult to enforce the [offence} 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'."*

202. The fact that a matter might, in practice, be difficult for the prosecution to prove, in this case because the scope of ACC operations and examinations can be so broad, does not justify the imposition of an evidential burden on a defendant. In general, the prosecution should be required to prove all aspects of a criminal offence beyond reasonable doubt. A defendant should only be required to bear an evidential burden where a matter is peculiarly within the knowledge of the defendant, such that it is significantly more difficult for the prosecution to disprove than for the defendant to establish the matter.

203. Whether a matter is a material particular in the context of an ACC operation is by no means a matter peculiarly within the knowledge of the defendant. On the contrary, only the ACC itself is likely to have sufficient oversight of an operation and its purpose to offer evidence as to what is material to the operation.

204. The Law Council strongly objects to the proposed imposition of an evidential burden on a defendant in these circumstances.

New Search Warrant Provisions in the ACC Act

205. The Bill also seeks to substantially the search warrant provisions of the ACC Act.

206. Due to time constraints the Law Council has not had an opportunity to review these proposed amendments properly. However, the Law Council makes the following comments.

207. The Law Council strongly objects to granting of powers which are ordinarily reserved for police officers to civilian members of the ACC. The Law Council believes that if, as a result of staffing issues at the ACC, there are insufficient police personnel available to facilitate the proper functioning of the ACC, this matter should be addressed as a staffing problem and not by granting police powers to member of staff who are not police officers.

208. The impetus for the new search warrant provisions introduced by the Bill is the desire to bring the ACC Act into line with the provisions of the *Crimes Act*.

[37] ACC Act section 33

[38] Schedule 3, Item 45

According to the Explanatory Memorandum, this is in accordance with Commonwealth criminal law policy that all search warrant schemes should be aligned with Part 1AA of the *Crimes Act.*

209. In its response to the Senate Standing Committee for the Scrutiny of Bills Fourth Report of 2000, on entry, search and seizure provisions in Commonwealth legislation, the Government stated that the entry and search powers available to the AFP under the *Crimes Act* should constitute the "high water mark" for search powers generally.

210. On that basis the Law Council believes that other agencies should not be granted comparable powers to those contained in the *Crimes Act* simply as a matter of course and alignment. To the extent that the proposed amendments to the search warrant provisions in the *ACC Act* represent an extension of that agency's powers, the extension of power should be justified.

Amendments to the Witness Protection Act

211. Due to time constraints, the Law Council has not had an opportunity to review Schedule 4 of the Bill and therefore has no submissions on the proposed changes to the *Witness Protection Act.*

Amendments Relating to Seized Electronic Equipment

212. The Bill seeks to introduce changes to the *Crimes Act*, the *ACC Act*, the *Customs Act 1901*, the *Mutual Assistance in Criminal Matters Act 1987* and the *Proceeds of Crime Act* which will allow an officer who has seized electronic equipment (such as a mobile phone or computer) to operate that equipment to access data (such as voice messages or emails) even if:

    (a) the warrant under which it was seized has expired;

    (b) the data was not accessible from the item at the time it was seized.

213. The *Telecommunications (Interception and Access) Act 1979* already provides a specific statutory regime regulating the access of law enforcement agencies to data of this kind. The Law Council believes that this specialist regime should not be circumvented, and therefore possibly undermined, in order that law enforcement agencies might avoid the burden of applying for multiple warrants.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.