QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

G.P.O. Box 2281 Brisbane 4001

22 January, 2007

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

via email: legcon.sen@aph.gov.au

Dear Madam/Sir

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

I write to you on behalf of the Queensland Council of Civil Liberties ("QCCL").

On behalf of the QCCL I thank you for the opportunity to make this submission

Three areas of concern arise from this Bill:

1. Controlled operations;
2. Delayed notification search warrants;
3. Anonymity for witnesses.

We will address each of these issues separately:

1. Controlled Operations

The QCCL strongly opposes the authorisation of illegal conduct by police. The purpose of the police is to suppress criminal activity, not to encourage or create it. There is in our view no justification for any police instigation of any serious criminal conduct.

This type of legislation violates two of the fundamental principles of our society: equality before the law and that we live by the rule of law and not the rule of men. It violates the first principle by creating a group of superior citizens who are immune from and above the law. It violates the second principle by creating such broad immunities that it requires other citizens to place our trust in individuals rather than the system of law itself.

This is very alarming when you consider that the Australian police forces

have been regularly exposed by many commissions of inquiry as corrupt. Presumably many operations under these provisions will be directed at drug trafficking, one of the most lucrative areas of criminal activity and consequently one of the major sources of police corruption.

It is entirely unacceptable that police officers should be authorised to physically harm innocent citizens.

Whilst the QCCL is strenuously opposed to these provisions if they are to proceed then it is our view that a number of significant safeguards need to be added to those in the present legislation.

Any exception from criminal liability must be carefully targeted to limited and specified circumstances. The general exemption provided for in this legislation is entirely unacceptable particularly given that these operations can relate to offences carrying a penalty of as little as 3 year imprisonment, hardly the most serious of offences. In addition the immunity should not extend the beyond the police to civilian participants in the operations

The "safeguards" provided for in the Bill are entirely in adequate. Simon Bronitt[1] observes that:

> *The official data on telecommunications interception reveal that interception warrants are rarely refused. This low rate of refusal properly reflects the administrative as opposed to the judicial character of warrant application proceedings. The application proceedings are conducted in secret. They are also heard ex-parte the decision maker hearing only from law enforcement officials: the interests of the person being targeted and the wider community are not represented.*

Mr. Bronitt goes on to observe at page 46[2] that the ombudsman's monitoring role under the *Crimes Act* provisions to be repealed by this Bill appears, as one would unfortunately expect, extremely limited. The reports reviewed by Bronitt as at the date of his article suggested that controlled operation applications are rarely, if ever, refused.

These operations must be the subject of judicial supervision. In other words, it should be a requirement that these operations can only be authorised by judicial officers. It is entirely unsatisfactory that these operations can be authorized by a senior police officer. We have consistently opposed the giving of powers to the Administrative Appeals Tribunal to issue warrants since that Tribunal does not in our respectful submission have adequate independence.

Furthermore, the Commonwealth should appoint a Public Interest Monitor ("PIM") which is authorised to appear in relation to applications for warrants authorising controlled operations and to make submissions on the public interest. The PIM should also be authorised to review the conduct of

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[1] "The Law in Undercover Policing: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe" (2004) 33(1) *Common Law World Review* (Bristol, Vathek Publishing) 35-80. http://eprints.anu.edu.au/archive/00002395/ page 44

[2] ibid

those operations in a similar fashion to which the Ombudsman is authorised by the Bill.

The legislation should contain provisions similar to that in Section 21 of the *Search Warrants Act 1985 (NSW)* requiring the person to whom the warrant is issued to furnish a report in writing to the court which issued it stating whether or not the warrant was executed and setting out the results of the execution or setting out the reasons why the warrant was not executed.

These mechanisms would to some extent address the concern[3] that the gaping whole in the Bill as in the existing Act is that there is no prospect of accountability where the operations don't result in prosecutions.

To the extent that a right of civil action remains it cannot be counted as a credible safeguard. The success rate for civil claims against the police, certainly in the writer's experience, appears to be low.

Clauses 15GW and 15GH duplicate sections 15IB and 15GH in the existing Act to provide that the immunity does not apply where the participant in a controlled operation intentionally induces another to engage in a crime which would not otherwise have occurred. However as Mr. Bronitt observes [4] these provisions introduce an element of subjectivity into the law which has been rejected in Canada, Australia and England. The result is that no matter how great the inducement if the subject has a proven predisposition to crime the immunity will apply.

2. Delayed Notification of Search Warrants

The QCCL accepts that there may be a legitimate argument for the introduction of these types of warrants. However given the prospect of serious abuse they need to be subject to stringent safeguards. Those provided in the Bill are entirely inadequate and we certainly oppose the Bill in its present form.

The additional safeguards we propose would be:

1. The warrants should be issued by judicial officers only not by the AAT.
2. The Commonwealth should introduce the concept of the Public Interest Monitor as found in Queensland law. The review function of the Ombudsman is very much a case of shutting the gate after the horse has bolted.
3. The PIM should have the right to send a representative on the raid to report personally on how it is conducted
4. Furthermore, the Commonwealth should apply the principle found in the New South Wales *Search Warrants Act* which requires police on the execution of a warrant to report to the court, or the Administrative Appeals Tribunal if it is to be kept as the authorising body, on the outcome of the execution of the warrant.

[3] ibid at page 46
[4] ibid pages 45 and 46

3. Witness Anonymity

As discussed with Ms Morris I am unfortunately unable to make a submission on this part of the Bill at this time as I need to discuss it with Mr. Terry O'Gorman. I hope to be able to do this and make a further submission later in the week. I thank you for your consideration in this regard.

Yours faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties