



VICTORIA POLICE

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Ms Jackie Morris
Committee Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Ms Morris

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

Thank you for your invitation to comment on the provisions of the above Bill.

Victoria Police has considered the draft legislation and its relationship to the model laws developed by the Joint Working Group ("JWG") on National Investigation Powers. I understand that most of those aspects of the Commonwealth draft which vary from the model arise from the inclusion of intelligence agencies' operations under the legislation. The introduction of this factor has inevitably altered the nature of the Bill and we have taken this into account in formulating our response.

Earlier in this legislative process we were able to provide some informal input and received additional advice via the Commonwealth Attorney-General's Department which clarified and resolved a number of issues we had raised. Those matters which we still wish to raise are outlined in the attached submission.

Once again, thank you for the opportunity to contribute to consideration of this Bill. If you wish to contact Victoria Police concerning this submission, the contact officer is Inspector Neil Paterson, Legal Policy ☎ 9247 6723.

Yours sincerely

Christine Nixon APM
Chief Commissioner
Victoria Police

16/1/2006

**Crimes Legislation Amendment
(National Investigative Powers and Witness Protection) Bill 2006**

Victoria Police Submission

Victoria Police has been given an opportunity to comment on the Commonwealth Government's Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006. The Bill addresses controlled operations, assumed identities, and witness identity protection.

A Joint Working Group ("JWG") on National Investigation Powers (under the Standing Committee of Attorneys-General and the Australasian Police Ministers' Council) developed model laws on the matters covered by the Bill, following a nation-wide consultation. After the release of the JWG's Report on cross border investigative powers for law enforcement, Victoria passed legislation based on the model laws.

The Commonwealth Bill contains a number of significant amendments to the model laws. Many of these tend to provide for long-term covert intelligence activities of a type not contemplated in the development of the model laws. As the title of the JWG report suggests, the laws were designed to facilitate and regulate the conduct of law enforcement operations. We note, however, that Victorian legislation has since been passed to allow the inclusion of intelligence agencies in the regime along with law enforcement agencies.

The changes to the model laws necessitated by the incorporation of the operational requirements of intelligence agencies are significant. They include the ability for a law enforcement officer to apply to another agency for authorisation for a controlled operation, increased flexibility in attaching additional individuals to a controlled operation, and provisions for assumed identities of indefinite duration. All these changes tend to reduce the level of accountability applied to controlled operations. (For this reason we suggest it might have been desirable to provide for the needs of intelligence agencies via a separate piece of legislation and to allow more time for considered scrutiny of the draft provisions.)

PART IAB Controlled Operations

*Applications for authorities to conduct controlled operations (C70)
Variation of authority (C92, C96)*

C70 describes the means by which applications for authority to conduct controlled operations can be made and to whom they should be submitted. However, whereas Victoria's Crimes (Controlled Operations) Act 2004 (based on the model laws) states that

a law enforcement officer of a law enforcement agency may apply to the chief officer of the agency for authority... (s12(1)),

the Bill uses the following formula

an Australian law enforcement officer of a law enforcement agency may apply to an authorising officer for an authority... (C70(1)).

The wording of the model laws clearly intends that applications should be made to the authorising officer within the law enforcement officer's parent agency. As currently drafted, however, C70 provides for a law enforcement officer in one agency to apply to an authorising officer in another agency for authority to conduct a controlled operation. We note that this point also arises in relation to the power to vary an authority (at C92 and C96). The section on cancellation of authorities (C105) uses the slightly different formulation "an appropriate authorising officer". Victoria Police seeks further advice as to the communication requirements between agencies in such cases. For example, what information concerning such an operation would be provided to the head of the applicant's parent agency?

Formal and urgent authorities (C85A and C85B)
Authorisations of specified individuals (C85C)

In a significant variation from the model laws and the Victorian legislation, the Bill removes the requirement that an authority must "identify each person who may engage in controlled conduct for the purposes of the operation" (Crimes (Controlled Operations) Act 2004 at s18(3)(e)). Instead, once a controlled operation has been authorised, the principal law enforcement officer would issue authorisations to specific participants under C85C, without reference to the authorising officer. We note, however, that the chief officer would be made aware of those authorisations (C260(g)) and that they are subject to oversight by the Commonwealth Ombudsman.

The Commonwealth advises that law enforcement agencies were concerned with the form of both formal and urgent authorities under the model laws as they distinguished on the face of the document between controlled conduct engaged in by law enforcement participants and controlled conduct engaged in by civilian participants. These documents could be tendered in Court under clause 350 and might lead to the identification (correct or assumed) of a civilian participant, leading to some form of retribution.

Notwithstanding these arguments concerning flexibility and confidentiality, Victoria Police considers these should be weighed against the public policy interest in incorporating sufficient accountability in the system. By its nature, a controlled operation may allow law enforcement officers and/or civilian participants such as informers to engage in conduct which would otherwise be subject to criminal prosecution or civil liability. Given the significant powers granted to agencies by this legislation it is desirable that the authorising officer should be aware of the number, status and (where possible) identity of participants.

We note also that, unlike the model laws, the Commonwealth Bill does not require the authority to specify the Australian jurisdictions in which the controlled conduct is likely to be engaged in. Commonwealth controlled operations authorities allow for the conduct of an operation in the jurisdiction of the Commonwealth and we understand that it was considered unnecessarily restrictive to require the agency to identify the State and Territories in which the operation would be conducted. Victoria Police suggests, however, that from a State perspective it is desirable that the affected jurisdictions be noted.

PART IAC Assumed Identities

Period of authority (A20)

We note that the Commonwealth Bill provides that a civilian working for an intelligence agency can obtain an assumed identity authority for an indefinite period, as opposed to the three month limit on civilians working with law enforcement agencies. The drafting instructions provide that "intelligence agencies use civilians in a very different context to law enforcement agencies". The appropriate duration of an assumed identity authority was discussed at length by the JWG and the three month time limit for civilian use was set after extensive consultation with a range of stakeholders who had raised a number of concerns regarding long term use of false identities in the community.

It has been suggested that civilians working for an intelligence agency may need to retain their assumed identity for the duration of their involvement with the relevant operation and that this would often be for a lengthy period of time (potentially a number of years). Nonetheless, Victoria Police remains concerned about the desirability of granting an assumed identity authority to a civilian participant for an indefinite period.

Variation or cancellation of authority (A25)

We note that the Commonwealth Bill does not specify that the supervisor of a civilian who is using an assumed identity must inform the civilian that the authority has been varied or cancelled. The drafting instructions allow for the possibility that the person using the assumed identity may have "disappeared" resulting in an inability to advise them of the cancellation/variation. In such cases the person's supervisor would be contacted instead. The Commonwealth has acknowledged that it would be inappropriate to allow the assumed identity to continue indefinitely in such circumstances, as the intelligence agency may not be able to monitor whether or not it is being used for unlawful purposes. However, the situation as regards such a person's protection from criminal liability seems ambiguous. Victoria Police seeks clarification as to whether it is intended that this protection continue until notification of the cancellation occurs.

Yearly review (A30)

A new clause has been added to provide that intelligence agencies are only required to conduct a review of assumed identity authorities every three years, whereas the model laws specified that agencies should conduct a review every year. The yearly review has been retained for law enforcement agencies. We are aware that intelligence agencies may use an assumed identity for considerably longer than law enforcement agencies and in a different manner. However, given the range of significant policy issues associated with the creation and holding of assumed identities, we are not persuaded by the argument that it would be unduly burdensome for intelligence agencies to review these identities every year.

Part IACA Witness Identity Protection

Witness identity protection certificate (P3)

The Commonwealth's draft legislation provides that the chief officer may give a witness identity protection certificate for an operative in relation to a proceeding if the chief officer is satisfied on reasonable grounds that disclosure of the identity is likely to (P3(1)(d)(ii)-(iii)):

- prejudice any current or future investigation; or
- prejudice any current or future activity relating to security

These two criteria for the granting of a witness identity protection certificate are broader in scope than those contained in the Victorian and model laws (s42BB(1)(b)(ii) "any investigation"). We understand that the intention is to allow for the continued existence of an assumed identity, which might be of use in future intelligence operations. The policy rationale for this includes a consideration of the financial and temporal costs involved in creating such an identity. While acknowledging these factors, we suggest consideration should still be given as to whether the chief officer's discretion provides a sufficient level of accountability.