



Australian Government
Attorney-General's Department

Criminal Justice Division

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25 January 2007

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

Dear Ms Morris

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

I thank the Senate Legal and Constitutional Affairs Committee for the opportunity to appear before it in relation to its inquiry into the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill. During our appearance on 22 January 2007, we took a number of questions on notice. Attached are our responses to the Senator's questions (**Attachment A**).

During the hearing, several Senators also raised queries about whether the Bill extends the use of controlled operations to a much wider range of situations. In response, I noted that the Bill makes only an incremental adjustment to controlled operation powers, to give effect to national model provisions. The Bill, like the existing *Crimes Act 1914*, allows controlled operations only if a range of prerequisites are met, one of which is that it must relate to the investigation of an offence punishable by three years or more imprisonment.

The Bill departs from the existing Crimes Act in two respects. The requirement that an offence be of a listed type has been removed. The decision not to include a list of offences allows for the Government to respond to emerging categories of crime. It provides law enforcement agencies with the ability to undertake criminal investigations that involve controlled operations immediately, rather than waiting for Parliament to make amendments to the legislation. The second departure is allowing controlled operations for lower penalty offences to be prescribed by regulation. The regulations would be subject to disallowance and would, in any case, be an open and transparent process.

The new controlled operation provisions in the Bill are the result of a lengthy process of developing a national model that involved extensive consultation. Further details are in the *Cross-Border Investigative Powers for Law Enforcement Report* prepared by the Joint Working Group. ([http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/\(CFD7369FCAE9B8F](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/(CFD7369FCAE9B8F)

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at pp 39-43).

Thank you for the opportunity to respond to these matters.

The action officer for this matter is Erin Hobday who can be contacted on (02) 6250 6403.

Yours sincerely

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

Senator Ludwig asked the following question at the hearing on 22 January 2007:

Will non-police staff members of the ACC, including contractors, be executing search warrants and exercising the use of force against persons under the amendments in the Bill?

The answer to the honourable senator's question is as follows:

The amendments to the *Australian Crime Commission Act 2002* contained in schedule 3 to the Bill were not intended to authorise any person other than a police officer to use force against a person or to create any new powers to carry firearms.

The Bill is being examined to assess whether there is any uncertainty regarding this issue and whether amendments to the Bill are required to clarify this intention.

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

Senator Ludwig asked the following questions at the hearing on 22 January 2007:

- a) would the ACC use contractors in executing search warrants?
- b) how many contractors does the ACC have?
- c) what are they used for?
- d) how long are they engaged for?
- e) where are they sourced from?
- f) what expertise do they have?
- g) what training do they have?
- h) what oversight does the ACC exercise?

The answers to the honourable senator's question are as follows:

- a) The ACC would use seconded police officers or contract investigators who are special members of the AFP to be the responsible executing officer of a search warrant. Where the execution of a search warrant requires technical skills, such as computer forensic skills or financial analysis, then appropriate members of staff who are specialists in those areas would be called upon to assist.
- b) Currently the ACC has five investigators engaged under contract.
- c) Contractors undertake investigative duties within ACC investigations and intelligence operations. This involves collecting and collating evidence preparing briefs, identifying leads, interviewing persons and taking statements.
- d) Contractors are usually engaged on a 12 month, non-ongoing contract however, one contractor is currently engaged on a three year contract.
- e) Investigators are highly experienced police officers and the contractors are usually recruited from law enforcement agencies either by a general recruitment process or where specifically identified.
- f) Contractors have extensive, high level investigative experience and knowledge of current investigative laws and procedures.
- g) As police officers, the contractors have all law enforcement training required of a constable. Further, the investigators are included in the ACC learning and development program, so the usual range of training would be available to them such as induction, leadership training and training in job specific skills.
- h) The investigators operate within a team structure. Any powers are exercised under the supervision of a team leader who reports to a Head of Determination.

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

Senator Ludwig asked the following question at the hearing on 22 January 2007:

Could you check on that to see whether or not ADJR is available [for witness identity protection certificate decisions]?

The answer to the honourable senator's question is as follows:

ADJR is not available. Under proposed subsection 15KI(4) of the Bill, a decision to give a witness identity protection certificate is final.

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

Senator Ludwig asked the following question at the hearing on 22 January 2007:

How will the Bill align the ACC search warrant provisions more closely to the Crimes Act?

The answer to the honourable senator's question is as follows:

In order to have consistency with other Commonwealth legislation, Sch 3 removes discrepancies between the ACC Act search warrant provisions and the Crimes Act provisions by:

- allowing an executing officer or person assisting to search a conveyance, which includes an aircraft, vehicle or vessel that may be on the warrant premises (item 2)
- allowing an executing officer or person assisting to conduct a frisk or ordinary search on a person present at the warrant premises (item 16)
- allowing the search warrant to be reassigned (item 19)
- allowing a constable to use force if reasonable and necessary during the execution of a search warrant (proposed section 23A)
- allowing the use of equipment to examine or process things (proposed section 23D) at the warrant premises and to use electronic equipment which is at the warrant premises (proposed section 23E) with the assistance of a person with knowledge of the computer (proposed section 23F)
- providing for compensation where damage is caused to electronic equipment (proposed section 23H)
- providing that copies of seized things are to be provided to the occupier (proposed section 23J)
- allowing the occupier to be present during the search (proposed section 23K), and
- providing that the executing officers must make an announcement before entering the warrant premises (proposed section 23M).

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE
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Senator Ludwig asked the following questions subsequent to the hearing on 22 January 2007:

Having regard to controlled operations, will the Australian Commission for Law Enforcement Integrity be able to use the power contained in the Bill? Will State and Territory Integrity Commissions have access, either jointly or severally with ACLEI? If the answer is no, why have State Commissions been excluded?

The answer to the honourable senator's question is as follows:

ACLEI will be able to use the power contained in the Bill to authorise controlled operations.

State and Territory Integrity Commissions will not be able to authorise controlled operations, but will be able to participate in controlled operations as civilian participants under the supervision of ACLEI.

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

Senator Ludwig asked the following questions subsequent to the hearing on 22 January 2007:

- a) are direct employees of the ACC currently authorised to carry firearms?
- b) are direct employees of the ACC authorised to use deadly force?
- c) can the CEO of the ACC authorise contractors to carry firearms?
- d) can the CEO of the ACC authorise contractors to use deadly force?

The answers to the honourable senator's questions are as follows:

- a) Direct employees are authorised to carry firearms, if they are members or special members of the AFP, or are members or special members of a Police Force of a State or Territory.
- b) They are required to comply with the applicable home agencies' legislation and instructions or, in the case of an ACC staff member, the AFP's policy.
- c) No. There is no legislation which enables the CEO to authorise the carriage, use or possession of firearms.
- d) No.

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

Senator Ludwig asked the following questions subsequent to the hearing on 22 January 2007:

Having regard to the witness protection regime, do States currently use the federal regime, or do they have their own? Where they use the federal system, how do they use it and how often do they use it?

The answer to the honourable senator's question are as follows:

All States and Territories have enacted complementary witness protection legislation and associated administrative arrangements. These enable the Commonwealth, State and Territory agencies that operate witness protection programs to work together, including to refer witnesses to each others' relevant program for protection or assistance and to provide identity documents for witnesses included in the programs. Since 1982 the AFP has received 67 referrals relating to witness protection from other Australian law enforcement agencies.

In the case of the National Witness Protection Program (NWPP), section 6 of the *Witness Protection Act 1994* provides for the AFP Commissioner to make arrangements with 'approved authorities' for any matter in relation to administering the NWPP including to accept witnesses from other approved authorities. This power enables State and Territory Police and other 'approved authorities' such as the Australian Crime Commission to refer witnesses to the NWPP. Such referrals may be necessary in a range of circumstances, including where the investigation involves a degree of corruption; the program in the relevant jurisdiction has no current capacity to undertake the referral; and the referring agency has decided it is not desirable to have witness protection services delivered internally.

Ongoing liaison between jurisdictions is important for the programs to operate with the appropriate levels of security and to share expertise and best practice. To this end, the AFP is an active member of the Australasian Heads of Witness Protection Forum. States and Territories utilise the National Witness Protection Program (NWPP) on an as needs basis depending on the individual circumstances of each matter.

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE
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Senator Kirk asked the following question at the hearing on 22 January 2007:

Information on how many controlled operations were conducted during the course of the year and what offences they were used for.

The answer to the honourable senator's question is as follows:

This information is contained in the *Controlled Operations Annual Report 2005-06* which can be accessed through the following website link:

http://www.afp.gov.au/__data/assets/pdf_file/24507/Controlled_Operations_Annual_Report.pdf

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

Senator Trood asked the following question at the hearing on 22 January 2007:

Information on how the timelines for the notification periods and execution times for delayed notification search warrants compare to other States and Territories.

The answer to the honourable senator's question is as follows:

The warrant execution times and notification periods are similar to other Australian jurisdictions. All jurisdictions with covert or delayed notification search warrant legislation have a 30 day warrant execution time. New South Wales is the only jurisdiction that provides notice to the occupier, and their notice period is similar to the one contained in the Bill (see chart below for comparison).

Legislation	Warrant Execution Time	Notification Period to Occupiers
The Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006 (Cth)	30 days from when the warrant is issued (proposed section 3SJ)	Six months but it can be postponed. It cannot be postponed past 18 months without the eligible issuing officer being satisfied that there are exceptional circumstances justifying the longer period and the Minister's approval (proposed section 3SS).
<i>Terrorism (Police Powers) Act 2002</i> (NSW)	30 days from when the warrant is issued (section 27N)	Six months but it can be postponed. It cannot be postponed past 18 months without judge's approval that there are 'exceptional circumstances' that justify the postponement (section 27U).
<i>Terrorism (Community Protection) Act 2003</i> (Vic)	30 days from when the warrant is issued (section 8)	No provision to notify occupier
<i>Police Powers and Responsibilities Act 2000</i> (Qld)	30 days from when the warrant is issued (section 215)	No provision to notify occupier
<i>Terrorism (Extraordinary Powers) Act 2005</i> (WA)	30 days from when the warrant is issued (section 26)	No provision to notify occupier
<i>Terrorism (Emergency Powers) Act</i> (NT)	30 days from when the warrant is issued (section 27 L)	No provision to notify occupier