

# CHAPTER 3

## INVESTIGATIVE POWERS AND WITNESS PROTECTION

### Background

3.1 Schedule 3 of the Bill proposes to replace the existing provisions in the *Crimes Act 1914* (the Crimes Act) providing for controlled operations, assumed identities and witness identity protection with model laws. These model provisions were developed by the Joint Working Group of SCAG and the then Australasian Police Ministers Council and endorsed by SCAG in 2004.<sup>1</sup> The Explanatory Memorandum explains that:

The model laws are intended to enhance the ability of law enforcement agencies to investigate and prosecute multi-jurisdictional criminal activity. This type of crime is becoming increasingly common due to advances in information and communication technology, and the increasing sophistication of organised criminal groups, particularly those involved in terrorism or transnational crime, including drug trafficking. Implementation of the model laws will enable authorisations issued under a regime in one jurisdiction to be recognised in other jurisdictions.<sup>2</sup>

3.2 The Senate Legal and Constitutional Affairs Committee reported on a bill to implement the model laws in February 2007: the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006.<sup>3</sup> However, that bill lapsed when Parliament was prorogued in October 2007.

### Provisions in the Bill

#### *Controlled operations*

3.3 A controlled operation is a law enforcement operation in which a person is authorised to engage in unlawful conduct in order to obtain evidence of a serious criminal offence.<sup>4</sup> The current provisions regulating controlled operations are set out in Part 1AB of the Crimes Act. Controlled operations may only be authorised by senior members of the AFP, ACC and ACLEI.<sup>5</sup> Generally applications for, and authorisations of, controlled operations must be in writing but both the existing

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1 Explanatory Memorandum, p. 3; SCAG and Australasian Police Ministers Council Joint Working Group on National Investigation Powers, *Cross-Border Investigative Powers for Law Enforcement*, November 2003 at: [http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_Cross-borderinvestigativepowersforlawenforcementReport-November2003](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Cross-borderinvestigativepowersforlawenforcementReport-November2003) (accessed 27 July 2009).

2 Explanatory Memorandum, p. 3.

3 Senate Legal and Constitutional Affairs Committee, *Report on the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006*, February 2007.

4 Explanatory Memorandum, p. 46.

5 Section 15J of the Crimes Act and proposed section 15GF.

provisions and the Bill provide for applications and authorisations to occur orally in person, or by telephone, in urgent cases.<sup>6</sup>

3.4 The main differences between the existing provisions relating to controlled operations and the provisions set out in the Bill relate to:

- providing protection from criminal and civil liability to informants who participate in a controlled operation;
- providing for recognition of state and territory controlled operation laws;
- providing for urgent variations to controlled operation authorities;
- extending the timeframes for controlled operations;
- altering the reporting and recordkeeping obligations of authorising agencies; and
- increasing the Ombudsman's inspection powers.<sup>7</sup>

#### *Protection for informants*

3.5 At present, informants who participate in controlled operations are not protected from civil or criminal liability for any conduct they engage in as part of the controlled operation.<sup>8</sup> The Explanatory Memorandum states that:

This has hampered the ability of law enforcement agencies to use informants to perform controlled conduct, which has presented a significant obstacle to law enforcement agencies in successfully conducting controlled operations. ...As organised criminal groups may only trust established members of their group, infiltration by undercover officers may only be possible with the ongoing assistance of an informant. ...It is also often necessary for informers to participate in criminal conduct in order to maintain the trust of, and their position in, the criminal group. These acts could be as simple as moving a suitcase containing drugs from the boot of a car to a premises. Informants who might be willing to assist law enforcement agencies if they were protected from liability for certain approved conduct are unlikely to provide that assistance if they cannot receive any protection from criminal liability.<sup>9</sup>

3.6 Proposed sections 15HA and 15HB<sup>10</sup> of the Crimes Act would protect civilian participants, including informants, from criminal and civil liability for conduct in accordance with a controlled operation authorisation.<sup>11</sup> The protection under proposed sections 15HA and 15HB would only apply where:

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6 Sections 15K and 15L of the Crimes Act and proposed subsections 15GH(2) and 15GJ(1).

7 Explanatory Memorandum, p. 47.

8 Subsections 15I(2A) and 15IA(2A) of the Crimes Act specifically exclude informants from the protections given to other participants in controlled operations.

9 Explanatory Memorandum, p. 53.

10 References to proposed provisions in this chapter refer to proposed provisions of the Crimes Act.

11 These provisions would also provide protection to law enforcement officers who participate in controlled operations on similar terms.

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- the conduct is in the course of, and for the purposes of, the controlled operation and in accordance with the authority to conduct the operation;
  - the participant is authorised to engage in the conduct;
  - the conduct does not involve entrapment;
  - the conduct is not likely to cause the death of, or serious injury to, any person, or involve the commission of a sexual offence; and
  - in the case of a civilian participant, he or she acts in accordance with the instructions of a law enforcement officer.<sup>12</sup>

3.7 Civilians will only be authorised to participate in a controlled operation where the authorising officer is satisfied on reasonable grounds that a law enforcement officer could not adequately perform the role that the civilian will perform.<sup>13</sup> Further, under the proposed amendments an authority to conduct a controlled operation must detail the ‘particular controlled conduct’ that a civilian may undertake, while in relation to law enforcement officers only the ‘nature of the controlled conduct’ must be specified.<sup>14</sup> The Explanatory Memorandum argues that this will ensure that the behaviour of civilian participants is tightly controlled.<sup>15</sup>

#### *Recognition of state and territory controlled operations laws*

3.8 The Explanatory Memorandum states that the proposed amendments would:

...recognise corresponding State and Territory controlled operation laws and provide protection against liability for Commonwealth offences for participants in operations that have been validly authorised under those laws, without requiring a separate Commonwealth authority to be sought for the controlled operation.<sup>16</sup>

3.9 The Explanatory Memorandum notes that, as a result of the decision in *Gedeon v Commissioner of the New South Wales Crime Commission*, there is a risk that there is insufficient protection for evidence obtained from, and participants in, controlled operations authorised under a state or territory law where the operation may involve the commission of a Commonwealth offence.<sup>17</sup>

3.10 In that case, the High Court noted that an authority for a controlled operation issued under New South Wales legislation would only protect the participants in the operation in relation to activities which would otherwise be unlawful under New South Wales law. If the proposed controlled activity was also unlawful under federal

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12 Explanatory Memorandum, pp 73-75.

13 Proposed paragraphs 15GI(2)(h) and 15GQ(2)(h); Explanatory Memorandum, pp 53, 60 and 74.

14 Proposed paragraphs 15GK(1)(f), 15GK(2)(f) and 15GO(2)(b); Explanatory Memorandum, p. 73.

15 Explanatory Memorandum, pp 54, 61, 64 and 73-74.

16 Explanatory Memorandum, p. 47.

17 [2008] HCA 43; Explanatory Memorandum, p. 48.

criminal law then full protection for those involved could only be obtained by obtaining an authorisation for the controlled operation under the federal Crimes Act as well as the New South Wales legislation.<sup>18</sup>

3.11 Proposed section 15HH would provide equivalent protection from criminal liability for participants in controlled operations authorised under state or territory controlled operations laws, as would be provided to participants in a Commonwealth controlled operation.<sup>19</sup> This would mean that state and territory agencies would not have to seek simultaneous authorisation under Commonwealth law for a controlled operation where a Commonwealth offence may be committed in the course of the operation.<sup>20</sup>

#### *Urgent variations to controlled operations authorities*

3.12 The current regime for controlled operations provides for variations to the original authority for the controlled operation but these variations must be applied for and granted in writing.<sup>21</sup> The proposed amendments allow for urgent variation applications to be made orally in person, by telephone or by any other means of communication.<sup>22</sup> The amendments would also allow for the granting of urgent variations by these means.<sup>23</sup> The grounds for making an urgent application or variation is that the delay caused by requiring a written application or variation may affect the success of the controlled operation. In all cases, there would be a requirement to document the urgent application or variation as soon as practicable.<sup>24</sup>

#### *Duration of operations*

3.13 At present, authorisation for a controlled operation can only be given for a maximum of six months from the date an application was approved. Furthermore, authorisations which have been in place for three months must be reviewed by a nominated member of the Administrative Appeals Tribunal (AAT) who determines whether the authorisation should remain in force for six months.<sup>25</sup>

3.14 Under the proposed amendments, the maximum duration of a formal authority<sup>26</sup> for a controlled operation will be three months.<sup>27</sup> However, the duration of a controlled operation will be able to be extended by a nominated member of the AAT

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18 [2008] HCA 43 at paras 40-41.

19 Explanatory Memorandum, p. 78.

20 Explanatory Memorandum, p. 78.

21 Section 15NA of the Crimes Act.

22 Proposed paragraphs 15GP(3)(b) and 15GU(3)(b).

23 Proposed paragraphs 15GR(1)(b) and 15GW(1)(b).

24 Proposed subsections 15GP(8), 15GR(2), 15GU(7) and 15GW(2).

25 Subsection 15N(4) and section 15OB of the Crimes Act.

26 A 'formal authority' is one that is in writing and signed by the authorising officer (see Explanatory Memorandum, p. 60; proposed subsection 15GJ(1)).

27 Proposed paragraph 15GK(1)(h).

for three month periods, provided the total length of the operation does not exceed 24 months.<sup>28</sup>

3.15 The Explanatory Memorandum notes that extending the maximum duration of controlled operations to 24 months:

...recognises that some controlled operations, particularly those investigating organised crime, may extend for a long period of time and it would cause significant disruption to the investigation, and possible risk to participants, if the operation was interrupted at a sensitive state.<sup>29</sup>

3.16 Under proposed subsection 15GT(4), a nominated AAT member may only grant an extension of a controlled operation authority in the two weeks prior to the end of the period of effect of the authority. The Explanatory Memorandum states that the rationale behind this limitation is to ensure that the AAT member is considering the most recent events in the controlled operation before making the decision to extend the operation.<sup>30</sup>

3.17 The maximum duration of an urgent authority<sup>31</sup> will be seven days. This period cannot be extended.<sup>32</sup> However, the controlled operation authorised by an urgent authority will be able to continue beyond seven days if a formal application is subsequently made and a formal authority is granted.<sup>33</sup>

#### *Record keeping and reporting by authorising agencies*

3.18 At present, section 15R of the Crimes Act requires the chief officers of the AFP, ACC and ACLEI to report to the Attorney-General quarterly on controlled operations. In addition, the Attorney-General is required by section 15T to provide an annual report to Parliament on controlled operations.

3.19 Proposed section 15HM will provide that the chief officers of the AFP, ACC and ACLEI must report, every six months, to the Commonwealth Ombudsman and the Attorney-General on controlled operations and sets out the information which must be included in these reports.<sup>34</sup> The Ombudsman would be empowered to require the chief officer of an authorising agency to furnish additional information on any authorised operation contained in the report.<sup>35</sup>

3.20 In addition, proposed section 15HN will require the chief officers of the AFP, ACC and ACLEI to provide an annual report to the Commonwealth Ombudsman and the Attorney-General on controlled operations. Proposed subsection 15HN(3) will

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28 Proposed section 15GT; Explanatory Memorandum, p. 69.

29 Explanatory Memorandum, p. 63.

30 Explanatory Memorandum, p. 69.

31 An 'urgent authority' is one that is given orally in person, by telephone or by another means of communication (see Explanatory Memorandum, p. 60; proposed subsection 15GJ(1)).

32 Proposed subsection 15GO(3).

33 Proposed subsections 15GH(3) and 15GJ(2); Explanatory Memorandum, pp 62-63.

34 Explanatory Memorandum, p. 81.

35 Proposed subsection 15HM(3); Explanatory Memorandum, p. 82.

require the Attorney-General to table each report in Parliament within 15 sitting days of receiving the report.<sup>36</sup>

3.21 Proposed section 15HP would impose recording keeping obligations on authorising agencies with respect to controlled operations.<sup>37</sup> Authorising agencies would also be required to maintain a general register of controlled operation applications and authorities under proposed section 15HQ.<sup>38</sup> The Explanatory Memorandum notes that these new obligations will facilitate proper accountability and oversight of controlled operations and, in particular, will assist the Ombudsman in his oversight role.<sup>39</sup>

#### *Ombudsman's inspection powers and reporting*

3.22 Proposed sections 15HR to 15HY set out the powers of the Ombudsman in relation to his oversight of controlled operations in much greater detail than the existing provisions in the Crimes Act.<sup>40</sup> In particular, the Bill would provide the Ombudsman with explicit powers to:

- enter the premises of authorising agencies, have full and free access to relevant records of the agencies and make copies of those records; and
- require law enforcement officers to provide information or answer questions relevant to the Ombudsman's inspections.<sup>41</sup>

3.23 Proposed section 15HO would require the Ombudsman to prepare an annual report regarding the monitoring of controlled operations and provide that report to the Attorney-General and the chief officer of the law enforcement agency to which the report relates.<sup>42</sup> The Attorney-General would be required to table this report in Parliament within 15 sitting days.<sup>43</sup> Under existing section 15UC of the Crimes Act, the Ombudsman reports directly to Parliament on his monitoring of controlled operations rather than providing the Attorney-General with a report which must then be tabled.<sup>44</sup>

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36 Explanatory Memorandum, p. 82.

37 Explanatory Memorandum, pp 83-84.

38 Explanatory Memorandum, p. 84.

39 Explanatory Memorandum, p. 84.

40 Division 2A, Part IAB of the Crimes Act; Commonwealth Ombudsman, *Submission 2*, p. 2.

41 Proposed subsection 15HS(3) and proposed section 15HT; Explanatory Memorandum, pp 85-86.

42 Explanatory Memorandum, p. 83.

43 Proposed subsection 15HO(3).

44 Previous annual reports of the Commonwealth Ombudsman regarding the monitoring of controlled operations are available at:

[http://www.ombudsman.gov.au/commonwealth/publish.nsf/Content/publications\\_inspectionreports\\_all](http://www.ombudsman.gov.au/commonwealth/publish.nsf/Content/publications_inspectionreports_all) (accessed 4 August 2009).

### *Assumed identities*

3.24 An assumed identity is a false identity that is used for the purpose of investigating criminal activity, or conducting intelligence or security activities.<sup>45</sup> The current provisions relating to the use of assumed identities are set out in Part 1AC of the Crimes Act. Under both the existing Crimes Act provisions and the provisions in the Bill, the use of assumed identities may be authorised by the head of the ACC, ACLEI, AFP, the Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence Service (ASIS), ATO or Customs, or their delegates.<sup>46</sup>

3.25 Generally, assumed identities are used by law enforcement officers and intelligence officers but civilians, may be authorised to use an assumed identity under the supervision of a law enforcement officer or an intelligence officer.<sup>47</sup> There is also provision for foreign law enforcement, intelligence or security agents be authorised to obtain and use assumed identities.<sup>48</sup>

### *Strengthening of assumed identities provisions*

3.26 The Bill would alter the regime regulating the use of assumed identities by introducing more rigorous requirements in relation to the granting, review and cessation of assumed identities. In particular, proposed section 15KA would establish a formal application process for acquiring or using an assumed identity including setting out the information which must be included in an application.<sup>49</sup> Proposed section 15KB would permit the chief officer to whom an application is made (or his or her delegate) to grant an authority to acquire or use an assumed identity. This provision would set out, in greater detail than the existing Crimes Act provisions, the factors a chief officer must be satisfied of prior to granting such an authority.<sup>50</sup>

3.27 The Bill would introduce a time limit of three months on authorities for civilians supervised by law enforcement officers.<sup>51</sup> However, this time limit will not apply to civilians supervised by intelligence officers. The Explanatory Memorandum notes that:

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45 Explanatory Memorandum, p. 48.

46 Section 15XG and the definitions of ‘authorising person’ and ‘Commonwealth participating agency’ in section 15XA of the Crimes Act; and proposed sections 15KA, 15KB and 15LH, and the definitions of ‘law enforcement agency’ and ‘intelligence agency’ in proposed section 15K. Under both the existing provisions and the provisions in the Bill, other Commonwealth agencies may be specified by regulation as agencies permitted to authorise the use of assumed identities.

47 Explanatory Memorandum, p. 88; subsection 15XB(2) of the Crimes Act and proposed subsection 15KB(3).

48 Subsections 15XB(1) and 15XG(3) and the definitions of ‘approved officer’ and ‘foreign officer’ in section 15XA of the Crimes Act; proposed subsections 15KA(2) and (3), proposed section 15KB and the definition of ‘foreign officer’ in proposed section 15K.

49 Explanatory Memorandum, pp 90-91.

50 Explanatory Memorandum, pp 92-93.

51 Proposed paragraph 15KC(2)(h) and proposed subsection 15KD(2). This would not prevent further authorities being granted in relation to a civilian supervised by a law enforcement officer: proposed subsection 15KC(4).

This difference reflects the different operational contexts for civilians involved in law enforcement and intelligence operations. Law enforcement agencies are likely to require the assistance of a civilian in the context of a specific investigation of more defined duration, while intelligence agencies may require the assistance of a civilian in intelligence activities occurring over many years.<sup>52</sup>

3.28 Proposed section 15KF would introduce a requirement for:

- the chief officers of law enforcement agencies to review assumed identity authorities every 12 months; and
- the chief officers of intelligence agencies to review authorities granted to foreign officers and civilians every 12 months, and authorities granted to Australian officers every three years.<sup>53</sup>

3.29 If, after reviewing an authority, the chief officer is satisfied that an assumed identity is no longer needed, he or she will be required to cancel the authority. If the chief officer is satisfied that the assumed identity is still necessary, he or she will have to record the reasons for that opinion in writing.<sup>54</sup>

3.30 Furthermore, the Bill would give the chief officers of law enforcement and intelligence agencies an explicit power to request the return of evidence of an assumed identity, from the person who was authorised to use the identity, once an authority ceases.<sup>55</sup>

#### *Mutual recognition of assumed identities laws*

3.31 Under the existing Crimes Act provisions, state and territory law enforcement and anti-corruption agencies may authorise a person to acquire evidence of an assumed identity from a Commonwealth agency and use that identity.<sup>56</sup> The Bill would instead provide for mutual recognition of corresponding state and territory assumed identities laws. In particular, the Bill would:

- enable an assumed identity authority that was granted under a corresponding state or territory law to be recognised as if the authority had been granted under the Crimes Act;<sup>57</sup>
- ensure that officers who are authorised under a state or territory law to use an assumed identity are protected from criminal liability under Commonwealth law when using that identity;<sup>58</sup> and

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52 Explanatory Memorandum, p. 94.

53 Explanatory Memorandum, p. 96.

54 Proposed subsections 15KF(4) and (5); Explanatory Memorandum, p. 96.

55 Proposed section 15KM; Explanatory Memorandum, p. 99.

56 Section 15XH and the definition of ‘State or Territory participating agency’ in section 15XA of the Crimes Act.

57 Proposed section 15LA; Explanatory Memorandum, pp 48 and 107.

58 Combined effect of proposed sections 15LA, 15KP and 15KQ; Explanatory Memorandum, p. 48.



- enable a person authorised to use an assumed identity in one jurisdiction to lawfully acquire evidence of that assumed identity from issuing agencies in another jurisdiction.<sup>59</sup>

### ***Witness identity protection***

3.32 Section 15XT of the Crimes Act currently gives courts and tribunals a broad discretion to protect the real identity of a witness who is or was using an assumed identity.<sup>60</sup> The Bill would insert a new Part IACA into the Crimes Act setting out much more comprehensive provisions in relation to the protection of the identity of witnesses who are law enforcement or intelligence operatives.

3.33 One of the differences between the old and new regimes is that the protections will extend to operatives who are participants in a controlled operation even where the operative has not used an assumed identity.<sup>61</sup> More fundamentally, the new regime would provide for the chief officer of an intelligence or law enforcement agency (or his or her delegate) to issue a ‘witness identity protection certificate’ rather than a court or tribunal determining whether it is necessary to protect an operative’s identity.<sup>62</sup> The Explanatory Memorandum argues that:

The chief officer of a law enforcement agency or intelligence agency is well placed to make an informed decision about the need to protect an operative’s identity to ensure his or her safety or avoid prejudicing operations. In most cases, the information about [an] undercover operative is highly sensitive and disclosing or filing this information could increase the risk to personnel and compromise operations. ...Further, allowing a chief officer to make the decision to protect identity in the first instance is appropriate given that the court retains the discretion to reveal the operative’s true identity...<sup>63</sup>

3.34 In general terms, the new regime for witness identity protection would:

- govern the procedures and requirements for giving a witness identification protection certificate;<sup>64</sup>
- establish requirements for notifying the court and the parties to the proceedings of a certificate;<sup>65</sup>
- set out the effect of a certificate;<sup>66</sup>
- allow the court to make orders protecting the witness’ identity and for the disclosure of the witness’ true identity;<sup>67</sup>

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59 Proposed sections 15KX and 15KY; Explanatory Memorandum, pp 48 and 105-106.

60 Explanatory Memorandum, p. 49.

61 Explanatory Memorandum, p. 50.

62 Proposed sections 15ME and 15MX.

63 Explanatory Memorandum, pp 114-115.

64 Proposed sections 15MD to 15 MG.

65 Proposed sections 15MH and 15MI.

66 Proposed section 15MJ.

- introduce offences for unauthorised disclosures of the witness' identity;<sup>68</sup>
- provide that agencies which give certificates must meet certain annual reporting requirements;<sup>69</sup> and
- facilitate the mutual recognition of certificates given under corresponding state and territory laws.<sup>70</sup>

#### *Granting of witness identity protection certificates*

3.35 The witness identity protection provisions would extend to law enforcement and intelligence officers and other authorised people (such as foreign law enforcement officers and civilians) who have been granted an assumed identity or have been authorised to participate in a controlled operation.<sup>71</sup>

3.36 Proposed section 15MD would provide that the witness identity protection provisions will apply to a proceeding in which an operative is, or may be, required to give evidence obtained as an operative.<sup>72</sup>

3.37 Proposed section 15ME will set out the circumstances in which the certificate can be given.<sup>73</sup> The chief officer of the ACC, ACLEI, AFP, ASIO, ASIS, ATO, Customs or any other Commonwealth agency specified by regulation will be able to give a certificate if he or she is satisfied on reasonable grounds that disclosure of the operative's identity or address is likely to:

- endanger the safety of the operative or another person; or
- prejudice any current or future investigation or activity relating to security.<sup>74</sup>

3.38 Under proposed section 15MX, a chief officer would be able to delegate this power to senior officers.<sup>75</sup>

3.39 Before a witness identity protection certificate is given, the operative will be required to make a statutory declaration, under proposed section 15MF, setting out matters that go to his or her credibility such as:

- details of any offence the operative has been convicted of;
- details of any charges against the operative which are pending; and
- any adverse comments made by a court about the operative's credibility.<sup>76</sup>

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67 Proposed sections 15MK to 15MM.

68 Proposed section 15MS.

69 Proposed sections 15MU and 15MV.

70 Proposed section 15MW; Explanatory Memorandum, p. 50.

71 Definition of 'operative' in proposed section 15M; Explanatory Memorandum, pp 50 and 112.

72 Explanatory Memorandum, p. 113.

73 Explanatory Memorandum, p. 112.

74 Proposed subsection 15ME(1) and definitions of 'law enforcement agency' and 'intelligence agency' in proposed section 15M; Explanatory Memorandum, p. 114.

75 Explanatory Memorandum, p. 128.

3.40 Details relating to the operative's credibility must be included in the witness identity protection certificate.<sup>77</sup>

*Filing of certificates and notification of parties*

3.41 The witness identity protection certificate must be filed in court and a copy provided to each party to the proceedings at least 14 days prior to the operative giving evidence.<sup>78</sup> The Explanatory Memorandum states that:

This will enable the operative's credibility to be challenged in the proceeding without disclosing his or her true identity. This will be an important safeguard to ensure the fairness of proceedings when a witness' identity is protected under this Part.<sup>79</sup>

3.42 However, proposed section 15MI would allow a court to waive the requirements for a witness identity protection certificate to be filed with the court and provided to the parties at least 14 days prior to the operative giving evidence.

*Effect of a certificate*

3.43 The effect of a certificate will be that the operative is permitted to give evidence under a pseudonym.<sup>80</sup> In addition, the certificate will prevent:

- a witness from being asked a question, or being required to answer a question, that may disclose or lead to the operative's true identity or address, being revealed; and
- a person involved in the proceeding from making a statement that discloses, or may reveal, the operative's true identity or address.<sup>81</sup>

*Court's discretion to override a certificate*

3.44 Proposed subsection 15ME(4) would provide that a decision to give a certificate is final and cannot be challenged or reviewed in any court. The Explanatory Memorandum argues that it would defeat the purpose of the witness identity protection regime if a certificate could be challenged or reviewed because this would require sensitive operational information to be disclosed, which may risk the safety of an operative or the integrity of an operation.<sup>82</sup>

3.45 However, a party to a proceeding would be able to apply to the court to override a certificate to allow questions or statements which may lead to the disclosure of the operative's real identity or address.<sup>83</sup> The court would not be permitted to allow such evidence or statements unless the court is satisfied that:

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76 Proposed subsection 15ME(3); Explanatory Memorandum, pp 115 and 116.

77 Proposed subsections 15MG(1).

78 Proposed subsections 15MH(1) and (2).

79 Explanatory Memorandum, p. 117. See also p. 119.

80 Proposed section 15MJ; Explanatory Memorandum, p. 118.

81 Explanatory Memorandum, p. 119.

82 Explanatory Memorandum, p. 115.

83 Proposed section 15MM; Explanatory Memorandum, p. 121.

- there is evidence that, if accepted, would substantially call into question the operative's credibility;
- it would be impractical to test properly the credibility of the operative without allowing the risk of disclosure of the operative's true identity or address; and
- it is in the interests of justice for the operative's credibility to be able to be tested.<sup>84</sup>

#### *Reporting requirements*

3.46 Proposed section 15MU will require the chief officer of a law enforcement agency to submit an annual report to the Attorney-General about the certificates given by the chief officer and require the Attorney-General to table that report in Parliament within 15 sitting days.<sup>85</sup>

3.47 Similarly, the chief officer of an intelligence agency will be required to provide an annual report to the Inspector-General of Intelligence and Security about the certificates given by the chief officer. However, this report will not be tabled in Parliament.<sup>86</sup>

#### *Mutual recognition of witness identity protection laws*

3.48 The proposed amendments would recognise corresponding state and territory witness identity protection laws and provide that certificates issued under those laws would be treated as if they had been issued under the Crimes Act.<sup>87</sup> The Explanatory Memorandum explains that these mutual recognition provisions will:

[E]nable undercover operatives – who often have to work across jurisdictions – to be protected by a certificate issued by their home agency that is recognised in proceedings which may be held in another jurisdiction.<sup>88</sup>

#### **Key issues**

3.49 No significant issues were raised in the evidence to the committee regarding the provisions to implement the model laws in relation to assumed identities.<sup>89</sup> However, some issues were raised regarding the provisions dealing with controlled operations and witness identity protection.

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84 Proposed subsection 15MM(5); Explanatory Memorandum, p. 121.

85 Explanatory Memorandum, p. 127.

86 Explanatory Memorandum, p. 127.

87 Proposed section 15MW and definitions of 'corresponding witness identity protection certificate' and 'corresponding witness identity protection law' in proposed subsection 15M(1); Explanatory Memorandum, pp 49 and 127-128.

88 Explanatory Memorandum, p. 127.

89 The Law Council noted that it had some concerns about both the existing assumed identities provisions in the Crimes Act and the amendments but did not detail these concerns: *Submission 6*, p. 45.

### *Controlled Operations*

3.50 There was some support for the proposed changes to the regime governing controlled operations.<sup>90</sup> Furthermore, even witnesses who had reservations about these provisions, acknowledged that the Bill addresses a number of the concerns that were raised when similar reforms to the controlled operations regime were proposed by the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006.<sup>91</sup> The key remaining concerns related to:

- the proposal to extend the maximum length of controlled operations to 24 months;
- the provisions which would extend civil and criminal immunity to informants participating in controlled operations; and
- reporting requirements in relation to controlled operations.

#### *Duration of operations*

3.51 When the Senate Legal and Constitutional Affairs Committee considered the controlled operations provisions in the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006, the provisions set no limit on the number of three month extensions of an operation which could be granted. That committee recommended that an absolute limit of 12 months should be placed on each authorised controlled operation.<sup>92</sup> Under the existing provisions in the Crimes Act, the maximum duration of a controlled operation is six months.

3.52 Mr Phillip Boulten of the Law Council acknowledged that the provisions in the Bill include a time limit on controlled operations but argued that no adequate justification has been provided for extending the maximum duration of a controlled operation from the existing limit of six months to 24 months:

...a two-year cap is just far too long. There is no need for a controlled operation to last for two years. The most extraordinary undercover drug or even terrorist operation is over and done with in a year. We would have thought that a 12-month cap would be more than adequate.<sup>93</sup>

#### *Protection for informants*

3.53 The Law Council expressed concern about the proposal to extend criminal and civil immunity to informants participating in controlled operations, particularly in the absence of an external authorisation process for controlled operations. The Law Council cited the view of the Criminal Bar Association of Victoria that:

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90 Police Associations, *Submission 3*, p. 1; Mr Jon Hunt-Sharman, Police Associations, *Committee Hansard*, 28 August 2009, p. 25; Assistant Commissioner Mandy Newton, AFP, *Committee Hansard*, 28 August 2009, p. 48.

91 Law Council, *Submission 6*, p. 36. That bill was not enacted.

92 Senate Legal and Constitutional Affairs Committee, *Report on the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006*, February 2007, recommendation 3, p. 16.

93 *Committee Hansard*, 28 August 2009, p. 3. See also *Submission 6*, p. 39.

...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[s] 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.<sup>94</sup>

3.54 The Ombudsman's submission also noted that the use of informants can add complexity and risk to a controlled operation, and suggested that law enforcement agencies would need to place a greater emphasis on the use of appropriate conditions and controls, particularly where informants' activities involve dealing with illicit goods.<sup>95</sup>

#### *Reporting requirements*

3.55 The Commonwealth Ombudsman was generally supportive of the changes to the reporting and inspection regime in relation to controlled operations noting that:

The proposed amendments will enhance this office's oversight function by providing stronger legislative powers for the Ombudsman in relation to inspections, and greater clarity with respect to the recordkeeping and reporting obligations of law enforcement agencies.<sup>96</sup>

3.56 However, the Ombudsman raised two specific issues. Firstly, he recommended that the principal law enforcement officer with respect to a controlled operation should be required to make a report to the chief officer of the law enforcement agency within two months after the completion of the operation and the report should include, amongst other things:

- the nature of the controlled conduct engaged in;
- details of the outcome of the operation; and
- if the operation involved illicit goods, the nature and quantity of any illicit goods and the route through which the illicit goods passed during the operation.<sup>97</sup>

3.57 The Ombudsman noted that there is a requirement for such a report under the legislation regulating controlled operations in New South Wales, Queensland, Victoria, and the Australian Capital Territory.<sup>98</sup> He submitted that:

Such reports would seem to provide an important tool for law enforcement agencies to assess their own performance in terms of the outcome of a controlled operation, and would provide information necessary for this

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94 *Submission 6*, pp 39-40.

95 *Submission 2*, p. 4.

96 *Submission 2*, p. 1. See also Prof. John McMillan, *Committee Hansard*, 28 August 2009, p. 9.

97 *Submission 2*, p. 3.

98 See for example section 37 of the *Crimes (Controlled Operations) Act 2004 (Vic)* and section 27 of the *Crimes (Controlled Operations) Act 2008 (ACT)*.

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office to ensure that agencies are compliant with annual reporting and other requirements.<sup>99</sup>

3.58 Secondly, the Ombudsman noted that under existing provisions in the Crimes Act there is a requirement for agencies to include in quarterly reports information regarding the handling of narcotic goods and the people (other than law enforcement officers) who had possession of those goods.<sup>100</sup> The Ombudsman expressed concern that there is no provision in the Bill that requires this information to be recorded and stated that:

In my view, it is an important control and safeguard on the handling of narcotic goods that everybody who is not a law enforcement officer who has handled those goods should be recorded in the official record that can then be audited later on—for the obvious reason, as human experience teaches, that there are allegations from time to time that narcotics goods go missing during the course of policing and allegations that the quantity that is officially destroyed at the end of an operation is less than the quantity that commenced the operation.<sup>101</sup>

3.59 The Ombudsman suggested that the Bill should make provision for information relating to the handling of narcotic goods, and people who had possession of narcotic goods, to be recorded in the general register that authorising agencies will be required to maintain under proposed section 15HQ.<sup>102</sup>

#### *Other concerns*

3.60 The Law Council expressed two further concerns regarding the controlled operations provisions. Firstly, the Law Council suggested that an external approval process for controlled operations should be established under which an independent authority, such as a retired judge, would authorise controlled operations rather than operations being authorised by a senior law enforcement officer.<sup>103</sup>

3.61 Secondly, the Law Council suggested that, in providing for mutual recognition of state and territory controlled operations regimes, the proposed amendments do not guarantee that those regimes will incorporate equivalent safeguards to those required under the Commonwealth regime either now or in the future.<sup>104</sup> Mr Boulton of the Law Council argued that this has the potential to dilute the safeguards incorporated in the federal regime:

If a state or territory regime has more liberal or lax provisions that allow their officials to do more than what the Commonwealth laws would require, the proposed amendments will then effectively dispense with the

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99 *Submission 2*, pp 2-3. See also Prof. John McMillan, *Committee Hansard*, 28 August 2009, pp 9 and 10.

100 Paragraph 15S(2)(e) and subsection 15S(3) of the Crimes Act; *Submission 2*, p. 3.

101 Prof. John McMillan, *Committee Hansard*, 28 August 2009, p. 13. See also *Submission 2*, p. 3.

102 *Submission 2*, p. 4; Prof. John McMillan, *Committee Hansard*, 28 August 2009, pp 9 and 10.

103 Mr Phillip Boulton, *Committee Hansard*, 28 August 2009, p. 3; *Submission 6*, p. 38. See also Mr Lance Williamson, *Civil Liberties Australia, Committee Hansard*, 28 August 2009, p. 19.

104 *Submission 6*, pp 41-42.

requirement for controlled operations to comply with the Commonwealth laws. That will mean that Federal Police might choose deliberately not to get a controlled operation certificate under these provisions and to allow their state or territory counterparts to get the controlled operation under their provisions if it is thought that it is more efficacious to get the controlled operation under a more lax regime. For this reason at the very least, this law should require the Commonwealth to recognise only those state or territory regimes which are at least equal in force to the Commonwealth regimes.<sup>105</sup>

3.62 Finally, the New South Wales police portfolio recommended that the controlled operations provisions should allow for retrospective authorisation of unlawful conduct by a participant in a controlled operation within 24 hours of the conduct.

[C]ontrolled operations can place police officers in dangerous situations where, despite good planning, circumstances can change rapidly. Allowing police to adapt controlled operations within defined limits (for example, purchasing a different type of illicit drug when the one originally discussed is no longer offered) allows police to operate effectively, efficiently and with a greater degree of safety in potentially dangerous situations.<sup>106</sup>

#### *Government response*

3.63 In evidence to the committee, an officer of the AFP submitted that the arrangements for approval and oversight of controlled operations in the Bill were appropriate.<sup>107</sup> Similarly, the Attorney-General's Department argued that the Law Council's concern regarding the lack of an external approval process for controlled operations was not justified:

...the AAT have external oversight for any extensions, from three months onwards, and the Ombudsman has very detailed oversight of all reports and monitoring of the conduct of controlled operations. ...In addition, I would also point out that the Commonwealth already has controlled operations provisions that are reasonably similar. They have been in operation since 2001 without, as far as I am aware, any issues ever having arisen about inappropriate behaviour when using those provisions.<sup>108</sup>

3.64 The Ombudsman supported the view that his oversight role in relation to controlled operations has helped to ensure that these powers are exercised properly:

My view is that... the compliance auditing inspection regime that is a part of this act and of other legislation that enables exercise of coercive, intrusive powers by law enforcement agencies is an appropriate regime. In my experience, this detailed inspection and regular reporting regime has focused the attention of law enforcement agencies quite closely on the need to be rigorous in complying with the detailed legislative requirements, and

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105 *Committee Hansard*, 28 August 2009, p. 3.

106 *Submission 13*, p. 2.

107 Mr Peter Howell, *Committee Hansard*, 28 August 2009, p. 58.

108 Ms Sarah Chidgey, *Committee Hansard*, 28 August 2009, p. 66.



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so it provides that reassurance of the propriety and integrity that is required.<sup>109</sup>

### ***Witness identity protection***

3.65 The Law Council opposed the witness identity protection amendments arguing that the amendments prioritise law enforcement agencies' internal, unscrutinised assessments of their operational and security needs above all other concerns, including a defendant's right to a fair trial.<sup>110</sup> The Law Council submitted that:

[T]he proposed amendments remove the court's existing role under section 15XT of the Crimes Act and replace this process with one that invests considerable authority in the hands of government agencies to protect a covert operative, without including appropriate safeguards to protect the fair trial rights of the accused.<sup>111</sup>

3.66 While proposed section 15MM would allow the court to grant leave for questions and statements which may reveal an operative's true identity, the Law Council submitted that:

[T]his provision offers only limited practical protection for accused persons. This is because in the absence of information about the operative's true identity, defence counsel is unlikely to be able to adduce evidence that if accepted would substantially call into question the operative's credibility.<sup>112</sup>

3.67 The Senate Legal and Constitutional Affairs Committee considered very similar provisions in its report on the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006. The committee expressed significant reservations about the provisions and stated that:

The committee can see no justification for the court to be denied the opportunity to consider the matter of witness identity on its merits, and in conjunction with other relevant considerations. ...[A]ny provision which limits the right of the defendant to question the credibility of his or her accuser, as this one does, deserves careful implementation by a court. The committee considers that this is best achieved through leaving intact the court's discretion to balance the various interests at stake in individual cases.<sup>113</sup>

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109 Prof. John McMillan, *Committee Hansard*, 28 August 2009, p. 10.

110 *Submission 6*, p. 49.

111 *Submission 6*, p. 48. See also Mr Phillip Boulton, *Committee Hansard*, 28 August 2009, p. 3.

112 *Submission 6*, p. 47.

113 Senate Legal and Constitutional Affairs Committee, *Report on the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006*, February 2007, p. 25.

