



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

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Law and Bills Digest Section

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

**Date introduced:** 29 November 2006

**House:** Senate

**Portfolio:** Justice and Customs

**Commencement:** Sections 1 to 3 commence on the day the Bill receives Royal Assent. Schedules 1 to 6 commence on the 28th day after Royal Assent

### Purpose

The Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006 ('the Bill') makes changes to law enforcement investigative powers, including powers to conduct covert investigations, and provides for new arrangements for the provision of search warrants. It also amends laws for the protection of witnesses.

The Bill introduces the following measures:

- a delayed notification search warrants scheme which will enable police officers to get search warrants that will allow the covert entry and search of premises to prevent or investigate Commonwealth terrorism offences and a limited range of other serious Commonwealth offences, in cases where keeping the existence of an investigation confidential could be 'critical to its success'
- inserts a new part 1ACA into the Crimes Act which will create a mechanism to protect the identity of a covert operative who gives evidence in court proceedings.

### Background

#### Basis of policy commitment

The Bill amends the *Crimes Act 1914* (Crimes Act); the *Australian Crime Commission Act 2002* (the ACC Act); the *Witness Protection Act 1994* (WP Act); the *Customs Act 1901* (Customs Act), *Proceeds of Crime Act 2002* (POC Act) and the *Mutual Assistance in Criminal Matters Act 1987* (MA Act).

On 7 December 2006, the Senate referred the Bill to the Legal and Constitutional Committee for [inquiry](#) and the [report](#) was tabled on 7 February 2007.

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The Scrutiny of Bills Committee reported on the Bill in the [Alert Digest No. 15 of 2006](#) and made some recommendations in relation to ‘delayed notification search warrants’ discussed below.

When introducing the Bill to the Senate, Senator Chris Ellison stated:

Schedule 1 of the proposed amendments fulfils the government’s election commitment to introduce national model legislation on assumed identities, controlled operations and the protection of witness identity.

In order to investigate crime, police must be given effective powers. Contemporary policing requires law enforcement agencies to undertake covert investigations that extend beyond the boundaries of any one jurisdiction. To address this threat it is critical that law enforcement agencies adopt a nationally coordinated and cooperative approach to law enforcement.<sup>1</sup>

Controlled operations

A ‘controlled operation’ is a covert investigative method. In a controlled operation, a law enforcement officer (known as an ‘operative’) conceals his or her identity in order to associate with people suspected of being involved in committing, organising or financing crimes and to gather evidence or intelligence about them.

The operative typically acts under the supervision or guidance of another law enforcement officer known as a ‘controller’. The controller acts as the operative’s link to the law enforcement agency during the course of the operation.

Commonwealth controlled operations legislation had its genesis in the High Court’s decision in *Ridgeway v. Queen*. On his release from prison, a person with drug trafficking convictions-Ridgeway-contacted a former associate in order to obtain some heroin. However, the former associate had turned police informer. The police and the former associate arranged to buy and import heroin into Australia and sell it to Ridgeway who was then arrested, charged and convicted of offences under the Customs Act. The High Court quashed Ridgeway’s conviction. In their joint judgment, Mason CJ, Deane and Dawson JJ said:

In these circumstances ... grave and calculated police criminality; the creation of an actual element of the charged offence; selective prosecution; absence of any real indication of official disapproval or retribution; the achievement of an objective of the criminal conduct if evidence be admitted-combine to make the case an extreme one in which the considerations favouring rejection of evidence on public policy grounds are extremely strong.<sup>2</sup>

Their Honours also remarked:

... in the context of the fact that deceit and infiltration are of particular importance to the effective investigation and punishment of trafficking in illegal drugs such as

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heroin, it is arguable that a strict requirement of observance of the criminal law by those entrusted with its enforcement undesirably hinders law enforcement. Such an argument must, however, be addressed to the Legislature and not to the courts. If it be desired that those responsible for the investigation of crime should be freed from the restraints of some of the provisions of the criminal law, a legislative regime should be introduced exempting them from those requirements.<sup>3</sup>

In September 2001, Parliament passed legislation to extend the scope of controlled operations provisions to enable operations against a broader range of criminal activity subject to appropriate limitations, review and accountability measures. This legislation was passed as part of the *Measures to Combat Serious and Organised Crime Act 2001* and is enacted through the *Crimes Act 1914* (see history of controlled operations in the [Bills Digest](#)). Controlled operations can currently be undertaken with respect to any serious Commonwealth offence attracting a penalty of over 3 years imprisonment.

On 5 April 2002, the Prime Minister and state and territory leaders [agreed](#) on a number of reforms to enhance arrangements for dealing with multi-jurisdictional crimes. In particular, they agreed to introduce model laws for a national set of powers for cross-border investigations covering controlled operations, assumed identities, electronic surveillance devices and the protection of witness identity.

The replacement provisions dealing with controlled operations in this Bill are based on a model law on controlled operations, assumed identities and protection of witness identity that was developed by the Joint Working Group of the Standing Committee of Attorneys-General and the Australasian Police Ministers Council. The model law was published in November 2003 in the Joint Working Group's [Cross-Border Investigative Powers for Law Enforcement Report](#). The stated intention of this model law was to harmonise, as closely as possible, the controlled operations, assumed identities and protection of witness identity regimes across Australia.

Information on how the regime currently operates is contained in the *Controlled Operations Annual Report 2005-06* which can be accessed [here](#).

The Commonwealth Ombudsman monitors and reports on controlled operations conducted by the Australian Crime Commission (ACC) and the Australian Federal Police (AFP). Some of these [reports](#) are available to the public.

The Commonwealth Government introduced model legislation on electronic surveillance devices in 2004. On 8 December 2004, Federal Parliament passed the *Surveillance Devices Act 2004* (Cth) which significantly widened the circumstances in which Federal law enforcement agencies (other than ASIO, ASIS and DSD) can covertly use data, optical, listening and tracking surveillance devices (see further the [Bills Digest](#)).<sup>4</sup>

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## Delayed Notification Search Warrants

A delayed notification search warrant would enable police officers to get search warrants that will allow the covert entry and search of premises to prevent or investigate Commonwealth terrorism offences and a limited range of other serious Commonwealth offences.

The provisions for delayed notification search warrants were not included in the model law on cross-border investigative powers for law enforcement.

The AFP representative told the Senate Committee that:

The ability for police to enter and search premises without notifying the occupants of the target premises is an important investigative tool. Searches of this nature—such as controlled operations, telecommunications interception and the use of electronic surveillance devices and stored communication warrants—complement the existing investigative tools available to law enforcement because they allow the examination of physical evidence such as computers, diaries and correspondence that enable police to identify the full range of people involved in suspected serious criminal activity and to obtain evidence of that activity. It is particularly important in being able to operate to prevent criminal activity. The rationale for seeking this power and the context in which it would be used is that there are investigations where keeping the existence of the investigation confidential, in particular from targets of the investigation and their associates, is often critical to the success of that investigation.<sup>5</sup>

The Senate Scrutiny of Bills Committee tabled a report into [Entry, Search and Seizure Provisions in Commonwealth Legislation](#) on 4 December 2006.

The Scrutiny of Bills Committee noted that while this new regime provides some protection of personal rights and liberties through the warrant application and reporting process, the new Division could be regarded as trespassing on personal rights and liberties, and so left the question of whether it does so unduly for consideration by the Senate as a whole.<sup>6</sup>

These types of warrants exist at the state level but are much more restricted—delayed notification warrants in the New South Wales jurisdiction have, as their exclusive focus, prevention and response to terrorist acts. In Victoria and the Northern Territory the issue of such warrants are limited to circumstances in which 'a terrorist act has been, is being, or is likely to be committed'. In Queensland, the warrants are available in relation to the investigation of organised crime, terrorism or designated offences, where 'designated offences' is limited to offences involving death or serious injury with a maximum penalty of life imprisonment.

A similar provision in the United States (US) has proved controversial. Section 213 of the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (Public Law 107-56), (the US Patriot Act), titled

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‘Authority for Delaying Notice of the Execution of a Warrant,’ makes it legal for investigators to delay notification that a search has taken place when: they seize no tangible thing; and if the court finds ‘reasonable cause’ that immediate notification ‘may have an adverse result’ on an investigation. Under the US Patriot Act, the Government need not tell a person that a space was searched for up to 90 days.

In the US these are known as ‘sneak-and-peek’ search warrants. A sneak-and-peek warrant, according to an analysis of the Patriot Act done by the [American Law Division for Congress](#), allows agents to secretly enter a home or office and ‘search, observe, take measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files and the like’ and depart ‘without leaving notice of their presence.’<sup>7</sup>

Assumed identities

**New Part 1AC** deals with assumed identities. As the Attorney-General noted in his second reading speech to the Crimes Amendment Bill 2005:

Assumed identities are false identities adopted to facilitate intelligence and investigative functions, or the infiltration of a criminal, hostile or insecure environment with a view to collecting information and investigating offences.<sup>8</sup>

The 2005 Bill amended the Crimes Act to enable Commonwealth participating agencies to request assumed identity documents from State and Territory issuing agencies in accordance with legislation in force in those jurisdictions.

This Part of the Bill also implements the model laws published in November 2003 in the Joint Working Group’s Report on Cross-Border Investigative Powers for Law Enforcement.

The AFP provides an annual report on use of assumed identities. The 2005-2006 annual report is available [here](#).

The measures relating to assumed identities were passed, with bipartisan support, under the *Measures to Combat Serious and Organised Crime Act 2001* (see the [Bills Digest](#) for further information). Amongst other things, that Act inserted section 15XR into the Crimes Act to criminalise the misuse of assumed identities. As the Attorney-General stated when introducing that Act:

This is not something that is used lightly, and there is a reporting mechanism in place and criminal punishments for the misuse and abuse of the system of assumed identities. For the financial year 2003-04, for example, only 71 authorisations were issued. Perhaps in the coming year we may see a more widespread use of these identities as security issues come to light. In particular, the controversy that was before the parliament and the media yesterday concerning controlled operations at our airports is perhaps a continuing trend and a situation where we will see these assumed identities being necessary to assist those officers who are operating under cover.

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However, that is obviously going to be an operational matter for the Australian Federal Police to determine.<sup>9</sup>

#### Witness Protection

The *Witness Protection Act 1994* is the legislative basis for the National Witness Protection Program (NWPP), which provides protection and assistance to witnesses involved in legal proceedings—for example, in cases where the witness has given evidence in a serious, or high profile, criminal trial and as a result, their lives or the lives of their family are potentially placed at risk.<sup>10</sup> Each State and Territory has complementary legislation and runs its own witness protection scheme, however, the AFP Commissioner can enter into arrangements with an ‘approved authority’, which includes State and Territory Commissioners of Police, and the Chairman of the ACC, to enable protection and assistance to witnesses involved in operations run by those organisations. In these cases, costs are shared between the NWPP and the approved authority.

In the financial year ending 30 June 2006, the NWPP managed 19 active witness protection operations, providing protection to 39 people. According to the AFP, the majority of people have been accepted into the program because of their involvement as witnesses in prosecutions relating to organised, large-scale importation of illegal drugs, or corruption matters. The movement of witnesses into or out of Australia ‘remains an active element of the NWPP’.<sup>11</sup>

The Bill makes a number of amendments to the Witness Protection Act suggested by the Australian Federal Police following a *Review of the National Witness Protection Program* report of December 2003.

The Australian Federal Police told the Senate Committee inquiry into the Bill:

The proposed witness protection amendments are necessary to address issues which have arisen in the operation of the National Witness Protection Program. The amendments clarify the basis on which the AFP can provide protection and assistance to former participants and their associates as well as to witnesses in state or territory matters.<sup>12</sup>

#### Australian Crime Commission Act amendments and data access provisions

The Bill makes some technical amendments to the *Australian Crime Commission Act 2002*. The amendments will purportedly improve the function of the ACC by expanding the powers of examiners, aligning the current search warrant provisions with the Crimes Act model and correcting some technical errors in the legislation.

The Parliamentary Joint Committee on the Australian Crime Commission conducted a [review](#) of the ACC Act which was tabled on 10 November 2005. This included substantive discussion of oversight of the ACC in relation to controlled operations.

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The Bill also makes amendments to the search warrant provisions in the Crimes Act, *Proceeds of Crimes Act 2002*, *Mutual Assistance in Criminal Matters Act 1987* and *Customs Act 1901* to allow law enforcement officers to access data from electronic equipment once it is seized.

### Senate Legal and Constitutional Committee Report

The Senate referred the Bill to the Legal and Constitutional Committee for [inquiry](#) and the report was tabled on 7 February 2007 as noted above. The Committee received only thirteen submissions, of which only two, the Law Council of Australia and the Queensland Council of Civil Liberties (QCCL) were not from government agencies or police forces.

The QCCL in its submission strongly opposes the controlled operations provisions because they authorise illegal conduct by police: '[t]he 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'.<sup>13</sup> The Law Council strongly opposed delayed notification warrants as well as other aspects of the Bill which are dealt with under the 'Main Provisions' below.

The Committee recommended that the Bill be passed subject to ten recommendations which focused mainly on human rights safeguards:

- that **proposed subsection 15GE(3)** be deleted from the Bill to prevent offences carrying a penalty of less than three years imprisonment being included in the definition of 'serious offence' by regulation
- that the Bill be amended to retain the requirement for extensions of controlled operations for three month periods to be approved by a member of the AAT
- that the Bill be amended to impose an absolute limit of 12 months on each authorised controlled operation
- that if controlled operations are able to be extended indefinitely, **proposed subsection 15HH(4)** should be amended to require enforcement agencies to report to the Commonwealth Ombudsman on the progress of current operations every six months
- that **proposed section 15KP** be amended to prohibit the retention, copying or recording by a presiding officer of any information or documentation provided to them under that provision
- that the Federal Government limit the offences in relation to which delayed notification search warrants may be issued to offences involving terrorism or organised crime; or death or serious injury with a maximum penalty of life imprisonment
- that **subsection 3SL(1)(b)** be deleted so that applications to impersonate a person for the purposes of executing a warrant are subject to the same approval process as for other uses of an assumed identity

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- that the Bill be amended to require the Ombudsman to conduct an inspection of agency files and issue a report to the Minister in relation to the administration of delayed notification search warrants at least every six months
- that the definition of 'executing officer' in Schedule 3 be confined to sworn federal, state or territory police officers, and
- that **proposed subsection 25B(2)** be amended to require an ACC examiner to adjourn an examination for an adequate time to enable a witness to engage an alternative legal representative; and ensure that a witness will only be examined without representation when his or her decision to forego representation is express and informed.

#### Commonwealth Ombudsman

The Commonwealth Ombudsman will receive extra reporting obligations under this Bill. The Ombudsman's submission to the Senate inquiry states:

The powers given to the Ombudsman in the 2001 amendments to the Crimes Act setting up the controlled operations regime were scant. The Ombudsman was not consulted on that legislation until the last minute and no attempt was made to align the Ombudsman's power with those at his disposal under other legislation where he exercised powers of inspection. This has been corrected in the Bill. Some issues arose over the extent of the Ombudsman's powers but these were resolved after discussion. A provision based on the Ombudsman Act was added to clarify that legal professional privilege is not affected by the Ombudsman having access to documents.

I would like to flag the desirability of having a set of powers which are automatically available to the Ombudsman whenever he exercises an inspection role. At present there is a different set of powers for every inspection regime.<sup>14</sup>

The Ombudsman raised some disquiet of future wide interpretations of 'serious crimes' in relation to the delayed notification warrants:

Given the highly intrusive nature of the power it is appropriate that the delayed notification search warrant will be available for investigation of Commonwealth offences and State offences with a Federal aspect punishable on conviction by imprisonment for a period of 10 years, namely the high end of suspected serious offences. There are other offences for which a warrant may also be available, not all of which are punishable by 10 years' imprisonment. The list is diverse and includes recruitment of mercenaries and recruitment of members of organizations engaged in hostile activities towards foreign governments, politically motivated violence, dealing with assets frozen under UN sanctions, sexual slavery or use of communications services to make death threats. Other offences may in time added to the list and it is hoped that any additions will be limited only to the most serious criminal conduct.<sup>15</sup>

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## Financial implications

The Bill appears to be revenue neutral.

## Main provisions

Schedule 1: Amendment of the Crimes Act 1914—Controlled operations, assumed identities and protection of witness identity

### Proposed Part IAB—Controlled Operations

Item 1 repeals the current Parts IAB and IAC of the Crimes Act and replaces these with *Proposed Part IAB—Controlled Operations*.

**Proposed subsection 15GA(1)** preserves judicial discretion to admit or exclude evidence or stay proceedings, except to the extent that these discretions are expressly restricted by the Bill. **Proposed subsection 15GA(2)** makes it clear that a court should not apply its discretion to exclude evidence obtained during a controlled operation solely because it was obtained through the commission of unlawful acts, provided that the conduct was within the scope of the controlled operation authority. See the discussion of *Ridgeway* above.

**Proposed section 15GB** provides that it is the intention of the Parliament that this Part is not to apply to the exclusion of a law of a State or Territory to the extent that the law is capable of operating concurrently with this Part.

**Proposed section 15GD** defines the phrase *controlled operation* as

an operation authorised under this proposed Part for which immunity from civil and criminal offences is provided to law enforcement and other participants. It may involve covert or overt activity, but its object is to obtain evidence of serious criminal offences against Commonwealth law or State or Territory law with a federal aspect. In a covert controlled operation a law enforcement officer (an ‘operative’) may conceal his or her true identity and associate with people suspected of being involved in committing, organising or financing crimes to gather evidence or intelligence about them. In some instances, a civilian (a non-law enforcement officer) is used as an operative where the civilian is better placed to attain the information than a law enforcement officer. During the controlled operation the participant may need to engage in unlawful conduct (‘controlled conduct’), for which, if not for proposed section 15GW, the participant would be criminally responsible. A controlled operation commences at the time an authority is granted under proposed section 15GH (see also proposed section 15GN).<sup>16</sup>

The Bill enables controlled operations in the case of a serious Commonwealth offence defined as an offence carrying a maximum penalty of three or more years imprisonment; or a serious state offence with a federal aspect. This is defined in **subsection 15GE(2)** as a

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state offence with a similar maximum prison term, but pertaining to a subject on which the Commonwealth has constitutional power, or an offence which is incidental to a Commonwealth investigation of a Commonwealth offence, is defined as a serious state offence with a federal aspect. **Proposed section 15GE** provides that regulations may also prescribe a serious Commonwealth offence, and such an offence need not carry a maximum imprisonment period of three or more years.<sup>17</sup> Note the Ombudsman's comment on this section in the 'Background' above.

Applications, formal or urgent, must contain sufficient information for an authorising officer (usually a Senior Executive Service officer of the AFP or ACC to make a decision, and include details of previous authorities applied for in relation to the operation, whether granted or not. Applications must identify the nature of criminal activity suspected (including suspected offences), the nature of the controlled conduct which may be engaged in, the identity of those targeted, and any conditions to which the operation is subject. An urgent application contains similar information, but with less detail of, for example, the kind of criminal activity which is suspected.

**Proposed section 15GH** provides that the authorising officer must not grant an authority unless satisfied, on reasonable grounds, that:

- any unlawful conduct will be limited to the maximum extent consistent with conducting an effective controlled operation;
- the operation will be conducted in a way that ensures that, to the maximum extent possible, any illicit goods will be under the control of Australian law enforcement officers at the end of the operation; and
- the operation will not be conducted in a way that is likely to induce a person to commit any offence they would not otherwise commit.

Operations cannot be authorised if they would seriously endanger the health or safety of a person, would cause death or serious injury, would involve the commission of a sexual offence, or would result in significant loss or damage to property other than illicit goods (**proposed section 15GH**).

The authorisation process for controlled operations is 'entirely internal' to the AFP, the ACC and ACLEI. The Explanatory Memorandum states that '[i]nternal authorisation for controlled operations is appropriate as the conduct of controlled operations is essentially an internal and operational matter and provides operational efficiency and protects the security of the investigation.'<sup>18</sup>

Under the current Crimes Act provisions, appropriate authorising officers are able to vary an application with the exception of extending the duration of the controlled operation. Under **proposed section 15GO**, this function is given to a nominated member of the AAT who can extend the duration of a controlled operation only once and for a period of 3 months. This means a controlled operation could only run for a maximum of 6 months.

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The AAT member could only extend the duration of the authorisation if they were reasonably satisfied that all the criteria that were required for the granting of the authorisation remain in existence.

**Proposed section 15GL** which allows authorisations of specified individuals to engage in controlled conduct is a new provision which was not contained in the model laws.

**Proposed section 15GG** provides that only an Australian law enforcement officer of a law enforcement agency may apply for an authority to conduct a controlled operation. Civilians can be authorised to participate in a controlled operation in limited circumstances. **Proposed paragraph 15GH(2)(h)** provides that the authorising officer must be satisfied on reasonable grounds that the role given to a civilian is not one that could be adequately performed by a law enforcement officer. See the discussion about use of contractors under Schedule 3 below.

**Proposed sections 15GW, 15GX and 15H** provide criminal and civil immunity from prosecution for participants in controlled operations for acts which would be unlawful but for their taking place as part of a controlled operation. Participants may be law enforcement officers or civilians, including informants. The immunity operates where the participant acts within the terms of the authority and, in the case of a civilian, where instructions from law enforcement officers are followed.

**Proposed section 15HA** provides for compensation to a person who suffers personal injury, or loss or damage to property, as a direct result of an authorised controlled operation. Current provisions cover only personal injury. Compensation is not payable where the loss or damage has been caused by the exercise of powers of criminal investigation available under different laws than those relating to controlled operations. That is, only actions which are directly connected to the controlled operation, and not conduct which is incidental, will be compensable.

**Proposed sections 15HH to HT** deal with reporting obligations. Chief officers are responsible for reporting six-monthly to the Ombudsman and Minister, in addition to annual reports to the Minister. Reports must detail the number of authorities granted, refused and varied; the nature of those authorities; any losses or damage which resulted and the number of authorities expired or cancelled. Chief Officers must report on completed operations, indicating the nature of the operation, the nature and quantity of illicit goods detained, and all foreign countries through which those goods passed. The Ombudsman is also granted comprehensive powers of inquiry and access to any records held by an agency.

Other provisions which are broader than the current Crimes Act provisions are:

- **proposed section 15GW** which provides protection from criminal responsibility to informants
- **proposed section 15GX** which provides indemnity against civil liability to informants

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- **proposed section 15HA** which extends compensation to persons who suffer personal injury as well as property damage.

**Proposed section 15HF** creates an offence relating to the unauthorised disclosure of information. 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. However, it is a defence if the disclosure was made:

- in connection with the administration or execution of this Part
- for the purposes of any legal proceeding arising out of, or otherwise related to this Part, or of any report of any such proceedings
- in accordance with any requirement imposed by law, or
- in connection with the performance of functions or duties, or the exercise of powers, of a law enforcement agency.

**Proposed section 15HG** creates an aggravated form of the offence in proposed section 15HF.

#### Part 1AC-Assumed Identities

**Proposed section 15HW** states that the provisions relating to assumed identities relate to law enforcement agencies, including the AFP, the ACC, Customs, ACLEI, the Australian Taxation Office (ATO), or any other agency specified in the regulations.

**Proposed section 15HX** extends the ability to take an assumed identity beyond law enforcement officers to include security and intelligence officers and other authorised people (such as foreign law enforcement officers) and allows those officers to acquire and use assumed identities for law enforcement, security and intelligence purposes. Application can be made by an enforcement or intelligence officer on behalf of themselves, a colleague, a foreign officer, or a civilian. Application can be made to the chief officer of the law enforcement or intelligence officer's agency. Officers applying for identities to be used by foreign officers or in foreign countries must apply to the chief officer of the AFP or ACC.

**Proposed section 15HY** provides that the authorising officer must be satisfied on reasonable grounds that the assumed identity is necessary:

- for the purposes of an investigation or for gathering intelligence in relation to criminal activity;
- for the exercise of powers and performance of functions of an intelligence agency;
- for the exercise of powers and performance of functions under the National Witness Protection Program;

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- for the training of people to carry out any of these functions or powers; or
- for any administrative function in support of any of these powers or functions.

The authorising officer must also be satisfied that the risk of abuse of the identity is minimal. Specific criminal activity need not be pointed out by the applicant for the purposes of obtaining authorisation. Where an assumed identity is requested for use in a foreign country, the authorising officer must also be satisfied that such an identity is reasonably necessary in the circumstances.

**Proposed section 15HZ(2)** provides that if the authority for an assumed identity relates to a civilian supervised by a law enforcement officer, the authority can remain in force for a maximum of three months. Otherwise, authorities for assumed identity run until they are cancelled, although authorising officers are required to review the necessity of each authority annually, and every three years for intelligence officers.

**Proposed sections 15JK-JL and 15JN to JR** make provision for the return of evidence of the assumed identity in case of cancellation. People operating under an assumed identity, and third parties that assist them in creating and maintaining the identity, are, in a limited way, indemnified against prosecution for acts which would otherwise be illegal.

**Proposed sections 15J-JY** create offences for misuse of an assumed identity, and for improper disclosure of information about an assumed identity. Each offence carries a maximum penalty of two years imprisonment.

**Proposed section 15KB** deals with audits. A relevant chief officer must arrange for the audit of assumed identity records at least six-monthly. Audits may be carried out by a person holding an assumed identity, or a person who has issued, varied or terminated an identity, but they may not audit their own file (should they hold a false identity) or one on which they have worked.

Under **proposed sections 15JZ and 15KA**, a report must be provided to the Minister by a relevant chief officer. Reports must include a description of any unlawful activity uncovered by audits, and statistical information about the agency's operations as they relate to assumed identities. In the case of the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service, a similar report must be made to the Inspector-General of Intelligence and Security.

## Part 1ACA–Witness Identity Protection

### Background

This Part of the Bill implements national model legislation developed by a Joint Working Group of the Standing Committee of Attorneys-General (SCAG) and the Australasian Police Ministers' Council, to protect the true identity of covert operatives who give

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evidence in court. The model laws were published in 2003 as part of the [Report on Cross-Border Investigative Powers for Law Enforcement](#).

However, the Bill goes further than the model legislation, and expands the proposed scheme beyond law enforcement officers to include protection for security and intelligence officers and others (such as foreign law enforcement officers) granted an assumed identity.

The Bill replaces existing section 15XT of the Crimes Act with **new Part IACA**. Part IACA will create a mechanism to protect the identity of a covert operative who gives evidence in court proceedings.

Division 1, **sections 15KD – 15KG** provide definitions and ‘avoidance of doubt’ provisions regarding court proceedings.

Issue of Witness Identity Protection Certificates

**Division 2** provides for Witness Identity Protection Certificates for operatives.

**Proposed section 15KI** provides that the chief officer of a law enforcement agency or an intelligence agency may give a witness identity protection certificate for an operative of the agency in relation to a proceeding if the operative is required to give evidence on the proceeding. Before issuing the certificate, the chief officer must be satisfied on reasonable grounds that the disclosure in the proceeding of the operative’s identity or where the operative lives is likely to:

- (i) endanger the safety of the operative or another person; or
- (ii) prejudice any current or future investigation; or
- (iii) prejudice any current or future activity relating to security.

It could be argued that items (ii) and (iii) above allow a wide discretion to the chief officer in issuing a witness protection certificate (WPC). According to the Explanatory Memorandum, allowing the decision to be made within the law enforcement or intelligence agency enables an informed decision to be made about the need for protection, without possible security risks.<sup>19</sup>

The list of enforcement agencies able to issue a WPC is the same as those enabled to issue an assumed identity, and includes 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. Under section 15LA, the ability to issue a WPC may be delegated to a Deputy Commissioner or equivalent (for example, Deputy CEO of Customs, or Director National Operations of the Australian Crime Commission – Section 15LA(3) lists the deputy for each organisation).

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The operative seeking protection must complete a statutory declaration, containing the following information, to inform the decision-maker:

- whether the operative has been found guilty of an offence, and if so, particulars thereof
- whether charges are pending or outstanding, and if so, particulars thereof
- where the operative is an intelligence or law enforcement officer, whether they have been found guilty, or been accused of, misconduct, and the particulars thereof
- whether, to the applicant's knowledge, a court has made adverse findings about their credibility, and the particulars thereof
- whether the operative has made a false representation where the truth was required, and particulars thereof, and
- anything else known to the operative relevant to their own credibility.

The witness will appear in person to give evidence, be cross-examined and have their demeanour assessed by the court. However, their real name and address will be withheld from the court as well as the defence. Details relating to the credibility of the witness, drawn from the statutory declaration, will appear on a certificate of protection issued by the decision-maker, and made available to the defence. This will mean that the defence is restricted in their ability to question the credibility of the witness, as only those details revealed on the certificate will be available.<sup>20</sup>

Under proposed **subsection 15KI(4)**, the decision to provide a WPC is ‘final, and cannot be appealed against, reviewed, called into question, quashed or invalidated by any court’. There has been strong criticism of this provision. The Law Council of Australia stated:

[subsection 15KI(4)] 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.

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.

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.<sup>21</sup>

In its report, the Senate Committee also commented:

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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. It is the role of the court to adjudicate on disputes which, by their nature, involve more than one party. The rights of each party must be respected for justice to be done and seen to be done, and any 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>22</sup>

The Government defends the lack of an appeal mechanism for the issue of a WPC on the grounds that the decision to issue a WPC is based on highly sensitive operational information, and the decision could not be reviewed without disclosing this information. The Explanatory Memorandum states:

This may put at risk the safety of operatives or their families or colleagues and may jeopardise an ongoing investigation. Review of a decision would therefore defeat the purpose of the witness identity protection regime.<sup>23</sup>

Disclosure of an operative's identity despite a certificate

**Subsection 15KP** provides for the disclosure of an operative's identity to a court's presiding officer. Upon filing of the WPC in court, its presiding officer may require the operative to disclose their true identity to the presiding officer, and/or provide the presiding officer with photographic evidence of that identity. In its submission to the Senate inquiry, The Queensland Police Service argued that an amendment needs to be made to this section, ensuring that the judge is not to record, copy or maintain any information or photographic evidence relating to the operative's true identity. The Qld Police argued that this was essential to prevent the information being disclosed to a third party – for example through a subsequent search through court records.<sup>24</sup>

**Proposed subsection 15KQ** provides for a court to give leave to a party or a lawyer to ask a question of a witness, including the operative, that may lead to the disclosure of their identity or address; or for a court to order a witness to answer a question or provide information that may lead to the disclosure of their identity or address, in a limited set of circumstances.

In order for the court to make such an order, it must be 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 allowing the risk of disclosure of, or disclosing, the operative's identity or where the identity lives

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

**Subsections 15KQ (6) to (10)** provide that such applications must be made in the absence of a jury, in a closed court, and with a publication suppression, and that the court must make any other order it considers appropriate to protect the operative's identity. Contraventions of such court orders carry a penalty of imprisonment for two years.

The Law Council of Australia argued that in practice, defence lawyers will find it difficult to uncover evidence that would question an operative's credibility:

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.<sup>25</sup>

#### Disclosure offences

Proposed subsection **15KW** creates three offences relating to conduct which results in the disclosure of an operative's identity or address. **15KW (1)** provides that a person commits an offence if they are reckless as to whether a certificate has been given, and intentionally engages in conduct that results in the disclosure, or likely disclosure of, the operative's identity or address. Subsections **15KW (2)** and **(3)** are indictable offences, and provide that if the person is reckless as to whether the conduct will endanger the health and safety of another person, or as to whether the conduct will prejudice the conduct of an investigation or intelligence-gathering activity, the penalty is imprisonment for 10 years.

In its report, the Senate Committee noted what it considered to be a significant error in the Explanatory Memorandum to the Bill. At proposed **section 15KW**, in relation to disclosure offences, the Bill states that a person commits an offence if [their] conduct results in the disclosure of the operative's identity, whereas the Explanatory Memorandum reports that an offence will be committed if the conduct results 'or is likely to result' in disclosure of the identity.

The Committee commented:

This is a significant anomaly, and warrants special mention in the context of the increasing number of government agencies who decline to make written submissions to parliamentary inquiries, preferring instead to refer committees to the Explanatory Memorandum. The committee would be less concerned were this an isolated example, but it is not. Officers from the Attorney-General's Department acknowledged at least one other inaccuracy in the Explanatory Memorandum, in relation to the possible use of force by personnel other than police officers. If committees are to be directed to the Explanatory Memorandum, they should be able to rely on its accuracy.<sup>26</sup>

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General comments on Part IACA

Regarding these provisions of the Bill, the Police Association of Victoria stated:

We are pleased with the proposal to protect the identity of covert operatives. Being a covert operative is difficult and carries with it considerable risk and any mechanism that can be introduced to protect Police officers and others who undertake this important work is much appreciated.

As well as the objections to certain provisions outlined above, the Law Council of Australia stated that in general it supported a model for witness protection which was proposed by the Australian Law Reform Commission:

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.

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.

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).

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.

The Law Council commented that the Bill's proposed scheme 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'.<sup>27</sup>

## Schedule 2: Delayed notification search warrants

**Item 8** inserts a new **Division 2A—Delayed Notification Search Warrants** into Part 1AA of the Crimes Act. This new Division provides for requesting, authorising, issuing and reporting obligations with respect to delayed notification search warrants.

**Proposed section 3SA** provides definitions of terms used in the Division. The Division applies to:

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- a Commonwealth offence that is punishable on conviction by imprisonment for a period of 10 years or more, or
- a State offence that has a federal aspect that is punishable on conviction by imprisonment for a period of 10 years or more (see definition in section 4AA of the *Australian Federal Police Act 1979*), or
- an offence against section 8 (Recruiting persons to join organizations engaged in hostile activities against foreign governments) or 9 (Recruiting persons to serve in or with an armed force in a foreign State) of the *Crimes (Foreign Incursions and Recruitment) Act 1978*, or
- an offence against section 20 (dealing with freezable assets) or 21 (giving an asset to a proscribed person or entity) of the *Charter of the United Nations Act 1945*, or
- an offence against subsection 147.2(1) or (3) (Threatening to cause harm to a Commonwealth public official etc), section 270.7 (Deceptive recruiting for sexual services), or subsection 471.11(2) (Using a postal or similar service to make a threat) or 474.15(2) (Using a carriage service to make a threat) of the *Criminal Code*.

**Proposed section 3SB** defines the terms ‘eligible Judge’ and ‘Judge’. ‘Judge’ has its normal meaning as a Judge of a court created by the Parliament, but also includes a State or Territory Judge. Eligible Judges in this Division, unlike other parts of the Crimes Act, will include Family Court Judges. Eligible Judges are Judges who have consented to be, and have been declared by the Minister to be, eligible Judges for the purposes of the Act under **proposed subsections 3SB(2) and (3)**. Both the consent and the declaration must be in writing.

**Proposed subsection 3SB(4)** provides that any function or power conferred on a Judge under the Bill is conferred in a personal capacity, that is, in persona designata, rather than as a court or a member of a court.

**Proposed section 3SC** provides that the Minister may nominate a Deputy President, a full-time senior member, a part-time senior member or a member of the Administrative Appeals Tribunal (the AAT) to issue delayed notification search warrants, but only if they have been admitted for at least 5 years.

Existing section 4AAA of the Crimes Act deals with the rules that apply if, under a law of the Commonwealth relating to criminal matters, a function or power that is neither judicial nor incidental to a judicial function or power, is conferred on specified judicial officers. The rules currently apply to State or Territory judges and magistrates.

The use of judicial officers raises certain constitutional issues. See further discussion of the High Court decision of *Grollo v Palmer* (1995) 184 CLR 348 which found that Federal Court judges could validly issue telecommunications interception warrants [here](#).

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#### Applications for delayed notification search warrants

**Proposed subsections 3SD(1) and 3SD(2)** enable the chief officer of the AFP or of the police force or police service of a State or Territory to authorise a constable, in writing, to apply for a delayed notification search warrant in respect of particular premises. The constable must be from the same police force or police service as the chief officer. A constable cannot apply for a delayed notification search warrant without such authorisation. The requirement for authorisation to apply for a delayed notification search warrant is an additional safeguard which is not contained in the general search warrant provisions.

**Proposed subsection 3SD(3)** provides a three part test which must be satisfied before a chief officer can authorise an application for a delayed notification search warrant. The chief officer must be satisfied that there are reasonable grounds to suspect that one or more relevant offences have been, are being, are about to be or are likely to be committed. The chief officer must also be satisfied that entry to and search of the premises will substantially assist in the prevention of, or investigation into, those relevant offences. Finally, the chief officer must also be satisfied that there are reasonable grounds to believe that it is necessary for the entry and search of the premises to be conducted without the knowledge of any occupier of the premises. **Proposed subsections 3SH(1) and 3SI(2)** make it clear that it is not the intention of this Division that an application for a delayed notification search warrant should be authorised where there are other means of collecting relevant evidence.

**Proposed section 3SE** sets out the procedures to be followed by a constable applying for a delayed notification search warrant. **Proposed subsection 3SE(2)** sets out what must be included in an application for a delayed notification search warrant. Unless made remotely under **proposed section 3SF**, the application must be in writing. The application must include the name of the applicant, as well as the name of the constable executing the warrant unless the name of another constable is inserted. It must also include details or a copy of the authorisation given under **proposed section 3SD**, an address or description of the premises, and must specify the duration of the warrant sought. **Proposed subparagraph 3SE(2)(f)** limits the duration of a delayed notification search warrant to 30 days. The application must include a description of the kinds of things that are proposed to be searched for, and state whether entry to adjoining premises is required.

Subject to **proposed subsection 3SE(4)**, **new paragraph 3SE(2)(i)** requires the application to be supported by an affidavit. **Proposed subsection 3SE(4)** enables the making of an application for a delayed notification search warrant without an affidavit if the applicant believes that it is impracticable for an affidavit to be prepared or sworn before the application is made or that any delay would frustrate the effective execution of the warrant. **Proposed subsection 3SE(5)** requires the applicant to provide as much information as the eligible issuing officer considers is reasonably practicable and send a sworn affidavit to the eligible issuing officer within 72 hours of making the application even if the application was not successful.

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**Proposed subsection 3SE(6)** provides that an eligible issuing officer may request further information relating to the application, and may require an affidavit in relation to that further information. This power enables an eligible issuing officer to be satisfied as to the necessity for issuing a delayed notification search warrant.

Issue and execution of delayed notification search warrants

**Proposed subsection 3SI(2)** sets out seven matters which an eligible issuing officer must have regard to in deciding whether to issue a delayed notification search warrant:

- the extent to which the exercise of the powers would assist the prevention of or investigation into the relevant offences
- the existence of alternative means of obtaining the evidence or information
- the extent to which the privacy of any person is likely to be affected
- the nature and gravity of the alleged offence(s) for which the warrant is sought
- if it is proposed that adjoining premises be entered for the purpose of entering the target premises whether that entry is reasonably necessary
- whether any conditions should be included in the warrant, and
- the outcome of any known previous applications for delayed notification search warrant or a Division 2 warrant in connection with the same premises.

The Explanatory Memorandum states:

Proposed subsection 3SI(2) recognises and balances the competing public interest in timely and effective law enforcement and the intrusion on the privacy of a group or individual. The eligible issuing officer hearing the application must balance these interests in the circumstances of each application.<sup>28</sup>

**Proposed section 3SJ** sets out the information which must be contained in a delayed notification search warrant. The warrant must also state whether it authorises re-entry of the warrant premises to return any thing seized or to retrieve any thing substituted, and if so **proposed paragraph 3SJ(1)(j)** requires that re-entry to be within seven days of the day on which the warrant was executed, that is, the day on which the premises were first entered under the warrant.

**Proposed section 3SL** sets out what is authorised by a delayed notification search warrant. The powers under this provision are based upon the powers conferred under section 27O of the New South Wales *Terrorism Legislation Amendment (Warrants) Act 2005*, as well as powers based on section 3F of the Crimes Act.

**Proposed subsection 3SL(2)** defines ‘relevant thing’. A reference to a relevant thing in this section means a thing that an executing officer or a constable assisting in the execution of the warrant believes, on reasonable grounds, is evidential material in relation

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to an offence to which this Division applies, or evidential material in relation to another offence which is an indictable offence. This empowers the seizure of things found on the premises which do not relate to the relevant offence for which the delayed notification search warrant was issued but which may constitute evidence of other serious offences.

The power to enter warrant premises authorised at **proposed paragraph 3SL(1)(a)** would include a power to enter adjoining premises specified in the warrant. The power to impersonate a person authorised by **proposed paragraph 3SL(1)(b)** would enable executing officers and constables assisting to gain entry ‘for example, by impersonating a council technician carrying out routine work for the purposes of allaying suspicion of other residents of the area.’

**Proposed section 3SN** based on section 3G of the Crimes Act, authorises an officer executing the warrant to obtain such assistance as is necessary and reasonable in the circumstances to execute the warrant. It also authorises the executing officer or a person who is a constable who is assisting, to use such force against people and things as is necessary and reasonable to execute a delayed notification search warrant.

The proposed section also authorises a person who is not a constable but who has been authorised to assist in executing the warrant, to use such force against things as is necessary and reasonable in the circumstances. A person who is not a constable assisting but who has been authorised to assist is not authorised to use force against people. This section may contemplate a contractor or technical assistant such as an IT specialist, who can help in the search process, eg to look at parts of a computer found during a search.

See further the Senate Committee discussion of the ‘use of force’ provisions in Schedule 3.

**Proposed subsection 3SN(2)** requires that an executing officer or a constable assisting has a copy of the warrant, but **proposed subsection 3SN(3)** clarifies that there is no requirement to produce the warrant.

Because a warrant allows an executing officer or constable assisting to impersonate another person during the execution of the warrant, the occupier may accept the legitimacy of the action, which obviates the need to produce the warrant, and allows the operation to remain covert.<sup>29</sup>

**Proposed section 3SP** authorises the operation of electronic equipment found at the warrant premises to access data held on that equipment to determine whether it constitutes evidential material, and to copy it to a storage device and remove it from the premises.

**Proposed subsection 3SP(6)** applies section 3M of the Crimes Act to the delayed notification search warrants scheme, entitling an occupier to compensation for damage caused to electronic equipment as a result of it being operated under this section. Given the covert nature of the operation, compensation would normally only be paid when an

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occupier's notice was provided, unless the occupier had become aware that damage had been sustained.

#### Notice to occupiers

**Proposed section 3SQ** requires that a notice be given to the occupier of premises entered under a delayed notification search warrant and sets out the information which must be contained in the notice. The notice may be prepared by either the executing officer or the applicant. These requirements will ensure that the occupier of the premises is aware of why a delayed notification search warrant was issued in respect of the premises, and what was done under the warrant. The notice is to be given in accordance with the time limits specified under **proposed section 3SS**, that is within six months of the date on which the premises were first entered under the warrant.

This can be extended by periods of up to six months on any one application, up to a maximum of 18 months. An extension beyond 18 months from the date of entry may only be granted with the written approval of the Minister and if the eligible issuing officer is satisfied that there are exceptional circumstances. This recognises that some investigations may be undertaken over an extended period.

#### Reporting

**Proposed section 3ST** imposes reporting requirements on the executing officer of a delayed notification search warrant, whether or not it was executed.

The chief officer of an authorising agency must report to the Minister within three months of the end of each financial year under **proposed section 3SU**. The report must set out the number of warrants applied for and issued to officers of the authorising agency during the year, and specify the number applied for in person or by electronic means. The report must also include details of the relevant offences to which the issued delayed notification search warrants relate. The report must not only specify the number of warrants that were executed, but must also specify the number of warrants that were executed under which things were seized, placed in substitution, returned to or retrieved from the premises, and copied, operated or printed. Additional information may be requested by the Minister, and the chief officer is obliged to provide it. The Minister is required to table the report in Parliament.

**Proposed sections 3SV-SZ** establish an inspection regime requiring the Commonwealth Ombudsman to inspect the records kept by authorising agencies at least once every 12 months. The role of the Ombudsman is to determine whether the records kept are accurate and whether an authorising agency is complying with its obligations under proposed Division 2A. The Ombudsman is empowered to enter premises occupied by the authorising agency at any reasonable time after notifying the chief officer of the agency. The Ombudsman is then entitled to full and free access at all reasonable times to all records of the delayed notification search warrants scheme that are relevant to the

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inspection. Agency staff are required to co-operate with requests for assistance and to retrieve information reasonably required by the Ombudsman.

The Ombudsman may also require written and oral information from any officer of an agency where the Ombudsman has reason to think the officer can assist with inquiries. Failure to comply with requests from the Ombudsman for information are not excused on the grounds that doing so would contravene a law, would be contrary to the public interest or might tend to incriminate the person or make them liable to a penalty, or to disclose certain advice of a legal nature. The Ombudsman may also pass information to an equivalent state or territory inspecting authority where it is considered necessary for that authority to carry out its functions. The maximum penalty for failure to comply with the Ombudsman's request for information is six months imprisonment (**proposed sections 3SZA-SZD**).

Under **proposed section 3SZF**, the Ombudsman is required to provide a written report to the Minister every six months on the results of each inspection undertaken, and a copy of the report must be tabled in Parliament.

Offence relating to unauthorised disclosure

**Proposed subsection 3SZG(1)** creates an offence of unauthorised disclosure of information relating to an application for a delayed notification search warrant, the execution of a delayed notification search warrant, a report prepared by an executing officer or applicant after the warrant has been executed or has expired, or relating to an occupier's notice or adjoining occupier's notice. The offence carries a maximum penalty of two years imprisonment.

**Proposed subsection 3SZG(2)** specifies exceptions where lawful disclosure can be made. The defendant bears the evidential burden of proof of the exception in accordance with the provision at subsection 13.3(3) of the Criminal Code.

### Schedule 3: Amendments to the Australian Crime Commission Act 2002

Schedule 3 makes amendments to the *Australian Crime Commission Act 2002* (the ACC Act). The amendments are aimed at addressing operational difficulties experienced by the Australian Crime Commission (the ACC), and making some minor technical amendments. The main issues arising in Schedule 3 are outlined below.

Persons executing warrants

**Item 1** inserts the following definition of constable into the ACC Act:

**Constable** means a member or special member of the Australian Federal Police or a member of the police or police service of a state.

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**Item 4** in Schedule 3 inserts a definition of ‘executing officer’, in relation to a warrant issued under section 22 of the ACC Act:

*Executing officer*, in relation to a warrant issued under section 22, means:

- (a) the person named in the warrant by the issuing officer under paragraph 2(5)(e) as being responsible for executing the warrant; or
- (b) another person whose name has been inserted in the warrant by, or on behalf of, the person mentioned in paragraph (a).

Under Section 22 of the ACC Act, a person named in a warrant as an issuing officer must be a police officer. **Item 4** amends the ACC Act to authorise the person named in a warrant to sign the warrant over to another person. There is no stipulation that that person must be a police officer.

The Explanatory Memorandum states that this is necessary due to the ACC employing a number of contract or in-house investigators, as well as seconded police officers. The employment of contractors is necessary because the regular rotation of seconded police means there is a need for continuity and corporate knowledge in long-term investigations.<sup>30</sup>

The Explanatory Memorandum further elaborates that whilst executing a search warrant, and ACC officer (who may or may not be a police officer), may be called upon to exercise powers normally given to police officers, and there will often be the need to carry a firearm.<sup>31</sup>

The powers of executing officers to use force are detailed in item 26, which inserts **new Section 23A** into the ACC Act, allowing the executing officer, or a person who is a constable and who is assisting in executing the warrant, use of ‘such force against persons and things as is necessary and reasonable under the circumstances’ (new section 23A (b)). A person who is not a constable and who is assisting in executing the warrant is able to use ‘such force against things as is necessary and reasonable in the circumstances’ (section 23A (c)).

This transfer of warrant execution power to a non-police officer, particularly if they are authorised to use force and a firearm, has raised some concern. The Police Federation of Australia stated:

The PFA is concerned that contract investigators may be brought into the ACC for specific investigations, be sworn in as a Special Member of the AFP and therefore be eligible to execute search warrants, use reasonable force and carry a firearm in so doing. We argue that the community needs to be confident that such investigators, who are not members of the AFP or a state police force, have the requisite skills and experience to be given such authority. There appears to be nothing in the current

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legislation, the Bill or the Explanatory Memorandum that would give comfort on this issue.<sup>32</sup>

In its report on the Bill, the Senate Legal and Constitutional Affairs Committee stated:

... the committee [has] identified a significant anomaly. In the delayed notification search warrant provisions in Schedule 2, proposed section 3SN proscribes the use of force against persons and things by anybody other than a sworn police officer. However, in Schedule 3, which pertains to the ACC specifically, the term 'executing officer' is defined differently, and need not necessarily be a police officer. While an issuing officer is required to issue the warrant only on application by a police officer, there is no requirement that the person nominated to execute the warrant be a police officer. Furthermore, the executing officer may transfer the warrant to any other person, who may in turn execute the warrant and use force against persons and things in doing so. This may involve carrying a firearm.

In public hearings the committee raised this matter with the Attorney-General's Department. The AGD representatives responded that the amendments to the ACC Act contained in Schedule 3 of 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:

...our policy intention was that you could have certain roles in the execution of warrants being exercised by ACC employees who were not sworn police, but that they would not extend to the use of force, or, for example, to the carrying of firearms.<sup>33</sup>

AGD stated that the Bill was being examined to assess whether amendments to the Bill were required to clarify this intention.<sup>34</sup>

The Senate Committee recommended that the definition of 'executing officer' be confined to sworn federal, state or territory police officers.

#### Execution of Warrants

Item 26 inserts **new Sections 23A to 23N**, which adds a number of new provisions to the ACC's search warrant scheme. New subsections cover:

- availability of assistance and use of force (23A)
- details of a warrant to be given to occupier (23B)
- specific powers available to executing officer (23C)
- use of equipment to examine or process things (23D)
- use of electronic equipment at warrant premises (23E)
- person with knowledge of a computer or computer system to assist access (23F)
- accessing data held on other premises – notification to occupier of that premises (23G)

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- compensation for damage to electronic equipment (23H)
- copies of seized things to be provided (23J)
- occupier entitled to be present during search (23K)
- receipts for things seized under warrant (23L)
- announcement before entry (23M), and
- dealing with seized equipment (23N).

These provisions mirror sections in the Crimes Act 1914, to align the ACC's search warrant scheme with the Crimes Act model. The Law Council of Australia argued that when these provisions were written into the Crimes Act in 2000, the Government stated that that the entry and search powers available to the AFP under the *Crimes Act* should constitute the 'high water mark' for search powers generally:

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.

Further, the Law Council argued:

...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.<sup>35</sup>

Exclusion of legal practitioners

Subsection 25A(2) of the ACC Act provides that persons giving evidence (and in special circumstances, persons not giving evidence), may be represented by a legal practitioner. **Item 31** inserts **new section 25B**— Refusal to allow particular legal representative. The proposed section would allow an examiner to exclude a particular legal practitioner from proceedings where he or she has reason to believe that allowing the legal practitioner to appear at the examination may prejudice the effectiveness of the special ACC investigation or operation. This will 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 is unknowingly under investigation themselves. The Bill also gives to examiners a discretion to allow a break in proceedings for a witness to obtain replacement legal representation.<sup>36</sup>

**Subsection (2) of 25B** will allow an examiner to adjourn an examination to allow the witness to find an alternative legal representative. However, this power is left to the

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examiner's discretion, to 'avoid the safeguard being used by witnesses as a delaying tactic'.<sup>37</sup>

While noting that 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, the Law Council of Australia has nonetheless expressed concern about proposed Section 25B:

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.

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.<sup>38</sup>

The Senate Committee examining the Bill expressed similar concerns:

The right to legal representation is a fundamental one, and is especially important where, as is the case here, refusal by a witness to answer a question results in a penalty. The discretion to allow an adjournment should be removed. Should the witness decline to locate a mutually acceptable legal representative, the examiner should be required to offer to appoint an acceptable legal representative for the witness. No witness should be examined without a legal representative unless it is his or her express and informed desire to proceed without representation.<sup>39</sup>

Usually, administrative decisions of an examiner may be reviewed by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act). However, decisions under this section will be exempt from the requirement to provide reasons (by virtue of Schedule 2 of the ADJR Act) in circumstances where providing reasons may prejudice either:

- the safety or reputation of a person;
- the fair trial of a person who has been, or may be, charged with an offence, or;
- the effectiveness of an ACC operation or investigation.

Evidential burden of proof

Section 33 of the ACC Act currently contains an offence of giving information that is false or misleading in a 'material particular' at an examination, which is punishable by five years imprisonment or a penalty of 200 penalty units (less if heard by a court of summary jurisdiction).

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The Explanatory Memorandum states that it is difficult to enforce this 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'.<sup>40</sup>

**Item 45** of the Bill modifies the offence by reversing the burden of proof. Under **new subsection 33 (1A)**, the defendant will bear the evidential burden of proof in proceedings for an offence of giving information that is false or misleading in a 'material particular' at an examination. The defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the information *was not* false or misleading in a material particular, rather than the prosecution having to prove beyond a reasonable doubt that the information *was* false or misleading in a material particular.

The Law Council of Australia has criticised the reversal of the evidential burden of proof, stating that the fact that the matter may be difficult for the prosecution to prove does not justify the reversal.

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.

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.<sup>41</sup>

Requirement to provide a written statement

Section 28(1) of the ACC Act empowers an examiner to summons witnesses to an examination, and obtain evidence. Failure to comply with a summons is an offence punishable by imprisonment up to five years. **New subsection 28(1)** extends this power to allow an examiner to issue a notice to a person requiring certain information in the form of a written statement. A written statement is subject to the same rules that govern answers and documents that are provided to an examiner at an examination.<sup>42</sup>

The Explanatory Memorandum acknowledges that this new power is broader than existing powers under tax and consumer protection laws, in that information required may relate to any issue, rather than be limited to information in relation to offences against the Acts. Despite the possibility of this amendment placing a 'heavy burden on witnesses', the Explanatory Memorandum argues that the burden is offset by benefits such as possibly not being required to attend an examination, and the likelihood of shorter examinations.<sup>43</sup>

The Law Council of Australia argues that this provision essentially asks the witness to conduct the investigatory legwork for the ACC.

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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.

The Explanatory Memorandum's argument that the requirement to provide a written statement may, in the end, alleviate the need for an examination, or make an examination shorter, is dismissed by the Law Council:

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.<sup>44</sup>

The Law Council recommended that if the additional power was to be granted, the Bill should at least prescribe some limits on the nature or scope of matters that may be required in a written statement.

#### Privilege against self incrimination

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.<sup>45</sup>

**Item 39** clarifies 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 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.

**Item 40** expands the use of information subject to the privilege against self-incrimination to provide that a truthful statement which is subject to a claim of privilege may be used as evidence of another statement's falsity (including a written statement), in proceedings for making a false or misleading statement.

The Law Council of Australia strongly opposes this amendment, arguing that the proposed amendment would mean, for example, that a witness could receive a summons from the

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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.

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.<sup>46</sup>

#### Schedule 4: Amendments to the Witness Protection Act 1994

Schedule 4 makes amendments to the *Witness Protection Act 1994*.

**Items 1 to 10** insert new definitions into the Witness Protection Act. Many of the other amendments in Schedule 4 are consequential to these new definitions.

Amongst other things, the new definitions differentiate between a NWPP participant's 'original identity', 'current NWPP identity', and 'former NWPP identity'. This recognises that from time to time, individuals in the NWPP need to change assumed identities. The new definitions ensure that prior identities assumed under the NWPP, and not just a participant's current identity, are protected under the *Witness Protection Act 1994*. **Item 6** repeals the old definition of 'participant' and inserts the following:

**Participant** means a person who is included in the NWPP, and, unless the contrary intention appears, includes a former participant.

The definition has been amended to reflect the fact that there are times where protection and assistance need to be provided to former participants of the NWPP, not just current participants.

#### Protection for former NWPP participants

**Item 16** inserts **new subsection 13(5)** to extend the AFP Commissioner's powers to take action to protect former NWPP participants and their relatives, friends or associates. The Commissioner may take action if he/she considers that the actions are necessary and reasonable for the protection of the former participant or the related person; and the Commissioner has assessed the suitability of taking the actions. However, these former participants or related persons do not become current participants in the NWPP simply because they are provided with this assistance or protection.<sup>47</sup>

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Disclosure of identities

**Item 36** repeals the existing subsection 22(1) and inserts proposed **new subsections 22(1) and 22(1A)**, regarding disclosure of information.

**Proposed section 22(1)** makes it an offence for a person to disclose information about an individual where the individual is a Commonwealth participant or a Territory participant in the NWPP; the individual has a current NWPP identity; and the information disclosed is about the person's original identity or a former NWPP identity. The penalty is imprisonment for up to 10 years. The provision reflects the possible serious implications of a revelation about a participant's original or former NWPP identity. Any such disclosure could reveal that a person is included in the NWPP, and could endanger the participant.<sup>48</sup>

Similarly, **new subsection 22(1A)** will make it an offence to disclose that a person is undergoing assessment for inclusion as a Commonwealth or Territory participant in the NWPP, where that information may compromise the security of the individual. For 22(1A), the requirement that the disclosure could compromise a person's security is important. The Explanatory Memorandum states:

...it is essential for a person to be able to disclose identifying information about the current identity of a participant in order to introduce them to other people. For this reason, proposed subsection 22(1A) includes the requirement that the disclosure of the information must compromise the participant's security or reveal that the individual is a participant in the NWPP.<sup>49</sup>

**Item 40** inserts **new subsection 22(3)** which ensures that section 22 applies to the disclosure of information in proceedings of a court, tribunal, Royal Commission or other commission of inquiry. The one exception, contained in subsection 26(3) of the Act, is that if it is essential to the determination of legal proceedings that a judge or magistrate presiding over the proceedings be advised of a participant's location and circumstances, the AFP Commissioner or an AFP employee may disclose the relevant information to the judge or magistrate in chambers, but not to any other person. **New subsection 22(4)** will ensure this provision continues to apply.

**Item 52** also provides a process for protecting a participant's original identity, current NWPP identity or former NWPP identity, where they may be disclosed before a court, tribunal, Royal Commission or other commission of inquiry. In cases where the identity is to be protected, the court must:

- hold the proceedings relating to the identity in private
- make orders about the suppression of publication of evidence, as necessary to protect the identity, and
- make any other orders that are appropriate to ensure that information that compromises an identity is not made public.<sup>50</sup>

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#### Extension of NWPP to State Participants

The Bill extends the Act to cover State Participants, defined as participants who have been included in the NWPP because they were involved in State offences with a federal aspect.

**Item 11** inserts **new section 3B** to specify which offences against a law of a State are taken to be State offences with a federal aspect, for the purposes of the Act. These include:

- (a) in a case where the offence is being investigated by the AFP – if it would be taken to be a State offence that has a federal aspect under section 4AA of the Australian Federal Police Act 1979; and
- (b) in a case where the offence is being investigated by the Australian Crime Commission – if it would be taken to be a State offence that has federal aspect under section 4A of the Australian Crime Commission Act 2002; and
- (c) in any other case – if it would be taken to be a State offence that has a federal aspect if either of the sections referred to in (a) and (b) were to apply.

**Item 41** inserts **new section 22A**, which outlines offences relating to State participants, and disclosures which compromise security.

**Item 41** also inserts **new section 22B**, in which a person commits an offence if:

- (a) the person discloses information; and
- (b) the information may compromise the security of an individual; and
- (c) the individual
  - (i) is a Commonwealth or a Territory participant, or is undergoing assessment for inclusion in the NWPP as a Commonwealth participant or a Territory participant; or
  - (ii) is a State participant or is undergoing assessment for inclusion in the NWPP as a State participant.

The penalty is imprisonment for 10 years.

#### Protection for AFP employees

**Item 43** contains provisions to protect the identities of AFP employees who administer the NWPP or have taken on an assumed identity for the purposes of the NWPP from being disclosed in proceedings before a court, tribunal, Royal Commission or any other commission of inquiry. Similarly, **item 45** specifies that the Commonwealth Ombudsman and his staff are not required to divulge information that would reveal such information about the identity of an AFP employee.

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## Comment on the changes

There has been little public comment about the proposed amendments to the Witness Protection Act. In its submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the Bill, the Police Association of Victoria 'positively noted' the proposed amendments. The Law Council of Australia noted that it did not have time to comment on Schedule 4 of the Bill in the limited time available to make submissions to the Senate Committee.

## Schedule 5: Other Amendments

**Part 1** contains consequential amendments to the Crimes Act and Customs Act relating to controlled operations.

**Part 2** contains consequential amendments to the ACC Act.

**Part 3** clarifies that where a constable has seized electronic equipment under a section 3E search warrant (and the warrant has since expired) or under the arrest provisions in the Crimes Act, the constable will be able to operate the electronic equipment to access data, including data not held on the equipment at the time of seizure. For example, currently when a constable seizes a mobile phone, and takes it off-site, the officer is not able to access voicemail without executing a stored communications warrant on the carrier under the *Telecommunications (Interception and Access) Act 1979*. Now that access would be allowed. It would also relate to email on computers. Similar amendments are made to the Customs Act, POC Act and the MA Act (**item 19, proposed section 3ZVA**)

## Schedule 6: Transitional Provisions

**Part 1**—'Transitional Provisions Relating To Controlled Operations', **item 1** provides that controlled operations authorised before commencement continue under the previous legislation.

**Item 2** ensures that Division 3 of Part IAB of the Crimes Act continues in effect.

**Part 3** is a regulation making provision that provides that the Governor-General may make regulations dealing with matters of the transitional nature relating to amendments and repeals made by the Bill.

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## Concluding comments

In relation to delayed notification search warrants, US courts have stated that ‘[t]he mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else.’<sup>51</sup>

Crime, even in the privacy of one’s own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.<sup>52</sup>

The Scrutiny of Bills Committee has opined that:

there can be a temptation for the Government and its agencies, in proposing new laws, to reach for an ambit position which may not be justified, simply by appealing to the existence of a similar, but perhaps rarely used power, elsewhere. The Committee considers that all new legislative proposals should be judged on their own merits, based on a careful assessment of the needs of the agency in the particular circumstances, balanced against the impact of the proposed powers on individual rights. This analysis and justification for the proposed powers should be set out in appropriate detail in the explanatory memorandum to the Bill, to assist the Parliament in its consideration of the legislative proposal. The Committee will continue to play a role in providing the Parliament with the information it needs to make properly informed decisions on the content of legislative proposals, by seeking explanations and justifications from proposing Ministers where these are not provided with the Bill.<sup>53</sup>

Parliament may wish to seriously consider the justification for the new warrants, and the Senate Committee recommendation that the Federal Government limit the offences in relation to which delayed notification search warrants may be issued to offences involving terrorism or organised crime; or death or serious injury with a maximum penalty of life imprisonment.

In relation to the Bill in its entirety, Parliament may wish to consider strenuous criticism by the Law Council raised in its submission to the Senate inquiry highlighted within the ‘Main Provisions’ section above, and the several amendments suggested by the Senate Committee set out in full in the ‘Background’ section above.

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## Endnotes

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1. Senate, *Debates*, 29 November 2006, p. 1.
2. (1995) 184 CLR 19 at 42–3.
3. *ibid* at 43–4.
4. See further Simon Bronitt, ‘The Law in Undercover Policing: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe’ (2004) *Common Law World Review* 33(1) (Bristol, Vathek Publishing): 35–80.
5. Federal Agent Lawler, Evidence to the Standing Committee on Legal and Constitutional Affairs, Inquiry into the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006, 22 January 2007, available at: <http://www.aph.gov.au/hansard/senate/committee/S9930.pdf>, accessed 26 February 2007, p. 16.
6. Alerts Digest No. 15, 2006, p. 16.
7. Charles Doyle, ‘The USA PATRIOT Act: A Legal Analysis’, [American Law Division for Congress](#), 15 April 2002, p. 12.
8. The Hon. Philip Ruddock MP (Attorney-General), *Debates*, House of Representatives, 26 May 2005, p. 5.
9. *ibid*.
10. Explanatory Memorandum, p. 2.
11. Australian Federal Police, *Witness Protection Annual Report 2005-06 (Witness Protection Act 1994)*, Commonwealth of Australia, September 2006, p. 3.
12. Federal Agent John Lawler, *op. cit*.
13. QCCL, submissions 8, 8a and 8b.
14. Commonwealth Ombudsman, submission 5, p. 3.
15. *ibid*, p. 6.
16. Explanatory memorandum, p. 7.
17. *ibid*, p. 8. 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. These regulations are not limited by the requirement that the offence must carry a maximum penalty of three years or more imprisonment. This will enable the Australian Government and law enforcement agencies the flexibility to deal with emerging categories of serious crime. This is consistent with the definition of ‘relevant offence’ under the model laws
18. *ibid*, p. 12.
19. *ibid*, p. 53.

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20. Senate Legal and Constitutional Affairs Committee: *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006*, 7 February 2007, available at: [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/witness\\_protection/report/c03.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/witness_protection/report/c03.pdf), accessed 21 February 2007.
21. Law Council of Australia, *Submission* to the Senate Legal and Constitutional Affairs Committee review of the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006, available at: [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/witness\\_protection/report/c03.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/witness_protection/report/c03.pdf), accessed 21 February 2007.
22. Senate Committee report, op. cit.
23. Explanatory Memorandum, p. 54.
24. Queensland Police Service, submission to the Senate inquiry.
25. Law Council of Australia, op. cit.
26. Senate Committee report, op. cit.
27. Law Council of Australia, op. cit.
28. Explanatory Memorandum, p. 70.
29. *ibid*, p. 74
30. *ibid*, p. 84.
31. *ibid*.
32. Police Federation of Australia, *Submission* to the Senate Legal and Constitutional Affairs Committee review of the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006, 19 January 2007, available at: [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/witness\\_protection/submissions/sub07.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/witness_protection/submissions/sub07.pdf), accessed 21 February 2007.
33. Dr Karl Alderson, Attorney-General's Department, Evidence to the Senate Legal and Constitutional Affairs Committee, 22 January 2007, p. 21.
34. Senate Committee report, op. cit.
35. Law Council of Australia, op. cit.
36. Explanatory Memorandum, p. 96.
37. *ibid*.
38. Law Council of Australia, op. cit.
39. Senate Committee report, op. cit.
40. Explanatory Memorandum, p. 102.
41. Law Council of Australia, op. cit.
42. Explanatory Memorandum p. 97.

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43. *ibid*, p. 98.
44. Law Council of Australia, *op. cit*.
45. *ibid*.
46. *ibid*.
47. Explanatory Memorandum, p. 106.
48. *ibid*, p. 110.
49. *ibid*. The section in fact says 'may' not 'must'.
50. *ibid*, p. 115.
51. *U.S. v. Freitas*, 856 F.2d 1425, 1430 (9th Cir. 1988)
52. *Johnson*, 333 U.S. at 14 (1948).
53. Chapter 5 - Conclusions and recommendations.

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