

**STANDING COMMITTEE ON
UNIFORM LEGISLATION AND STATUTES REVIEW**

CRIMINAL INVESTIGATION (COVERT POWERS) BILL 2011

**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 5 DECEMBER 2011**

SESSION ONE

Members

**Hon Adele Farina (Chairman)
Hon Nigel Hallett (Deputy Chairman)
Hon Linda Savage
Hon Liz Behjat**

Hearing commenced at 11.49 am**PORTER, MRS HELEN****Chief Assessor, Criminal Injuries Compensation, Office of Criminal Injuries Compensation,
Level 12, 26 St Georges Terrace,
Perth 6000, sworn and examined:**

The CHAIRMAN: On behalf of the committee, I welcome you to the meeting. Before we begin, I must ask you to take either the oath or the affirmation.

[Witness took the affirmation.]

The CHAIRMAN: You will have signed a document entitled “Information for Witnesses”. Have you read and understood the document?

Mrs Porter: I have.

The CHAIRMAN: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please state the full name of any document that you quote during the session, and also be aware of the microphones and try to talk into the microphones and not cover them with paper. I remind you that your transcript will become a matter for the public record. If you wish for any reason to make a confidential statement during today’s proceedings, you should request that the evidence be taken in closed session. The committee will then consider your request and if it is granted, the room will be cleared of members of the public so that you are able to give that evidence in front of it. Please note that until such time as a transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. Did you have any opening statements you wanted to make?

Mrs Porter: No, none.

The CHAIRMAN: I understand that the committee has provided you with an outline of the questions that will be asked today, so I am just proposing to run through those. Would you please explain your role as chief assessor?

Mrs Porter: The task of the assessor generally is to determine applications for compensation brought under the Criminal Injuries Compensation Act. That task involves conducting hearings when necessary, examining the records of the police inquiry and/or prosecution in response to a complaint of an offence, sometimes determining whether an alleged offence has been committed in order to determine whether a person is eligible for compensation, and then assessing compensation within the limits of that provided by the act.

The CHAIRMAN: Have you been consulted on the bill currently before the committee?

Mrs Porter: No.

The CHAIRMAN: Do you have a general comment on the interaction of the bill with the Criminal Injuries Compensation Act?

Mrs Porter: Generally, I think the questions that were indicated to me have identified broadly the issue that does arise, which is as to the relationship between the proposal to declare the participant in criminal conduct not criminally responsible for any offence committed within the limit of the authority. That creates an issue, which I think whoever drafted these questions is alive to, with respect to eligibility for compensation, which obviously we will go into in some more detail.

There is one other thing I do not know whether it is appropriate to mention. There might be a drafting error in the bill in an area which has nothing to do with criminal injuries.

The CHAIRMAN: Do you want to bring it to our attention now?

Mrs Porter: Should I?

The CHAIRMAN: Yes; that is fine.

Mrs Porter: In clause 12(1)(f), I think the word “been” has been omitted from the second last line “could not reasonably have expected to engage in”. I suspect it is meant to read “could not reasonably have been expected”, because elsewhere it appears in the objective form, and that appears to me to raise a subjective measure of expectation. I think it is just the word “been” has been omitted.

[11.55 am]

The CHAIRMAN: Between the words “have” and “expected” on the second-last line?

Mrs Porter: Yes. I am not sure that I am right about it, but if you look at clause 27(b), the objective form is used, “the other person could not reasonably be expected to engage”. It appears to me that there is a slight inconsistency between those two sections, and I think that the same idea is being addressed.

The CHAIRMAN: Thank you for that.

Mrs Porter: That is the only other matter I wanted to raise apart from the matters that relate directly to compensation.

The CHAIRMAN: Prior to this bill, and in your experience, have injured persons attempted to claim compensation where either you or they have suspected that a covert operation was involved?

Mrs Porter: I cannot answer whether any applicant has suspected it. There have been cases where a colleague of mine has believed that there was a covert operation and one case that she recalls where it was clear that there was because it turned out that there was surveillance footage of a premises that was the subject of a burglary, which was unrelated to the surveillance but which was recorded by the surveillance. By that means she came to have evidence of the commission of the offence; the offence was in fact filmed by the covert surveillance. That is the only case any of the current assessors could think of directly. We have had a case where a woman who was in witness protection was the victim of an offence, but I do not know whether that is really relevant. It certainly was not in a circumstance where any offence was likely to be authorised or considered by legislation like this. I personally have not had a case where I thought that there was a covert operation or knew that there was one.

The CHAIRMAN: Do the police inform you of covert operations?

Mrs Porter: The police do not, generally. To the extent that we find out about it, it is usually because we have access to the DPP file, and we have unfettered access to it, so that to the extent that it contains what is probably confidential information, they send us their whole file. There have been a few issues with telephone intercept transcripts on those files which, strictly speaking, I think probably should not be disclosed to my office—well, they should not be disclosed, but they are not removed from the DPP file. I think there is a general understanding that we treat them with great confidentiality and understand the rules around them. To answer your question, we obtain information from the police directly in response to an application. I cannot really answer the question whether the police would tell us about covert material, and it would depend a bit on the outcome of the investigation, because if there was a successful prosecution, we would get the prosecution brief, and that would tend to have resolved any question of the covertness or otherwise of the operation. If an application arises perhaps out of an investigation that did not result in a successful prosecution, we would be looking to the police to be given information that is not on the

public record. As I say, I have not had a case where there was a covert investigation standing behind a matter that I have dealt with. I think our subpoena power means that they should tell us but, of course, I cannot know if they have not.

The CHAIRMAN: In your experience, have you been advised that a covert operation has been in place and that a person has been injured? I think you covered the first bit.

[12.00 noon]

Mrs Porter: Not in my experience. As I say, the only one we could think of when I tested that question with my colleagues was the one where it was just a coincidence that led to there being evidence of the other offence. It did not strictly arise out of the operation itself. In a sense, it is not likely to arise terribly often. That depends, I suppose, on the nature of the investigation. But investigations, for instance, into drugs matters, generally do not lead to offences being committed against individuals for which they would be eligible for compensation under criminal injuries. But it is possible to imagine one that would.

The CHAIRMAN: I am just a little surprised that you have not actually had any at all, because the act merely states that they cannot grant authority for a crime that will cause the death or serious injury to a person. So I would have thought that there might be circumstances in which a person might have received an injury which did not fall into the definition of serious injury but would be sufficient to claim under the Criminal Injuries Compensation Act.

Mrs Porter: I am not saying they have not, but I am not aware of a case where there has been a covert operation leading to that outcome. As I say, it really does depend on the outcome of the prosecution. If the prosecution was successful, we generally do not need that much information about the basis of the investigation, because there is the evidence that was presented as part of the prosecution.

The CHAIRMAN: What if there was not a prosecution because the officer was protected by the authority that was given through the covert operation?

Mrs Porter: All I can say is that I have not had a case involving it. Where there has been no prosecution, as I said, we need to access the police brief. If that reveals the covert operation, then we would know about it. I suppose it depends on what you mean by “covert operation”. We have had cases where the police have been engaged in the task of searching for an identified offender and incidents have happened in the process of that.

Hon LIZ BEHJAT: Sorry; could you speak up a little bit? I am having difficulty hearing you.

Mrs Porter: I am sorry. I beg your pardon.

You are talking about covert operations prior to this bill, are you not?

The CHAIRMAN: Yes.

Mrs Porter: By that I take it you just mean police operations which are being carried out to investigate a crime. That is exactly the kind of case that we get. To the extent that their inquiries might have been conducted with a degree of covert police procedure does not really matter. What matters to us is the evidence that was produced as a result of that. It is just not possible for me to say that we have had cases where there has been a covert operation that has led to an injury that I have been aware of. It is possible that there have been some and I have not known what the degree of or the covert nature of the inquiry was to start with. Am I not making myself clear?

The CHAIRMAN: I suppose just to clarify: are you saying that whether it is covert or not is irrelevant if there has been an offence and there is evidence of an offence; whether that person who committed the offence was a Joe Blow, ordinary citizen, or a police officer in uniform, or a police officer with an assumed identity, it would not make any difference and you would still deal with it, simply on the basis that there was a personal injury and there is a claim, regardless?

Mrs Porter: As long as I am satisfied that the person who is alleged to have committed the offence, committed an offence and was not protected from criminal responsibility in some way. But, yes, to answer your question, a police officer who commits an offence, the only cases I have had—I have had some—did not arise in circumstances where that officer had any protection except —

The CHAIRMAN: So if the officer has protection under the covert powers to commit certain crimes —

Mrs Porter: Yes, that is under this bill.

The CHAIRMAN: Yes, under this bill, and it also exists currently under the prostitution bill and the drugs bill.

Mrs Porter: Right; and no cases arising under those pieces of legislation have come to me as criminal injuries compensation applications.

The CHAIRMAN: So if a police officer was undertaking a covert operation and was protected under that authority for assaulting someone, and a person was assaulted and lodged a criminal injuries claim for assault, how would you deal with that?

Mrs Porter: If this bill becomes law?

The CHAIRMAN: Yes.

Mrs Porter: The first problem would be that the alleged offender, the police officer, does not bear criminal responsibility for the conduct and therefore no offence is committed; therefore, the applicant is ineligible. That is the problem that is addressed by these questions. The Criminal Injuries Compensation Act proceeds on the basis that where an offence is not proved but is only alleged compensation can only be considered and granted if the assessor can be satisfied that an offence was committed. Obviously, for instance, take the case of a schoolyard fight with a child under 10 who does not bear criminal responsibility, the assessor cannot award compensation because there is an absence of criminal responsibility. The exception is section 27 of the Criminal Code, so that if the absence of criminal responsibility arises through unsoundness of mind, then the Criminal Injuries Compensation Act deals with that as an exception to the requirement of criminal responsibility in the alleged offender—it will be an alleged offender only, because there will not be a conviction.

Hon LIZ BEHJAT: I just wanted clarification. You say that currently under the Prostitution Act and the Misuse of Drugs Act there have been no criminal injuries compensation claims.

Mrs Porter: Not that I have been aware of.

Hon LIZ BEHJAT: Is that because there have been acts committed by people who are protected from criminal responsibility or, to your knowledge, there have been no crimes committed.

Mrs Porter: I cannot answer that. Generally, Misuse of Drugs Act matters do not give rise to problems of personal injury; and generally a person involved in a drug situation is either an offender or a police officer. If the police officer, for instance, is injured arresting someone on a drugs offence, then he or she is eligible, but a person who is injured in the process of any kind of police operation into their drug offending would be ineligible because they are committing an offence themselves. They tend to be victimless crimes in our context. We do see, for instance, cases of a person who is beaten up in the process of—just using this as an example—a deal to buy or sell drugs; but of course they are not eligible because of their own offending behaviour. We do get those cases and we have to refuse them, but they are really the only ones that come up under the Misuse of Drugs Act. I could imagine a drug investigation going wrong and injuring a member of the public. If that happened, although I have not had a case of it, and if the assessor could be satisfied that the member of the public was injured as a consequence of the commission of the drug offence, then that person would be eligible under the current regime, even if it were a covert operation. It is the provision in here that says committing an offence as part of a covert operation does not attract

criminal responsibility. That is the one that would create the hiatus for eligibility for either the police officer, the suspect or a bystander.

The CHAIRMAN: So in your view it would create a hiatus for the police officer as well?

Mrs Porter: It is arguably open that a police officer committing an offence for which he was authorised and became injured would be eligible because he was not criminally responsible for what he was doing; therefore, no offence is committed.

The CHAIRMAN: So he would be able to make a claim.

Mrs Porter: I think so. There is the question of the conduct of —

The CHAIRMAN: But a third party who he may have assaulted would not be?

Mrs Porter: They would not be, because the conduct was not criminal—or at least there was no criminal responsibility for the conduct.

Hon LIZ BEHJAT: I might be wrong on this, but what if, hypothetically, there is a covert operation taking place and the operative is involved in a clandestine drug lab.

Mrs Porter: Yes.

Hon LIZ BEHJAT: There is an explosion; there is an innocent bystander walking past at the time of the explosion. Where is the innocent bystander going to get their compensation from if that is a covert operation?

[12.10 pm]

Mrs Porter: It depends. It depends on whether the person responsible for the lab—if the lab is solely being run by the covert operative, then there would be a problem for the bystander under the bill as it presently is. Probably the more likely circumstance is that the covert operative is participating with others in the lab; in that case it would be possible for the assessor to determine that someone else committed an offence as a result of which that person was injured. Unless the officer is going to set up the lab entirely on his own, and run it completely on his own, I would have thought the idea of doing that would be —

Hon LIZ BEHJAT: It is not outside the realms of possibility that he may have to do that to prove himself to the underworld group that he is trying to become part of.

Mrs Porter: Quite; and if he did, he is probably not going to be an expert chemist—he may well blow it up! Anyone injured in that explosion would be ineligible under the bill as it presently stands.

Hon LIZ BEHJAT: Interesting.

Mrs Porter: Although the exception that the conduct is not likely to lead to serious injury applies—in which case you might argue the officer was acting outside of his authority, because blowing up a clan lab by accident is clearly conduct likely to cause serious injury—that may invalidate his authority to do it without threat of criminal sanction. I had not thought of that particular example, but one problem we have is with the provision in the bill which says the authority can be given but not so as to extend to conduct likely to cause serious injury. I would have thought that is —

Hon LIZ BEHJAT: That is foreseeable.

Mrs Porter: That is a situation in which, arguably, the authority is never going to protect him from an accidental explosion of a clandestine laboratory. One of the problems we have with that is we will be required to determine whether the conduct entailed that risk. “Serious injury” is not defined. For instance, the definition of “grievous bodily harm” is not used, so we are left, under this bill, potentially having to determine: was it likely the operation might lead to serious injury? Is the injury which was caused properly described as serious injury, which was likely to have flowed, and did flow, from the operation?

The CHAIRMAN: Would it assist you if offences that constitute serious injury were actually identified in the bill?

Mrs Porter: It is not the offences which identify the serious injury; it is the extent of injury. For instance, the Criminal Code deals with that by calling it either “bodily harm” or “grievous bodily harm”. Using those terms would help us because they have a clear meaning that we are all used to using. It still remains a task for us, which might be difficult and there will be a question of judgement—of course you have to bear in mind that we make these decisions on the balance of probability and not beyond reasonable doubt—whether the operation was likely to lead to serious injury. If it was likely to lead to serious injury, and an injury was done, are we required to be satisfied that the injury was serious, or is compensation available simply because we can see that the operation was likely to lead to serious injury? I think there are a number of difficulties for the assessor. Like most of these problems, they are usually made easier by the actual facts, but in theory I can foresee some difficult determinations that we would have to make under the present form of the question of “likelihood” and definition of “serious injury”.

Hon LINDA SAVAGE: That was the point I was going to raise. The example given about a clan lab, I think the issue of serious injury and “likely to” is perhaps a more straightforward one given what a clan lab can do. I was thinking more, I suppose, of how you deal with it when something inadvertent happens with a covert operation where someone just gets knocked off their feet or run over; that type of thing. What you are saying went to what I was thinking about; you would begin to unwrap that to understand not the overtly, what we would think of as likely to be serious, but someone who gets a lesser, though serious injury, but was it likely to have led to that.

Mrs Porter: One example that I was thinking of, to try to test the concepts—this is likely in a sense to be the kind of criminal conduct a covert operative would be given permission to carry out—is authority to burgle the premises of the target, to break in to see what is in there. It is possible to imagine circumstances where that offence is being carried out involving breaking glass or involving a passer-by realising that somewhere there is a burglary going on and a passer-by decides to intervene. There is smashed glass; somebody gets badly cut. It is not difficult to foresee circumstances where that might lead to actual serious injury. What is the answer to the judgement question: was it likely to? It is that question of determining the likelihood after the event, obviously, of what was permitted under the authority, that gives us some concern.

The CHAIRMAN: I am going to move on. Some of this next question that I am going to ask, you may have answered. I will ask you again so we have it on the record.

Mrs Porter: Yes, because there are a couple of things we have not dealt with.

Hon ADELE FARINA: Clause 27 provides protection for a covert operative from criminal responsibility for controlled conduct during an authorised operation. The effect of clause 27 on section 17 of the CIC act appears to be that it prevents the chief assessor from making a compensation award to a victim of an alleged offence where no person has been charged. Is it your understanding that this is the effect of the bill?

Mrs Porter: It is. Clause 27 would have that impact on the operation of sections 16 and 17. Section 12 would be straightforward because the offence has been proved, so obviously any question of authority is foregone. Section 13 deals with an acquittal. I tried to imagine a circumstance where the problem might arise, and I do not think it does. Sections 14 and 15 do not. Sections 16 and 17 are the ones where it is live.

The CHAIRMAN: Is it your view that this is a weakness in the CIC act, or a problem in the bill?

Mrs Porter: I am glad you added that! I do not like to think of it as a weakness in the CIC act, especially as this is coming over the top. It is a weakness in the scheme if this bill is passed. With respect, it is a question of policy whether it needs to be fixed but it is quite a simple process to fix because the Criminal Injuries Compensation Act has provision for dealing with a situation where

there is an absence of criminal responsibility. In subsection (5) of each of 16 and 17—funnily enough, you would add a reference to another section 27 and simply say something to the effect that —

The CHAIRMAN: I think it reads —

Mrs Porter: You would add to subsection (5), “Unless the person was not criminally responsible for it by reason of the Criminal Code section 27”, or “the Criminal Investigation (Covert Powers) Act section 27”, assuming that it was enacted that way. It seems quite straightforward and best dealt with, from our point of view, in the criminal injuries act rather than this bill, simply because it constitutes a flag for people inquiring into criminal injuries to have it in that location, and it is consistent with the theoretical formulation of eligibility under the Criminal Injuries Compensation Act; that you have taken a group of people outside of criminal responsibility for policy reasons, the same as with insanity, but it is not meant to penalise the victim. It is done by reference to reasons to do with the offender, not the victim.

The CHAIRMAN: What is your view of an amendment to the CIC act to make it clear that compensation can be claimed when a lack of criminal responsibility is by reason of a controlled operation? You have suggested that amendment in that clause. Are there any other amendments that you think might be necessary, or might be necessary in the bill that we are dealing with?

Mrs Porter: I do not think so. I think subsection (5) of sections 16 and 17 need to be amended. I have not thought of any other change to the CIC act that would be necessary. That is assuming that it is intended that any personal injury caused by a covert operation produces eligibility for compensation. I assuming it is, because the bill provides for compensation for property damage. I can see no reason in policy why you would not want to cover these situations.

[12.20 pm]

The CHAIRMAN: If the amendment were to be made, what sort of information would you need—if in fact you do need any additional information—in order to make available a compensation award under section 17(4)?

Mrs Porter: I think our normal procedures would be fine and they involve a notice issued under section 19 of the Criminal Injuries Compensation Act. The problem I think would arise is that possibly we would not know what we did not know, and that is a problem now. If the police or prosecuting agency chooses not to give us information and we do not by reason of our own suspicious natures go digging for—which we tend to do a bit; we have investigative powers and it is amazing how often you get a flag that makes you go further in your enquiries—but if we do not get a flag and the police do not give us information, then we do not know that we have not got it. I doubt that that is going to be a problem very often, and it may simply mean that if this bill comes into effect, we would need to liaise with the authorities that we speak to in the police department—in WA Police—about provision of information and make sure that they understand that it extends to this material.

The CHAIRMAN: There is a provision in the bill in relation to property damage as a result of a covert operation where the police officer involved—the operative—needs to inform the police commissioner and the police commissioner then has an obligation to inform the owner of the property that has been damaged, and inform them that they have a right to claim compensation under the act.

Mrs Porter: Yes.

The CHAIRMAN: Would a similar provision in relation to personal injuries be of value in terms, perhaps, of informing the person who was injured and also informing yourself?

Mrs Porter: Certainly, informing us, but then advice to us in the abstract is not terribly helpful, because unless the applicant claims there is not much we can do with the information. I am a little

hesitant about advice to a potential applicant, simply because we have a number of cases where people have come and said the police have said that I am they are eligible for compensation, when in fact they are not—for one reason or another—and that creates a great deal of disharmony. There is the expectation that they have been told they are and therefore they should be, and I can understand the problem. Unless the advice that is given takes account of other problems with eligibility, then sometimes it can be a double-edged sword. It is possible in cases that might arise in this situation that the person injured does not come with clean hands themselves, and that often leads to ineligibility and the advice given to a potential applicant that they are eligible needs to be against a background that compensation is only available in certain circumstances and that there are limitations placed on it, especially to do with the conduct of the victim—applicant.

The CHAIRMAN: From my recollection of the bill, and I can go back and double-check it, it is actually the police commissioner who has that responsibility to advise the owner of the property.

Mrs Porter: Yes; I cannot remember who it is either.

The CHAIRMAN: I think that he can delegate it but that he cannot delegate it down too far; in which case it would be a pretty senior officer who was making that contact who you think would be able to make that assessment. No? Do you still have your concerns?

Mrs Porter: That is a very trusting assumption. I think the further up in the police hierarchy an officer goes, the less likely they are to know how the criminal injuries compensation scheme works. The officers who do know generally are aware of it because they have been applicants. Look, I may be jumping at shadows. I think to advise people of the potential right is a proper step to take. I just know that it needs to be tempered by an assessment of—or at least some warning to the applicant that puts it along the lines of, “You may be eligible, and here’s how you go about finding out.”

The CHAIRMAN: Although it is quite possible that the police officers are telling the applicants that they may be eligible, but by the time they have come to you they have convinced themselves that they were told that they are eligible.

Mrs Porter: Absolutely; and I have had that situation where people have said, “But you said”, and it had nothing to do with what I said so I appreciate that many of the people who feel that they have been given a certain bit of advice have not been given that at all. But there are cases that I know of—in fact prosecutors in the DPP—who sometimes give wrong advice to victims about their eligibility. That is just a caution. But I think the general principle is right that it should be flagged—especially in a covert operation where people might feel that they are compelled by some sense of secrecy to not exercise their rights—that it would be wise for them to be warned that there was likely eligibility.

Hon LINDA SAVAGE: Perhaps I am not following this correctly: but where I see an issue that I think you are raising is if someone comes to you, the step that is missing is how you would find out that this had been a covert operation, let us say with a serious injury. Are you saying that you would then begin to dig and it would be sort of up to you how you then navigated that, and is what we talking about whether there should be some automatic trigger or some more standard way in which that could become apparent to you?

Mrs Porter: I think that it would be good if there were, but in reality, I think, it has not worked terribly well in the past to have flagging arrangements put in place. The situation depends so much in each case on the particular circumstances. It is perfectly possible that it will be very obvious to all and sundry that there was a covert operation and that all of that information will come with the request. But sometimes when we give a request to the police, all we might get is the incident report. It is often not until we have done a fair bit of digging that we discover that there is a whole lot more information that is very pertinent that is not provided. It is not bad faith or any other bad motive; it is just that the easiest way to respond to a query is to provide some information in response to it and it is off your desk. So that there is a tendency—I have great sympathy for police officers who I

know are working very hard and under limited resources in many cases—to just pull out what comes to hand and send it off and hope that that is enough. That puts us very often in the situation—it exists now; it is not just in this kind of situation—in which we often sigh and think to ourselves, because we have had a certain amount of experience, that there has to be more than this. And then we have to go hunting for it.

I think it will depend on internal police procedures put in place between their information management service and those running the covert operations, because of course our request does not go to anyone senior in the police; it goes to a civilian clerical officer in the information management service, who works like a trojan and digs up all sorts of material and is extremely good, but she will not have access to material which she is not provided by the police system itself. So I think that it will be a function that the police service needs to address—it is not called the police service any more, is it?

The CHAIRMAN: Yes it is.

Mrs Porter: WA Police? The police service will have to put in place some steps, which we have no control over, to ensure that the information management people know when a request relates to a matter on which there has been a covert operation. The likelihood is that the information will be managed in such a way as to make that less available and not more, for obvious reasons. So I do foresee some practical difficulties, if not legal ones. We encounter them all the time already.

The CHAIRMAN: Any other questions from members? No. Was there anything further that you would like to add?

Mrs Porter: I do not think so—only that drafting issue and the question of—I raised it—the interpretation required for us of the likelihood of causing death or serious injury; and, look, I have not got a suggested solution to that. I did try to think of how it might be formulated, but it just flags a problem.

The CHAIRMAN: Do you have any concerns about the retrospective authorisation, particularly when it might involve a personal injury?

Mrs Porter: No, not specifically. If there is not an authorisation in place and an application has already been dealt with, then there is no problem. If the application has not yet been made and the situation is retrospectively authorised, then there will not be a problem by the time the application comes to be made as long as the amendment to sections 17 and 18 that we have discussed is in place. Just off the top of my head, I cannot—and nothing occurred to me when I was thinking about it that necessarily—the retrospective aspect —

[12.30 pm]

The CHAIRMAN: There is one option that you have missed in all of that; that is, you get an application before the retrospective authorisation is issued.

Mrs Porter: That is not likely to happen either. On average, we get the application two years and eight months after the event.

The CHAIRMAN: That is because of waiting to see whether there is a charge laid and it is going through the court process.

Mrs Porter: That is right, and other reasons to do with the applicant, him or herself, as much as to the official response to the incident. I think the retrospective authorisation has to be brought within a week. We would not make a determination on a claim, even if we got it the day after the offence happened. We would not determine it. Our average is four months to determine a claim. In any event, we would not open a file until it was clear that the operation had been concluded one way or the other. When the incident report comes back showing “under investigation”, that is a flag to us that it is not yet time to be considering the criminal injuries claim.

The CHAIRMAN: If it was an ongoing covert operation over a period of time and there was an offence at the beginning of the covert operation, you would not consider any claim in relation to an incident that might have occurred until —

Mrs Porter: We might but we would need to have that information. There have been cases in which other aspects are ongoing, even aspects of the prosecution ongoing, but it is possible to say that this element of it is discrete and can be resolved, but we would need to know all of that. Broadly, what we get on the incident report when something is still ongoing is an indication that it is not finalised. That will then trigger us to make some more inquiries, ring a few police officers, talk to some people and find out where it is at and why. If as a result we can identify that this is a matter we can process now, we will, but if it is specifically the investigation of the outcome of that particular incident that is ongoing, we would probably defer it. Again, there is no rule that says we cannot deal with the matter. We generally wait because if there is a possibility of a person being prosecuted, questions of defences arise which sometimes impact on eligibility. If the award is made before a person is convicted and someone is ultimately convicted, the state has no avenue to pursue recovery against that person. That is not a strong consideration but in a case where it is likely the police will find the person, we would wait. There have been cases, for instance, where a bench warrant has been issued and a reasonable amount of time has passed and it is just not fair to the applicant to make him or her wait until that person is finally caught up with and in those cases we do go ahead. It is not a statutory rule and it is not a fixed position but it is a question that we would have to answer before we proceeded.

The CHAIRMAN: Thank you very much for attending. Thank you for drawing our attention to that drafting error as well. It is much appreciated. We thank you for your time.

Hearing concluded at 12.33 pm
